Parliament of Australia

Senate Economics Committee

INQUIRY INTO THE STATUTORY DEFINITION OF UNCONSCIONABLE CONDUCT

Submission
by

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PROMOTING ETHICAL CONDUCT THROUGH THE *TRADE PRACTICES ACT* AND THROUGH THE ADOPTION OF OTHER STRATEGIES

This Submission is concerned entirely with promoting ethical conduct towards consumers and small business in an effective manner and without in any way undermining legitimate business activity. It is drafted by an independent commentator with nearly 20 years of experience in relation to the *Trade Practices Act* as a consultant; researcher; regular expert media commentator; as an occasional adviser to members of Federal and State Parliaments; Federal and State Governments and Departments; and the ACCC on all matters relating to the operation and identifiable gaps in the *Trade Practices Act*.

The purpose of this submission is to ensure that Australia has effective laws to promote ethical conduct towards consumers and small businesses. Effective laws require that they be expressed in clear language and in a manner that covers all forms of unethical conduct. A legal framework that clearly sets out the standards of ethical conduct between the parties is also essential. Such a legal framework should require larger businesses to act in good faith towards consumers and small businesses.

All recommendations made in this submission are targeted to deal with specific problem areas in the existing regulatory framework in relation to the concept of unconscionable conduct and are designed to be a minimum necessary response to effectively deal with such problem areas.

List of recommendations for promoting ethical conduct

(1) **Inserting a statutory definition of the term "unconscionable" into s 51AC of the *Trade Practices Act*;**

(2) **Inserting a statutory list of examples of the types of conduct that would ordinarily be considered to be "unconscionable" under s 51AC of the *Trade Practices Act*;**

(3) **Having only one prohibition against unconscionable conduct within the *Trade Practices Act* to cover both consumer transactions and business to business relationships involving small businesses;**

(4) **Expressly prohibiting bullying, intimidation, physical force, coercion or undue harassment in consumer transactions as well as business to business relationships involving small businesses;**

(5) **Enacting a statutory duty of good faith;**

(6) **Enacting a new legislative framework within the *Trade Practices Act* to deal with unfair contract terms in consumer transactions as well as in business to business transactions involving small businesses;**

(7) **Amending the *Trade Practices Act* to provide that the Court can issue a class compensation order whereby a Court would, once a breach has been found in an action brought by the ACCC, have the power to compensate affected consumers and small businesses without the need for those consumers and small businesses to bring their own action or recovery proceedings;**

(8) **Requiring that contractual documents be drafted in plain language;**

(9) **Establishing an Australian Small Business Development Corporation responsible for providing policy leadership and advice on small business matters to the Federal Government, including in relation unethical conduct faced by small businesses in business to business relationships;**

(10) **Establishing an Office of the Small Business Ombudsman within the Australian Small Business Development Corporation with specific responsibility to research and identify existing**

and emerging areas of disputation in business to business relationships involving small businesses with a view to identifying strategies, mechanism or legal options for minimising such disputes;

(11) Establishing an Expert Determination Scheme within the Australian Small Business Development Corporation with specific responsibility for finally resolving disputes in business to business relationships involving small businesses that remain unresolved following mediation; and

(12) Establishing a dedicated Small Business Enforcement Unit within the ACCC with sufficient funding to undertake enforcement action for all breaches of the *Trade Practices Act* relating to business to business relationships involving small businesses; and with a specific mandate to pursue test cases to clarify the operation and to identify possible gaps in the application of the unconscionable conduct provisions of the *Trade Practices Act*, as well in the proposed new statutory duty of good faith and proposed new laws against unfair contract terms in business to business relationships involving small businesses

Promoting ethical business conduct – Closing the gaps in the unconscionable conduct sections of the *Trade Practices Act* and clearly identifying standards of ethical conduct

The recommendations made in this submission are intended to address a number of problem areas in relation to s 51AC of the *Trade Practices Act* as well as offering various statutory alternatives to promoting ethical conduct within consumer transactions as well as in business to business relationships involving small businesses. Once again, these recommendations are concerned to ensure that contractual power is not abused in a manner that denies the consumer or small business the benefits of the transaction or relationship. In particular, the recommendations are aimed at clarifying key concepts such as unconscionable conduct in a manner that is in keeping with their parliamentary intention. Such statutory clarification is needed in view of the very narrow approach taken by the Courts towards such concepts.

Once again, the focus of the recommendations is to promote the most efficient outcome for consumers and businesses as a whole. The recommendations are not about picking winners or protecting the inefficient, but rather are concerned to ensure that unscrupulous large businesses and owners of shopping centres behave in an ethical manner towards consumers and small businesses. Currently, there are allegations of unethical conduct that are not being tested in the Courts simply because the Courts are giving such a narrow interpretation of the concept of unconscionable conduct that victims of unethical conduct are being advised that the chances of success in court are virtually non-existent.

In these circumstances, for vested interest groups like the Shopping Centre Council of Australia and the Franchising Council of Australia, and their consultants and advisers as represented by groups such as the Trade Practices Committee of the Law Council of Australia to suggest that there is no need to insert a statutory definition of unconscionable conduct is to again take a “head in the sand” approach to what is a serious issue. Once again, such a dismissive approach is not only self serving and protective of the vested interests of large business and shopping centre owners, but more importantly it fails consumers and businesses as a whole. Unethical conduct by unscrupulous large businesses and owners of shopping centres is a problem simply because such conduct creates market failures or inefficiencies to the detriment of all concerned. Unethical conduct leads to higher levels of disputation. If we are aspiring to have an efficient market for contractual relationships, such markets must not be characterised by unethical conduct. Currently, such unethical conduct continues to exist because such conduct goes unchallenged as a result of the very narrow judicial interpretation of the concept of unconscionable conduct.

The following recommendations are made in this part of the submission:

- **Inserting a statutory definition of the term "unconscionable" into s 51AC of the *Trade Practices Act*;**

- **Inserting a statutory list of examples of the types of conduct that would ordinarily be considered to be "unconscionable" under s 51AC of the *Trade Practices Act*;**

- **Having only one prohibition against unconscionable conduct within the *Trade Practices Act* to cover both consumer transactions and business to business relationships involving small businesses;**

- **Prohibiting bullying, intimidation, physical force coercion or undue harassment within consumers transactions as well as in business to business relationships involving small businesses;**

- **Enacting a statutory duty of good faith; and**

- **Enacting a new legislative framework within the *Trade Practices Act* to deal with unfair contract terms in consumer transactions as well as business to business relationships involving small businesses.**

Inserting a statutory definition of the term "unconscionable" under s 51AC of the *Trade Practices Act*

The insertion of a definition of "unconscionable" in s 51AC of the *Trade Practices Act* would be an obvious way to provide clear statutory guidance as to what is meant by the term as is used in s 51AC.[1] Importantly, the insertion of a statutory definition in s 51AC would send a clear parliamentary signal to the Courts that the concept is not only broader than the equitable concept, but that s 51AC is intended to promote ethical business conduct. Such a definition would set out a non-exhaustive benchmark for assessing conduct to determine whether or not it goes beyond what is reasonably necessary to protect the legitimate interests of the parties involved. This would not in any way interfere with the driving of a "hard" bargain, but rather would provide clear statutory guidance as to what is considered unethical. Currently, in the absence of a statutory definition in 51AC of the term "unconscionable" the Courts are being left to define the term and, in doing so, are taking such an onerous view of what constitutes "unconscionable" that there is a growing danger that s 51AC will fall into disuse.

Growing acknowledgement of the presence of unfair terms in business to business contracts involving small business

The difficulty of bringing action under s 51AC of the *Trade Practices Act* has been recently acknowledged in a number of State Government reports and discussion papers. In each case, the consensus is that s 51AC or equivalent State and Territory provisions is being too onerously interpreted by the Courts and, as a result, there is a need to either reform those provisions or adopt a new approach to unethical conduct in business to business contracts involving small businesses.

One example of the growing acknowledgement that s 51AC has not been interpreted in keeping with its original parliamentary intention is found in a recent report by the South Australian Parliament into the franchising sector. In its report titled – *Franchises* – the Economic and Finance Committee of the South Australian House of Assembly made the following observations:[2]

> "Section 51AC of the *TPA* was introduced in 1998 to address the problem of small businesses facing power imbalances while dealing with larger commercial entities.[3] It prescribes unconscionable conduct in a specific way and refers to a list of factors that a court may consider in determining whether the conduct in question is unconscionable. This non-exhaustive list of statutory indicators of unconscionable conduct is intended to guide the courts in their application of the provision. The

[1] See Zumbo F., "Commercial Unconscionability and Retail Tenancies: A State and Territory perspective," (2006) *Trade Practices Law Journal*, Vol. 14, p 165 at p. 171 – 172.
[2] The Economic and Finance Committee of the South Australian House of Assembly Report, *Franchises*, May 2008, 42-43.
[3] Philip Tucker, "Unconscionability: The hegemony of the narrow doctrine under the Trade Practices Act" (2003) 11 *Trade Practices Law Journal* 78.

> presence of a single factor, such as unequal bargaining power, does not define the conduct as unconscionable in the absence of some other factor. In the absence of a definition of unconscionable conduct the courts have the power to determine on a case by case basis whether particular action amounts to a breach of the provision.
>
> A narrow doctrine of unconscionability, developed in common law, has been traditionally guided by the assertion that "equity does not expect commercial people to be each others' keepers".[4] It is evident, however, that the meaning of unconscionability under section 51AC is wider than this older, restrictive model. The intention of creating a level playing field for commercial parties of different sizes and bargaining strengths is the underlying theme of the provision. The inclusion of a list of factors in the text of the provision has been interpreted as an indication that unconscionability should be given a broader meaning.[5]
>
> The problem with section 51AC, as put to the Committee, is that the section has not been effective despite its broader remit. The Committee was told that despite the inducements in the provision to consider a wider definition, judicial interpretation of statutory unconscionability has tended to rely on so-called "procedural" aspects of unconscionability, restricting its scope to cases of serious misconduct during the formation and performance of the contract. [6] That approach seems to exclude instances where harsh contractual terms have been inserted in otherwise procedurally valid contracts.[7]
>
> Controversy surrounding the application of the section is provoked by the cautious approach adopted by Australian judges to interpreting it.[8]"

The Report especially identified the omission of a definition of the concept of "unconscionable conduct" as representing a considerable challenge in taking action under s 51AC of the *Trade Practices Act*:

> "The fact the *TPA* does not provide a definition of the term "unconscionable conduct" appears to represent a challenge for the ACCC, the agency responsible for enforcement of the prohibition. 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

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[4] Ibid 83.
[5] Joachim Dietrich, "The Meaning of Unconscionable Conduct Under the Trade Practices Act 1974" (2001) 9 *Trade Practices Law Journal* 141.
[6] Frank Zumbo, "Promoting Fairer franchise agreements: A way forward?" (2006) 14 *Competition and Consumer Law Journal* 127.
[7] *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) 21 ATPR 41-703.
[8] Liam Brown, "The impact of section 51AC of the Trade Practices Act 1974 (Cth) on commercial certainty" [2004] 20 *Melbourne University Law Review* at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MULR/2004/20.html?query=impact%20of%20section> at 15 August 2008).

> 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 cause of action. The inability to resort to any other similar provision creates a situation where businesses are denied legal remedies in disputes that often severely impact their interests. In the course of the inquiry perhaps the most high profile example of a franchisee feeling unable to rely on the section was provided by Competitive Foods Australia Pty Ltd (Competitive Foods), whose dispute with Yum! Restaurants International in Western Australia was the subject of discussion and investigation in that State, but it was not an isolated example across the sector."[9]

In view of these concerns and of the considerable evidence put before the Committee, the Report took the position that legislative reform of s 51AC of the *Trade Practices Act* was required:[10]

> "The Committee is of the opinion that section 51AC of the *TPA*, as it currently stands, is not being effectively utilised because of a combination of drafting imprecision and judicial caution. The section has the potential to provide a clear course for redress for franchise disputes and those factors currently obstructing its use should be identified and resolved, even if this requires revisiting the Act. Any such examination of the Act should be done in consultation with the franchising industry, with the needs of franchisees given equal weight with those of franchisor advocates."

> **The Committee recommends section 51AC of the *Trade Practices Act 1974 (Cth)* be amended by the inclusion of a statutory definition of unconscionability or alternatively by the insertion in the Act of a prescribed list of examples of the types of conduct that would ordinarily be considered to be unconscionable.**

In short, the Report provides further recognition of the limitations of s 51AC of the *Trade Practices Act* and, in particular, of how the provision has been narrowly interpreted by the Courts.

A further example of the growing acknowledgement that s 51AC or equivalent provisions are too narrowly interpreted by the Courts or Tribunals is found in a recent discussion paper issued in New South Wales in relation to the retail leasing industry in that State. Indeed, the discussion paper titled - *Issues affecting the retail leasing industry in NSW: Discussion paper – February 2008* – specifically acknowledged the onerous interpretation being given to the New South Wales equivalent to s 51AC. That provision, which is found in s 62B of the *Retail Leases Act 1994*, was described in the following terms in the discussion paper:

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[9] Ibid 44-45.
[10] Ibid 46.

> "Section 62B sets out a non-exhaustive list of matters to which the Administrative Decisions Tribunal may have regard in assessing whether particular conduct is unconscionable:
> …
> Since 2002, the Administrative Decisions Tribunal has heard 29 cases alleging unconscionable conduct. These authorities indicate that a finding of unconscionable conduct under s 62B can only be made if the conduct can be described as 'highly unethical' and involves 'a high degree of moral obloquy'— s 62B unconscionable conduct will not be found simply because conduct is 'unfair' or 'unjust'.[11] The outcomes of the 29 cases were as follows:
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> - Unconscionable conduct was found in five cases (however two of these were overturned on appeal on grounds unrelated to the unconscionable conduct claims);
> - One matter was transferred to the Supreme Court;
> - The unconscionable conduct claims were withdrawn in five cases;
> - Unconscionable conduct was held not to be made out in 13 cases;
> - It was held unnecessary to consider the question of unconscionable conduct in six cases.
>
> Analysis of the unconscionable conduct cases heard by the Administrative Decisions Tribunal to date indicates the test is onerous and the threshold for a finding of unconscionable conduct is very high. Because of the narrow interpretation of s 62B in accordance with equitable doctrine, the unconscionable conduct provisions have not operated as intended. There are many instances of unfair conduct on the part of landlords where tenants are unable to avail themselves of the remedy in s 62B due to the onerous test imposed."[12]

Significantly, the discussion paper raised similar concerns with s 51AA of the *Trade Practices Act*:

> "Similar criticisms have been levelled at s 51AA of the *Trade Practices Act 1974* (Cth), which contains specific provisions aimed at providing increased protection where there may be an imbalance of bargaining power between small businesses and their larger business suppliers or customers. This section was introduced in 1992 to extend the unconscionability provisions. The ACCC noted in its submission to the 2007 Productivity Commission inquiry that it had been anticipated these provisions would be of particular use to tenants and franchisees in unequal bargaining positions with their landlords or franchisors. It noted however that s 51AA had not lived up to its expectations in respect of retail leasing matters due to the court's limited interpretation of s 51AA in

[11] *Attorney General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583.
[12] *Issues affecting the retail leasing industry in NSW: Discussion paper – February 2008,* 17-18.

> accordance with equitable doctrine. Despite making enforcement of s 51AA a priority, the ACCC has been unable to build a single case that would succeed in relation to complaints from retail tenants in shopping centres."[13]

In short, the Courts are taking a narrow approach to the concept of unconscionable conduct and, consequently, it is appropriate that legislature define the term in the legislation to ensure that the concept is interpreted in a manner that promotes ethical conduct by large businesses.

[13] Ibid 19.

A proposed definition of unconscionable conduct

The following is a draft of a proposed definition of "unconscionable conduct" that could be inserted under the *Trade Practices Act* and in relevant State and Territory legislation:

> "For the purposes of this section "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.

The proposed definition represents a non-exhaustive definition of unconscionable conduct. Importantly, the use of word "includes" makes it clear that the proposed definition is intended to allow the existing judicial interpretation to be built upon through a statutory mandate that makes it clear that the concept of unconscionable conduct for the purposes of s 51AC of the *Trade Practices Act* is meant to cover all forms of unethical conduct.

In short, the proposed definition is intended to overcome the restrictive view that the Courts are currently taking towards the notion of "unconscionable conduct" under s 51AC. Indeed, in applying the concept of "unconscionable conduct" under s 51AC the Courts are focusing increasingly on procedural unconscionability. In doing so, the Courts continue to be influenced by the narrow equitable doctrine of unconscionability. While perhaps not surprising given the concept of "unconscionable conduct" has been previously used under the equitable doctrine of unconscionability, this procedural unconscionability bias unfortunately raises considerably the threshold for succeeding under s 51AC. Thus, to ensure that the concept of "unconscionable conduct" is given a wider application than is currently the case it would be appropriate to include a legislative definition of the concept of "unconscionable conduct." Such a definition defines "unconscionable conduct" by reference to a variety of other known concepts that make it clear that the term "unconscionable" as used under the proposed provision is one concerned with dealing with unethical conduct within trade or commerce generally.

Inserting a statutory list of examples of the types of conduct that would ordinarily be considered to be "unconscionable" under the *Trade Practices Act*

An alternative to inserting a statutory definition of "unconscionable" would be to recast the exiting list of factors under s 51AC(3) and 51AC(4) to represent *examples* of conduct that would ordinarily be considered to be "unconscionable." Currently, the factors can be considered or dismissed at the Court's discretion and as mere factors certainly cannot be seen to define what is unconscionable. In short, It is important to note that the listing of factors in s 51AC(3) and s 51AC(4) does not elevate those factors to a definition of unconscionable conduct. Indeed, it would be misleading to suggest that the factors included in s 51AC(3) or s 51AC(4) provide a definition of what is "unconscionable" under s 51AC. The question of whether or not conduct is unconscionable under s 51AC is considered by reference to the individual circumstances of the case having regard to all matters considered relevant by the Court irrespective of whether or not those matters are listed in s 51AC(3) or s 51AC(4). So under s 51AC(3) and s 51AC(4) the listed factors as currently drafted may be considered by a Court, but so can factors not listed be taken into account if the Court considers them to be relevant.

In such circumstances, recasting the factors into examples of unconscionable conduct would provide considerable and practical statutory guidance as to what is meant by the term "unconscionable." The examples could easily be added to or fine-tuned overtime and, would give all parties a very clear legislative indication of where they would ordinarily stand in relation to particular types of conduct. The following sets out how a statutory list of examples could be drafted:

> "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 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:
    - o any intended conduct of the supplier that might affect the interests of the business consumer; or
    - o 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."

Such a statutory list of examples would be of considerable value in setting out clear statutory benchmarks for the Courts to rely on when assessing conduct under s 51AC. Currently, the Courts are left to their own devices as to the meaning of "unconscionable" under s 51AC and this brings with it the real danger that the Courts will revert to the more narrow equitable notion of unconscionability when assessing conduct under the section. By setting out statutory benchmarks in the section itself the legislature can provide clear direction to the Courts regarding the types of conduct ordinarily considered to be unethical by the legislature. Such benchmarks would seek to steer judicial attention away from the narrow equitable notion of unconscionability and towards having the Courts assess the conduct by reference to the ethical norms set out by the legislature in its statutory list of examples.

RECOMMENDATION

Inserting a statutory list of examples of the types of conduct that would ordinarily be considered to be "unconscionable" under s 51AC of the *Trade Practices Act*.

Creating a new ethical norm of conduct: Prohibiting unconscionable conduct within trade or commerce generally

In seeking to use s 51AB and s 51AC of the *Trade Practices Act*, the conduct must not only be in trade or commerce, but there must also be a sufficient link between the conduct and the supply or acquisition, possible supply or acquisition of goods or services. Unlike s 52 which establishes a norm of conduct within trade or commerce generally, s 51AB and s 51AC have been expressly linked to the supply or acquisition of goods or services. Given the intended wider operation of provisions like s 51AB and 51AC there may be considerable merit in enacting prohibitions against unconscionable conduct within trade or commerce generally in both the *Trade Practices Act* and State and Territory *Fair Trading Acts*.

In short, it may be time to consider whether or not there should be a single prohibition in both the *Trade Practices Act* and the State and Territory *Fair Trading Acts* against unconscionable conduct within trade or commerce generally, rather than provisions like the current s 51AB and s 51AC which deal separately with consumer and business to business relationships involving small businesses and also require a link with the supply or acquisition of good or services. Significantly, a prohibition against unconscionable conduct in trade or commerce generally would bring such provisions as s 51AB and s 51AC into line with s 52 and ensure their development as a general ethical norm of conduct within business activity. In turn, that would lead to a rationalisation of the three unconscionability provisions currently found in the *Trade Practices Act*, bring State and Territory *Fair Trading Acts* into line with the *Trade Practices Act* in the area of unconscionable conduct, and remove the need for industry-specific prohibitions against unconscionable conduct.

RECOMMENDATION

Having only one prohibition against unconscionable conduct within the *Trade Practices Act* to cover both consumer transactions and business to business relationships involving small businesses.

Expressly prohibiting bullying, intimidation, physical force, coercion or undue harassment within business to business relationships involving small businesses

While of course a business should be entitled to enforce the terms of contract with consumers and small business, it is equally true that consumers and small businesses should be allowed to carry on their activities without bullying, intimidation, physical force, coercion or undue harassment from the business. Clearly, there is a line between a business enforcing its legal rights and the business engaging in bullying, intimidation, physical force, coercion or undue harassment of the consumers or small businesses.

Prohibiting such conduct is well accepted in consumer transactions. This should now be extended to business to business relationships involving small businesses. While it has long been acknowledged that consumers may be vulnerable to conduct that goes beyond normally acceptable behaviour, it is clear that small businesses are similarly vulnerable in their dealings with larger businesses. The currently prohibition in consumer transactions is dealt with under s 60 of the *Trade Practices Act*:

> **TRADE PRACTICES ACT 1974 - SECT 60**
> **Harassment and coercion**
>
> A corporation shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

Such a provision could easily be modified to also apply within a business to business context involving small businesses. After all, small businesses, because of their captive status once they enter a supply agreement, retail lease or franchise agreement, are similarly vulnerable to conduct that goes beyond normally acceptable behaviour. Significantly, s 60 of the *Trade Practices Act* has been subject to judicial comment in a manner which assists in understanding how a proposal for a prohibition against physical force, coercion or undue harassment could operate within business to business relationships involving small businesses.

The following comments regarding the terms “coercion” and “undue harassment” were made by Hill J. in *Australian Competition & Consumer Commission v The Maritime Union of Australia* [2001] FCA 1549 within the context of s 60 of the Trade Practices Act are particularly noteworthy:

> 61 There is an obvious ambiguity which the legislature could easily have solved, either by repeating the word "undue" before each of harassment and coercion or listing the word "coercion" before the words "undue harassment". However, neither course commended itself to Parliament. For my part, I am inclined to the view that undue qualifies only harassment and not coercion.

62 The word "harassment" in my view connotes conduct which can be less serious than conduct which amounts to coercion. The word "harassment" means in the present context persistent disturbance or torment. In the case of a person employed to recover money owing to others … it can extend to cases where there are frequent unwelcome approaches requesting payment of a debt. However, such unwelcome approaches would not constitute undue harassment, at least where the demands made are legitimate and reasonably made. On the other hand where the frequency, nature or content of such communications is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor, rather than merely to convey the demand for recovery, the conduct will constitute undue harassment … Generally it can be said that a person will be harassed by another when the former is troubled repeatedly by the latter. The reasonableness of the conduct will be relevant to whether what is harassment constitutes undue harassment. …

63 "Coercion" on the other hand carries with it the connotation of force or compulsion or threats of force or compulsion negating choice or freedom to act: see *Hodges v Webb* [1920] 2 Ch 70 at 85-7 per Peterson J. A person may be coerced by another to do something or refrain from doing something, that is to say the former is constrained or restrained from doing something or made to do something by force or threat of force or other compulsion. Whether or not repetition is involved in the concept of harassment, and it usually will be, it is not in the concept of coercion.

64 It is clear that the word "undue" suggests that what is done must, having regard to the circumstances in which the conduct occurs, extend beyond that which is acceptable or reasonable. It thus adds, … "*an extra layer of evaluation*". The word "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. It would, however, be somewhat unusual to qualify the concept of coercion with the word undue. If there is such a qualification it would suggest that the policy behind s 60 accepted that some normal level of coercion or force overbearing choice or will was, having regard to the circumstances in which the conduct occurred, acceptable or reasonable in a civilised society and that it was only where that acceptable level of coercion was exceeded so that the coercion became "undue" that coercion was intended to be prohibited. I note that J D Heydon in *Trade Practices Law* (2nd edition at [13.620]) likewise is of the view that undue does not qualify coercion. But if undue does qualify coercion it would not seem to add much to it, whereas I am of the view that qualitatively the word "undue" adds the quality of unreasonableness, unacceptability or lack of proportionality to the general concept of harassment.

RECOMMENDATION

Expressly prohibiting bullying, intimidation, physical force, coercion or undue harassment in consumer transactions, as well as in business to business relationships involving small businesses.

Enacting a statutory duty of good faith

While any statutory definition of "unconscionable" could usefully rely on the concept of good faith as a means of ensuring the Courts take a broader approach to s 51AC of the *Trade Practices Act* than their presently onerous and very legalistic approach to the section, an alternative would be to enact a stand alone statutory duty of good faith. Either way, the concept of good faith offers considerable potential as a mechanism for promoting ethical business conduct. Indeed, this is readily apparent from the growing judicial attention and support given to an implied duty of good faith in commercial contracts, especially in New South Wales.[14]

Such a statutory duty of good faith should operate generally within the business to business relationships involving small businesses, including requiring the parties to resolve disputes in good faith. A precedent for requiring the parties to mediate in good faith is found in Clause 45(1) of the Mandatory OilCode which provides:[15]

45 Provision of mediation and assistance

(1) All mediation … provided under this Part must be carried out in good faith.

A convenient summary of the nature and scope of an implied duty of good faith was recently provided by Gordon J in *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd*:[16]

> 146 Specific conduct has also been identified by various courts as constituting '*bad faith*' or a lack of '*good faith*' including:
> (1) acting arbitrarily, capriciously, unreasonably or recklessly: e.g. see Viscount Radcliffe in *Selkirk v Romar Investments Ltd* [1963] 1 WLR 1415 at 1422-23 cited by Gyles J in *Goldspar* at [173]; and *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288 at [65];
> (2) acting in a manner that is oppressive or unfair in its result by, for example, seeking to prevent the performance of the contract or to withhold its benefits: *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288 at [65]-[66];
> (3) failing to have reasonable regards to the other party's interests: *Overlook Management BV v Foxtel Management Pty Ltd* (2002) ACR 90–143 at [67] …
> (4) failing to act 'reasonably' in general. …

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[14] See for example *Renard Constructions (ME) Pty Limited v Minister for Public Works* (1992) 26 NSWLR 234; *Alcatel Australia Limited v Scarcella* [1998] NSWSC 483 (16 July 1998*); Burger King Corporation v Hungry Jack's Pty Limited* [2001] NSWCA 187: *Overlook v Foxtel* [2002] NSWSC 17 (31 January 2002); and *Vodafone Pacific Ltd & Ors v Mobile Innovations Ltd* [2004] NSWCA 15 (20 February 2004).

[15] *See Trade Practices (Industry Codes - Oilcode) Regulations 2006*

[16] [2007] FCA 1066 (23 July 2007).

> 147 A requirement to act '*reasonably*' when acting in good faith was first articulated in Australia by Priestly JA in *Renard Constructions* where his Honour observed that reasonableness had "*much in common with the notions of good faith"*: at 263. Following this decision, courts have favoured '*reasonableness*' as one of the requirements of good faith. Finkelstein J in *Garry Rogers Motors* stated that *"provided the party exercising the power acts reasonably in all the circumstances, the duty to act fairly and in good faith will ordinarily be satisfied"*: at [37].

Significantly, Gordon J also outlined apparent judicial consensus as to what is *not* encompassed by a duty of good faith:

> 149 …a duty of good faith:
> (1) is not fiduciary in nature;
> (2) does not require a party to subordinate its own interests, let alone act selflessly; and
> (3) does not require a party to restrict decisions and actions, reasonably taken, which are designed to promote the legitimate interests of a party and which are not otherwise in breach of an express contractual term.

Clearly, the concept of good faith has not only received strong judicial support, but now has reached the point in Australia where its nature and scope is being defined with an increasing degree of precision. Consequently, there is a ready body of law on which a statutory duty of good faith could quite readily and usefully draw upon in seeking to promote ethical business conduct.

There is growing recognition of the value of a statutory duty of good faith. For example, the Matthews' Review into the Australian franchising sector recommended that a duty of good faith be incorporated in the Franchising Code (see pages 46 - 47).[17] This recommendation was rejected by the then Federal Government on the basis that "good faith" was factor in s 51AC. Unfortunately, this represents a fundamental misunderstanding by the previous Federal Government of the role played by the factors in s 51AC. As explained above, the factors in s 51AC do not define "unconscionable" conduct but are merely matters that a court may or may not choose to consider in cases under s 51AC. In fact, although an absence of good faith would ordinarily be considered to be unethical, it is entirely possible that an absence of good faith may not in itself be unconscionable under s 51AC. This situation arises simply because of the extreme nature of the conduct required by the courts before they will consider conduct to be "unconscionable" under s 51AC.

A statutory duty of good faith would represent a positive statement of what is considered ethical conduct within business to business relationships involving small business and provides an appropriate and well accepted benchmark of appropriate standards of ethical behavior. The ongoing success of such relationships requires that they act in a mutually respectful and cooperative

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[17] See http://www.innovation.gov.au/Section/SmallBusiness/Pages/FranchisingCodeofConduct.aspx

manner throughout the course of the relationship. A statutory duty of good faith would set out the boundaries of acceptable conduct in a positive manner for the benefit of those involved in a business to business relationship involving small businesses.

RECOMMENDATION

Enacting a statutory duty of good faith.

Enacting a new legislative framework within the Trade Practices Act to deal with unfair contract terms in consumer transactions, as well as business to business relationships involving small businesses

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.[18] Such a framework would help promote greater judicial scrutiny of substantive unconscionability and could be based on the United Kingdom[19] and Victorian[20] legislation for dealing with unfair terms in consumer contracts.[21]

Needless to say, the acceptance of the need for a new legislative framework to deal with unfair contract terms is a vital first step in a process that leads to designing and then implementing such a legislative framework. Clearly, further work needs to be undertaken to give full effect to the growing consensus that Australia needs to implement a world's best practice legislative framework dealing with unfair contract terms. Such a framework should have the following features;

- a clear definition of an unfair term;
- include a comprehensive listing of potentially unfair terms which provides clear statutory guidance to consumers, businesses and the Courts regarding the types of terms considered to be unfair;
- contain an ability to prescribe particular terms or classes of terms as "unfair" so that widespread consumer detriment can be prevented in advance and without the need to separately pursue each individual use of the unfair term or terms;
- impose a penalty for using a prescribed unfair term as a necessary deterrent against the use of terms recognized as being unfair;

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[18] See for example Zumbo F., Promoting Fairer Franchise Agreements: A Way Forward?" (2006) *Competition and Consumer Law Journal*, Vol. 14, 127 – 145.

[19] The UK legislation was implemented first and is now found in the *Unfair Terms in Consumer Contracts Regulations 1999*. These Regulations came into force on 1st October 1999.

[20] The Victorian legislation is found in Part 2B of the *Fair Trading Act 1999* and came into force on 9 October 2003.

[21] For a discussion of the operation of the United Kingdom and Victorian legislation see Zumbo, F., (2005), "Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?" *Trade Practices Law Journal*, Vol. 13, pp. 70 - 89; Zumbo, F., (2005), "Dealing with Unfair Terms in Consumer Contracts: The search for a new regulatory model," *Trade Practices Law Journal*, Vol. 13, pp. 194 - 213; and Zumbo, F., (2007), "Promoting Fairer Consumer Contracts: Lessons from the United Kingdom and Victoria", *Trade Practices Law Journal*, Vol. 15, pp. 84-95.

- have a well resourced Government enforcement agency to respond to allegedly unfair contracts terms in a timely and pro-active manner to minimize the actual or potential detriment arising from the term;
- provide guidance and education to both businesses and consumers to maximize awareness and understanding of the legislative framework;
- allow for enforceable undertakings to be provided to Government agency to enable matters to be resolved quickly and without recourse to the Courts;
- allow for advisory opinions by Government enforcement agency to enable particular businesses and industries to seek specific guidance in advance of using terms considered at risk of being viewed as unfair;
- allow for advisory opinions by quasi-judicial body to provide businesses or the Government enforcement agency the opportunity to secure a binding opinion as to the whether or not a particular term is unfair; and
- allow for private enforcement of the framework to enable those affected parties to recover any loss or damage arsing from an unfair contract term.

A single legislative framework for dealing with unfair contract terms in relation to consumers and small businesses would play a central role in the promotion of ethical business conduct. [22] Significantly, Senator Stephens on behalf of the Australian Labor Party also made mention of the issue of unfair contracts during the Senate debate on *Trade Practices Legislation Amendment Bill (No. 1)* 2007 by calling on the then Federal Government to "closely examine options for introducing a regime dealing with unfair contract terms between businesses as well as between business and consumers."[23]

RECOMMENDATION

Enacting a new legislative framework within the *Trade Practices Act* to deal with unfair contract terms in consumer transactions as well as business to business relationships involving small businesses.

[22] Zumbo, F., (2007), "Are Australia's Consumer Laws Fit for Purpose", *Trade Practices Law Journal*, Vol. 15, p. 227, at 232 -236.
[23] See Harsard, Australian Senate, 17 September 2007, at 2.

Strategies for promoting ethical conduct

A range of strategies are available to promote ethical conduct. The following recommendations are made in this regard:

- **Amending the *Trade Practices Act* to provide that the Court can issue a class compensation order whereby a Court would, once a breach has been found in an action brought by the ACCC, have the power to compensate affected consumers and small businesses without the need for those consumers and small businesses to bring their own action or recovery proceedings;**

- **Requiring that contractual documents be drafted in plain language;**

- **Establishing an Australian Small Business Development Corporation responsible for providing policy leadership and advice on small business matters to the Federal Government, including in relation unethical conduct faced by small businesses in business to business relationships;**

- **Establishing an Office of the Small Business Ombudsman within the Australian Small Business Development Corporation with specific responsibility to research and identify existing and emerging areas of disputation in business to business relationships involving small businesses with a view to identifying strategies, mechanism or legal options for minimising such disputes.**

- **Establishing an Expert Determination Scheme within the Australian Small Business Development Corporation with specific responsibility for finally resolving disputes in business to business relationships involving small businesses that remain unresolved following mediation; and**

- **Establishing a dedicated Small Business Enforcement Unit within the ACCC with sufficient funding to undertake enforcement action for all breaches of the *Trade Practices Act* relating to business to business relationships involving small businesses; and with a specific mandate to pursue test cases to clarify the operation and to identify possible gaps in the application of the unconscionable conduct provisions of the *Trade Practices Act*, as well in the proposed new statutory duty of good faith and proposed new laws against unfair contract terms in business to business relationships involving small businesses**

Class compensation order - Amending the *Trade Practices Act* to provide that the Court can issue a class compensation order whereby a Court would, once a breach has been found in an action brought by the ACCC, have the power to compensate affected consumers and small businesses without the need for those consumers and small businesses to bring their own action or recovery proceedings

A key challenge faced by consumers and small businesses relates to their current inability to recover losses from breaches of the *Trade Practices Act* in a timely and cost-effective manner. All too often agencies like the ACCC can successfully prosecute breaches of the *Trade Practices Act*, but franchisees affected by the conduct find it to difficult to cost-effectively recover their losses. Within this context, it is appropriate to consider a new approach to efficiently and effectively facilitating the recovery of losses from breaches of the *Trade Practices Act* and misleading or deceptive conduct as well as unconscionable conduct. Such an approach could involve giving the Courts the power to make a "class compensation order" whereby the Court would, following a finding that there has been a breach of the *Trade Practices Act*, order the business to compensate all affected consumers or small businesses notifying a court-appointed assessor of their loss or other claim within a specified period of time.

Under a class compensation order, the Court would have the power to compensate affected consumers or small businesses without the need for those consumers or franchisees to bring their own action or recovery proceedings. In particular, a class compensation order would, once a breach has been found in an action brought by the ACCC, allow the Court itself to set up a framework:

(i) to ensure that affected consumers and small businesses are notified within a reasonable period of time that they are able to make a claim to the particular Court in relation to the contravening conduct;
(ii) allowing a reasonable period of time for affected consumers and small businesses to lodge their claim;
(iii) appointing an assessor, answerable to the Court, to review all claims lodged by affected consumers and small businesses within the specified time; and,
(iv) for the Court to finally approve any claim recommended by the assessor.

This process would be funded by the contravening party and would provide a streamlined process for dealing with individual claims arising from a proven breach. While there would be judicial oversight of the process, the Court itself would not be tied down by having to consider the factual background of each affected franchisee. Indeed, any factual assessment of individual claims can easily be undertaken by an assessor or assessors, who could conduct such

assessments in a very efficient and cost effective manner without the need to take up valuable court time.

Thus, a class compensation order would not only enable consumers and small businesses affected by the contravening conduct to recover their losses in a streamlined manner, but such an order would be an excellent way to avoid courts being clogged up by a proliferation of individual recovery actions which may occur at present. Importantly, a class compensation order would allow the Courts to respond flexibly and effectively to cases where a large number of consumers and small businesses are affected by the contravening conduct and, in this regard, the availability of a class compensation order would enable the ACCC to play a leadership role in targeting conduct that has a wide-ranging detrimental impact on consumers and small businesses.

My proposal for a “class compensation order” was considered on page 236 of an article published last year titled "Are Australia's consumer laws fit for purpose," (*Trade Practices Law Journal*, Vol. 15, p. 227). A copy of the article has been provided in Appendix 7 of this Submission.

RECOMMENDATION

Amending the Trade Practices Act to provide that the Court can issue a class compensation order whereby a Court would, once a breach has been found in an action brought by the ACCC, have the power to compensate affected consumers and small businesses without the need for those consumers and small businesses to bring their own action or recovery proceedings.

Promoting ethical conduct towards consumers and small businesses - Requiring that contractual documents be drafted in plain language

A key factor in the promotion of ethical conduct is that consumers and small businesses understand any contractual documents they are required to sign. This would be greatly assisted by such documents being drafted in plain language.

Given the obvious benefits of plain language drafting, it is surprising that it has not been adopted more universally in, for example, the drafting of contracts. On the positive side, it is noteworthy that some industry sectors have expressly promoted the use of plain language drafting. For example, Clause 7.1 of the Australian Communications Industry Forum: Industry Code ACIF C620:2005 *Consumer Contracts*[24] provides that telecommunication contracts are to be written in plain language:

> **7.1 Plain Language**
> 7.1.1 A Supplier must ensure that the terms of a Contract:
> (a) are clearly expressed by using words in their plain and ordinary meaning;
> (b) are consistent in the use of definitions and other terminology; and
> (c) that may have multiple valid interpretations are completely defined and used consistently.
> …
> 7.1.2 A Supplier must avoid the use of complex definitions or technical terms as far as is reasonably practicable having regard to the subject matter of the Contract.

Significantly, Clause 7.2 of the Code provides additional guidance regarding the format and structure of telecommunication contracts so as facilitate a better understanding of such contracts by consumers:

> **7.2 Format and Structure**
> 7.2.1 A Supplier must ensure that the terms of a Contract are available in writing and are legible having regard to the medium and format used.
> 7.2.2 A Supplier must take reasonable steps to ensure that any document which contains the material terms of the Contract:
> (a) is available in hard copy in a minimum 10 point font by reference to the font size of Times New Roman or equivalent size in any other font or, if also available in electronic format, is capable of being printed in that font size;
> …
> (b) avoids clauses or paragraphs which are excessive in length;
> (c) groups the terms by subject matter or otherwise in a clear and logical order with subheadings;

[24] The Code can be accessed at http://www.acma.gov.au/webwr/telcomm/industry_codes/codes/c620(1).pdf

(d) includes an index or table of contents for the terms where necessary for ease of reference;
(e) avoids excessive cross-referencing and the incorporation of terms from other documents which are not available or accessible to the Consumer at the same time as the document;
(f) ensures the text of the document appears in a colour that contrasts sufficiently with its background; and
…
(g) brings important terms to the attention of Consumers in a manner that is reasonable having regard to the length of the document and subject matter of the Contract. …

The direction provided in Clauses 7.1 and 7.2 of this Industry Code demonstrates how consumer contracts can be made more user-friendly in an efficient and cost effective manner though the use of plain language drafting and a sensible structuring and formatting of the particular contract.

While clearly there are positive steps being taken towards the adoption of plain language drafting, it is disappointing to find that some consumer and business to business contracts involving small business are still being drafted in dense legalese. Such an unwillingness to adopt plain language drafting is unfortunate and appears to reflect a failure of the generally self regulatory approach in this area. Indeed, while there has been a growing awareness of the value of plain language drafting, legislatures have typically left it to suppliers to decide whether or not to adopt plain language drafting in the preparation of consumer and business to business contracts, involving small businesses.

More recently, however, legislatures have required that contracts be written in plain language. For example, Regulation 7(1) of the *Unfair Terms in Consumer Contract Regulations 1999* (UK) requires that any written term of a contract be expressed in “plain, intelligible language.” Interestingly, Regulation 7 (2) provides that, subject to specified exceptions, if there is doubt about the meaning of a written term, then the interpretation which is most favourable to the consumer shall prevail.

Similarly, section 163 of the *Fair Trading Act 1999* (Vic) requires consumer documents to be “clear” and provides an enforcement mechanism to secure compliance:

163. Consumer documents to be clear

(1) In this section **"consumer document"** means—
  (a) a consumer contract; or
  (b) a statement, notice or other document required by this Act to comply with this section.
(2) …
(3) A consumer document—
  (a) must be easily legible; and
  (b) to the extent that it is printed or typed, must use a minimum 10 point font; and

(c) must be clearly expressed.

(4) If the Tribunal is satisfied, on application by the Director, that any provision of a consumer contract does not comply with the requirements of this section, the Tribunal may by order prohibit a supplier from using the provision in the same or similar terms in consumer contracts.

(5) A supplier must comply with an order under this section.
Penalty: 60 penalty units, in the case of a natural person.
120 penalty units, in the case of a body corporate.

Importantly, both the United Kingdom and Victorian approach to plain language drafting are seen as integral to promoting fairer consumer contracts.

RECOMMENDATION

Requiring that contractual documents be drafted in plain language.

Establishing an Australian Small Development Corporation responsible for providing policy leadership and advice on small business matters to the Federal Government, including in relation to unethical conduct faced by small businesses in business to business relationships

In view of the importance of a successful small business sector to the Australian economy, it is vital that there is sufficient and appropriate Government policy leadership with respect to small business matters including in relation to unethical conduct faced by small businesses in business to business relationships. The size of the Australian small business sector is such to now justify a stand alone and well resourced Government agency. Such an agency can be modelled on the Western Australian Small Business Development Corporation.[25] This WA Government agency has responsibility for providing policy advice on small business matters in Western Australia. Such a model could quite easily be adopted in relation to small business Australia-wide with the agency possibly being called the Australian Small Business Development Corporation.

RECOMMENDATION

Establishing an Australian Small Business Development Corporation responsible for providing policy leadership and advice on small business matters to the Federal Government including in relation to unethical conduct faced by small businesses in business to business relationships.

[25] See http://www.sbdc.com.au/

Establishing an Office of the Australian Small Business Ombudsman within the Australian Small Business Development Corporation with specific responsibility to research and identify existing and emerging areas of disputation with a view to identifying strategies, mechanisms or legal options for minimising such disputes

A new Government agency to be called the Australian Small Business Development Corporation could also provide a home for a new Office of the Australian Small Business Ombudsman. Establishing an Office of the Australian Small Business Ombudsman would ensure that there was a suitable qualified person with specific responsibility to research and identify existing and emerging areas of disputation within business to business relationships involving small businesses with a view to identifying strategies, mechanisms or legal options for minimising such disputes.

In effect the Australian Small Business Ombudsman would be a “trouble shooter” who systematically searches for new and emerging areas of disputation in business to business relationships involving small businesses with a view to seeking to identify strategies, mechanisms or legal options for efficiently and effectively resolving such disputes.

RECOMMENDATION

Establishing an Office of the Australian Small Business Ombudsman within the Australian Small Business Development Corporation with specific responsibility to research and identify existing and emerging areas of disputation within business to business relationships involving small businesses with a view to identifying strategies, mechanism or legal options for minimising such disputes.

Establishing an Expert Determination Scheme within the Australian Small Business Development Corporation with specific responsibility for finally resolving disputes within business to business relationships involving small businesses remaining unresolved following mediation

A new Government agency to be called the Australian Small Business Development Corporation could also provide a home for an expert determination scheme which could operate as a mechanism for resolving disputes within business to business relationships involving small businesses that remain unresolved following mediation. Within this context, an expert determination scheme would be very useful in making available to all small businesses within business to business relationships a suitably qualified person who would be available to make an expert determination regarding unresolved matters involved in the dispute with a view to finally resolving those matters in an efficient, cost effective and mutually beneficial manner.

RECOMMENDATION

Establishing an Expert Determination Scheme within the Australian Small Business Development Corporation with specific responsibility for finally resolving disputes within business to business relationships involving small businesses remaining unresolved following mediation

Establishing a dedicated Small Business Enforcement Unit within the ACCC with sufficient funding to undertake enforcement action for all breaches of the *Trade Practices Act* relating to business to business relationships involving small businesses; and with a specific mandate to pursue test cases to clarify the operation and to identify possible gaps in the application of the unconscionable conduct provisions of the *Trade Practices Act*, as well in the proposed new statutory duty of good faith and proposed new laws against unfair contract terms in business to business relationships involving small businesses

As the agency having responsibility for enforcing the small business related provisions of the *Trade Practices Act*, the ACCC has a duty to pursue to test cases to clarify the operation of the *Trade Practices Act* and to identify possible gaps in their application. This requires that the ACCC be given sufficient and specific funding for such activities and that the ACCC have sufficient and specific internal focus on business to business relationships involving small businesses. In this regard, it would be appropriate for there to be a dedicated Small Business Enforcement Unit within the ACCC.

RECOMMENDATION

Establishing a Small Business Enforcement Unit within the ACCC with sufficient funding to undertake enforcement action for all breaches of the *Trade Practices Act* relating to business to business relationships involving small businesses; and with a specific mandate to pursue test cases to clarify the operation and to identify possible gaps in the application of the unconscionable conduct provisions of the *Trade Practices Act*, as well in the proposed new statutory duty of good faith and proposed new laws against unfair contract terms in business to business relationships involving small businesses

APPENDIX 1

Zumbo, F., (2005), "Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?" *Trade Practices Law Journal*, Vol. 13, pp. 70-89.

APPENDIX 2

Zumbo, F., (2005), "Dealing with Unfair Terms in Consumer Contracts: The search for a new regulatory model," *Trade Practices Law Journal*, Vol. 13, pp. 194-213.

APPENDIX 3

Zumbo, F., (2007), "Promoting Fairer Consumer Contracts: Lessons from the United Kingdom and Victoria" *Trade Practices Law Journal*, Vol. 15, pp. 84-95.

APPENDIX 4

Zumbo F., (2006), "Commercial Unconscionability and Retail Tenancies: A State Territory Perspective," *Trade Practices Law Journal*, Vol. 14, pp. 165-174.

APPENDIX 5

Zumbo, F., (2008), "Promoting Ethical Business Conduct: The Case for Reforming s 51AC of the *Trade Practices Act*" *Trade Practices Law Journal*, Vol. 16, pp. 132-141.

APPENDIX 6

Zumbo, F., (2006), "Promoting Fairer Franchise Agreements: A Way Forward?" *Competition and Consumer Law Journal*, Vol. 14, pp. 127-145.

APPENDIX 7

Zumbo, F., (2007), "Are Australia's Consumer Laws Fit for Purpose?"
Trade Practices Law Journal, Vol. 15, pp. 227-237.