Promoting ethical business conduct: The case for reforming section 51AC

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The operation of s 51AC of the Trade Practices Act 1974 (Cth) has long been the subject of much debate. From the earliest days where the section's enactment was welcomed by those seeking a new legislative framework for the promotion of ethical business conduct until more recent years when such hopes have well and truly faded, discussion about the nature and scope of s 51AC has been ongoing and, at times, controversial. With s 51AC now approaching its 10th anniversary, it is timely to review recent amendments to the section and to consider possible reforms and alternatives to the section to ensure that Australia has an effective and well understood legislative framework for promoting ethical business conduct.

INTRODUCTION

With s 51AC of the *Trade Practices Act 1974* (Cth) (TPA) approaching its 10th anniversary, it is opportune to consider not only recent amendments made to the section by the *Trade Practices Legislation Amendment Act (No 1) 2007* (Cth), but also possible further amendments in the unconscionability area to ensure that the TPA effectively promotes ethical business conduct. In doing so, the writer will point out how the judicial interpretation of s 51AC has fallen short of the parliamentary intention behind the section. Indeed, while s 51AC was clearly intended to broaden the concept of unconscionability beyond the narrow equitable doctrine, it is readily apparent that the courts have required a very high standard of "unconscionability" under s 51AC, and, in interpreting the section, have maintained the procedural unconscionability bias of the equitable doctrine, rather than being ready to directly target substantive unconscionability. In short, despite recent amendments to s 51AC, further attention needs to be given to the unconscionability provisions of the TPA to ensure that they achieve their full potential in promoting ethical business conduct.

RECENT AMENDMENTS TO S 51AC

Schedule 3 of the *Trade Practices Legislation Amendment Act (No 1) 2007* made a number of amendments to s 51AC of the TPA. Each amendment to s 51AC will be considered individually and, from this review, it will become readily apparent that the amendments are cosmetic and fail to address underlying concerns with the operation of the section.

Adding to the non-exhaustive list of factors the court may have regard to in determining whether there is breach of s 51AC

The amendment provides for the inclusion of the following "new" factor in s 51AC(3):

> (ja) whether the supplier has 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;

A comparable "new" factor has been inserted in relation to acquirers of goods or services and is found in s 51AC(4)(ja). The inclusion of a "new" factor dealing with a contractual right to vary unilaterally a term or condition of a contract adds nothing meaningful to s 51AC, since the court is already able to consider any matter that it considers relevant to determining whether conduct is unconscionable under s 51AC.

It would be misleading to suggest that the insertion of a "new" factor to the non-exhaustive list in s 51AC(3) and (4) is necessary to allow the courts to have regard to that factor in future cases. Similarly, it would be misleading to suggest that, in the absence of such a "new" factor, the courts could not have regard to the factor. Clearly, these amendments need to be considered against the

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background of the existing opening words of s 51AC(3) and (4). In doing so, one is best able to appreciate that the "new" factor adds nothing substantive to the consideration of cases under s 51AC. Indeed, the opening words clearly state that "without in any way limiting the matters to which the court may have regard", the court "may have regard to" a number of factors listed in s 51AC(3) and (4). Thus, the courts may have regard to any matter, whether or not listed in s 51AC(3) and (4), in determining whether or not there has been a breach of s 51AC.

It is important to note that the listing of factors in s 51AC(3) and (4) does not elevate those factors to a definition of "unconscionable conduct". Indeed, it would also be misleading to suggest that the factors included in s 51AC(3) or (4) provide a definition of what is "unconscionable" under s 51AC. The question of whether or not conduct is "unconscionable" 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 (4). So, under s 51AC(3) and (4), the listed factors 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 short, the addition of a factor in s 51AC(3) and (4) does not better define the term "unconscionable conduct", but merely makes a cosmetic change to the list. Importantly, adding or subtracting factors to s 51AC(3) and (4) as currently drafted would not impact on what the courts consider to be "unconscionable" because the courts have defined the term independently of the factors in s 51AC(3) and (4).

Since the addition of a "new" factor in s 51AC(3) and (4) does not impact on the definition of the term "unconscionable", the amendment does not address the central question of whether the term "unconscionable" under s 51AC is being applied in a way that allows small business to have appropriate recourse to the courts for unethical conduct by big businesses. In this regard, it is readily apparent that the courts are setting a very high threshold for what constitutes unconscionable conduct under s 51AC and, in doing so, are increasingly requiring that a very high level of procedural unconscionability be established in order to succeed under that section. This notion of procedural unconscionability has its origins in the narrowly focused equitable doctrine of unconscionability and requires proof of extreme conduct by the stronger party towards the weaker party.

The extreme nature of the conduct that needs to be demonstrated under s 51AC can be seen from the following comments by the Full Federal court in *Hurley v McDonald's Australia Ltd* [1999] ATPR 41-741 at 40,585:

> 22 For conduct to be regarded as unconscionable, serious misconduct or something **clearly unfair or unreasonable**, must be demonstrated – *Cameron v Qantas Airways Ltd* (1994) 55 FCR 147 at 179. Whatever "*unconscionable*" means in sections 51AB and 51AC, the term carries the meaning given by the *Shorter Oxford English Dictionary*, namely, actions **showing no regard for conscience**, or that are **irreconcilable with what is right or reasonable** – *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 262. The various synonyms used in relation to the term "*unconscionable*" import a pejorative moral judgment – *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 283-4 and 298.

This judicial definition of what constitutes "unconscionable" conduct is, in the absence of statutory definition of "unconscionable" under s 51AC, the test to be applied in s 51AC cases. Significantly, the test is a very difficult one to satisfy in practice. This is particularly so, given that, under s 51AC, the weaker party must point to more than just an allegedly unfair contract term. Indeed, allegedly unfair contract terms or what is known as "substantive unconscionability" typically escapes judicial scrutiny because of the judicial focus on procedural unconscionability and the need for the weaker party to show that the conduct surrounding the contract or commercial relationship was extreme. The judicial focus on procedural unconscionability under s 51AC can be seen from the following comments by the Full Federal court in *Hurley* at 40,555 and 40, 586:

> 24 No allegation of unconscionable conduct is made in … relation to the making of the alleged contracts between McDonalds, on the one hand, and the Applicant and the group members, on the other. The allegation is simply that it would be unconscionable for McDonalds to rely on the terms of such contracts.
>
> …

> 29 There is no allegation of any circumstance that renders reliance upon the terms of the contracts unconscionable. For example, it might be that, having regard to particular circumstances it would be unconscionable for one party to insist upon the strict enforcement of the terms of a contract. One such circumstance might be that an obligation under a contract arises as a result of a mistake by one party. The mistake is an additional circumstance that might render strict reliance upon the terms of the contract unconscionable. Mere reliance on the terms of a contract cannot, without something more, constitute unconscionable conduct.

This procedural unconscionability focus gives rise to two problem areas under s 51AC: (i) the courts are taking a restrictive view of what is "unconscionable"; and (ii) in the absence of procedural unconscionability, the courts refrain from considering unfair contract terms in their own right.

Within this context, the possible presence of unfair contract terms or substantive unconscionability is something the courts have not been open to considering. This judicial focus on procedural unconscionability effectively means that unfair contract terms (or allegations of substantive unconscionability) escape judicial scrutiny. Thus, unfair contract terms may currently be included by large and powerful businesses in contracts with small businesses in the full knowledge that small businesses have little or no recourse to the courts regarding those allegedly unfair contract terms.

Increasing the cap for cases under s 51AC

Under this amendment, the monetary cap in relation to actions that may be commenced under s 51AC is increased from $3 million to $10 million. Previously, s 51AC(9) and (10) limited cases that could be commenced under s 51AC to those involving the supply or acquisition of goods or services at a price not exceeding $3 million. Not only is this amendment contrary to the recommendation of the Senate Inquiry into the Effectiveness of the *Trade Practices Act 1974* in Protecting Small Business, that the monetary threshold under s 51AC be removed all together,[1] but the retention of a monetary cap is questionable, given that such a cap is arbitrary and detracts from what should be the central issue under s 51AC; namely, whether or not the conduct is unconscionable.

In any event, the $10 million cap may not be enough to cover all small businesses. In this regard, it needs to be remembered that the monetary cap under s 51AC refers to the "price" for the supply or acquisition, or for the possible supply or acquisition, of goods or services. This "price" may be the value of the specific transaction alleged to be unconscionable, but the "price" may also be the value of the goods or services covered by a commercial arrangement where it is the commercial arrangement itself that is alleged to be unconscionable. This point was made by Jessup J in *Ford Motor Company of Australia Ltd v Jefferson Ford Pty Ltd* [2007] ATPR 42-167 at 47,663-47,664:

> 26. It is not in dispute that the "supply" to which s 51AC(1) refers includes supply pursuant to a transaction based on a particular contractual obligation. However, the term is a wide one (and is widely defined in the TP Act) and I can think of no reason why it should be confined to such a context, or even to a number of such contexts pursuant to s 23 of the *Acts Interpretation Act 1901* (Cth). In the commercial or business settings with which the TP Act is concerned, it is not unlikely that there would be many situations in which the supply of goods was effected, arranged or even contemplated without there being any particular, or even identifiable, contract or transaction in mind. The prohibition in s 45 upon understandings containing exclusionary provisions is an obvious example. So too the reference in s 51AC(1) itself to the "possible supply" of goods. If a corporation engaged in unconscionable conduct in its negotiation for the intended supply – and in that sense for the "possible supply" – of goods of a particular kind over a period of some five years, for example, there would have been a contravention of s 51AC, notwithstanding that no particular contract for the supply of goods then existed, and that no transaction had by then occurred. If the putative purchaser of the goods would, as matter of probability, have been required to pay, say, $5,000,000 for them, if and when they were supplied, that sum should, in my view, be treated as the "price" at which, at the time of the negotiation, the goods might possibly be supplied. In such an example, subs (9) would exclude the conduct complained of from the purview of s 51AC.

[1] See Senate Inquiry, *Effectiveness of the Trade Practices Act 1974 in Protecting Small Business* (2003), Recommendation 7, p 37.

Thus, where the "price" of the supply or acquisition, or the possible supply or acquisition of goods or services to a small business exceeds the $10 million monetary cap, that possible supply or acquisition would be excluded from s 51AC. As the "price" may relate to the value of a specific transaction alleged to be unconscionable or to the value of goods or services under a commercial arrangement alleged to be unconscionable, a price exceeding $10 million will mean that small business is excluded from s 51AC.

In short, a monetary cap in relation to s 51AC is an artificial and blunt instrument for determining who can access the section. Allowing such a cap to stand can also significantly detract from the policy objectives sought to be achieved by s 51AC. Thus, if the policy objective sought to be achieved is the prohibition of unconscionable conduct, then that conduct should be prohibited regardless of monetary value of the dealings involved. Either the conduct is unconscionable or it is not. Where the conduct is unconscionable, it is questionable from a policy perspective to say that the conduct is not permissible where it relates to dealings of less than a particular amount, but permissible otherwise. The question of whether or not conduct is unconscionable should be considered on its merits and not be pre-empted by reference to arbitrary monetary caps.

Replicating the proposed changes to the TPA dealing with unconscionable conduct in the equivalent sections of the Australian Securities and Investments Commission Act 2001

The comments made above in relation to the s 51AC amendments are equally applicable to the amendments also made by the *Trade Practices Legislation Amendment Act (No 1) 2007* to the unconscionable conduct sections of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act). These amendments merely replicate the changes to s 51AC of the TPA. For example, the following "new" factor has been inserted into s 12CC(2) of the ASIC Act:

> (ja) whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the service recipient for the supply of the financial services.

A comparable "new" factor has also been inserted as s 12CC(3)(ja) in relation to acquisitions. Finally, the monetary cap under s 12CC(8) and (9) has been raised from $3 million to $10 million.

Like the amendments to s 51AC, the amendment to insert "new" factors adds nothing to the operation of the unconscionable conduct sections of the ASIC Act. Similarly, the increase in the threshold may fail to cover some small businesses. As s 12CC is intended to cover the supply or acquisition of financial services to small businesses, there is a risk that the provision of some financial services to small businesses may exceed the $10 million threshold. This is particularly so, given that under s 12CC(10)(e) the capital value of a loan or loan facility is included in the "price" for the purposes of the threshold:

> (10) For the purposes of subsections (8) and (9):
>
> …
>
> (e) the price for the supply or possible supply, or the acquisition or possible acquisition, of services comprising or including a loan or loan facility is taken to include the capital value of the loan or loan facility.

Finally, the question arises as to whether it is appropriate that a prohibition against unconscionable conduct be split between the TPA and the ASIC Act. This is an artificial split which not only potentially creates definitional issues, but makes little policy sense. Repealing the unconscionability provisions of the ASIC Act and having the ACCC as the sole federal enforcer of the unconscionability provisions would remove any uncertainty arising from the present situation and promote a single consistent approach to those provisions at the federal level.

PROMOTING ETHICAL BUSINESS CONDUCT: A WAY FORWARD

The following proposals are intended to address a number of problem areas in relation to s 51AC, as well as offering various statutory alternatives to promoting ethical business conduct.

Reviewing the need for a monetary cap or having a monetary cap higher than the new $10 million cap

In keeping with Recommendation 7 of the *Majority Report of the Senate Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*,[2] the monetary cap for s 51AC cases should be removed altogether. In the event, however, that it is decided from a policy standpoint to retain a monetary cap, there would be considerable merit in adopting a higher amount than the $10 million currently specified under s 51AC. A higher monetary cap can be justified on the basis that higher amounts of up to $20 million have been adopted in relation to the new small business collective bargaining notification procedure under the TPA.[3]

Inserting a statutory definition of the term "unconscionable"

The insertion of a definition of "unconscionable" in s 51AC would be an obvious way to provide clear statutory guidance as to what is meant by the term as used in s 51AC.[4] 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 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.

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 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.[5]

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* (2008) ACR 90-269; [2007] FCA 1066:

> 146 Specific conduct has also been identified by various courts as constituting "*bad faith*" or a lack of "*good faith*" including:
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> (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];
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> (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] …

[2] Senate Inquiry, n 1, p 79.

[3] See Costello P, *Higher Collective Bargaining Thresholds For Small Business*, Media Release No 17 Of 2007.

[4] See Zumbo F, "Commercial Unconscionability and Retail Tenancies: A State and Territory perspective" (2006) 14 TPLJ 165 at 171-172.

[5] See, eg *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Alcatel Australia Ltd v Scarcella* (1998) 34 NSWLR 349; *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Overlook Management BV v Foxtel Management Pty Ltd* (2002) ACR 90-143; [2002] NSWSC 17; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15.

(4) failing to act "reasonably" in general …

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 an existing 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.

Inserting a statutory list of examples of the types of conduct that would ordinarily be considered to be "unconscionable"

An alternative to inserting a statutory definition of "unconscionable" would be to recast the existing list of factors under s 51AC(3) and (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. 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 over time 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 subs (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 subs (1) and (2):
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> - 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.

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.

Enacting a new legislative framework within the TPA to deal with unfair contract terms

Ensuring greater judicial scrutiny of unfair contract terms or substantive unconscionability 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 large and powerful businesses intent on including contract terms that go beyond what is reasonably necessary to protect their legitimate interests. In such circumstances, a new legislative framework within the TPA is needed to deal with unfair contract terms. Such a framework would help promote greater judicial scrutiny of substantive unconscionability and could be based on the United Kingdom[6] and Victorian[7] legislation for dealing with unfair terms in consumer contracts.[8]

Within this context, it is interesting to note that there has been growing interest and support for amending the TPA to deal with unfair contract terms. For example, Senator Murray moved the following amendment on behalf of the Democrats during the Senate debate on the *Trade Practices Legislation Amendment Bill (No 1) 2007* (Cth):[9]

51AAC Unfair contract terms

(1) A corporation must not, in trade or commerce, in connection with:
  (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
  (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

include in a contract, arrangement or understanding, or proposed contract, arrangement or understanding, an unfair term.

(2) A person must not, in trade or commerce, in connection with:
  (a) the supply or possible supply of goods or services to a corporation (other than a listed public company); or
  (b) the acquisition or possible acquisition of goods or services from a corporation (other than a listed public company);

include in a contract, arrangement or understanding, or proposed contract, arrangement or understanding, an unfair term.

(3) A term is to be regarded as unfair for the purposes of subsections (1) and (2) if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the

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

[7] The Victorian legislation is found in Pt 2B of the *Fair Trading Act 1999* (Vic) and came into force on 9 October 2003.

[8] For a discussion of the operation of the United Kingdom and Victorian legislation, see Zumbo F, "Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?" (2005) 13 TPLJ 70; Zumbo F, "Dealing with Unfair Terms in Consumer Contracts: The Search for a New Regulatory Model" (2005) 13 TPLJ 194; Zumbo F, "Promoting Fairer Consumer Contracts: Lessons from the United Kingdom and Victoria" (2007) 15 TPLJ 84.

[9] See Australian Senate, *Hansard* (17 September 2007) p 123.

parties' rights and obligations arising under the contract, arrangement, or understanding, or the proposed contract, arrangement or understanding, to the detriment of the consumer or small business.

(4) An unfair term is void.

(5) The contract will continue to bind the parties if it is capable of existing without the unfair term.

(6) This section only applies to a contract, arrangement or understanding, or proposed contract, arrangement or understanding entered, or proposed to be entered into, on or after the commencement of this section.

While the amendment was not accepted by the Senate, it did offer a new approach to the issue of unfair contract terms. Importantly, the proposal did not distinguish between consumer and small business related transactions, but would have applied to any unfair term in a contract, arrangement or understanding relating to the supply or acquisition, or possible supply or acquisition, of goods or services. On the question of what constitutes an unfair term, the proposal draws on the definition of an unfair contract term used in the Victorian legislation dealing with unfair terms in consumer contracts.[10] Interestingly, 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 government to "closely examine options for introducing a regime dealing with unfair contract terms between businesses as well as between business and consumers".[11]

More recently, the Productivity Commission has made the following recommendation in its draft report into the Australian Consumer Policy framework:[12]

> Draft Recommendation 7.1
>
> A new provision should be incorporated in the new national generic consumer law that voids unfair terms in standard form contracts, where:
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> - the term is established as "unfair": that is, it is contrary to the requirements of good faith and causes a significant imbalance in the parties' rights and obligations arising under the contract;
> - there is evidence of material detriment to consumers;
> - it does not relate to the upfront price of the good or service;
> - all of the circumstances of the contract have been considered; and
> - there is an overall public benefit from remedial action.
>
> Where these criteria are met, the unfair term would be voided only for the contracts of those consumers subject to detriment, with suppliers also potentially liable to damages for that detriment.
>
> There should also be a capacity for an industry or business to secure regulatory approval for "safe harbour" contract terms that would be immune from any action under this provision.
>
> The operation and effects of the new provision should be reviewed within five years of its introduction.

While it remains to be seen what form the Commission's recommendation on unfair contract terms will take in the final report, the Commission's draft recommendation provides further recognition of the need for a legislative framework to deal with unfair contract terms. For the time being, however, it is noteworthy that the Commission has accepted not only the need for a single national framework for dealing with unfair contract terms, but also the definition of unfair term used in the Victorian legislation.[13] The reference to "safe harbour" contract terms is also noteworthy, particularly as it has previously been suggested that a new legislative framework for dealing with unfair contract terms could make allowance for the use of approved model contract terms as a way of providing business and consumer certainty as to the legitimacy of particular terms.[14] In short, once a model contract term was approved through an appropriately rigorous and transparent process the term would not be able to be challenged as "unfair".

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[10] See s 32W of the *Fair Trading Act 1999* (Vic).

[11] See Australian Senate, *Hansard* (17 September 2007) p 2.

[12] See Productivity Commission, *Review of Australia's Consumer Policy Framework*, Draft Report, Vol 2, pp 127-128, http://www.pc.gov.au/__data/assets/pdf_file/0006/73662/consumer2.pdf viewed February 2008.

[13] See s 32W of the *Fair Trading Act 1999* (Vic).

[14] See Zumbo (2005), n 8, at 212.

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 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. In view of lessons from the United Kingdom and Victoria, such a framework should, in addition to a clear definition of an unfair term accepted by the Productivity Commission, have the following features;

- 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 recognised as being unfair;
- have a well-resourced government enforcement agency to respond to allegedly unfair contracts terms in a timely and pro-active manner to minimise the actual or potential detriment arising from the term;
- provide guidance and education to both businesses and consumers to maximise awareness and understanding of the legislative framework;
- allow for enforceable undertakings to be provided to the government agency to enable matters to be resolved quickly and without recourse to the courts;
- allow for advisory opinions by the 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.

Finally, consideration should also be given to having a single legislative framework to deal with unfair terms in not only consumer contracts, but also business-to-business contracts involving small businesses.[15] 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.

CONCLUDING REMARKS

It is readily apparent from the above discussion that, after nearly 10 years of operation, s 51AC is now at the crossroads. With the previous government having only made cosmetic changes to s 51AC in its dying days, and with the courts taking an extremely onerous view of what constitutes unconscionable conduct under s 51AC, it is clear that unless the section is quickly revitalised with appropriate amendments, it will rapidly fall into disuse. Such amendments include removing the monetary cap in relation to cases that can be commenced under s 51AC; inserting a statutory definition of the term "unconscionable" in s 51AC; enacting a statutory duty of good faith; and inserting a statutory list of examples in s 51AC of the types of conduct that would ordinarily be considered to be "unconscionable". Such proposals would ensure that s 51AC operates to promote ethical business conduct, while in no way undermining contractual certainty. Indeed, clear statutory guidance would promote greater contractual certainty by setting out exactly the types of unethical conduct that the legislature intends to prohibit under s 51AC. Finally, given the continued procedural unconscionability bias by the courts in relation to s 51AC, it would be appropriate to enact a new legislative framework

[15] Zumbo (2007), n 8 at 232-236.

for dealing with unfair contract terms. Such a legislative framework would promote judicial scrutiny of unfair contract terms in a direct and targeted manner.

