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Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee

Trade Practices - Unconscionable Conduct

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide this submission to the Senate Economics Committee's Inquiry into the need to develop a clear statutory definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974 (TPA)* and the scope and content of such a definition. We apologise for the delay in making our submission.

In summary, our key points are:

1. Statutory unconscionable conduct under sections 51AB and 51AC of the TPA is intended to apply more broadly than the general law or section 51AA concept. However, it appears that courts still view as a determinative factor, whether the "victim" was under a 'special disadvantage' of which the other party took advantage. The TPA should be amended to make clear that 'special disadvantage' is not an essential element for making out a breach of sections 51AB or 51AC.
2. The statutory unconscionable conduct provisions are not effective in remedying more general or systemic unfair trading practices that harm consumers, due to their limited focus on remedying individual cases of unfair conduct.
3. The better approach to addressing problems with unfair practices against consumers, both in terms of unfair contractual substance and unfair trading conduct, is to introduce new provisions. In the case of unfair contractual substance the implementation of national unfair contract terms laws has now been agreed by the Council of Australian Governments (**COAG**). In the case of unfair trading conduct, a

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national general prohibition on unfair trading or commercial practices similar to the European *Unfair Commercial Practices Directive* is needed.

4. The operation of the statutory unconscionable conduct provisions should be reviewed at the same time as the new unfair contract terms provisions are first reviewed within five years of their introduction. Given the interaction of the two sets of provisions, this might provide a better opportunity to examine whether changes should be made to Part IVA of the TPA.
5. Any amendments made to the statutory definition of unconscionable conduct in the TPA would also need to be made to the mirror unconscionable conduct provisions in the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

History and current operation of Part IVA of the TPA

The Committee has noted that sections 51AA, 51AB and 51AC of the TPA prohibit 'unconscionable conduct' but that this expression is not defined in the TPA. Sections 51AB and 51AC, which prohibit unconscionable conduct towards consumers and small businesses respectively, do refer to matters to which the courts may and may not have regard in determining whether there has been unconscionable conduct. Section 51AA, on the other hand, simply prohibits unconscionable conduct as that concept is understood in general law, and only applies where section 51AB or 51AC do not apply.

The prohibition on unconscionable conduct now found in section 51AB was incorporated into the TPA in 1986¹ and covers most consumer transactions.² Section 51AA was inserted in 1992 and, as noted above, adopts general law unconscionable conduct principles into the TPA.³ Section 51AA did not apply to conduct covered by section 51AB, thus the general law principles of unconscionable conduct as adopted into the TPA only applied as a set of residual standards where section 51AB did not extend, including in business to business transactions. In 1998 section 51AC was added to the TPA to prohibit unconscionable

¹ It was originally inserted into the Act as s.52A by the *Trade Practices Revision Act 1986* s.22 and was renumbered as s.51AB and placed into a new Part IVA – Unconscionable Conduct by the *Trade Practices Legislation Amendment Act 1992* s.8.

² Subsections 51AB(5) and (6) limit the prohibition to consumer transactions by providing that the conduct must be in connection with the supply of goods or services 'of a kind ordinarily acquired for personal, domestic or household use or consumption' and not 'for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce'.

³ *Trade Practices Legislation Amendment Act 1992* s.9.

conduct against small businesses, limiting the application of section 51AA even further.⁴ Section 51AA might still apply in circumstances such as the giving of guarantees in exchange for the supply of a loan or other goods to a third party. For example, the leading Australian case on equitable unconscionable conduct, *Commercial Bank of Australia Ltd v Amadio*,⁵ concerned this sort of situation, with an elderly couple having given a guarantee to the bank for their son's business loan.

Sections 51AB and 51AC use a two-fold method to determine whether conduct falls foul of the prohibition. First, they set out a general test that a corporation shall not engage in conduct that is, in all the circumstances, unconscionable. Secondly, a non-exhaustive list of factors is given which a court may consider when it determines whether a corporation has engaged in unconscionable conduct. Some limited factors that a court must not consider are also given.

It seems clear that it was Parliament's intent that the statutory prohibitions on unconscionable conduct under sections 51AB and 51AC operate more broadly than the general law concept. In particular, they are not expressly limited by the notion that the "victim" must be under a 'special disadvantage' or 'special disability' that the other party takes advantage of before unconscionable conduct can be said to have occurred.⁶ Further, the list of factors that may be considered under these sections are arguably broader than the test laid out in the case law, and are explicitly stated to be non-exhaustive. In addition, the relevant second reading speeches for the bills that introduced each of section 51AB (statutory unconscionable conduct in consumer transactions), 51AA (general law unconscionable conduct) and 51AC (statutory unconscionable conduct in small business transactions) provide useful insight. For example, in introducing the 1986 Bill that implemented section 51AB (then section 52A), it was said that:

The section is directed at conduct which, while it may not be misleading or deceptive, is nevertheless clearly unfair or unreasonable. For example, a corporation which attempted to take advantage of a buyer's obvious lack of understanding of a transaction might fall foul of this section. The new provisions will supplement existing provisions of Part V and strengthen the protection afforded to consumers against unscrupulous trading practices.⁷

When the new section 51AA was inserted into the Act in 1992, it was clearly distinguished from section 51AB for being narrower, given it merely reflected the equitable concept:

The new provision will prohibit unconscionable conduct by corporations in trade and commerce and thus will extend, but in modified form, the prohibition now in section 52A.

Unconscionability is a well understood equitable doctrine, the meaning of which has been discussed by the High Court in recent times. It involves a party who suffers from some special disability or is placed in some special situation of disadvantage and an 'unconscionable' taking advantage of that disability or disadvantage by another...

⁴ *Trade Practices Amendment (Fair Trading) Act 1998* s.3 and Schedule 2.

⁵ (1983) 151 CLR 447.

⁶ Cf *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, at 467, 474.

⁷ Lionel Bowen, Attorney-General, *Trade Practices Revision Bill 1986 - Second Reading*, 19 March 1986.

Both the new provision, which will be numbered as section 51AA, and existing section 52A, which will be renumbered, are placed in a new part IVA. The new provision will not extend the equitable principles of unconscionability beyond their current limits. The new provision refers to 'conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories'. All transactions covered by the new provision are already covered by the equitable doctrine.⁸

Lastly, in 1998 it was stated that section 51AC was being introduced to extend to small business a greater level of protection against unconscionable conduct than was afforded by the equitable concept as enacted under section 51AA, being a level of protection comparable to that afforded to consumers by section 51AB:

The government has accepted the principle that small business people are entitled to a legal protection against unconscionable conduct which is comparable to that accorded to consumers...

Accordingly, the government will mirror for small business consumers, in a new section of the Trade Practices Act, the legal rights available to consumers in section 51AB, and incorporate a range of additional matters...

Business conduct which is unconscionable, having regard to the enumerated factors, will be prohibited by the act and give rise to a broad range of remedies under the act. This new provision will extend the common law doctrine of unconscionability expressed in the existing section 51AA of the act.⁹

Below we discuss some of these issues further.

Amendment to sections 51AB and 51AC to address 'special disadvantage'

As noted above, it seems clear that sections 51AB and 51AC intend to extend unconscionability beyond the general law concept set out in the leading Australian case of *Amadio*¹⁰ and adopted in section 51AA of the TPA.

For example, in the *C G Berbatis Holdings* case which considered the application of section 51AA, Justice French of the Federal Court (as he then was) compared section 51AA to the other two unconscionable conduct prohibitions and found that there was 'no reason to suppose that the unconscionable conduct prohibited by s 51AB and s 51AC is limited by reference to specific equitable doctrines.'¹¹ The court in the *Simply No-Knead* case held that section 51AC was broader than equitable unconscionable conduct and stated it was likely

⁸ Mr Duffy, Attorney-General, *Trade Practices Legislation Amendment Bill 1992 - Second Reading*, 3 November 1992. The purpose of incorporating the equitable principles of unconscionable conduct into the TPA was not to increase their scope but to apply the TPA's remedies to them. The second reading speech makes clear that section 51AA's advantages: 'lie in the availability of remedies under the Act, the potential involvement of the [ACCC], including the possibility of representative actions being brought by the [ACCC] in cases where it seeks an injunction, and the educative and deterrent effect of a legislative prohibition'.

⁹ Mr Reith, Minister for Workplace Relations and Small Business, *Trade Practices Amendment (Fair Trading) Bill 1997 - Second Reading*, 30 September 1997.

¹⁰ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

¹¹ *Australian Competition & Consumer Commission v C G Berbatis Holdings Pty Ltd* [2000] FCA 2 (14 January 2000) at §24. This issue was not considered by the High Court on appeal.

section 51AB was also broader (although it was not directly considering this point).¹² In the *ACCC v Lux*¹³ case under section 51AB, it is said of section 51AB unconscionable conduct that the ‘word unconscionable is not a term of art. It is not limited to traditional equitable or common law notions of unconscionability...’.¹⁴

However, while sections 51AB and 51AC extend beyond the general law concept of unconscionable conduct in theory, it remains unclear how this applies in practice. In particular, there has been no clear judicial statement at a high level explicitly removing the requirement imposed on the plaintiff under the general law doctrine to show that they were under a ‘special disadvantage’ (or ‘special disability’) which was taken advantage of by the other party, before unconscionable conduct will be made out.¹⁵

The only explicit statement we could find making it clear that ‘special disadvantage’ is not a required element to prove statutory unconscionable conduct was in a case in the Victorian Civil and Administrative Tribunal regarding section 8A of the Victorian *Fair Trading Act 1999*, which essentially mirrors section 51AC of the TPA. In this case the tribunal stated that ‘...it is not necessary for the person complaining of the conduct to prove the element of special disadvantage or special disability...’.¹⁶

There are a few cases regarding section 51AC of the TPA which appear to have been decided as if ‘special disadvantage’ is not required.¹⁷ However, in the case of *Cit Credit v Blayn Norman Keable*,¹⁸ for example, while ‘special disadvantage’ was not specifically required, the focus on ‘special disadvantage’ in the case indicates that there is a real risk that judicial interpretation may make ‘special disadvantage’ a key determining factor to prove unconscionable conduct.¹⁹

Further, we can find no higher court decisions which explicitly state that ‘special disadvantage’ is not a required element for section 51AB unconscionable conduct to be made out. This is problematic because it appears there is a risk that even if courts do not require ‘special disadvantage’ *per se*, the presence of ‘special disadvantage’ will be such an important factor in deciding whether section 51AB unconscionability is present that it is, in practice, determinative, as occurred in relation to section 51AC in the *Cit Credit* case. In the section 51AB *Lux* case, the court held that the defendants had engaged in unconscionable conduct without explicitly talking of any ‘special disadvantage’ on the part of the consumer. However, the parties in the case argued extensively over whether or not the consumer had an intellectual disability. While the court ultimately found that she did not necessarily have

¹² *Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365 (22 September 2000) at §§31-37.

¹³ *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 (16 July 2004).

¹⁴ As above at § 96 per Nicholson J.

¹⁵ See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, at 467, 474.

¹⁶ *Russo v Westpac Banking Corporation (Civil Claims)* [2007] VCAT 2298 (28 November 2007).

¹⁷ For example, *Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365 (22 September 2000); *Cit Credit Pty Ltd v Blayn Norman Keable* [2006] NSWCA 130 (25 May 2006).

¹⁸ *Cit Credit Pty Ltd v Blayn Norman Keable* [2006] NSWCA 130 (25 May 2006).

¹⁹ As above at §§75-76.

an intellectual disability, it did make a finding that she was illiterate and unable to understand commercial matters in any depth.²⁰

The requirement to make out a 'special disadvantage' is onerous and restrictive, and if required in every case brought under section 51AB or 51AC it would prevent genuine cases of statutory unconscionable conduct from being successfully prevented. In our view, a clear example of the injustice that can result from requiring 'special disadvantage' is the case of *ACCC v Berbatis*,²¹ which was brought under section 51AA of the TPA.

In this case, Berbatis Holdings and other parties (together **Berbatis**) owned and managed a shopping centre in which Mr & Mrs Roberts leased a fish-and-chip shop. The Roberts, together with other lessees, had instituted proceedings against Berbatis claiming they had overpaid Berbatis by \$50,000. The Roberts' daughter became seriously ill with encephalitis, and the Roberts needed to sell the business. Just over a year before the expiration of their tenancy, a buyer signed a contract to buy the Roberts' business conditional on a new long-term lease being granted by Berbatis. Berbatis was aware of this, and told the Roberts it would only allow an assignment of the extended Roberts' lease to the buyer if the Roberts withdrew their legal proceedings against Berbatis. Various lease sites at the shopping centre were already vacant and it was likely Berbatis would have agreed to a lease extension in normal circumstances or sometime in the future, if the Roberts had not needed to sell the business urgently. Despite being forced into withdrawing from legal proceedings against Berbatis that were unrelated to the extension and assignment of the lease, due to the Roberts' urgent need to sell the business to care for their daughter, the High Court found that the ACCC could not succeed under section 51AA principally because the Roberts could not be said to have been suffering a 'special disadvantage' at the time of the events. In our view, however, any reading of the detailed facts of this case illustrates the unjust outcome that resulted from requiring 'special disadvantage' to be proven.²²

It is understood that the concept of 'unconscionable' conduct, whether at general law, under section 51AA or under sections 51AB and 51AC, is directed at conduct that goes beyond the merely unfair or the mere result of a situation of unequal bargaining power.²³ This is inherent to the concept of unconscionable conduct and is not a flaw in it as such, although it does mean that not all instances of unfair trading are prevented – a gap that needs to be

²⁰ *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 (16 July 2004) at §112.

²¹ *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; 214 CLR 51; 197 ALR 153; 77 ALJR 926 (9 April 2003).

²² The conduct took place in 1996-1997 before section 51AC was enacted, hence proceedings were brought under section 51AA.

²³ See, eg, *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 (16 July 2004) at §98: 'The word unconscionable... bears its ordinary meaning of "showing no regard for conscience, irreconcilable with what is right or reasonable"'; *Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365 (22 September 2000) at §51: 'an overwhelming case of unreasonable, unfair, bullying and thuggish behavior...that amounts to unconscionable conduct'; *Australian Competition & Consumer Commission v Samton Holdings Pty Ltd* [2000] FCA 1725 (29 November 2000), in which the court found that the tenant was at a 'special disadvantage' but held at §99: 'It might well be thought that the respondents adopted an avaricious, opportunistic approach and struck a very hard bargain. But, in my opinion, their conduct fell short, though not far short, of being the sort of conduct which Equity would regard as unconscionable', affirmed on appeal by the Full Federal Court, which also overturned the trial judge's finding that the tenant was under a 'special disadvantage': *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* [2002] FCA 62 (6 February 2002) at §63.

addressed by other means, as discussed further below. By contrast, however, any re-importation of the notion of 'special disadvantage' into sections 51AB and 51AC would appear contrary to the intended operation of those provisions, and detracts from their effectiveness.

Consumer Action therefore recommends that an amendment be made to sections 51AB and 51AC of the TPA to make it clear that 'special disadvantage' (or 'special disability') is not an essential element in establishing statutory unconscionable conduct and should not be given a disproportionately high degree of weight in considering whether unconscionable conduct is made out.

Dealing with unfair conduct against consumers

One key concern about the operation of the doctrine of unconscionable conduct in Australia has been that it only addresses unfair conduct in the process of contracting, but not unfairness in the substantive bargain struck. This is sometimes referred to as the difference between *procedural unconscionability* versus *substantive unconscionability*.²⁴

It is now widely accepted that the prohibitions on unconscionable conduct in the TPA do not adequately address problems that consumers have with unfair contracts or agreements, even if section 51AB (and section 51AC) is broader than general law unconscionable conduct. For example the Productivity Commission, in the report of its recent and comprehensive inquiry into Australia's consumer policy framework, summarised its findings in this area as follows:

- Existing consumer laws deal adequately with most instances of unfair practices and conduct.
- However, there is a gap in provisions relating to unfair contract terms.
 - There are sound economic and ethical rationales for proscribing unfair contract terms that cause consumer detriment.
 - The existing unconscionability provision of the generic consumer law prohibits the abuse of unfair terms only in constrained circumstances, is very costly and slow to use, and lacks clarity about its application in this area.²⁵

Consumer Action agrees that the current unconscionable conduct provisions are problematic because they only apply in constrained circumstances, lack clarity and are costly and slow to use.

As noted above, unconscionable conduct is ill-suited to addressing problems of unfair terms in consumer contracts because it focuses on the process or conduct in individual

²⁴ See, eg, the US case of *Kohl v. Bay Colony Club Condominium, Inc.* 398 So.2d 865, at 868 (Fla. Dist. Ct. App. 1981): 'The various factors considered by the courts in deciding questions of unconscionability have been divided by the commentators into "procedural" and "substantive" categories...Under the "procedural" rubric come those factors bearing upon...the "real and voluntary meeting of the minds" of the contracting parties: age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question. The "substantive" heading embraces the contractual terms themselves, and requires a determination whether they are commercially reasonable...'

²⁵ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report, Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, page 139.

transactions rather than the content of those transactions. Although section 51AB(2) includes some factors that relate to the substance of a contract,²⁶ the overall test in section 51AB is whether the corporation has engaged in conduct that is unconscionable, not whether a contract or a contract term is unconscionable.²⁷ The factors relating to the substance of the contract would be seen as evidence indicating that conduct was unconscionable (as otherwise such unfavourable terms would not have been agreed to), rather than being unconscionable in themselves. The *Amadio* case²⁸ and other cases such as *Hurley v McDonald's*²⁹ and the *Lux* case³⁰ confirm that there must be some circumstance other than the mere terms of the contract itself that makes relying on the terms of the contract unconscionable, whether the case is being brought under section 51AA, 51AB or 51AC.³¹

Further, unconscionable conduct is concerned with individual transactions, not market-wide or systemic problems. While including prohibitions on unconscionable conduct in the TPA gives the regulator, the Australian Competition and Consumer Commission (**ACCC**), the ability to take action, the ACCC cannot use the provisions to tackle contract terms that are unfair in themselves, for example by seeking a declaration that terms in a standard form contract are 'unconscionable' or by obtaining an injunction against their continued use. The focus of the TPA provisions is on unfair or unreasonable behaviour in individual transactions, not in contracts generally available in the market.

One of the reasons the extent of the protection from unconscionability in sections 51AB (and 51AC) lacks clarity is that there have been few higher court cases that have examined these questions. The Part IVA provisions have led to a trickle of cases not a flood.³² This lack of precedent is partly due to the ACCC running relatively few statutory unconscionability cases. We consider that the ACCC could and should have undertaken additional unconscionable conduct cases by now, not least to establish the boundaries of this aspect of the law. Nevertheless, in view of the apparently narrow interpretation of these provisions by Australian courts, the relative cost of this sort of litigation can be quite high, with the direct benefit of a successfully argued case confined to an individual consumer remedy and an individual trader sanction. Further, the general deterrence effect of the case is uncertain, particularly as unconscionable conduct cases, more than most, turn so specifically on their individual facts.

²⁶ Section 51AB(2)(b): whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation; section 51AB(2)(e): the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

²⁷ Section 4(2) of the TPA defines engaging in conduct to mean doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement; but not the making or including of a provision in a contract.

²⁸ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

²⁹ *Hurley v McDonald's Australia Ltd* [1999] FCA 1728.

³⁰ *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 (16 July 2004).

³¹ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462-63; *Hurley v McDonald's Australia Ltd* [1999] FCA 1728 at §31; *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 at §94.

³² Brown, Liam, *The Impact of Section 51AC of the Trade Practices Act 1974 (Cth) on Commercial Certainty*, [2004] 28 Melbourne University Law Review.

The small number of cases indicates that statutory unconscionable conduct is not effective in remedying general unfair trading practices that harm consumers. However, while amendments to the definition in the TPA may make statutory unconscionable conduct *easier* to prove, they are unlikely to result in great increases in the number of cases being brought or in significant change to the benefit of consumers (or small businesses) generally, because unconscionable conduct cases by their nature remain focussed on the circumstances of individual transactions, which makes them a poor basis for tackling more general unfair trading practices.

Consumer Action considers that the better approach to addressing problems with unfair substance in consumer contracts is to implement unfair contract terms laws. This was also the conclusion of the Productivity Commission, which has recommended the introduction of national unfair contract terms legislation.³³ Victoria has had such laws in place since 2003,³⁴ based on the UK model³⁵ which in turn implements an EU Directive to all member states to implement such laws.³⁶ In brief, the benefit of such laws over unconscionable conduct prohibitions is that they allow the regulator proactively to address unfairness that will affect whole classes of consumers (as well as also allowing for individuals to seek their own remedies in their own cases as is the case with unconscionable conduct).

More could be written about this issue but is perhaps unnecessary for the purposes of this inquiry. We remain happy to provide the Committee with further details if required. However, we note that COAG recently announced that it had agreed to a new consumer policy framework comprising a single national consumer law based on the TPA, drawing on the recommendations of the Productivity Commission and best practice in State and Territory consumer laws, including a provision regulating unfair contract terms.³⁷ Consumer Action supports this decision (subject to the details of the new unfair contract terms provisions, which are yet to be drafted).

Given these recent developments, and the fact that they arise from a comprehensive and recent review of Australia's entire consumer policy framework, we suggest that the Committee might consider recommending that the operation of the statutory unconscionable conduct provisions be reviewed properly at the same time as the new unfair contract terms provisions are first reviewed. The Productivity Commission recommended in its report that the operation and effects of the new unfair terms in consumer contracts provisions should be reviewed within five years of their introduction. Given their relationship to unconscionable conduct, this might provide a better opportunity to examine whether changes should be made to Part IVA of the TPA.

We note that unfair contract terms provisions will address only substantive problems with contracts, but not necessarily unfair trading conduct more generally. Yet as discussed above, prohibitions on unconscionable conduct are currently too narrowly focused on individual transactions to address broader unfair trading adequately, and only catch conduct

³³ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report, Volume 2 – Chapters and Appendixes, No. 45, 30 April 2008, pages 168-69.

³⁴ *Fair Trading Act 1999* (Vic) Part 2B.

³⁵ *Unfair Terms in Consumer Contracts Regulations 1999* (UK).

³⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

³⁷ Council of Australian Governments, *Communique*, Perth, 2 October 2008, page 2.

of a very high level of unfairness. The Productivity Commission also recognised this problem, stating that:

The prohibition of unconscionability in the generic legislation represents a general prohibition of unfairness, but usually only for unfairness that crosses a high threshold of severity. Other Australian provisions relating to unfair conduct only deal with specific instances of unfair practices, such as deceptive conduct. As a result, there is no broad prohibition on unfair practices by business in Australia, unlike the USA, which bars unfair or deceptive acts and practices, or Europe, which applies an Unfair Commercial Practices Directive.³⁸

However, we do not consider that amending the unconscionable conduct provisions is the most appropriate way in which to deal with this gap in Australia's consumer protection laws. Doing so would distort the concept of unconscionable conduct beyond its understood scope, and by doing so perhaps create only more confusion or overly narrow interpretation.

Instead, Consumer Action strongly supports the adoption of a national general prohibition on unfair trading or unfair commercial practices, similar to the European *Unfair Commercial Practices Directive* that forms the basis for new UK laws in this regard.³⁹ Again, such provisions would allow for more pro-active action by the regulator and are specifically designed to address broader market conduct, including conduct that targets vulnerable or disadvantaged groups of consumers.

We note that the Productivity Commission did not recommend that Australia adopt such provisions at this time, but did conclude that "it would be prudent for Australian policymakers to see how the European model develops, and only to consider the option of pursuing a general unfair practices provision at a later time if warranted by strong evidence in its favour."⁴⁰ We respectfully disagree with this assessment, for example a general prohibition has existed in the US jurisdiction for many years and provides ample material for consideration by Australian policy makers.

Further, there is demonstrated need in Australia for a new provision that addresses systemic or general unfair trading conduct. For example, in its latest annual report Consumer Affairs Victoria (**CAV**) included a case study describing problems that consumers had faced in dealing with an internet and telecommunications business that did not involve misleading, deceptive or unconscionable conduct but were unfair for the consumers, including that the business mistakenly continued to bill customers after services have been cancelled but customers had problems contacting the business to resolve problems. CAV noted that these problems affected many consumers but it did not have the power to address the conduct on this systemic level, meaning it was up to each individual consumer to pursue their own legal remedies. CAV concluded that a general unfair conduct standard would allow it to address

³⁸ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report, Volume 2, No. 45, 30 April 2008, page 140.

³⁹ 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).

⁴⁰ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report, Volume 2, No. 45, 30 April 2008, page 141.

such problems.⁴¹ A recent Consumer Action case also illustrates the current gap in Australia's laws:

Unfair trading conduct...but not unconscionable

Donna went to a major retailer looking to rent an equipment package. She understood that "renting" meant you made regular payments but was not aware that there was a minimum period for rental. She advised the salesperson that she wanted to rent some equipment and chose some items. When Donna was taken to a desk on the showroom floor she asked about payments and was informed it was \$97 per month, which she felt she could afford. Donna did not understand that under the retailer's contract, "renting" would actually be for a fixed term of 3 years and that she would have to pay out the entire rental contract even if she returned the goods and terminated the contract early. While the discussion focussed on the monthly amount, the salesperson packaged up the equipment and brought it to Donna, and only then gave her the documents for signing while she was standing on the showroom floor, in front of all the other customers, with the package ready to go. He did not take her to an office to sit and read the contract and sat in front of her waiting while she looked at the documents. Donna felt pressured and did not feel she could read through the entire contract, which was about eight pages long. She also felt it would be rude to back out of the purchase or to take too much time reading as the equipment was already packaged up and ready to take away, so she simply signed the documents.

Several weeks later Donna telephoned the retailer to change to a fortnightly payment arrangement and was told she could not - monthly direct debits were the only payment option under the contract. She looked at the paperwork and saw this was the case. She also saw that the contract was a fixed term contract over several years and if she wanted to terminate the contract early she would have to pay a large lump sum to pay out the contract. A year and a half after entering this lease contract, Donna has paid more than the total value of the equipment but still has a long time to run under the contract, with the total amount payable over that time much more than the equipment is worth. Despite this, at the end of the contract period she will not own the equipment, with an additional 15% payment required if she wishes to buy the equipment. Donna simply wants to end the lease contract as she originally thought she would be able to under a rental arrangement.

It does not seem that the salesperson made any positive misrepresentations to Donna nor was Donna particularly vulnerable or under any special disadvantage. However, the salesperson did not correct Donna's misunderstandings, did not disclose important information such as the termination costs and fixed nature of the contract and the total amount payable under the contract and, while not exercising overt pressure, the salesperson orchestrated an overall situation that made it very likely Donna would not properly consider the documents before signing and would thus not understand key terms of the contract.

We have written about unfair trading provisions extensively elsewhere,⁴² but are happy to provide more details to the Committee if interested.

⁴¹ CAV, *Report to the Minister for Consumer Affairs for the year ended 30 June 2007*, November 2007, at 12.

⁴² See, eg, Consumer Action Law Centre, *The consumer protection provisions of the Trade Practices Act 1974: Keeping Australia up to date*, May 2008, pages 105-132.

Amendments to the ASIC Act

Finally, if any amendments were to be made to the statutory definition of unconscionability in the TPA, there would also need to be similar amendments made to the mirror unconscionable conduct provisions (in relation to financial services) in the ASIC Act.

Section 51AAB of the TPA explicitly excludes conduct engaged in regarding financial services from the scope of sections 51AA and 51AB of the TPA and sections 12CA, 12CB and 12CC of the ASIC Act mirror, respectively, section 51AA, 51AB and 51AC of the TPA but in relation to financial services only. The principal effect of this arrangement is to vest regulatory responsibility for unconscionable conduct in relation to financial services with the financial services regulator, the Australian Securities and Investments Commission, rather than the ACCC.

Should you have any questions about this submission, please contact us on 03 9670 5088.

Yours sincerely

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