Business Council of Australia

Submission to Senate Economics Committee

on

Inquiry into a statutory definition of unconscionable conduct

3 November 2008

The BCA appreciates the opportunity to comment on the inquiry into the statutory definition of unconscionable conduct which was referred to the Senate Economics Committee on 15 September 2008.

The Business Council of Australia (BCA) is an association of Chief Executives of leading Australian corporations.

Currently sections 51AA, 51AB and 51AC of the *Trade Practices Act 1974* (Cth) (TPA) prohibit 'unconscionable conduct', but the expression is not defined in the TPA. The TPA refers to matters to which the Courts may and may not have regard in determining whether there has been unconscionable conduct.

The BCA supports appropriate and proportionate laws to promote competition and protect Australian consumers, but believes that the existing legislation provides such protection whilst ensuring that business is also provided with a regime that is workable and certain.

The current legislation, which is underpinned by a substantial body of case law, is therefore preferable to the insertion of a statutory definition of unconscionable conduct into our laws. This is particularly so given the risk of undue prescription and introduction of a lack of flexibility by the proposal to impose such a statutory definition.

Proposed changes to existing laws should only occur where there is a clearly identifiable problem to be addressed. The BCA supports the more detailed legal analysis contained in the Law Council of Australia Trade Practices Committee (Business Law Section) (LCA) submission. The LCA submission states amongst other things:

> *"The recent cases on unconscionability, including Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd (No 2), demonstrate that the sections of the Act that deal with statutory unconscionability are working as intended."*

Additionally, proposed reforms should achieve the purpose for which they are intended (without creating uncertainties and additional red tape) and should not be disproportionate or stifle ordinary and legitimate business behaviour. There is a significant risk of undue prescription should a statutory definition of unconscionability or a list of examples of unconscionable conduct become included in the existing provisions of the TPA.

The BCA believes that sufficient flexibility for the courts and the ACCC to determine what amounts to unconscionable conduct is provided in the existing laws. Undue prescription runs

the risk of reducing the flexibility and undermining the objectives of the laws. For example, in respect of section 51AA, the LCA submission states:

> *"Codification of a definition of unconscionable conduct would not pick up developments in the definition of unconscionable conduct at common law.*
>
> *The lack of flexibility that would be associated with a codified definition of unconscionable conduct may mean the wider range of remedies that are available for unconscionable conduct under the Act may not be available to all victims of unconscionable conduct."*

Attempts to identify what is meant by a certain type of conduct at a particular point in time risks undermining the more flexible approach in developing the concept of unconscionable conduct over time.

The BCA believes that it is an inappropriate at this time to amend the existing provisions of the TPA in relation to unconscionable conduct, as there is no clear problem with the existing law and instead there is a risk of narrowing the scope of the existing laws by imposing undue prescription at the risk of undermining flexibility.

This submission has been copied to Lindsay Tanner MP, Dr Craig Emerson MP, Chris Bowen MP and Su McCluskey, Executive Director of the Office of Best Practice Regulation, for their information.