AUSTRALIA'S INNOVATIVE UNIVERSITY

Submission to the Senate Economics Committee

Inquiry into the Statutory Definition of Unconscionable Conduct

'The Need to Develop a Clear Statutory Definition of Unconscionable Conduct for the Purposes of Part IVA of the *Trade Practices Act 1974* and the Scope and Content of Such a Definition'

By

Professor Bryan Horrigan
Associate Dean (Research), Macquarie Law School
Head of the 'Legal Governance' Concentration of Research Excellence (CORE)
Co-Director of the Centre for Comparative Law, History, and Governance
Louis Waller Chair of Law and Associate Dean (Research), Monash University
Faculty of Law (from February 2009)

The Terms of Reference

Asking whether someone is in favour of a statutory definition of unconscionable conduct is akin to asking whether or not someone is in favour of Australia becoming a republic, in this sense. The answer really depends upon the structure, scope, and terms of the model on offer. In other words, reasonable people might agree in the abstract about the need to clarify this area of the law and its practice, and yet still disagree about whether inserting a statutory definition of unconscionable conduct is the best available means of doing so. Similarly, even people who might be attracted to the idea of a new statutory definition of unconscionable conduct might disagree about the scope and content of particular model definitions on offer.

Equally, many stakeholders and their advisers on all sides of this debate might reach a level of agreement that the current state of the law lacks the necessary degree of certainty, clarity, and guidance for them, but still disagree over what kind of solution might be possible and best. In many cases, their recommendations will be informed by the views and interests of a particular constituency that they represent or advise.[1]

Some people (including the author of this submission) might have no objection in principle to the idea of an additional statutory definition of unconscionable conduct, or even embrace wider rationalisation and harmonisation for this area of law and practice, and yet have residual concerns that need to be aired and satisfied about (a) the likelihood and scope of the claimed benefits that would flow from introducing such a definition into the law, (b) the overall cost-benefit assessment of such a reform once potential counter-productive effects are factored into the equation, and (c) the policy and regulatory desirability of a new statutory definition of unconscionable conduct as the only or best step at this stage in developing this area of law and practice and its cascading effect throughout the country.

In the end, any decision to change or supplement the current statutory law of unconscionable conduct is a matter of legal policy and political judgment, rather than simply a matter of demonstrable consensus about the state of the law within the legal community, or a matter that is dictated one way or another simply by the existing body of case law that interprets and applies this statutory regime. The question of whether or not the existing statutory regime on unconscionable conduct strikes a clear and appropriate balance between freedom of contract and governmental intervention is a normative judgment, and one that is aided and not conclusively determined one way or another from within the body of law itself, as a purely legal question. Similarly, the extent to which the existing balance of outcomes under the law for big business, small business, and consumers should be rebalanced – or, more accurately, set up for a rebalance through the conditioning impact of a new statutory definition of unconscionable conduct upon the existing unconscionability provisions in the Trade

[1] In the interest of transparency, the author of this submission discloses that he has published views on the topic of unconscionable conduct in academic literature, and also advised lawyers and clients in this area of practice in his consultancy role with a national law firm. Many of those clients have been banks, companies, and others within big business, and some of them have been small business operators and individuals too. Whatever the extent to which the analysis in this submission is informed by perspectives and experiences gained in those roles, this submission remains a personal one in the author's academic capacity alone.

Practices Act – similarly is a matter in which considerations of legal policy, political judgment, and legal doctrine are (and the arguments associated with them) are all intertwined.

The terms of reference for the Senate Economics Committee ('Committee') cover '(t)he need to develop a clear statutory definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974* and the scope and content of such a definition'. There is some discussion in the literature and in recent legislative consideration of such a definition elsewhere in Australia, much of it recently focused on suggestions in this direction by Professor Frank Zumbo. A recent example of a legislative attempt to introduce a statutory definition of unconscionable conduct into a related area of law, based upon Professor Zumbo's work, is recorded in the Hansard discussion of parliamentary debate surrounding the Retail Shops and Fair Trading Legislation Amendment Bill 2005 in one Australian jurisdiction, in terms that demarcate the battle lines over the need for a new statutory definition of unconscionable conduct, as follows:

> During debate on this bill in the Legislative Assembly, the then Minister for Consumer and Employment Protection, Hon John Kobelke, stated that it was unnecessary to provide a definition of unconscionable conduct in the bill as –
>
> > … there are High Court decisions and common law decisions in the courts … about the words 'unconscionable conduct' … even if we did provide a detailed definition to cover all the issues, cases would invariably arise that would not be covered by these specific things that we included in the definitions.
>
> By contrast, one of Australia's leading authorities in the area of trade practices law, Professor Frank Zumbo of the University New South Wales school of business law and taxation, believes not only that it is desirable to define unconscionable conduct, but also that it is a relatively simple matter to do so. The opposition will move an amendment to insert into the bill a definition of unconscionable conduct proffered by Professor Zumbo, which would read –
>
> > '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.
>
> Such a definition not only incorporates the key concepts from case history, but also, most importantly, extends these to cover matters of both procedural fairness and substantive fairness. This would avoid the potential problem of smaller retailers having to take expensive legal action simply to be able to state their case or claim of unconscionable conduct in the first instance. Issues relating to substantive fairness are presently largely ignored under the Trade Practices Act, from which this part of the bill draws. By extending the concept of unconscionable conduct to cover issues of substantive fairness and not merely procedural fairness, the position of small business will be substantially strengthened.

As this extract of parliamentary debate in a recent and analogous legislative context demonstrates, the decision whether or not to insert a new statutory definition of unconscionable conduct is not simply a matter of technical legal clarity or symmetry. This question has important implications for the balance of power as a matter of good

public policy between big business, on one hand, and small business and consumers, on the other. It also has implications for the various statutory schemes at state, territory, and federal levels that incorporate reference to notions of unconscionable conduct.

Accordingly, if the Committee recommends the introduction of a statutory definition of unconscionable conduct, and further suggests a model definition, the Committee might consider a further opportunity for public submissions on that proposed definition, so that the Committee's final recommendation to the Senate can be informed by the fullest possible stakeholder engagement on all aspects of the outcomes of the terms of reference.

The author of this submission's most recent academic and practical analysis of some of the problems besetting this area of law and practice appears in the published article entitled 'The Expansion of Fairness-Based Business Regulation – Unconscionability, Good Faith and the Law's Informed Conscience'.[2] The analysis of the uncertainties in this area of law and practice in that article are incorporated by reference in this submission, and are not duplicated in detail here. Although section 51AB is also potentially affected by the introduction of a statutory definition of unconscionable conduct in the Trade Practices Act, this submission focuses mainly upon sections 51AA and 51AC.

In the end, the primary purpose of this submission is to outline in a balanced way some key considerations and arguments for the Committee's consideration on more than one side of the debate about the Committee's terms of reference, which affect any decision to recommend a new statutory definition of unconscionable conduct, frame the wider context of any such decision, and shape any ancillary measures that might need to accompany any recommended reforms.

Diagnosing the Problem

The terms of reference place emphasis upon a particular kind of legislative reform as a law-based solution – namely, a new statutory definition of unconscionable conduct, to supplement the existing statutory indicators of unconscionability, the existing case law interpreting those statutory provisions, and the pre-existing judge-made law (ie common law and equity) of relevance to the law of unconscionable conduct. Ultimately, improvement in the law and practice in this area is more likely to come from a package of measures that extend beyond law to embrace other forms of regulation too, including forms of regulation that do not emanate from legislatures and courts alone.

Moreover, even if attention is confined to the benefit of inserting an appropriate definition of unconscionable conduct into the statutory regime – especially a definition that is intended to condition the interpretation and application of the existing statutory indicators of unconscionable conduct – the true fruits of such a significant reform will not be known until it is the subject of legal advice to affected stakeholders (eg consumers, small business operators (SMEs), major corporations, governmental regulators, and governmental business enterprises (GBEs)), followed in

[2] (2004) 32 *Australian Business Law Review* 159.

practice, and ultimately interpreted in a select range of appropriate judicial test cases. Indeed, in this area of legal policy and possible law reform, as in others, any recommendations for change must be grounded in a reasoned account and set of principles for regulation that structure and condition the framework within which any such recommendations will operate.

Other major federal governmental reviews of legislation are already taking both a broader and deeper approach to regulation, albeit in other contexts.[3] The significance of this development for the terms of reference is twofold. Improvements in the clarity and operation of this area of regulation are likely to require a package of legal, policy, and other regulatory measures involving both governmental and non-governmental players. In addition, the optimal model and structure for regulating unconscionable conduct across this area of law and related areas of law, and the balance as a matter of good public policy between the various stakeholder interests in play, both flow ultimately from a coherent and overarching account of public policy and social justice as applied to this discrete area of business and consumer regulation.

Any recommendation to introduce a new statutory definition of unconscionable conduct must presuppose a particular kind of mischief to be addressed and that an appropriate definition can satisfactorily address that mischief. The nature and dimension of the problem can be easily stated. After more than a decade since the introduction of the first statutory provisions of unconscionable conduct into the Trade Practices Act, we still do not know precisely how the various equitable and other doctrines related to unconscionability are distributed throughout the three main statutory provisions on unconscionable conduct in that Act. Nor do we know how far the provision specifically designed to protect small business extends beyond these equitable and other meanings.

At base, there is no single and defining meaning of unconscionability that applies universally. Rather, there are a range of equitable and other doctrines that draw upon specific ideas associated variously with conduct that is unconscionable and against 'good conscience', although legally the term 'unconscionable conduct' has a more discrete conventional meaning. This is made clear, for example, in the judgment of Justice Mason (before he became Chief Justice) in the leading High Court case of *Commercial Bank of Australia Ltd v Amadio*:[4]

> Historically, courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience. But relief on the ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from special disability or is placed in some special situation of disadvantage, e.g., a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink … It goes almost without saying that *it is*

[3] Eg *Review of Sanctions in Corporate Law*, Treasury, 2007.
[4] (1983) 151 CLR 447 at 461; emphasis added.

> *impossible to describe definitively* all the situations in which relief will be granted on the ground of unconscionable conduct.

Subsequent judicial decisions tell us little more than that s51AA of the Trade Practices Act at least embodies the equitable category of case concerning unconscionable bargains and (personal) special disadvantage,[5] that s51AA's reference to 'the unwritten law' on unconscionable conduct might not be limited to this equitable category of case and arguably extends to multiple categories of equitable intervention in commercial dealings,[6] and that the amplified statutory indicators of unconscionable conduct in s51AC of the Trade Practices Act probably extend beyond the unconscionability categories embraced by s51AA. Drawing upon High Court discussion of unconscionability, the author of this submission has previously warned against expecting too much in this area of law from overarching principles and definitions, given the way in which the general law of unconscionability in its various forms operates, as follows:[7]

> The High Court accepts that 'the notion of unconscionable behaviour does not operate wholly at large'.[8] Rather, courts must ground analysis of unconscionability in 'well developed principles' as an essential starting point, 'rather than entering into the case at that higher level of abstraction involved in notions of unconscientious conduct in some loose sense where all principles are at large.'[9] … This again emphasises the strong relationship between a conventional category of recovery, what unconscionability might mean as an organising principle in the context of that category of recovery, and the particular elements or factors which are relevant to that category of recovery and whose presence or absence informs any judgment of unconscionability in that context.
>
> … Similarly, two judges in the majority in *ACCC v CG Berbatis Holdings Pty Ltd* [10] describe unconscionability's multiple uses as follows:
>
> > The term 'unconscionable' is used as a description of various grounds of equitable intervention to refuse enforcement of or to set aside transactions which offend equity and good conscience. The term is used across a broad range of the equity jurisdiction.
>
> Of course, it is one thing to group various strands of doctrine together under one descriptive theme, and another thing altogether to use that descriptive theme itself as some kind of overarching test capable of applying directly to the various strands of doctrine. However, all of this simply emphasises the importance of analysing such matters from 'the inside out', starting with the traditional categories of recovery and the factors which relate to each category, rather than granting relief by reference to an open-ended general notion of unconscionability which is imposed upon a particular situation from 'the outside in'.

The Need For Institutional Dialogue

---

[5] *Garcia v National Australia Bank Ltd* [1998] HCA 48.
[6] *ACCC v Samton Holdings Pty Ltd* [2002] FCAFC 4.
[7] B. Horrigan, 'The Expansion of Fairness-Based Business Regulation – Unconscionability, Good Faith and the Law's Informed Conscience' (2004) 32 *Australian Business Law Review 159* at 168–169.
[8] *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [98].
[9] *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57 at [20].
[10] [2003] HCA 18 [42], approved by the majority in *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57 at [20].

In political terms, the major impetus behind the introduction of a statutory definition of unconscionable conduct at this stage in the development of this area of the law would be a public acknowledgement and declaration that the present state of the law is not satisfactory in its outcomes, needs reorienting towards the interest of groups of stakeholders (eg small business and consumers) whose interests are not being adequately protected, and can be addressed best through the legislative mechanism of inserting a new definition.

Institutional dialogue between the legislative and judicial arms of government can be an important feature of modern deliberative democracy. It is a feature of institutional architecture in other countries, especially in the structures for bills of rights. Dialogue between the executive and legislative arms of government is commonplace even in Australia, particularly in the vital work of scrutiny of legislation. Occasionally, public office-holders in the executive and legislative arms of government at state, territory, and federal levels publicly criticise judicial decisions in their official capacity. If the Committee believes that the mischief to be remedied by introducing a new statutory definition of unconscionable conduct is the fault to any degree of the courts failing to implement a clear statutory regime of unconscionable conduct or otherwise having taken a wrong turn in judicial interpretation and application of these provisions – even in having been too cautious in their approach to implanting Parliament's regulatory scheme - there is some public and institutional value in the Committee making that position clear.

Limits to the Benefits of a New Statutory Definition of Unconscionable Conduct.

There remain a considerable number of uncertainties in the statutory and non-statutory law relating to unconscionable conduct for which a new statutory definition of unconscionable conduct might offer little or no guidance. For example, depending upon what it says, such a definition might improve, exacerbate, or have no effect upon residual concerns about the constitutionality of s51AA of the Trade Practices Act and its equivalents in federal law (eg under the ASIC Act, concerning unconscionable conduct and financial services). To the extent that constitutional validity remains a concern, that concern focuses upon 'separation of powers' notions, particularly the abrogation by the legislative arm of government, and improper delegation to the judicial arm of government, of the task of setting the law on unconscionable conduct.[11] The conventional wisdom is that this issue has gone away for the moment, but it could always be reactivated in a suitable test case, and the High Court has not ruled conclusively on it.[12] At trial level in the ACCC's *Berbatis* litigation, Justice Robert French (who is now Chief Justice of the High Court of Australia) raised this issue with the parties, but ultimately found the provision to be constitutionally valid. Other courts have fallen into line accordingly.

Another example concerns the reach and elements of the particular equitable doctrine concerning unconscionability that focuses upon unconscionable bargains and special

[11] See, for example, the discussion in A. Finlay, 'Unconscionable Conduct and the Business Plaintiff: Has Australia Gone Too Far?' (1999) 28 *Anglo-American Law Review* 470 at 490; and B. Horrigan, 'The Expansion of Fairness-Based Business Regulation – Unconscionability, Good Faith and the Law's Informed Conscience' (2004) 32 *Australian Business Law Review* 159 at 183.
[12] See *ACCC v CG Berbatis Holdings Pty Ltd* [2003] HCA 18 at [68].

disadvantage. Nobody needs a new statutory definition of unconscionable conduct to clarify for courts that section 51AA of the Trade Practices Act at least includes the equitable doctrines of unconscionable conduct conventionally associated with unconscionable bargains and special disadvantage. Conversely, any such definition might offer little assistance in resolving some of the critical legal issues concerning this doctrine. As cases up to the level of the High Court of Australia make clear, the relevant special disadvantage here is *personal*, and it must also affect the capacity of the weaker party in a transaction to make a truly informed decision about what is in their best interests. In one of the leading test cases in this area, delivered before his recent elevation to the High Court as Chief Justice, Justice Robert French introduced into this area of law the possibility that this element of special disadvantage might be *situational* rather than simply personal. Notwithstanding the way in which subsequent courts have approached this novel suggestion (including both the High Court in the case in which Justice French as trial judge raised this possibility, and a full bench of the Federal Court (including Justice French) in a later case that offered its own gloss on it), it remains to be seen precisely how the scope and content of situational disadvantage will be addressed by the High Court with Justice French at its helm.

The practical significance of what seems like a mere matter of words here should not be underestimated. If, for example, a weaker party can legally find themselves in a position of situational disadvantage because of legal, financial, or informational imbalances of power and knowledge between themselves and parties in a stronger bargaining position, the door is open to a much wider and far more significant set of corporate, commercial, and consumer activity being regulated by even this conventional equitable doctrine of unconscionable conduct than would be the case if it is confined to its historical roots. However, adding a new statutory definition of unconscionable conduct might add nothing one way or another on this issue, as nobody seriously doubts that the statutory law on unconscionable conduct at least incorporates the equitable doctrines associated with unconscionable bargains and (personal) special disadvantage.

Of course, the Committee could also decide to introduce some clarifying legislative principles of interpretation to guide courts in interpreting and applying an overarching statutory definition of unconscionable conduct, in ways that attend to other unsatisfactory uncertainties in this are of law and practice too. Highlighting this potential limit to the effectiveness of introducing a statutory definition of unconscionable conduct also goes to the question of other remedial measures that might accompany such a reform if the Committee recommends that course, such as introducing a three-tiered statutory framework for unconscionable conduct under the Trade Practices Act, which contains and integrates (a) a new statutory definition in unconscionable conduct, (b) legislative principles for interpreting the statutory provisions on unconscionable conduct, and (c) listed statutory indicators on unconscionable conduct.

In addition, as with earlier reforms to the legislation on unconscionable conduct, any introduction of a new statutory definition of unconscionable conduct could be accompanied by an enhanced policy and funding commitment for the appropriate governmental regulators to bring suitable test cases as soon as possible for judicial guidance on the whole statutory regime as reformed, so that all affected stakeholders

have the benefit of more definitive guidance on this area of law and practice as soon as possible. For the sake of clarity, I should emphasise that the present point is simply about other recommendations that should accompany any recommendation by the Committee to change or add to the law in this area.

Rationale for a Statutory Definition of Unconscionable Conduct

Any possible change here cannot be assessed in the abstract simply as an additional set of statutory words, but rather must be understood in the context of how this body of law has developed and what exactly a definition might do to the interpretation and application of that body of law. One credible and published rationale for inserting a new statutory definition of unconscionable conduct into trade practices law is advocated by Professor Frank Zumbo. The paraphrased argument goes as follows. Whatever problems have emerged in delineating the precise boundaries of the equitable doctrines relating to unconscionable conduct that are enshrined in s51AA, s51AC potentially has a much wider operation, and one that is not simply grounded in pre-existing legal pigeon-holes under the general law of unconscionability. Nevertheless, the equitable doctrines in particular exert a strong gravitational pull on how both provisions are viewed, although to different degrees, and Australian courts have not demonstrated to this point a uniformally satisfactory approach to interpreting s51AC. So, in the absence of a clear touchstone that shapes and conditions how those provisions are interpreted and applied, we are left with the current unsatisfactory state of the law of unconscionable conduct.

Understood in that way, it is possible that an appropriate statutory definition of unconscionable conduct might offer the benefit of conditioning the interpretation and application of the existing statutory provisions on unconscionable conduct. Professor Zumbo himself frames the problem for which a new statutory definition of unconscionable conduct is the solution in the following terms:[13]

> While no doubt intending that the statutory concept of unconscionable conduct would have a wider operation than the equitable doctrine, the use of the expression unconscionable conduct in the proposed s 51AC clearly carried the risk that the courts would take a cautious approach to the statutory concept, particularly given their well-established views on the very limited scope of the equitable doctrine of unconscionability. Significantly, the risk of such a cautious approach being taken was increased by the omission of a definition of the expression 'unconscionable conduct' as used in s 51AC. While the inclusion of a non-exhaustive list of factors that the courts could have regard to in dealing with claims under s 51AC was intended to provide some guidance to the courts, *the failure to include a definition of unconscionable conduct* meant that the scope of the new statutory concept was essentially left to the courts to decide. In turn, this carried the risk of an ongoing debate as to how far the statutory concept extended in promoting ethical conduct in business transactions.
>
> Needless to say, such possible risks extend to any State and Territory provisions modeled on s 51AC.

[13] F. Zumbo, 'Unconscionable Conduct and Codes of Conduct' (2006) 14 *Trade Practices Law Journal* 165 at 171; emphasis added.

Of course, the problem is that the nature of this area of law is inherently open-ended (at least to some degree), context-dependent in its operation (and therefore incapable of exhaustive categorisation and guidance in a piece of legislation), and grounded in a body of law with pockets rather than full coverage of guidance built around at least some of the statutory and non-statutory manifestations of unconscionability. Still, there are too many judicial decisions for the author of this submission's comfort where a court simply extrapolates from the statutory indicators of unconscionable conduct to a conclusion one way or another about the presence of unconscionable conduct in the instant case, sometimes mediated through equally unsatisfactory reference to related notions such as 'exploitation', 'unfairness', 'unreasonableness', 'unconscientiousness' (ie 'against good conscience'), and their ilk, where the exercise of interpretation and application is ostensibly framed by courts within recognised categories and principles of legal analysis, but in reality still subject to what Professor Julius Stone famously labelled significant 'leeways of choice' for judges.

Identifying and Dealing with the Domino Effect of Statutory Reform

As the Committee would realise from its extensive work on the law of unconscionable conduct in this and other inquiries,[14] any change to the statutory provisions on unconscionable conduct in the Trade Practices Act will have implications for the equivalent statutory provisions on unconscionable conduct that now appear in a variety of federal and state laws concerning corporations, financial services, fair trading, consumer contracts, and commercial/retail leasing. In other words, any change to the Trade Practices Act here has more than usual significance for a range of other significant laws of relevance to business and consumers alike. Moreover, to the extent that any of those other sets of laws do not adopt any changes to the equivalent Trade Practices Act provisions, the different statutory regimes will become out of sync and the body of federal and state judicial guidance on one set of provisions will, to that extent, be less applicable across all of these statutory regimes. Whatever happens, these unsatisfactory policy and regulatory consequences must be avoided. This raises very important issues not only of cooperative federalism, but also of good statutory law-making in its own right.

The Committee no doubt will consider other cascading effects that might come into play upon any change to the Trade Practices Act's unconscionability provisions, especially if any new statutory definition of unconscionable conduct is inadequate or otherwise proves not to have the desired remedial effect. In the wake of national harmonisation of consumer credit code provisions and the heightened concern about regulation of responsible lending practices because of the current crisis facing the global financial system, it is possible or even likely that some of the legal notions and policy interests that are in play under a law of unconscionable conduct might also be revisited in that context too.

Similarly, there are emerging suggestions that some general areas of law might also be influenced by developments in human rights jurisprudence, either generally or under the influence of particular bills of rights in particular jurisdictions. Two

[14] Eg Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, 2004; and Senate Standing Committee on Economics, *Report on Trade Practices Legislation Amendment Bill 2008*, 2008.

Australian jurisdictions already have bills of rights of some kind (ie Victoria and the ACT), other states are reconsidering the issue, and the Federal Government has committed Australia to a national debate about the possible introduction of a bill of rights later this year. Just as a corporate employer's legal obligations to employees might possibly be informed in some contexts by the human rights of employees as well as by conventional statutory and non-statutory forms of negligence, so too we might reach a point where some of the statutory or non-statutory forms of unconscionable conduct might be informed by connections with human rights jurisprudence. Equity's traditional concern for the weak and the vulnerable, as articulated in particular doctrines such as the doctrine of special disadvantage (with its concern for individuals who are disabled by age, infirmity, mental illness, or other characteristics from making judgments in their own best interests), might one day be revisited from this angle, whatever might or might not be the present ameliorating impact of introducing a statutory definition of unconscionable conduct.

Of course, the Committee might ultimately come to the view that, whatever wider initiatives might be necessary, the first step of introducing a new statutory definition of unconscionable conduct should be taken. As this submission indicates, there are a number of checkpoints to pass before that conclusion can comfortably be reached, and there are some legitimate reservations (which might ultimately be answered, in the Committee's view) about the likelihood or reach of the intended consequences of introducing such a definition. All of those judgments are matters for the Committee. However, it is certainly a legitimate option under the terms of reference for the Committee to consider whether or not the step of introducing a statutory definition of unconscionable conduct should be taken now and alone, or alternatively whether the legitimate policy concern behind such a suggestion needs more coordinated attention through other means. On this point, proponents of a new statutory definition of unconscionable conduct highlight the possibility of developing model codes or laws that might apply nationwide, either generally or in relation to particular industry sectors (banking, financial services, retail leasing, property management, franchising etc).[15]

A Statutory Definition of 'Good Faith' as Part of Unconscionable Conduct

In principle, at least some of the ideas associated with 'good faith' are distinct from the ideas of 'unconscionable conduct',[16] whatever the extent to which some judges might conflate the two notions in particular cases and circumstances. Even where the two terms are brought together, as in section 51AC of the Trade Practices Act, the academic literature on good faith questions the extent to which this linkage draws upon the full range of doctrines and elements associated with 'good faith' under the law.[17] Although the Committee's terms of reference expressly focus upon the desirability of having a statutory definition of unconscionable conduct, any move in this direction must also confront the question of clearer statutory guidance on the

[15] Eg F. Zumbo, 'Unconscionable Conduct and Codes of Conduct' (2006) 14 *Trade Practices Law Journal* 165 at 172; proposed Opposition amendments to the Retail Shops and Fair Trading Legislation Amendment Bill 2005 (WA); and *Senate Standing Committee on Economics, Report on Trade Practices Legislation Amendment Bill 2008*, August 2008 at 172 and 174.
[16] E. Peden, 'The Meaning of Contractual 'Good Faith'' (2002) *22 Australian Bar Review* 235.
[17] Eg E. Peden, 'The Meaning of Contractual 'Good Faith'' (2002) *22 Australian Bar Review* 235 at 244.

meaning and application of notions of 'good faith', at least as they relate to unconscionable conduct.

There are many reasons for this. First, in previous deliberations on potentially reforming the statutory law of unconscionable conduct, at least some Committee members have recommended that '(a) new statutory duty of good faith be inserted into the Trade Practices Act'.[18] Secondly, notions of good faith and fair dealing are expressly or implicitly implicated in the wider debate about enhancement of fairness-based business regulation.[19] Put another way, any reform of the law relating to unconscionable conduct must be approached from the holistic perspective of how the law now treats a range of statutory and non-statutory reforms of benefit to small business and consumers, especially unfair and unjust contract laws, contractual and statutory obligations of good faith and fair dealing, and a range of doctrines concerning unconscionability in business and consumer contexts.

Thirdly, as good faith is now expressly incorporated as a statutory indicator of unconscionable conduct in section 51AC of the Trade Practices Act, the connection between good faith and unconscionable conduct is potentially affected by the introduction of an overarching statutory definition of unconscionable conduct. Fourthly, some of the suggestions in the academic literature and recent legislative contemplation of statutory reform of the law of unconscionable conduct raise issues about the treatment of good faith.[20] Fifthly, for comparative reference, the relevant provision on unconscionable contracts under the Uniform Commercial Code has been interpreted in American jurisprudence to incorporate standards related to 'good faith, honesty in fact and observance in fair dealing', notwithstanding the absence of an overarching definition of unconscionability for this purpose.[21]

Finally, Australian law remains in a state of flux about the nature and scope of implied obligations of good faith in a range of business contexts, and the correlation between those notions of good faith for contractual purposes and the statutory relationship between good faith and unconscionable conduct similarly remains insufficiently determined. So, to the extent that any definition of unconscionable conduct is inserted into legislation, the place of good faith in the statutory regime needs to be addressed one way or another, either as a notion that is expressly or implicitly incorporated in the definition, or alternatively as an existing statutory indicator of unconscionable conduct whose meaning and application would be affected in some way by such an overarching definition.

---

[18] *Senate Standing Committee on Economics, Report on Trade Practices Legislation Amendment Bill 2008*, August 2008.

[19] Eg B. Horrigan, 'The Expansion of Fairness-Based Business Regulation – Unconscionability, Good Faith and the Law's Informed Conscience' (2004) 32 *Australian Business Law Review 159.*

[20] Eg F. Zumbo, 'Unconscionable Conduct and Codes of Conduct' (2006) 14 *Trade Practices Law Journal* 165 at 172; Proposed Opposition Amendments to the Retail Shops and Fair Trading Legislation Amendment Bill 2005 (WA); and *Senate Standing Committee on Economics, Report on Trade Practices Legislation Amendment Bill 2008*, August 2008.

[21] *Kugler v Romain* 279A. 2d 640 (1971) 652. For comparison of Australian and American approaches to unconscionable conduct, see, for example: A. Finlay, 'Unconscionable Conduct and the Business Plaintiff: Has Australia Gone Too Far?' (1999) 28 *Anglo-American Law Review* 470; and L. Brown, 'The Impact of Section 51AC of the Trade Practices Act 1974 (Cth) on Commercial Certainty' [2004] *Melbourne University Law Review* 20.

Analysis of Arguments For and Against a Statutory Definition of Unconscionable Conduct

Arguments Favouring a New Statutory Definition of Unconscionable Conduct

The first set of arguments in favour of a statutory definition of unconscionable conduct relates to the rule of law. The law should be coherent, consistent, and sufficiently clear to those applying, following, or advising upon the law. In this context, it is important to note that the Committee's terms of reference are not limited to defining unconscionable conduct for only one of the three relevant provisions in the Trade Practices Act (say s51AC), but contemplate a definition that might apply across all three unconscionability provisions. Nobody can seriously suggest that it is an acceptable state of affairs for all regulatory stakeholders to be in a position of not knowing with complete certainty and clarity which of the various unconscionability doctrines available under the general law are encapsulated within section 51AA, which of them are encapsulated in section 51AC, and what section 51AC adds legislatively to the existing doctrines of unconscionability under the general law.

Included within these first set of reason are a range of subsidiary arguments too. The most important of these arguments is that the existing jurisprudence on statutory unconscionable conduct shows that the courts are not dipping sufficiently and otherwise adequately into all of the relevant sources of guidance on unconscionable conduct that are available to them.[22] This aspect of the rule of law raises questions about the extent to which the existing state of the statutory law on unconscionable conduct, as interpreted by the courts, properly reflects and fully draws upon the relevant doctrines of unconscionability under the general law. This question about where the existing law actually strikes the doctrinal balance between the interests of big business, on one hand, and small business and consumers, on the other, must not be confused with a separate and related question, which is also a relevant question for the Committee, but one which is more overtly political in character – namely, whatever might be said about doctrinal consistency and coherence across the statutory and non-statutory arms of the law of unconscionability, does the present legal position reflect the appropriate balance between the different groups of interests as a matter of good public policy? Although there are legal arguments and policy considerations from within the body of law that relate to that question, it is inherently a question of political judgment for the Committee and ultimately the Parliament.

The second set of reasons in favour of a statutory definition of unconscionable conduct relates to bringing the law of unconscionable conduct into line across the country, in a variety of statutory contexts and industry sectors. Professor Zumbo's analysis usefully highlights the potential ripple effects in play:[23]

> On the issue of proliferation of unconscionability provisions within retail tenancy legislation, it is clear that this is a reflection of the multitude of retail tenancy legislation that exists around Australia [and] (g)iven the clear advantages associated with uniformity, it may be appropriate to explore the possibility of developing a

[22] F. Zumbo, 'Unconscionable Conduct and Codes of Conduct' (2006) 14 *Trade Practices Law Journal* 165.
[23] F. Zumbo, 'Unconscionable Conduct and Codes of Conduct' (2006) 14 *Trade Practices Law Journal* 165 at 172-174; emphasis added (except italicisation of Acts).

> Model Law or Code that individual jurisdictions could adopt or apply … The inclusion of a statutory definition of the expression unconscionable conduct could be part of an overall strategy in which a uniform retail tenancy code or legislative scheme is implemented and supplement by a new regulatory framework for dealing solely with allegedly unfair terms in retail leases … In short, it may be time to consider whether or not there should be a prohibition in both the *Trade Practices Act* and the State and Territory *Fair Trading Acts* against unconscionable commercial conduct within trade or commerce generally, rather than provisions like the current s 51AC which require a link with the supply or acquisition of goods or services, or State- and Territory-based provisions that require a link with retail tenancies. Significantly, a prohibition against unconscionable commercial conduct in trade or commerce generally would bring such provisions such as s 51AC into line with s 52 and ensure their development *as a general ethical norm of conduct within commercial dealings*. 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 commercial conduct.

As Professor Zumbo's analysis also demonstrates, the contemporary reality confronting all stakeholders is that terms and notions that are expressly or implicitly associated with one or more meanings of unconscionable conduct are now littered throughout state, territory, and federal laws, most notably in corporate law (eg s991A Corporations Act, relating to the unconscionable conduct of financial services licensees), trade practices law (ie ss51AA, 51AB, 51AC Trade Practices Act), fair trading laws, commercial/retail leasing laws, industrial relations laws, (eg s106 Industrial Relations Act 1996 (NSW)), unjust contracts laws (eg Contracts Review Act 1980 (NSW)), consumer credit laws, and other regulatory standards (eg codes of conduct for particular industries). For example, apart from the state and territory equivalents of the statutory provisions on unconscionable conduct in the Trade Practices Act , there are at least two other good examples of related but different statutory references to unconscionability. The Industrial Relations Act 1996 (NSW) confers official power to make orders concerning 'an unfair contract', whose definition includes 'a contract … that is unfair, harsh or unconscionable, or … that is against the public interest'.[24]

Similarly, the Contracts Review Act 1980 (NSW) confers official but limited jurisdiction over unjust contracts, and defines these contracts to include 'unconscionable, harsh or oppressive' contracts, with a legislative instruction to construe references to 'injustice' in this context accordingly. Moreover, the fact that the Contracts Review Act 1980 (NSW) also includes a list of statutory indicators of injustice in this contractual context is important for the very question before the Committee. It is a clear, long-standing, and helpful example under existing Australian law of the feasibility of combining a statutory definition of a concept like unconscionability with a designated list of statutory indicators, albeit in a different context. At the same time, the Committee should not overlook the limitations of this example too – namely, it relates to only one Australian jurisdiction, and there are restrictions on the categories of people and contracts to which the jurisdiction attaches.

[24] Industrial Relations Act 1996 (NSW), sections 105 and 106.

Equally, the Committee should not overestimate the extent to which some of the terms that might be incorporated in a statutory definition of unconscionable conduct are truly pervasive throughout Australian law. The net is cast wide, but has significant gaps and anomalies. The particular doctrines associated with unjust contracts, unfair terms, harsh and oppressive bargains, and even good faith do not apply universally and in all contexts to the fullest extent possible throughout all state, territory, and federal jurisdictions, and certainly do not apply even within those jurisdictions to all varieties of business and consumer contracts across all industry sectors. Incorporating such notions into a general statutory definition of unconscionable conduct under the Trade Practices Act, either in its own right or as part of a move towards further consolidation and integration of the statutory and non-statutory law of unconscionability in various contexts throughout the country, is a significant and far-reaching reform. By its very nature as a federal reform, in a pivotal Act for business and consumers such as the Trade Practices Act, it would be pervasive in its impact across the country, whether or not equivalent reforms are then introduced into all of the state and territory counterparts of the statutory provisions on unconscionable conduct in the Trade Practices Act.

Despite the habitual cries of uncertainty and injustice that accompany any reform that is perceived by one group of stakeholders to affect their interests adversely, such a development might offer at least some advantages to all stakeholders, even if it disappoints some of them on other levels. For example, big business might not welcome something that clearly swings the legislative and judicial pendulum more in favour of small business and consumers than big business, or which at least creates new uncertainty in this area of the law and practice and therefore enables small business and consumers to raise a wider set of arguments and claims than are currently possible, even under the existing unsatisfactory state of this area of law and practice. At the same time, it is possible that even big business might eventually (although not happily) accept the short-terms cost of clearer laws that rebalance the law's power equation, in exchange for greater long-term certainty and clarity of what will actually amount to avoidable unconscionable conduct. If these stakeholders at least know with more certainty what the actual boundaries of acceptable behaviour are in this area, they can adjust their standard practices and contracts accordingly. After all, big business can manage risk if it is able to identify, price, and if necessary take precautions against risk accordingly.

Equally, it might turn out to be the case that introducing an appropriate statutory definition of unconscionable conduct itself becomes an important step in paving the way for a nationally uniform body of law on unconscionable conduct in a variety of business, consumer, and other contexts. The present point is simply to highlight what is really at stake in terms of reference for the Committee that ostensibly seem to concern themselves with the apparently simple matter of inserting a new definition into legislation. The political, policy, and legal undercurrents of such a reform potentially run deep.

The third set of reasons in favour of a statutory definition of unconscionable conduct hold that the definition would make a real and beneficial difference in practice. Obviously, nobody (including the Committee) can predict this completely in advance. At the same time, if neither the Committee (through its own research efforts) nor any submissions to the Committee can point to a sufficient body of previous cases whose

outcomes might reasonably have been different had such a definition existed, the policy imperative in favour of statutory reform holds less force. In other words, if the result would not have been too different in enough of those previous cases, or if the proposed definition includes terms that are largely (but not completely) open-textured (eg 'unfairness' or 'unreasonableness'), the desired policy outcome of any law reform might not be realised. While it is true that some open-textured notions related to unconscionability not only appear in existing Australian legislation but also have a body of judicial interpretation built around them, they still remain open-textured in nature and scope. The real question is whether or not the introduction of a statutory definition of unconscionable conduct, in combination with existing statutory indicators of unconscionable conduct, will achieve the necessary result.

Arguments Against a New Statutory Definition of Unconscionable Conduct

The first set of arguments against introducing a statutory definition of unconscionable conduct goes to its real necessity. The Committee is likely to receive a number of submissions that argue against any further change to the statutory law on unconscionable conduct, on the basis that the courts are still in the process of developing meaningful guidance in this area, thus making any further legislative intervention premature. Although at least some of those submissions are likely to be motivated by the interests of groups who think that the present state of the law works in their favour, the Committee should not be too quick to dismiss all such arguments out of hand. Nobody needs a vested interest to argue that the nature of the concepts in play in this area of the law, and the way in which Parliament has structured the statutory regime on unconscionable conduct, together mean that it is still relatively early days in the normal legal development of this body of law. At the same time, few stakeholders on all sides could be entirely happy with the state of regulation of statutory unconscionable conduct after more than a decade since the introduction of such provisions in the Trade Practice Act. All it will take is a major court case producing an unfavourable interpretation of some of the existing open-ended language in section 51AC for one group or another to clamour for legislative intervention again.

The second set of reasons against the introduction of a statutory definition of unconscionable conduct relates to the uncertainty of language in any terms in which such a definition might be expressed, given the open-textured nature of the concepts used by the law to regulate unfair and unjust business conduct. Presumably, such a criticism would attach to any attempt to incorporate notions like 'unreasonableness', 'injustice', 'exploitative' 'oppressive', 'fair play,' 'good conscience', and so on.[25] However, this alone is not a sufficient reason to reject the introduction of such a statutory definition. The nature of this area of law is that it uses such notions. They are not simply left at large to the individual idiosyncratic values of judges, but at least framed and contextualised by discrete legal categories and modes of legal analysis. In addition, there are related uses of equivalent concepts already throughout Australian law, such as the inclusive definition of 'unjust' contracts to include 'unconscionable harsh or oppressive' contracts under the Contracts Review Acts 1980 (NSW). More importantly, there are already a number of open-textured and insufficiently litigated

[25] On incorporation of such terms into a suggested statutory definition of unconscionable conduct, see: F. Zumbo, 'Unconscionable Conduct and Codes of Conduct' (2006) 14 *Trade Practices Law Journal* 172.

terms in the existing statutory indicators of unconscionable conduct under section 51AC of the Trade Practices Act that seem just as uncertain and unclear in the abstract (eg 'undue influence or pressure', 'unfair tactics', 'conditions that were not reasonably necessary for the protection of the legitimate interest of the supplier', 'good faith' etc).

The third set of reasons against the introduction of a statutory definition of unconscionable conduct relates to the regulatory impact and commercial costs for all stakeholders. On one hand, some commentators rightly warn against too easily accepting claims about the uncertainty generated in this area of the law and practice, not least because the cases gravitate heavily around two polar extremes of clearly unworthy 'scatter-gun' approaches to litigation that are clearly revealed as unmeritorious in any statistical analysis of judicial outcomes (but which still generate their own costs for all parties involved in litigating them, and for the countless exponentially increased numbers of parties whose matters never end up in court) and clearly unacceptable business behaviour that would be unconscionable under most understandings of the term, whatever else occupies the spectrum between them.[26] On the other hand, whatever definition might be introduced, inevitably there will be another settling-in period in which all stakeholders will need to await a sufficient number of judicial test cases to know what (if any) impact such a definition might have in practice. A presently unknown and ultimately incremental improvement in the certainty and clarity of the law might or might not be worth the cost of changes to standard procedures, contracts, and practices for big business, some of which will inevitably be passed on to small business and consumers as the cost of doing business with big business.

Similarly, if the only thing that happens after the introduction of a statutory definition of unconscionable conduct is a notional swing of the pendulum more in favour of small business and consumers than big business, but without sufficient certainty and clarity to avoid new increases in litigation that are due more to increased uncertainty in the law than to clear and demonstrable improvement in the legal position of small business, there might at least be some counter-productive costs for all stakeholders. The present point is simply to highlight that the consequences of such reforms are not always reducible to a win solely for one group of stakeholders at the expense of another. Big business cannot really complain if small business and consumers do what big business habitually does – namely use legal rights, uncertainties, and power imbalances enshrined in the law to maximum tactical effect in negotiating or adversarial contexts. Still, in the end, everyone loses in a rush to litigation that is caused by the wrong set of institutional changes, or the right set of institutional changes implemented in wrong or inadequate ways. For example, under the present state of this area of law and practice, some big business organisations have been disappointed by the extent to which some courts have been willing to allow unconscionability claims to proceed to trial, rather than striking them out in earlier proceedings as claims that clearly lack merit. The consumers and small business operators who might benefit initially from that development still have to argue their case at trial, with all of the costs associated with litigation. To the extent that the existing or any new state of the law reduces the capacity of reasonable parties to come

[26] Eg L. Brown, 'The Impact of Section 51AC of the Trade Practices Act 1974 (Cth) on Commercial Certainty' [2004] *Melbourne University Law Review* 20.

to a common point of understanding about what unconscionable conduct means in law and in practice, at least in a core set of business and consumer contexts, the more unsatisfactory the law becomes in terms of its desired effects.

The question before the Committee also should not be approached purely as a question of looking at previous judicial decisions. Laws have impact beyond the particular test cases that might be brought before the courts. For example, one thing that is not revealed by the present state of judicial guidance on these statutory provisions is the extent to which the introduction of such provisions has already resulted in the desired regulatory objective of virtuous businesses adjusting their agreements and behaviour accordingly. You do not have to ignore the clear cases of unconscionable conduct that still occur from unscrupulous business operators or become an apologist for big business to recognise not only that there is an important cost-benefit analysis in play here that affects all commercial parties, but also that there has been considerable improvement in business behaviour that is not traceable through the outcomes of the limited number of test cases on these provisions on unconscionable conduct in the last decade or so. The whole point of much legal advice from law firms, many industry codes of conduct, and other mechanisms of dialogue and standard-setting between all relevant stakeholders is to achieve an overall continuous improvement in business conduct through mechanisms other than litigation or legislative intervention. Even if there are situations of abuse in particular industry sectors that need further addressing – and there are - the question is whether they are best addressed through a sweeping definitional change of indiscriminate application across all commercial and consumer activity, with multiple potential policy and regulatory implications, knock-on effects, and new uncertainties.

The fourth set of reasons against the introduction of a statutory definition of unconscionable conduct goes to the overall structure of the statutory regime for unconscionable conduct into which such a definition would be inserted. Even if a completely new and overarching definition of unconscionable conduct is added into the Trade Practices Act to govern all of that Act's unconscionability provisions, such a definition still needs to interact with the pre-existing structure of statutory indicators of unconscionable conduct, especially for the purposes of small businesses protection in section 51AC. The existing statutory indicators of unconscionable conduct in section 51AC operate as a matrix of considerations for courts in deciding whether the statutory standard of unconscionable conduct is met or not. The statutory regime does not indicate how many of those indicators of unconscionable conduct must be present, and it does not identify the weighting to be given to each factor. Nor could it. The exercise is inherently context-dependent.

So, whatever benefit might be added to the body of statutory law of unconscionable conduct by inserting a definition that more clearly delineates the relationship between the various statutory provisions and also indentifies the range of doctrinal sources of guidance in giving effect to these provisions, there will still be a need for courts to connect the dots between such a definition, the relevant statutory indicators, and the particular case-specific circumstances before them. All of this might still be worth it in the long run from the point of view of one or more groups of stakeholders, but there will inevitably be yet another transitional period in the development of jurisprudence about these statutory provisions as the impact of a statutory definition of unconscionable conduct works its way through a series of test cases. No stakeholders

will be advantaged by any law reform in this area if the result is that a new and prolonged period of transitional uncertainty results. At the same time, it should not be underestimated that all stakeholders in this area who have to confront potential issues of unconscionable conduct suffer from the lack of certainty and precision with which they can be professionally advised in light of the current state of this area of the law, whether they come from the big business, small business, consumer, or regulatory communities. These considerations go not only to the question of whether or not there should be a statutory definition of unconscionable conduct, but also to the need for additional regulatory measures to accompany the introduction of any such definition, such as new ministerial directions and funding for suitable test cases, additional non-statutory regulatory guidance from official regulators, governmental facilitation of suitable sectoral codes of conduct in this area, and so on.

Conclusion

Clearly, there is a problem of legislative lack of clarity, excessive judicial caution, practical uncertainty, and unclear balance of protection apparent in the current state of the law and practice surrounding unconscionable conduct. This problem is a product collectively of: (a) the inherent nature of the kinds of legal notions associated with conduct that offends the law of equity's 'good conscience'; (b) how the open-textured doctrines of unconscionable conduct have developed under the general law; (c) what successive legislatures have done in designing and amending statutory regimes on unconscionable conduct; (d) the approaches chosen by courts collectively and individually in interpreting and applying these statutory regimes; (e) the inconsistent modelling of statutory provisions on unconscionable conduct across a variety of state, territory, and federal laws in a variety of contexts; (f) the unfolding critical mass of doctrinal cracks and unresolved 'test case' issues that have opened up in the statutory and non-statutory law surrounding unconscionable conduct; (g) the business, legal, and societal cultures that shape how attitudes and behaviours in this area of the law and practice have developed; and (g) the progressive and continuing emergence of regulatory needs (eg consumer protection, small business protection, retail tenancy fairness, consumer credit fairness, responsible lending etc) that are related to unconscionable conduct in commercial contexts.

A new statutory definition of unconscionable conduct might well offer at least some benefits for all of big business, small business, consumers, governmental regulators, courts, and legal advisers to all of these stakeholders, in terms of improving the overall certainty and clarity of the area of law and practice, even if this is accompanied by a new swing of the pendulum in substantive justice towards some stakeholders (eg small business and consumers) over others (eg big business). However, it depends very much upon the particular structure and content of any definition, how it relates in legislative design to the surrounding statutory provisions on unconscionability, and how it is interpreted and applied by all stakeholders, especially regulatory agencies and courts. The differential benefits for some stakeholders at the expense of others must be considered in tandem with the more discrete benefits of certainty in the law for all stakeholders over time, with both of those different kinds of benefits also assessed the kinds of costs and possible contingencies affecting reform outlined in this submission.

In addition, the question of introducing a new statutory definition of unconscionable conduct cannot be considered as a reform in isolation. It might or might not be a suitable step, or even the best first step, in terms of the wider policy and regulatory issue of harmonizing the law on unconscionable conduct throughout Australia, depending upon how the Committee views the political dynamics surrounding that issue. Those dynamics include supervening events such as business fall-out of the international financial and credit crisis, the resultant heightened attention to regulation of responsible business practices, and any knock-on effect for current national reform of consumer credit law. They also include whole-of-government issues such as the relation of these reforms to the Federal Government's plans for enhancing the regulation and practice of corporate social responsibility, as announced recently by the Minister for Superannuation and Corporate Law.

All of these things form part of the wider policy and regulatory landscape within which approaches to unconscionable business conduct must also be positioned. Much more is potentially at stake here than a mere matter of statutory definition. The right definition could help, but it also could hinder or be counter-productive. At the very least, it needs to be considered within the context of the desirability and needs of a wider reform agenda, on multiple levels. If recommended and adopted, such a definition also needs to be considered as simply one element in a package of legal and regulatory measures that accompany it. More might be needed than simply a change in legislation. Industry and sectoral codes of conduct might need to accompany it, including new ways for big business and small business to come to the table together in standard-setting in this area, as happens now in standard-setting for corporate governance. The Government might commission research and other initiatives on standard-setting and evidence-based law reform analysis in this area. Official regulatory guidance, prioritized 'test case' funding and enforcement, and sectoral targeting and standard-setting also need to be considered. A timely review of any reform recommended by the Committee must be built into its recommendations and occur down the track, so that the executive and legislative arms of government have an evidence-based assessment of whether such a reform has worked or not, given the periodic pattern of official inquiries into this area of law and practice.

The choices before the Committee range from 'do nothing, at least not just yet' to 'do quite a lot, but in a coordinated national effort, and with a package of legal and regulatory measures in play'. Much possible reform lies in between. The question of inserting a new statutory definition of unconscionable conduct into the Trade Practices Act might seem relatively straightforward, but it is complicated by a full canvassing of the residual doctrinal problems, additional uncertainties, cost-benefit assessments, potential consequences, supervening political dynamics, and cooperative national reform implications that truly arise.