The Trade Practices Act and retail tenancy views of the ACCC

The following is an edited speech by Commissioner John Martin to the Australian Retailers Association of Victoria delivered at the Melbourne Convention Centre on 11 April 2003.

Over recent years, laws that once only operated in protection of household consumers have been extended to cover business transactions. These new legislative schemes apply to such aspects of the industry as disclosure, dispute resolution and remedies. A key aspect of this regulatory framework is the unconscionable conduct provisions of the Trade Practices Act (TPA).

Section 51AA was introduced to prevent large companies taking unfair advantage of smaller businesses when the smaller business has a special disadvantage, such as illiteracy or a serious cognitive ability. The introduction of s. 51AC in 1998 offers broader protection to small businesses in commercial transactions. Retail tenancy and disputes with landlords is an important area of concern for retailers.

In discussing the relevance of the unconscionable conduct provisions of s. 51AC to the retail tenancy industry, I will:

- describe the role of the ACCC Small Business Commissioner and the small business program in addressing problem areas which are relevant to the proposed appointment in Victoria of a small business commissioner
- outline the developments on unconscionable conduct provisions in the TPA, in particular s. 51AC, and the reactions of the courts
- overview the position of the states and territories in adopting s. 51AC within their respective retail tenancy legislation and comment on the new Victorian Retail Lease Act
- provide some general assessment to going forward including the potential role a retail tenancy code of conduct could play in providing an adjunct to state and Commonwealth regulation covering retail tenancy relationships.

ACCC approach to compliance

The ACCC has a dual role as:

- a national enforcement agency
- a provider of support, education and information for business and consumers on compliance with the TPA.

It is the first role that gains most publicity. But it is the information and support role, especially to small business, that secures wider business understanding and acceptance of good trade practices compliance.

ACCC small business program

Since the 1998 government decision to strengthen the protection offered to small businesses under the TPA, the ACCC has upgraded the level and style of its dealing with small businesses and implemented a strategy of small business outreach.

The activities of the small business program in the ACCC and my appointment as commissioner responsible for small business have focused on demonstrating to small businesses how to avoid or handle TPA-related problems well before they require litigation. The emphasis is on good business practices, using protections of the TPA, mediation and dispute resolution including voluntary codes of conduct to provide a framework in industries where there are widespread problems.

In many matters that come before the Commission it is possible, with stakeholder cooperation, to reach a fair and reasonable administrative solution without resorting to enforcement action. To ensure complaints and issues are dealt with effectively and consistently there is close liaison internally between myself, small business mangers and ACCC investigation teams located in all states and territories.

As small business commissioner I have been pro-active in 'hot spots' such as retail tenancy where there is evidence of systemic problems. This has involved some industry-wide approaches including the consideration of a national code of conduct.

The small business program, through its small business managers and now regional outreach officers (ROO's), has developed a considerable network of contacts for getting messages out to and back from small business. The ACCC has also fostered consultation through its small business

advisory group that meets regularly under the chairmanship of the small business commissioner.

Trends in retail tenancy complaints

The TPA generally prohibits conduct that is anti-competitive, or misleading and deceptive. Retail tenants in a shopping mall, for example, sometimes complain that the restrictions placed on what they are allowed to sell prevent them from competing effectively. Other tenants allege that important issues were not disclosed to them before signing the lease.

A significant proportion of complaints received by the ACCC from retail tenants relate to possible unconscionable conduct. The number of unconscionable conduct allegations received by the ACCC increased from 1999—the first full year of operation of s. 51AC. Approximately a third of all unconscionable conduct complaints received by the ACCC each year involve retail tenancy issues.

However, the level of complaints has flattened out since 2001, either reflecting less disputation or more matters being channelled through retail tenancy tribunals and mediation processes in the states that have them.

When complaints to the ACCC have been specific they have dealt with the following:

- problems with lease renewal
- negotiation of rent increases
- discrimination between tenants that occupy similar premises for similar purposes
- alleged anti-competitive behaviour by lessor
- disputes over the interpretation of the conditions within the lease
- problems arising from renovations to a shopping complex
- misrepresentations regarding future earnings
- not allowing the lessee to transfer the lease to a tenant of their choice
- casual leasing
- restrictions placed on the business of existing tenants.

Unconscionable conduct

What it means

There are three provisions which prohibit unconscionable conduct under the Trade Practices Act.

The Act was amended to recognise that there are a variety of factors which can determine whether or not a corporation has engaged in unconscionable conduct—s. 51AB, which prohibits unconscionable in consumer transactions, and s. 51AC, which deals with unconscionable conduct in the supply of goods or services.

Section 51AC and to a lesser extent s. 51AA have a bearing on the relationships between shopping centre managers, retail landlords and tenants.

Historically, unconscionable conduct has referred to situations where one party to a transaction has a special disadvantage, and the other party is likely to know of this disadvantage. This traditional, equitable doctrine of unconscionable conduct is difficult to establish because of the requirement to prove a 'special disability'.

The historical reference, s. 51AA, prohibits unconscionable conduct within the meaning of the unwritten law.

Within the unwritten law, the following factors are recognised as tending to result in a special disability. These include ignorance of important facts known to the other party, illiteracy or lack of education, poverty, infirmity, or lack of assistance or explanation where these are necessary.

The ACCC has continued to take actions under s. 51AA for matters that occurred before the new s. 51AC came into force. However there has been considerable difficulty in winning s. 51AA cases as highlighted by this week's decision by the High Court to reject the ACCC's appeal in the Farrington Fayre retail tenancy matter from Western Australia.

For the purpose of today's discussion I have concentrated on s. 51AC which is the more relevant provision looking forward.

Section 51AC—'supplying goods or services'

Section 51AC was introduced in 1998 for the specific purpose of redressing the imbalance of bargaining power which often arises between small and large businesses. It prevents small businesses, when buying or selling goods or services, from

conduct by larger businesses which is 'in all the circumstances, unconscionable'. The value of the goods or services must not exceed $3 million, and the business subjected to the conduct must not be publicly listed (a publicly listed company has its shares listed on the stock market).

Factors the court will consider

Section 51AC sets out several factors the court can consider in deciding whether certain conduct was unconscionable. They include, but are not limited to, such things as:

- the bargaining strength of each party
- requiring conditions which were not reasonably necessary to protect the legitimate interests of the stronger party
- capacity of the targeted party to understand any document
- the use of undue influence, pressure or unfair tactics
- whether the weaker party could obtain an arrangement on better terms elsewhere
- consistent conduct in similar transactions
- adequate disclosure
- the willingness to negotiate
- the extent to which each party acted in good faith
- the requirements of any relevant industry code.

When problems under the TPA do arise, the ACCC recommends alternative dispute resolution processes as the first and best option. Businesses should only resort to court action after all mediation options have been explored.

In some cases, however, it will be necessary to take enforcement action. The ACCC has already secured successful precedents in a number of key areas—franchising, retail tenancy and primary production—which have clarified the scope and meaning of the unconscionable conduct provisions.

Section 51AC cases

The scope of s. 51AC has been considered in several court decisions involving actions brought by the ACCC, including retail tenancy matters. There are other s. 51AC cases currently before the courts. The examples that follow illustrate how the law has been applied to particular retail tenancy situations.

Leelee

Leelee was a retail landlord operating a food court. In dealings with one of its tenants Leelee withheld crucial information about changes to the agreement. It also failed to honour existing terms of the contract, and would not allow the tenant to transfer the lease.

The court declared that the landlord had acted unconscionably, and granted injunctions preventing any similar behaviour in the future.

Suffolke Parke

Suffolke Parke Pty Ltd was a master franchisee for The Cheesecake Shop. It leased premises to a franchisee, which operated a Cheesecake Shop business from the premises. Part of the leased premises was a separate shop that the franchisee had been permitted to sublet on previous occasions.

Following disputes between the parties over franchising matters, the franchisor refused to allow the franchisee to sublet the shop again. This refusal was allegedly in reprisal for complaints arising from Cheesecake Shop franchisees concerning the franchisor's conduct as a director of the master franchisee for SA.

When the franchisee sought mediation under the Franchising Code of Conduct, the franchisor refused to attend. The court declared that Suffolke Parke and its director had acted unconscionably toward its tenant and that the company had breached the Franchising Code of Conduct by refusing to attend mediation.

The court ordered Suffolke Parke Pty Ltd and its director to compensate the franchisee, pay the ACCC's costs and implement a trade practices compliance training program.

This retail tenancy dispute was unrelated to The Cheesecake Shop national franchise.

Avanti

Although the Avanti case dealt with a farm lease, it provides a useful guide on what conduct is and isn't acceptable when renegotiating lease agreements.

In 1994 Avanti Investments leased land to farmers in South Australia. The original lease agreements had no limitation on the water available from a bore on the land. However, subsequent agreements significantly reduced the amount of water available, despite Avanti claiming that the agreements were unchanged.

Avanti sold a large proportion of the water allocated to the bore, which resulted in the farmers incurring excess water charges. Avanti then demanded payment from the farmers, many of whom lacked formal education, English language skills or commercial experience, totalling more than $67 000 for excess water use.

The Federal Court declared that Avanti had engaged in misleading and deceptive conduct, had made false representations in relation to land, and had engaged in unconscionable conduct under s. 51AC.

The court granted injunctions restraining Avanti from demanding payment for excess water, and required them to indemnify the farmers for any excess water charges until their leases expired. Avanti and its then director were also required to pay the ACCC's costs.

Currently before the courts—Westfield

The ACCC alleges that the landlords, Westfield, made misrepresentations to the former tenants on matters including:

- the development of an outdoor dining precinct and the construction, by a certain date, of a number of restaurants that would attract patronage to the area
- customer traffic because of the design of the food court
- the finality of the plans for the food court.

The ACCC also alleges that Westfield acted unconscionably towards the former tenants by refusing to finalise a settlement with a small business tenant regarding the misleading and deceptive conduct unless:

- the former tenants withdrew their complaint to the ACCC and notified it that they were satisfied with the settlement
    - an undertaking was received by Westfield from the ACCC that it would cease its investigations into the matter
    - the former tenants waived their rights to take any action in respect of events arising from their commercial relationship with Westfield.

The ACCC seeks findings of fact, declarations, and injunctions preventing future similar conduct, damages and costs.

The Victorian initiative

Retail tenancy matters are primarily dealt with under state-based regulatory regimes. In general, these mechanisms are best placed to deal with complaints from small businesses and on the whole have been reasonably successful. Sometimes, however, issues arise that simply cannot be dealt with under the relevant state legislation. Often, in these circumstances, complainants turn to the ACCC as a last resort.

Several states are currently reviewing their legislation to identify ways they can make their retail tenancy laws more effective, efficient, and in some cases, more consistent with other states. Some states (NSW and Queensland) have 'drawn down' the unconscionable conduct provisions under s. 51AC into their state-based regimes. Many that have not are considering doing so.

The Victorian legislation

It is known that Victoria has now done all this and more in its *Retail Leases Act 2003* which passed through Parliament this week and will come into force in May.

The ACCC is not in a position to comment on the efficacy or validity of state legislation. However, the Commission strongly supports the incorporation of s. 51AC in the manner states like Victoria are doing.

It is the route to small business getting more timely outcomes at a lesser cost. At the same time the ACCC sees benefits in having as much consistency as possible among jurisdictions affecting the market place.

We understand that while some in the industry put a case that the new law creates greater uncertainty others have legal opinions to the contrary.

Our view is that the new specific provisions under the Retail Leases Act should not contribute to uncertainty. I say this for the following reasons:

- the Victorian Government's readiness to withdraw troublesome elements, i.e. words that the landlord would 'consider the best interests of the tenant ...' in relation to turnover, were omitted
- each of the three tenancy-specific provisions merely clarify in a retail tenancy sense the broad factors under s. 51AC—willingness to negotiate, unfair tactics and obtaining better alternative terms.

Clearly we will watch the application of the new Victorian law with interest.

An overall assessment—the case for industry codes of practice

ACCC experience

One way businesses can achieve more effective relationships within their industry is by the adoption of a voluntary code of practice. Section 51AC specifically refers to these codes, and the ACCC encourages such initiatives.

The ACCC continues to work with the film industry on the Code of Conduct for Film Distribution and Exhibition, which sets out a framework for negotiation between film distributors and exhibitors.

Private hospitals and health funds have also adopted a voluntary code. The main aim of the code is to minimise disputes between hospitals and health funds. It provides for an independent dispute resolution process with final reference to the Private Health Insurance Ombudsman, and it is hoped that the code will lead to improved negotiation processes between hospitals and funds.

The Retail Grocery Industry Code of Conduct was introduced on 13 September 2000. It is a voluntary code, membership of which is comprised of many major grocery producers, wholesalers and retailers. It sets out requirements for production standards, contracts, labelling and packaging, acquisitions, and dispute resolution. There have been some teething problems with the code and a claim by the National Farmers Federation that it lacks teeth. The newly appointed Ombudsman has confirmed shortcomings such as his lack of power to require parties to mediate and lack of protection from victimisation of complainants.

While litigation under the Act remains a major enforcement tool, the ACCC will also consider more systemic and cost effective approaches to achieving best practice among businesses. This is particularly the case in industries where there is a long history of complaints to the ACCC.

The Webb report and the industry roundtable

It is in this context that the ACCC engaged Eileen Webb, a senior lecturer at the University of Western Australia with expertise in trade practices law and retail tenancy, to prepare a paper on the effect of retail tenancy issues and state laws on the TPA and the role of the ACCC.

The report focused on the interaction of the unconscionable conduct provisions of the TPA with the existing state and territory regimes, and the potential for s. 51AC, in particular, to provide remedies for retail tenants. The report also identified a number of options that might facilitate greater harmony between the state and territory retail tenancy regimes.

The roundtable meeting was held on 30 September 2002 in Sydney, chaired by myself. The purpose of the roundtable was to bring together key industry bodies to canvass some key issues and consider the possibility of a nationally consistent approach to addressing these issues.

Staff contacted the following stakeholders regarding participation in the roundtable:

- Australian Retailers Association
- Shopping Centre Council of Australia
- state and territory retail tenancy officials
- Commonwealth Office of Small Business
- Commonwealth Treasury.

The meeting helped identify several concerns relating to disclosure of information between landlords and tenants; particularly turnover figures, the issues facing sitting tenants when negotiating lease renewals and market rental valuations.

The meeting was also an opportunity to discuss the interaction of retail tenancy issues with the TPA, current state regulations and the potential for a nationally consistent approach to retail tenancy regulation.

At the meeting I took the opportunity to clarify that the ACCC has no role in relation to policy issues and the reasons for convening the meeting. The meeting also presented an opportunity to survey the current status of state and territory legislation, the perceived advantages and disadvantages of the various types of code options, and to discuss some of the specific issues outlined above.

A number of positive initiatives were identified, particularly the steps taken by the Australian Retailers Association (ARA) and the Shopping Centre Council on the adoption of a code for a nationally uniform approach to casual mall leasing. In addition an agreement has recently been reached between the ARA and the SCS on a voluntary national code for outgoings.

Conclusion

There is a community acceptance that despite the common law and all the other provisions of the TPA, a 'safety net' is needed for situations where the 'un-level playing field' between small businesses and larger more sophisticated firms is subject to unreasonable abuse.

I suggest a few reasons why the retail leasing industry should be supportive of a balanced approach to this issue.

- Although ensuring compliance with regulations such as s. 51AC can incur administrative costs, it is good business practice for larger companies to achieve this, and play their part as good corporate citizens in ensuring the market operates as effectively and fairly as possible.
- Small businesses are responsible for a significant proportion of economic activity, and comprise a large portion of the customer base of retail tenancy lessors. Presumably a confident and thriving small business sector is good news for the industry and the wider economy.
- A larger business that consistently gets away with acting unconscionably towards its small business tenants could be gaining an unfair competitive advantage over large competitors acting fairly in their business transactions.
- When such behaviour occurs in an industry it is often to the detriment of the industry as a whole unless the misbehaviour is addressed quickly.

It is recognised that protections for small business are not panaceas and that the powers available to the ACCC and other jurisdictions need to be applied with commonsense and consistency. Unsubstantiated or vexatious claims are quickly weeded out by ACCC processes.

There has generaly been a positive response by larger businesses to comply with the new s. 51AC provision. For example, many leading franchisors identify a marked cleaning up of adverse behaviour by fringe elements in that sector which has had to embrace not only the new provision but also the application of a mandatory code of conduct.

With retail tenancy disputes primarily handled in state/territory jurisdictions there is a tendency for regulatory intervention to become inconsistent. A 'good practice' national self regulatory code could provide greater consistency and certainty for both landlords and terants and take some of the heat off individual jurisdicions.

Getting a fair deal in the mango industry

This is an edited text of a speech by Commissioner John Martin presented to the NT Mango Industry Association Code of Practice Forum at Parliament House, Darwin on 14 April 2003.

In September 1997 the federal government released its response to the report of the major parliamentary inquiry by the Reid Committee into fair trading business issues.

The government response was a reform package, 'New deal: fair deal', which put in place a series of initiatives connected to the Trade Practices Act and the role of the ACCC aimed at giving small business a fair go. This centred on a new commercial unconscionable conduct provision of the TPA which defines a range of criteria where the conditions imposed by a larger business on smaller entities are beyond its legitimate economic interest.

As ACCC Commissioner responsible for small business and the ACCC's implementation of the small business program, it is important to discuss the issues related to fair economic dealing in the supply and marketing of mangoes for Northern Territory growers.

The ACCC has been communicating with and subsequently investigating matters related to the mango industry supply chain following serious complaints from growers in 2001. Our actions have not taken the traditional enforcement course. The issues have been complicated and in some cases delicate. The Commission has collaborated with various stakeholders to explore solutions and best practices. At the same time the Commission remained ready to take enforcement action if a clear breach of the TPA could be established.

The ACCC does not discuss matters relating to investigations. In this instance I will speak in broad terms about the issues that were presented at that time as there has already been considerable public comment by some of those involved. I hope what I say will help identify some of the issues which have been causing problems. In many ways, unless the issues are on the table, there is little likelihood of us moving forward. Here is an outline of the dialogue and actions that have occurred in the parallel investigation and education processes.