Authorisation has been given to cooperative buying schemes in the wool industry and the pharmacy industry. The pharmacy authorisation was particularly significant for small business, authorising members of the Pharmacy Guild of Australia to participate in a joint buying and advertising arrangement for pharmacy 'specials'.

The Commission has been strongly supportive of self-regulation schemes which promote competition and efficiency. Authorisation of codes of conduct has been given to a wide range of groups including furniture removers, mining consultants, and transmission rebuilders. Franchising, airlines' computer reservations systems, and proprietary medicines are further examples of industry based codes which have been authorised.

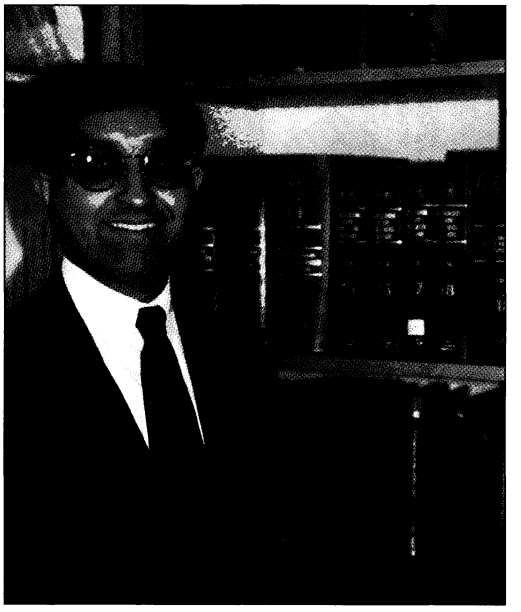
The authorisation processes of the Commission have recognised that primary producers are often in a special position. Authorisation was given to an agreement between the producers of oyster spats to impose a levy for research purposes and refuse to supply farmers who did not pay the levy. Authorisation was given to an industry committee to set annual recommended minimum prices for certain apples and pears sold for processing. Adelaide milk producers were granted authorisation in relation to a milk equalisation scheme.

The common philosophy behind this variety of circumstance is a recognition that some of the objectives of Australian society may not always be met by the operation of competitive markets.

Competition will invariably lead to winners and losers. Those firms unable or unwilling to respond to competitive pressures will not survive. But consumers will always be the beneficiaries of such outcomes. The Commission's processes are directed towards getting the 'best' outcomes for Australian consumers. Authorisation allows the broadest possible interpretation of what is best.

Unconscionable conduct — new boundaries for commercial dealings

Legislative amendments to the Trade Practices Act have redrawn the boundaries for what constitutes legally acceptable commercial conduct in Australia — particularly in commercial dealings between big business and small business. They have also introduced, amongst other things, a new Part IVB providing for industry codes of conduct to be prescribed under the Act and providing that a failure to comply with such a prescribed code is a breach. The following is an edited summary of a paper and presentation delivered by ACCC Commissioner Sitesh Bhojani on 4 November 1998 as part of a cooperative venture between the Commission and the Law Society of Western Australia to discuss implications of the new law.



ACCC Commissioner Sitesh Bhojani

In 1993 the Commonwealth Government introduced amendments to the Trade Practices Act covering the small business sector. Section 51AA was added. It prohibits a corporation engaging in 'conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories'.

Essentially, it appears that the key elements to proving unconscionability under s. 51AA are whether:

- the parties meet on unequal terms which are reasonably apparent (because of the weaker party's special disadvantage or special disability, e.g. illness, infirmity or dire economic need);
- the stronger party takes advantage of the special disadvantage or special disability (by unfair or unduly onerous terms, non-disclosure of unusual conditions or unusual facts, or failure to afford the weaker party an opportunity of obtaining independent advice); and
- the stronger party thereby obtains a bargain upon terms so beneficial that it is oppressive to the weaker party.

Judicial approach to 'unconscionable conduct'

I do not intend to set out the often cited comments on unconscionable conduct from the High Court judgments in *Blomley v Ryan*[1] and Commercial Bank of *Australia v Amadio.*[2] I do note that it was said in those cases that it is impossible to describe all of the situations in which relief will be granted on the ground of unconscionable conduct. Clearly this is an area of law that is still developing.

It is therefore not surprising that in February 1997 a Full Court of the Federal Court refused to allow a claim for unconscionable conduct to be struck out in *Pritchard v Racecage Pty Ltd and Others.*[3] The appellant in that case was the widow of the deceased who died after being struck by a motor vehicle being driven in a race known as the 'Cannonball Run'. At the time of the collision, the deceased was acting as an official in the race. The Full Court accepted the proposition (as had the primary judge) that s. 51AA does not expand equitable concepts of unconscionable conduct. It extends the remedies available under the Trade Practices Act to unconscionable conduct. The following passage from Branson J's judgment (with which Spender and Olney JJ agreed) is instructive:

> Conclusions as to whether particular conduct should be characterised in equity as unconscionable are based upon careful examination of the facts of each particular case. Such consideration involves, among other things, an examination of the precise relationship between the relevant parties, and consideration of their respective capacities and vulnerabilities (if any) in the circumstances in which they were involved the one with the other: *Jenyns v Public Curator (Qld)* (1952) 90 CLR 113 at 118–19 and 132–3.[4]

Other cases which provide an interesting insight into the developing concept of unconscionable conduct include the following:

- *Stern v McArthur,* where Deane and Dawson JJ said:

  > the general underlying notion is that which has long been identified as underlying much of equity's traditional jurisdiction to grant relief against unconscientious conduct, namely that a person should not be permitted to use or insist upon his legal rights to take advantage of another's special vulnerability or misadventure for the unjust enrichment of himself.[5]

- *Olex Focas Pty Ltd & Anor v Skodaexport Co Ltd & Anor,* where Batt J said:

  > I turn then to section 51AA. The Oxford English Dictionary, 2nd edition, gives as a second sense of the word 'unconscionable' in relation to actions, etc., the meaning 'showing no regard for conscience; not in accordance with what is right or reasonable'. In a very useful article from volume 35.5 of the Laws of Australia contributed by Mr Patrick Parkinson that was drawn to my attention by the plaintiffs, there are some very helpful statements. In paragraph 2 on page 8 it is said that the notion of unconscionability is given specific content by a number of doctrines. The third, which seems to me to be applicable here, is stated as, 'insistence upon rights in circumstances which make that harsh or oppressive'. The next paragraph on the same page states that the underlying categories of unconscionable conduct are various standards of conduct which are applied by the courts. The second one that is listed is 'that people should not, by an appeal to strict legal rights, cause hardship to others by violating their reasonable expectations'. There is on page 9, in a paragraph whose number does not appear on my photocopy, a reference to the Trade Practices Act and it is stated that unconscionability is a much wider concept than intentional deception. I accept the statements to which I have referred.

Later in his judgment Batt J said:

> Even if one is acting within one's rights one may still engage in unconscionable conduct: *Stern v McArthur* at 527. It must therefore follow that even if one believes, wrongly, that one is acting within one's rights, one can thereby engage in unconscionable conduct.[6]

ACCC involvement with s. 51AA

The Commission has been and is active in respect of s. 51AA. A number of matters have been resolved without judicial determination. However, in *ACCC v Chats House Investments Pty Ltd and Others*[7] the Commission took representative proceedings under Part IVA of the Federal Court of Australia Act on its own behalf and on behalf of some 18 clients of Chats House who had lost money by purported foreign exchange trading investments by Chats House on their behalf. In a considered judgment Branson J upheld, amongst other things, the Commission's allegations of a breach of s. 51AA. In her judgment her Honour noted that s. 51AA does not expand equitable concepts of unconscionable conduct. Of interest for present purposes her Honour also said:

> In my view, the group members, other than the [ACCC] were at a special disadvantage vis-à-vis the first respondent in the circumstances with which this proceeding is concerned. They did not understand the nature of the transactions, which they respectively instructed the first respondent to enter into as their agent. Only the first and second respondent had access to accurate information as to the manner in which the first respondent purported to carry out such instructions. I find that the first respondent deliberately and unconscientiously took advantage of its superior position of understanding and knowledge in circumstances in which its clients were in a position of special disadvantage, and without the ability to make judgments in their own best interests.[8]

The Commission is currently involved in other litigation for alleged contravention of s. 51AA.

Rationale for the changes

Reid Committee Report

In June 1996 the House of Representatives Standing Committee on Industry, Science and Technology (chaired by the Hon. Bruce Reid MP) was asked to investigate and report on major business conduct issues arising out of commercial dealings between firms and the economic and social implications of the major business conduct issues. In his tabling speech the Chairman said:

> The report on the Fair Trading inquiry, *Finding a balance: towards fair trading in Australia...* may come as a shock to many people who have not been following the inquiry closely over the past year. The Committee has felt compelled to make **strong recommendations** to set some ground rules for what constitutes acceptable commercial conduct in Australia.
>
> One witness suggested to us that, 'It's war out there' between small business and big business. On the balance of evidence to the Fair Trading inquiry, the Committee has concluded that small businesses are regularly being confronted with combative and unfair commercial conduct in their dealings with powerful companies. (original emphasis)

The Reid Committee reported in May 1997. In the report the Chairman stated:

> After a detailed investigation the Committee has concluded that concerns about unfair business conduct towards small business are justified, and should be addressed urgently. In an endeavour to find a balance towards fair trading in Australia, the Committee has recommended a number of specific measures, including legislation, **to induce behavioural change** on the part of big business towards smaller business, and to provide unfairly treated small business with a fair deal. (emphasis added)[9]

(See *ACCC Journal* nos 9 and 11 for summaries of the Reid Committee's recommendations and the Government's response.)

Legislative amendments — Second Reading speech

The Commonwealth's changes to the Act came in through the *Trade Practices Amendment (Fair Trading) Act 1998* which was assented to on 22 April 1998.
The amendments (including s. 51AC, unconscionable conduct in business transactions, and Part IVB, industry codes), took effect from 1 July 1998. In the Second Reading speech for the amendment Act the Minister said:

> This new provision will extend the common law doctrine of unconscionability expressed in the existing section 51AA of the Act.

> The Bill uses the expression 'unconscionable conduct' in order to build on the existing body of case law which has worked well in relation to consumer protection provisions of the Act and which will provide greater certainty to small businesses in assessing their legal rights and remedies. As this is a new provision targeted to small business, the new provision will be limited to transactions which do not exceed $1 million. Publicly listed companies cannot instigate action under this new provision.[10]
>
> ... the government would expect that the vast majority of commercial transactions would not be challenged under the new provision. The fundamental objective of the Government in enacting this provision is, in the [Reid] Committee's words, to 'induce behavioural change' where improved standards of commercial conduct are required and not a mere desire to create a more litigious commercial environment.[11]

Statutory unconscionability — s. 51AC

The new 'statutory unconscionability', provision (s. 51AC) includes a 'shopping list' of matters that the Court can take into account in determining whether or not there is a contravention, but unlike s. 51AA, it is restricted to transactions for the supply or acquisition of goods or services to a value of less than $1 million.

Section 51AC aims to provide protection for small business against exploitative business conduct. It will prohibit the stronger party exploiting its bargaining advantage to impose contractual terms, or engage in conduct, that is **in all the circumstances** unconscionable in the context of the particular commercial relationship between the parties.

As well as the 'shopping list', a Court can look at the use of the phrase 'in all the circumstances' (which is not present in s. 51AA). This suggests that the legislature clearly intended that the Courts not be confined to the type of considerations to which they can have regard to in determining whether or not there has been a contravention of the 'statutory' unconscionability provision — s. 51AC. That is, one would presume that it did not include those words for no reason — they must be given some meaning.

One question that therefore arises is whether an applicant needs to be shackled by having to establish **special disadvantage** or **special disability** in the sense required by equity (see *Amadio's* case for example) to make out a contravention. In my view, given the policy objectives, the 'shopping list' and the phrase 'in all the circumstances', the answer should be 'no'.

I think the same response should apply to endeavours to limit the reach of s. 51AC to procedural rather than substantive matters, or to limit it to conduct involved in the making of a contract — as distinct from implementing or enforcing contracts — or other conduct in trade or commerce generally. That is, apart from the statutory restrictions one should not read into the section other historical restrictions from the common law.

Part IVB — codes of conduct

The Government, and its committee of inquiry into small business in Australia, accepted that several aspects of small business are particularly vulnerable to unfair treatment in commercial dealings, including retail tenancy, franchising and petroleum retailing.

Franchisees and petroleum retailers have been regulated by voluntary industry codes of conduct, which went some way to providing small business rights in the marketplace. However, the Government noted that, overall, voluntary industry codes were ineffective in shielding small business from unfair conduct because they were not enforceable or because they carried ineffective sanctions. It accepted that these codes should be underpinned by legislation to give them real force and effect.

The new s. 51AD of the Act provides for industry codes of conduct to be enforceable. Such codes may regulate the conduct of participants in an industry toward other participants in the industry or toward consumers.

Franchising Code of Conduct

The Franchising Code of Conduct, which was launched on 19 June 1998, is the first to be prescribed under the terms of this new provision.

The first stage of the code came into effect on 1 July 1998, and is mandatory for franchising industry participants. It includes a provision ensuring that franchisees have the right to associate, and requires franchisors to provide a copy of any lease to franchisees and to prepare financial statements for marketing and cooperative funds.

The second stage, including disclosure and dispute resolution provisions, came into effect on 1 October 1998. This transition period has hopefully provided franchisors with three months in which to establish compliance systems.

The code will regulate the conduct of industry participants toward each other and aims to bring about cultural change in the sector. It aims to:

- raise the standard of conduct in the franchising sector without endangering its vitality and growth;
- reduce the cost of resolving disputes;
- reduce risk and generate growth by increasing the level of certainty for all participants; and
- address the imbalance of power between franchisors and franchisees.

A key element of the code is disclosure. Franchisors are now required to disclose, to franchisees and prospective franchisees, information relevant to the operation of the franchise business. They are also required to provide relevant information, such as details of a change of ownership or changes to certain financial circumstances, to franchisees during the course of the agreement. The code also imposes an obligation on a franchisee transferring or selling a franchised business to provide a disclosure statement to the person purchasing the business.

Other requirements include obligations on franchisors to provide a cooling off period for prospective franchisees. Franchisors may not prevent franchisees from associating with each other for a lawful purpose and may not seek a general release from liability on entering the franchise agreement. The code also deals with termination of a franchise agreement and sets guidelines for mandatory mediation where a dispute arises that cannot be resolved within the franchise system. The operation of the code will be monitored closely by a new body known as the Franchising Policy Council.

Raising the level of awareness of the rights and obligations of participants in the franchising sector is essential for significant behavioural improvement to be achieved. To that end, the Commission has launched an extensive information dissemination and eduction campaign, including widely advertising the availability of the code via national and regional newspapers, and publications such as the plain English *The Franchisee's Guide.*

The role of the Commission in enforcing prescribed codes is to send a clear signal to the marketplace that those who do not comply with such a code, or observe the form and not the substance of the code, will not escape with impunity. The Commission's aim is total compliance with prescribed industry codes.

The Commission's preferred method of achieving compliance is education of the relevant market participants, but enforcement will be taken seriously when it is needed. If a franchisor, for example, hasn't produced appropriate compliance material, then the Commission will be keen to ensure that they do this.

In relation to the Franchising Code of Conduct, the Commission will focus on the following enforcement priorities:

- educating franchisors about their responsibilities;
- where possible, taking a cooperative approach to averting breaches;
- issuing warnings for minor and technical breaches; and
- pursuing with vigour blatant or provocative breaches or failure to meet key requirements.

Enforcement objectives and priorities

The objectives of Commission enforcement action include:

- stopping the unlawful conduct;
- obtaining compensation/restitution for the victim;

- undoing the effects of the contravention;
- deterring/preventing future unlawful conduct (repetition by some person or first contravention by another who might be tempted to breach); and
- punishing the wrongdoer.

In relation to anti-competitive conduct, the Commission's current enforcement priorities are:

- anti-competitive agreements — especially price collusion;
- mergers which would, or would be likely to, substantially lessen competition in a substantial market;
- misuse of market power;
- resale price maintenance;
- conduct in breach of the Act which inhibits micro-economic reform;
- exclusive dealing where it significantly affects consumers or business; and
- serious secondary boycott conduct.

In relation to consumer protection, the Commission's focus is directed toward conduct which:

- is multi-state, national or international;
- involves significant consumer detriment;
- involves a significant new market;
- causes detriment to small business;
- causes detriment to the competition process; or
- involves an opportunity to test the law.

In assessing potential breaches by and against small business the Commission will take into account the following considerations:

- the size of the firm and/or its market power;
- the seriousness of the conduct in question;
- the gains expected or obtained from the illegal conduct;
- the likely impact of the cost of the remedy/penalty on the firm;
- the actions taken by the firm once the breach was discovered to ensure such conduct is not repeated; and
- the action taken to overcome the adverse effects of its conduct.

Alternative dispute resolution mechanisms

In recent times the Commission has been keen to stress the significance it attaches to effective alternative dispute resolution and avoidance mechanisms (ADRs) and has made a commitment to helping with their development. The Commission receives around 2500 complaints by small businesses against large businesses each year. In many cases, these complaints do not involve breaches of the Act but should be amenable to resolution by ADR procedures.

The Commission believes that many business disputes can be resolved by alternative dispute resolution methods such as mediation or negotiation. ADR can be very useful to business, as it is cheaper and quicker than litigation. It is cost effective, particularly where there is an imbalance of power between large and small businesses. ADR tends to be less adversarial, helping to preserve the commercial relationship between the parties and encouraging creative solutions. As ADR seems particularly suitable for small business dispute resolution, the Commission is working with industry organisations to publicise it.

In October 1997 the Commission published a guideline, *Benchmarks for dispute avoidance and resolution*. This sets out proactive dispute avoidance mechanisms designed to recognise the mutual interests of both parties in a commercial relationship. The guideline came out of a series of round table meetings convened by the Commission involving representatives of small and large businesses, the Commission's small business advisory group and the alternative dispute resolution sector.

Conclusion

The new legislation offers significant benefits for small business in terms of promoting a fair trading environment and the Commission is keen to ensure that the potential gains are in fact achieved. It will enforce the new

provisions rigorously but even-handedly, in relation to mandatory codes of conduct, unconscionable conduct in business transactions, and the misuse of market power against small businesses by large businesses.

In all of these areas the Commission is committed to pursuing opportunities to test the law. It is also committed to minimising enforcement actions by encouraging the development and use of ADRs and promoting compliance with the Act.

Small business has obligations as well as rights under the Act following its extension to cover unincorporated businesses. There is a heightened need to educate small business about its obligations now that the Act applies universally, and this is a substantial Commission activity.

Although the boundaries of acceptable commercial conduct for business dealings between small business and big business cannot be specified with precision, it is clear that the recent amendments have shifted the boundaries to benefit small businesses. The changes are designed to induce behavioural change in the way big business deals with small business. The challenges for some of the key players are, in my view, as follows:

- for professional advisers — to understand the changes so that they can properly advise their business clients (and to be aware of the impact of the changes in their own business dealings);
- for small businesses — to become aware of the changes in the law and the potential benefits for their future commercial dealings (with big businesses in particular); and
- for big businesses — to become aware of the changes in the law and to modify their dealings with small businesses in a way that eliminates conduct that may have been towards the extreme end of the legally acceptable in the past.

Contract, tort or neither? — the measure of damages under the Act

This is the first in a series of articles by Commission investigation staff about current issues in establishing liability and securing appropriate remedies to achieve effective enforcement outcomes.

The Commission is always concerned to be fully informed about the state of the law relevant to its operations. Indeed, as a statutory authority serving and protecting the public interest in promoting competition and fair trading, it has a role in bringing proceedings to clarify the law and to test its boundaries for the benefit of the community generally.

The Commission's enforcement policy is proactive and directed to securing effective outcomes; it is neither process-driven nor subjectively reactive. The Commission focuses upon priority and emerging issues. It works to a hierarchy of outcomes in pursuing enforcement matters:

- *stopping the offending conduct;*
- *securing redress for victims of offending conduct;*
- *preventing recurrence; and*
- *deterrence.*

To produce these outcomes through strategic case development and litigation, investigation staff are always mindful of legal requirements in establishing cases and remedies available at law to address contraventions.

In this issue, Bronwyn Fursey of the Commission's Brisbane office comments upon the recent decision of the High Court of Australia in Marks & Ors v GIO Australia Holdings Limited & Ors (1998) ATPR 41-665. The case is of particular relevance to the Commission's objective of securing redress for victims of offending conduct as it concerns how damages payable to affected parties ought to be measured. Bronwyn has