

Submission to the Senate Economics Committee Inquiry into the Statutory Definition of Unconscionable Conduct

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1 We understand that this inquiry was initiated by Senator Xenophon and reflects concerns about the effectiveness of Section 51 AC of the Trade Practices Act (the Act) in protecting small businesses from unfair conduct by bigger business¹.

2 Section 51 AC was incorporated into the Act in 1998. It was a response to the recommendations of the Reid Committee². This Committee had undertaken a comprehensive review of small business concerns about unfair market conduct and had recommended that a new provision be inserted in the Act to proscribe unfair conduct in commercial transactions. It also recommended that the existing Section(S) 51 AA, relating to unconscionable conduct covered by the unwritten law, be repealed.

3 It is difficult to assess the impact of the introduction of S 51 AC, or of the unconscionable conduct provisions more generally, in the absence of comprehensive surveys of behaviour before and after adoption of the legislation. It could be expected that the legislation would have had some impact on business behaviour. The Australian Competition and Consumer Commission (ACCC) has taken a number of cases to court over the past decade which has reinforced awareness of the law and tested its interpretation by the judges. The ACCC was given a ministerial direction on 28 August 1998 to initiate s 51 AC proceedings and give preference to representative proceedings on behalf of small business. The scope for the ACCC to take cases has been influenced by the availability of appropriate cases, availability of resources and overall organisational priorities.

4 Some commentators claim that the judicial interpretation of S 51 AC has fallen short of Parliament's intention for the section. In particular, Professor Zumbo has noted that *while S 51 AC 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 51 AC, and in interpreting the section, have maintained the procedural unconscionability bias of the equitable doctrine, rather than being ready to directly target substantive unconscionability*³.

5 Professor Zumbo considered the amendments made to S 51 AC in 2007. These included the addition of a specific reference to whether the supplier of goods or services had a contractual right to vary unilaterally a term or condition of a contract in the list of factors the Court may have regard to in determining whether unconscionable conduct has occurred⁴. He concluded that these changes were

¹ Commonwealth of Australia, Parliamentary Debates, Senate, Official Hansard No.9 2008, Trade Practices Amendment Bill 2008, Second Reading Debate, 16 September 2008, p. 4794.

² Australia, House of Representatives Standing Committee on Industry, Science and Technology, Finding a Balance: Towards Fair Trading in Australia, May 1997.

³ Frank Zumbo, "Promoting Ethical Business Conduct: The Case for Reforming Section 51AC, Trade Practices Law Journal 16 2008, p.132.

⁴ Section 51 AC (3) (ja)

essentially cosmetic and did not address the key weaknesses of S 51 AC. He has recommended a range of other measures to address these weaknesses, including removing the monetary cap on cases that can be commenced under the section (this has been done by the more recent amendments to the section); inserting a statutory definition of unconscionable conduct in S 51 AC (the focus of the Senate Economics Committee's current inquiry); enacting a statutory duty of good faith; including a statutory list of examples in S51 AC of the types of conduct that would ordinarily be considered unconscionable; and enacting a new legislative framework for unfair contract terms.

6 The two authors of this submission have had a long involvement in the administration and enforcement of fair trading legislation, including with the ACCC. Recently we presented a paper to the annual Trade Practices Workshop in Adelaide on the future of Australia's consumer protection laws, which touches on many of the issues raised by Professor Zumbo and the Committee's reference⁵. A copy of this paper is attached as part of this submission for the information of the Committee.

7 We have much sympathy with the views expressed by Professor Zumbo and support efforts to achieve higher general standards of ethical business conduct. We note indeed that the courts have interpreted the consumer protection provisions of the Act as being about setting a standard or norm of business conduct. As Senator Xenophon so aptly put it in the debate on the second reading of the Bill containing the latest amendments to S 51 AC: *(i)f the Australian economy is going to serve the people of Australia, we do not just need free markets; we need fair markets.*⁶

8 We do, however, have concerns about the general direction of the law in this area. We consider that the unconscionable conduct law is becoming unnecessarily complicated and there are undesirable inconsistencies between Commonwealth and State/Territory unconscionable conduct laws, both the general laws and the industry specific laws, such as those relating to retail tenancy⁷. We also consider that there is a need to integrate the development of the unconscionable conduct provisions of the Trade Practices Act with the general consumer (including small business) law.

9 Recently the Council of Australian Governments has agreed to the development of a national consumer law based on the Act, but drawing on recommendations made by the Productivity Commission (PC) and incorporating best practice from State/Territory laws, including a provision regulating unfair contract terms⁸. The attached paper outlines the background to this development, including the PC's review⁹. The national consumer law will be developed over the next few years with implementation expected by the end of 2011.

⁵ David Cousins and Sitesh Bhojani, "Consumer Protection Laws in Australia – The Future", The 6th Annual Trade Practices Workshop, Centre for Regulation and Market Analysis, University of South Australia, 17-18 October 2008.

⁶ Second Reading Debate, p. 4794.

⁷ Frank Zumbo, "Unconscionable Conduct and Codes of Conduct", Trade Practices Law Journal 14 2006, pp. 165-174.

⁸ Council of Australian Governments' Meeting 2 October 2008, Communique.

⁹ Australia, Productivity Commission, Review of Australia's Consumer Policy Framework, April 2008.

10 The PC considered, but did not support at this time, the notion of a general prohibition on unfair conduct as part of the national consumer law. It concluded that further consideration of this issue should wait until there is more experience of the operation of the Unfair Commercial Practices Directive adopted by the European Commission¹⁰ and recently implemented in the UK¹¹. This position, which was advocated by the ACCC, is a little strange given that the European law does not extend much beyond the well established Australian law and that the much more relevant experience is that of the USA, where there has been a general prohibition on unfair and deceptive conduct for many years¹². In the 1970s-80s this USA law was quite controversial, given the interpretation of it by the Federal Trade Commission at the time and the fact that the Commission was able to make rules based on the provision, which were of substantial concern to the Congress. Since then the interpretation of the provision has been codified in a less controversial way and it has been used to deal with numerous emerging unfair practices and conduct. In our view more detailed consideration of an unfair conduct prohibition in our law should be undertaken now when the general consumer law is being reviewed.

11 The USA Federal Trade Commission Act prohibits unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce. An act or practice cannot be declared unlawful unless it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition¹³. This provides an appropriate safeguard to the operation of the provision whilst still allowing it to cover emerging conduct and practices that may be unfair.

12 There is current concern about the construction of provisions recently added to s 46 of the Act relating to the misuse of market power. The so called Birdsville amendment S 46 (1AA) and S 46(1AB) is based on market share rather than market power and thus is inconsistent with the approach normally adopted under competition law. The emphasis it places on unfairness (in the limited context of predatory pricing) is also seen by some as not fitting easily into the ethos of Part 1V of the Act, which is seen as largely promoting competition and efficiency. This is not a view that we entirely agree with since the promotion of fairness can itself have significant benefits for competition and efficiency. For example, in relation to unfair contract terms, unreasonable penalties for contract termination can prevent consumers readily switching to more efficient suppliers. However, we do see value in retaining the market power focus in S 46. The concerns of small business, as reflected in the Birdsville amendment and more broadly the findings of the Reid Committee, can in our view best be dealt with by repealing the Birdsville amendment and considering a broader prohibition on unfair conduct to replace the three unconscionable conduct provisions in Part 1VA of the Act.

¹⁰ Directive 2005/29/ EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business - to - consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) no 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive)

¹¹ UK ,The Consumer Protection from Unfair Trading Regulations 2008, which came into force on 26 May 2008.

¹² USA, Section 5 Federal Trade Commission Act

¹³ Ibid. Section 5n

13 In our view the problems people have perceived with the unconscionable conduct laws (s 51 AA as well as the broader statutory unconscionable conduct provisions of S 51 AB and S 51 AC) reflect a failure to address the key concern which has to do with preventing unfair conduct, not just conduct which is so unfair as to be described as unconscionable. Similarly, the problem sought to be addressed by the Birdsville amendment was unfair conduct due to predatory pricing. Our submission is that we should look to return to the Reid report and consider the adoption of an unfairness law that would replace the current unconscionable conduct and Birdsville provisions. We consider this would ensure better protections for consumers and small business, whilst removing unnecessary uncertainties and complexities for business. It would be consistent with current policy aims of removing unnecessary regulatory burdens on business. The Act could be streamlined around this new ethical standard of fairness which the courts could interpret over time as they have done in relation to misleading and deceptive conduct covered by S 52 of the Act.

14 In relation to other matters raised by Professor Zumbo, we do not support the introduction of a statutory duty of good faith, but do strongly support the adoption of national unfair contract terms legislation. However, the form unfair contract terms legislation should take is important and we have discussed a number of aspects of this, including the most recent proposals of the Ministerial Council on Consumer Affairs, in our attached paper. The notion of good faith appears to us to be primarily focused on procedural rather than substantive aspects of unfairness. It would seem to add no more than would a general prohibition on unfair conduct in respect of procedural unfairness. It would be significantly inferior in respect of substantive unfairness. Whilst the common law could continue to be influenced by the good faith notion, we do not see a place for it in the statutory law.

15 A general prohibition on unfair conduct would need to be supported by some general guidance on what may be considered unfair, as is the case with the unfair conduct provision in the USA Federal Trade Commission Act. This guidance needs to be at a relatively high level, for example referring to unavoidable significant consumer detriment, not at a detailed prescriptive level. The law should be able to respond flexibly to emerging market developments and behaviours over time and not be constrained by a list of examples which may be currently relevant.

16 Unfair contract terms legislation was adopted by Victoria in 2003¹⁴. These laws were strongly influenced by the UK unfair contract terms legislation, although there are significant differences between them. The Victorian legislation enables the regulator to take a pro-active approach to considering the fairness of standard form contract terms. Only the regulator can initiate action under the Victorian law. A national general prohibition on unfair conduct would be a useful complement to a national, Victorian style, unfair contract terms law. The general law would be subject to both public and private enforcement and cases would be taken on a reactive basis, reflecting their particular circumstances. The unfair contract terms law would be confined to actions by the regulator designed to affect proactively the fairness of contract terms generally affecting many consumers. The attached paper illustrates the

¹⁴ Prior to this there were, and still are, provisions in Victorian Fair Trading Act that would allow the Tribunal to consider the justness of contract terms relating to a trader - consumer or trader-trader dispute that it was determining.

proactive operation of the unfair contracts terms law in the fitness industry where consumers have experienced many problems.

Our recommendations

We recommend the Committee

1. Consider the broader issues relating to unfair conduct which underlie the call for a definition of unconscionable conduct.
2. Consider whether the concerns of small business in relation to unfair conduct are likely to be satisfied by further complicating the unconscionable conduct laws by attempting to add a definition of unconscionable conduct.
3. Propose a further review to consider the need for a statutory prohibition on unfair conduct to cover both consumer and business transactions.
4. Propose that any review of the need for a statutory prohibition on unfair conduct also consider what scope there is for such a provision to replace S 51AA, s 51AB and S 51 AC, as well as s 46 (1AA) and s 46(1AB) of the Trade Practices Act.
5. Support the adoption of a national unfair contract terms law that will facilitate proactive efforts by regulators to ensure unfair contract terms are eliminated from standard form contracts and complement a national unfair conduct law.

Attachment: David Cousins and Sitesh Bhojani, *Consumer Protection Laws in Australia – the Future*, Paper presented to the 6th Annual Trade Practices Workshop, Centre for Regulation and Market Analysis and the University of South Australia, 17-18 October 2008.

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3 November 2008.