



21 December 2009

**By email:** [unconscionableconduct@treasury.gov.au](mailto:unconscionableconduct@treasury.gov.au)

Unconscionable Conduct Issues Paper  
Competition and Consumer Policy Division  
Treasury  
Langton Crescent  
PARKES ACT 2600

Dear Sir/Madam

### **Submission to Unconscionable Conduct Issues Paper**

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide comment to the inquiry process established by the Government to examine options for clarifying the unconscionable conduct provisions of the *Trade Practices Act 1974 (TPA)*.

Consumer Action provided a more detailed submission to the Senate Economics Committee's inquiry into statutory unconscionable conduct and we understand that we do not need to repeat any of those comments in the context of this inquiry process. In summary, one of our main conclusions in that submission was that the statutory unconscionable conduct provisions are not directed at, and are not effective in, remedying more general or systemic unfair trading practices within the marketplace, because they focus on remedying individual cases of very unfair conduct and each case turns so particularly on its individual facts.

For this reason, while developing a list of examples or a statement of principles (factors that *must* rather than *may* be taken into account in unconscionable conduct cases) might provide some marginal benefit in clarifying the operation of the statutory unconscionable conduct provisions, in our view they are unlikely to be able to be specified to any great degree due to the nature of unconscionable conduct as requiring consideration of the particular facts in every different case. Indeed, the Issues Paper and submissions to the Senate Economics Committee inquiry suggest that any list of examples or statement of principles may largely involve the recasting of the current listed factors that a court may take into account into examples or principles, rather than the creation of new and specific examples or principles.

We therefore consider that the potential minor benefits of making any such changes to the statutory provisions are probably outweighed by the effort of developing and inserting them,

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as well as the consequent need for the development of new case law on the amended provisions. Further, in our view even with such changes the provisions would remain unsuited to addressing concerns about more systemic unfair market conduct.

We also note that the current inquiry process and the Issues Paper are largely concerned with business-to-business conduct and, thus, current section 51AC of the TPA in particular. However, it was the supplier-to-consumer provision (current section 51AB) that preceded the other two statutory unconscionable conduct provisions. The “small business” provision (s.51AC) is clearly modelled to some degree on the “consumer” provision (s.51AB), and, for example, the Issues Paper notes Justice Sundberg’s comments in the *Simply No-Knead* case that it ‘would be curious if “unconscionable” in the two provisions had different meanings’.<sup>1</sup> We are concerned that the development of specific examples of business-to-business conduct or principles for insertion into section 51AC could, in fact, render the general meaning of ‘unconscionable conduct’ less clear, particularly when attempting to understand it in future consumer cases. This would be an unintended consequence but nevertheless a problematic one.

We therefore agree that alternative approaches to dealing with undesirable market conduct may be preferable to, and more effective than, a list of examples of a statement of principles in the statutory unconscionable conduct provisions.

We have advocated for more guidance from the regulators in the past and, for example, in our submission to the Senate Economics Committee inquiry we made the point that the regulators could and should have undertaken more test cases on unconscionable conduct by now (although we also noted that the cost of this sort of litigation can be quite high, with the direct benefit of a successfully argued case confined to an individual remedy and an individual trader sanction). We also agree that mandatory codes of conduct made under Part IVB the TPA can be better targeted at systemic market conduct of concern found within particular industries. In this regard, however, we note that the enforcement and remedies provisions available to enforce breaches of Part IVB codes remain inadequate and this must now be addressed.<sup>2</sup>

In terms of addressing problems with unfair trading practices against consumers that are market-wide or systemic in nature, we again submit that unfair contract terms laws (to address unfair contractual substance) and a general unfair trading or unfair commercial practices prohibition (to address unfair trading conduct) are alternative, and better, approaches than further amendments to the statutory unconscionable conduct provisions. As the Issues Paper has stated that such policy options are not within the scope of this inquiry process, we do not discuss them in further detail here.

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<sup>1</sup> *Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365 (22 September 2000), §35.

<sup>2</sup> The new enforcement and remedies provisions proposed in the current Trade Practices Amendment (Australian Consumer Law) Bill 2009 - which will apply to breaches of the consumer protection provisions of the *Trade Practices Act* - will not apply to breaches of codes made under Part IVB. See also, eg, Consumer Action Law Centre, *Submission to Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 30 July 2009, p14.

## 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.

Thank you again for the opportunity to provide our views to this inquiry process. Should you have any questions about this submission, please contact us on 03 9670 5088 or at [nicole@consumeraction.org.au](mailto:nicole@consumeraction.org.au).

Yours sincerely

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