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DOES THE TRADE PRACTICES ACT 1974 PROTECT SMALL BUSINESS?

AN ACCC UPDATE

Bruce Brown

General Manager, Legal

Australian Competition and Consumer Commission

Introduction.

I propose in this session to give you an update on how the *Trade Practices Act 1974* ('the Act' or 'TPA') is being used to protect small business. The areas that I am going to focus on are:

- Unconscionable conduct (Part IVA); and
- Mergers provisions (principally section 50); and
- Misuse of market power (section 46); and
- In general, the Senate Economics References Committee Report on the TPA and Small Business.

1. Unconscionable Conduct

A key focus of the Act is the promotion of fair trading. For small businesses, the most important of the fair trading provisions in the Act are the unconscionable conduct provisions in Part IVA.

These provisions were introduced to redress the imbalance of bargaining power between small and large business and, in particular section 51AC, are still relatively new and are the subject of a number of cases before the courts.

Although the unconscionable conduct provisions do not currently have the backing of pecuniary penalties which are attached to breaches of the misuse of market power provisions, they still remain an effective tool.

1.1 What 'Unconscionable Conduct' Means

Part IVA of the TPA provides for a series of remedies in cases of unconscionable conduct by businesses against consumers and small businesses.

The doctrine of unconscionable conduct is a common law doctrine based in equity. It generally refers to situations where one party to a transaction has a special disadvantage, and the other party is likely to know of and take advantage of this disadvantage. Factors typically recognised in the cases as tending to result in a special disability include ignorance of important facts known to the other party, illiteracy or lack of education, poverty, infirmity, drunkenness, or lack of assistance or explanation where these are necessary.

Where the stronger party takes unfair advantage of this inequality, they can be found to have engaged in unconscionable conduct, unless the respondent can establish that the transaction was fair, just and reasonable. Where unconscionable conduct is established, the court may award damages or other equitable remedies such as injunctions or rescission of contract.

The first unconscionability provision inserted into the TPA was section 51AA. It gave no specific definition of unconscionability and the section merely

incorporated the common law meaning of the term as it has evolved through court decisions. The common law doctrine of unconscionable conduct has been difficult to establish, due to the requirement to prove a ‘special disability’, and this has been the history of section 51AA to date as well.

Section 51AB expands the common law concept of unconscionable conduct with respect to consumers by specifying factors the courts may have regard to in the consideration of cases. For example, the relative strengths of the corporation and the consumer may be a factor - as might the circumstances where a consumer is required by a supplier to comply with unreasonable conditions.

In 1994 a working party was established under the previous Labor Government to examine a proposal for a new section under the unconscionable conduct provisions in the TPA. The working party reported to Parliament in May 1995 expressing reservations about the constitutional validity of s 51AA and its practical success.

The proposed new section 51AC was designed so as to avoid constitutional arguments by utilising the concept of harsh or oppressive conduct. Whilst the Bill lapsed in its original form, the newly elected Coalition Government raised the issue again in May 1997.

On 1 July 1998, s. 51AC and 51AD were inserted in the TPA by the Trade Practices Amendment (Fair Trading)Act 1998, with the express aim of prohibiting unconscionable conduct of ‘big business’ when dealing with small businesses and consumers. Section 51AC was specifically introduced to expand upon the existing concept of equitable unconscionability provided by s 51AA of the Act. The new section was designed to limit its application by imposing a financial limit of $1 million in a disputed transaction (subsequently raised to $3milion) and also to prohibit publicly listed companies from attempting to bring an action against a small business under this section.

When comparing the application of all the unconscionable conduct provisions, section 51AC goes one step further in allowing the court to consider all of the circumstances in determining whether the conduct has contravened the Act. Whilst s 51AA was designed to expand on the notion of an ‘equitable cause of action for unconscionability’ which enables relief where a party suffering has a special disadvantage or disability of which another party unconscionably took advantage of the situation, s 51AC (and in a more limited version, s 51AB) has been worded so as to encapsulate a wider range of transactions in which the court may find unconscionable conduct, without requiring proof of a special disadvantage or disability.[1] -

And so we have section 51AA, which is of general application, but we will see is proving to be of limited use, and we have the more prescriptive section

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[1] Buckley, R. Sections 51AA and 51AC of the Trade Practices Act 1974: The Need for Reform.

51AB which is meant to be a remedy for consumers and 51AC which is meant to be a remedy for small businesses.

Some similarities do exist between s 51AA and s 51AC. Merity notes in his article that the sections are very similar in that “instead of dealing with questions of unfairness in the terms of the contract, they focus on the conduct on the part of the parties to the contract”.[2] Furthermore, Knoll argues that bargaining that is considered hard, yet not contravening the Act in relation to misleading or deceptive conduct, may still be scrutinised in relation to unconscionable conduct, with cases such as Amadio and Blomley v Ryan tending to indicate this.[3]

1.2 Section 51AC: the Specifics.

Section 51AC specifically prohibits one business dealing unconscionably with another. What has often been referred to as a ‘shopping list’ of factors, ie the provisions in s 51AC sub-s (3) and (4), are designed to aid the Court in determining unconscionable conduct. The Court may have regard to all or none of the factors when making a determination, and may also consider any other factors that they deem relevant.

The specific factors the courts may consider are:

(a) the relative strengths of the bargaining positions of the supplier and the business consumer; and

(b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar

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[2] Merity, P. The Return of the Conscience: Section 51AC of the Trade Practices Act 1974

[3] Knoll, D. Protection against unconscionable business conduct – some possible applications for s 51AC of the Trade Practices Act 1974

transactions between the supplier and other like business consumers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the business consumer:

  (i) any intended conduct of the supplier that might affect the interests of the business consumer; and

  (ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and

(j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and

(k) the extent to which the supplier and the business consumer acted in good faith.

Some of these factors describe conduct that goes beyond what traditionally constituted unconscionability. For example, one factor directs attention to the extent to which a supplier, say, a landlord, was willing to negotiate the terms and conditions of any contract for the supply of good and services, say, a lease, with the business consumer.

1.3 Industry Codes of Practice

It should be noted that section 51AC specifically refers to the requirements of industry codes as a factor to which the Court may have regard in determining whether there has been unconscionable conduct by a corporation.

Section 51AC(3)(g) refers to the effect of any applicable industry code – of which there is currently one – the Franchising Industry Code of Practice.

Section 51AC(3)(h) refers to the effect of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with the code. These non prescribed codes include the Retail Grocery Industry Code, the Cinema Code, the Fruit Juice code and the Timepiece and Jewellery Code.

These paragraphs amount to a major endorsement by the Government of industry codes of practice and demonstrates a desire by the Government to allow industries to set their own standards of conduct.

Complaints, investigation and enforcement actions by the ACCC for unconscionable conduct have primarily been in mainly in four areas;

- franchising,
- retail tenancy
- primary producers in their dealings with businesses further down the supply chain; and
- mortgage contracts and guarantees.

1.4 Franchising

The franchising industry has traditionally been a source of complaints to the ACCC about the conduct of franchisors. The introduction of the mandatory Franchising Code of Conduct in 1998 was a response to the particular recurring issues in the franchising industry and that initiative has clearly gone a long way to improving industry practices. However, the ACCC still receives complaints from franchisees in relation to the following issues:

disclosure documents are not provided to franchisees, or the disclosure documents are inadequate or misleading;

- franchisors denying the existence of a franchise agreement to avoid the operation of the mandatory Franchising Code of Conduct;
- termination of franchise agreements;
- franchisor has misled franchisee for example, in relation to; potential earnings, nature of sales territory, level of support or supply of goods and services;
- franchisor refuses to negotiate with franchisees, often in relation to management issues; and
- franchisor refuses to renew the franchise agreement.

1.5 Retail Tenancy

The ACCC receives significant numbers of complaints from tenants, who feel that their landlord is dealing with them in an unconscionable manner. Concerns raised with the Commission include:

- landlords reneging on undertakings negotiated but not written into contracts;
- landlords capitalising on technical breaches of retail leases or of retail tenancy legislation, for example, when a tenant exercises an option to renew a lease;
- landlords unreasonably misusing appeal mechanisms as a tactic to exhaust tenant resources;
- landlords misrepresenting potential earnings and benefits of particular sites then refusing to negotiate with tenant when projected earnings are not realised;
- landlords refusing to negotiate with tenants who are affected by shopping centre developments.

1.6 Relevant Cases

ACCC v Leelee Pty Ltd[4]

This was our first test case. It involved the ACCC bringing an action against a lessor of food stalls in an international food hall in Adelaide. In his decision on the substantive issue, Mansfield J specified that regardless of the size of a claim, small business should no longer be deterred from pursuing actions under sections such as 51AC. He stated at 68 that:

> "It is likely to be the case that many actions under s 51AC and 51AB that the individual losses of the small business or businesses, or of the consumers, will be relatively small. Indeed, often the fact that individual losses are small leads to the individual trader or consumer not pursuing the claim. The Legislature has enacted provisions such as s 51AC to enable unconscionable conduct (if established) to be penalised notwithstanding such considerations."

The Court declared that Leelee had engaged in unconscionable conduct by:

- consenting to, or giving approval for, another tenant to infringe on the exclusive menu entitlements conferred by Leelee on one of its tenants; and
- by specifying the price at which its tenant sold their dishes in a manner which unfairly discriminated against, or inhibited, the tenant's ability to determine the prices at which its dishes were sold in competition with another tenant.

In dealings with one of the tenants, the landlord also withheld crucial information about changes to the lease agreement and failed to honour existing terms of the contract, and would not allow them to transfer the lease.

In reaching its decision, the Court considered:

- the parties' relative commercial strengths;
- whether undue influence was exerted;
- whether the contract exceeded what was reasonably necessary for the legitimate interest of the supplier;
- the requirements of any applicable industry code; and
- whether there was evidence of disclosure, good faith and willingness to negotiate on the part of the landlord.

The Court declared that the landlord had acted unconscionably, and granted injunctions preventing any similar behaviour in the future. The decision provides a concrete example of conduct that will be regarded as more than just tough commercial behaviour. It also shows that a retail tenant can look beyond the remedies set out in its lease to the TPA for protection in dealings with a landlord.

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[4] ACCC v Leelee Pty Ltd [1999] FCA 1121

ACCC v Simply No Knead (Franchising) Pty Ltd[5]

The second case taken to the Federal Court by the ACCC dealt with disputes between a franchisor of a bakery franchise and a number of its small business franchisees.

It was alleged that, among other things, Simply No Knead ('SNK') withheld obligatory disclosure documents unless each franchisee gave written consent to renew the agreement, and also competed directly with the franchisees in a way that was calculated to harm their businesses.

The Court found this conduct to be 'unreasonable, unfair, harsh, oppressive and wanting in good faith.' The case is particularly important because the Court established a number of principles to apply when utilising the shopping list of factors set out in section 51AC (3).

The Court found that in cases where a franchisor is seen to be exerting pressure and unfair tactics on franchisees, the franchisor, or their acting party, will be held to have contravened s 51AC (3) (d). Moreover, the alleged intimidation by the franchisor, combined with the making of economic threats and pressure in relation to the supply of goods, may also amount to a contravention of s 51AC (3) (d), as such matters are crucial to the operation of the franchise.[6]

It appears that there has been an acknowledgment by the Court that where a franchisor engages in conduct which adversely affects the franchisee's business, then such conduct may be found unconscionable. This may include conduct where the franchisor knows it to be detrimental to the franchisee, and is likely to breach s 51AC (3) (k) of the TPA which provides for the franchisor demonstrating a lack of good faith in regards to their relationship with the franchisee. Other conduct likely to breach this section would include competing with the franchisee in their business area and media advertising stating that franchised products are available at independent retail outlets in the franchisees' territory.

Quite often a franchisee will be the subject of what may be considered bullying tactics by the franchisor. The Court established in this case that such behaviour can be characterised as harsh or oppressive, amounting to a contravention of s 51AC (3) (k).

> "Having regard to the nature of the relationship that ought to exist between franchisor and franchisee, SNK's failure to negotiate in July and August 1998 was unfair, unreasonable and harsh."

In this case, Sundberg J noted that SNK's refusal to consult, its unilateral imposition of conditions, refusal of supply, intimidation, intransigence and lack

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5 *ACCC v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365, see also (2000) ATPR 41-790

6 Ibid, p 39

of good faith contributed to the contravention. Such a judgment tends to indicate that the Court will not rule on a single factor and that the overall conduct will be considered when making a determination.

A refusal to deliver goods or orders is also likely to result in a contravention of the Act. Sundberg J found that where a franchisor, or their distributor, failed to deliver goods or orders to a franchisee for no apparent reason amounted to the exertion of pressure on, and the use of unfair tactics against, the franchisee within s 51AC (3) (f). Such incidents are likely to occur on a daily basis in the business place, leaving many small businesses to feel that they are at the mercy of a franchisor or distributors. However, the decision in this case has provided an avenue for small business to stand up to those enforcing unfair conditions on them.

In that particular case, the Commission submitted that SNK's intended conduct was likely to affect the interests of their franchisees, yet failed to disclose this to them, resulting in a contravention under s 51AC (3) (i). While his honour did not reach a formal conclusion on this matter, he indicated that he believed that it was unlikely to be the case, though his conclusion tends to indicate that he believed that SNK had acted in this way in order to drive out the franchisees.

This was also the first case in which a Managing Director was held accountable for unconscionable conduct. Cameron Bates was held to have contravened s 51AC and 51AD as he was the person taken to have acted for SNK, resulting in the Court making him accountable for the actions of the company. The Court held that he was directly knowingly concerned in those contraventions for the purposes of s 75B (1) (c). Such a finding should send a warning to directors of corporations that they too can be held accountable for any wrongdoings in relation to conduct caught by s 51AC.

Simply No-Knead clarifies the distinction between the three TPA provisions dealing with unconscionable conduct. It seems clear that while the meaning of "unconscionable conduct" in section 51AA will be limited to the meaning it has in the case law, "unconscionable conduct" for the purposes of sections 51AB and 51AC has a broader meaning. More specifically, it is not necessary for a person wanting to establish a contravention of sections 51AB or 51AC to show that the weaker party was in a position of "special disadvantage" and that the stronger party took unfair advantage of that disadvantage (which is the requirement for unconscionable conduct in equity, or unwritten law).

The Simply No-Knead decision also demonstrates that the Federal Court will look to the criteria specified in section 51AC in deciding whether unconscionable conduct has occurred. Importantly, it establishes that those criteria do not limit what types of conduct the court may consider.

ACCC v Cheap as Chips Pty Ltd[7]

Following action by the ACCC, the Cheap as Chips domestic cleaning franchise holder was found to have terminated a franchise without following the procedures contained within the Franchising Code of Conduct. The Federal Court granted consent orders declaring that the franchisor contravened the Code by failing to negotiate with franchisees in accordance with the procedures set out in the Code; and by terminating a franchise without following the procedures outlined in the Code.

The Court also declared that the franchise's director attempted to contravene the Code by trying to prevent a franchisee from associating with other franchisees for lawful purposes.

Cheap as Chips was restrained from engaging in similar conduct, and ordered to provide franchisees with reasonable access to records, notify all current franchisees about the outcome of the proceedings, pay compensation, interest and the ACCC's legal costs. The company also implemented a trade practices compliance program.

In this decision, the Court again recognised the special nature of franchising relationships. A franchisor should negotiate disputes with a franchisee, rather than force terms upon the franchisee by withholding work or terminating the franchise.

Clearly, such cases have, to some extent, clarified the factors the court will take into account when examining an action under 51AC.

ACCC v Suffolke Parke and Gregory George Bradshaw[8]

Pressure in a retail tenancy agreement

This case concerned a franchisor which leased premises to a franchisee, who operated its franchise 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 unreasonably refused to allow the franchisee to sublet the shop again, despite being aware that the franchisee relied on the rental income to maintain a viable franchise.

When the franchisee sought mediation under the Franchising Code of Conduct, the franchisor refused to attend.

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[7] *ACCC v Cheap as Chips Pty Ltd* Unreported Decision. Matter V354 of 1999 FCA.
[8] Federal Court of Australia (SA) Proceeding no. S159 of 2001.

The court granted consent orders declaring that the franchisor 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, by consent, the franchisor to compensate the franchisee, pay the ACCC's costs and implement a trade practices compliance training program.

***ACCC v Daewoo Australia Pty Ltd and Daewoo Heavy Industries and Machinery Ltd and Mr EH Kang*[9],**

Failing to disclose intended future conduct

A machinery manufacturer entered into an agreement with one company, Porter Crane, after representing to it that it would be the exclusive dealer in Queensland for certain heavy machinery for the term of the agreement. Porter Crane was also led to believe that the agreement included an option to renew, and that it would be ongoing and long term. The manufacturer did not, however, intend to appoint Porter Crane as its exclusive Queensland dealer but in fact intended to appoint a national dealer whose territory could include Queensland. The manufacturer did not inform Porter Crane of this before contracting.

The manufacturer subsequently appointed Construction Equipment Australia (CEA) as a Queensland dealer and gave effect to this agreement, to the detriment of Porter Crane, by:

- Refusing to supply Porter Crane with machines when it was able to do so, and instead supplying CEA;
- Supplying machines to CEA at lower prices than it supplied Porter Crane;
- Referring sales leads to CEA instead of Porter Crane;
- Relying on the strict effect and wording of the agreement with Porter Crane to refuse to extend or renew its agreement.

The court granted consent orders declaring that the manufacturer had engaged in unconscionable and misleading and deceptive conduct and granted injunctions, by consent, preventing similar conduct in the future. The court ordered, by consent, the manufacturer and its director to undergo trade practices compliance training in the event that they resume trading in Australia.

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[9] Federal Court of Australia (Sydney) Proceeding no 1627 of 2001.

ACCC v Avanti Investments Pty Ltd and Giuseppe Rocco Barbaro[10]

Primary industries

This case concerned a lessor that 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 limited the allocation of water available, despite the lessor claiming that the agreements were unchanged.

The lessor made representations to the farmers that it was entitled to terminate the lease agreement and that unless the farmers signed the new leases they would have to vacate the land immediately.

The lessor transferred a large proportion of the water allocated to the bore elsewhere, exposing the farmers to excess water charges, without informing the farmers. Many of the farmers lacked formal education, English language skills or commercial experience.

The Federal Court declared, by consent, that the lessor engaged in unconscionable conduct under s. 51AC.

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

Automasters Australia Pty Ltd v Bruness Pty Ltd & Anor[11]

Failing to observe a good faith requirement

This case was instituted by a franchisee rather than the ACCC, but it is instructive.

This case concerned disputes that developed in an automotive servicing franchise system. The franchisor alleged that the franchisee had breached the franchise agreement, and obtained a temporary injunction preventing the franchisee from using the business name and trademarks.

When the franchisor sought a permanent injunction and damages for breach of contract, the franchisee filed a counter claim alleging that the franchisor had breached the good faith provision in the agreement and engaged in unconscionable conduct.

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[10] Federal Court of Australia (SA) Proceeding no. S51 of 2001
[11] [2002] WASC 286.

The court found that the franchisor:

- terminated the franchise agreement on the basis of information it was not sufficiently certain of
- proceeded to terminate the franchise immediately in spite of an independent quality assessment recommending otherwise
- withheld details of an independent quality assessment report that were favourable to the franchisee
- failed to comply with a term of the agreement requiring the franchisor to act in good faith
- was motivated by irrelevant matters in seeking to terminate the franchise
- purported to terminate the franchise over an amount of money that 'could not be said to impact on the (franchisor's) legitimate commercial interests'
- failed to attend mediation, in breach of the Franchising Code of Conduct.
- The court found that the franchisor was determined to find fault in the way the franchisee's business was being managed. It found that the franchisor was 'not really interested in explanations and attempts to sort out matters… but was looking for an opportunity to bring the Franchise Agreement to an end.'

The court found that the franchisor had engaged in conduct that was 'serious, unfair and oppressive and showed no regard for conscience'. The court declared that the franchisor had engaged in unconscionable conduct in breach of s. 51AC of the Trade Practices Act, and had breached the Franchising Code of Conduct. The court declared that the franchise was not terminated and awarded damages to the franchisee.

The case demonstrates that if a franchisor seeks to terminate a franchise agreement because of an irrelevant issue, this may be unconscionable.

It should not be thought, however, that the course of unconscionability has always been profitable for the ACCC. You will note that a number of the key successes described above were by consent orders – and their precedent value is therefore limited. There have been a number of critical failures for us as well, principally in our attempts to get the courts to take a wide view of the section 51AA ('common law unconscionability') provision.

ACCC v Berbatis Holdings Pty Ltd[12]

Often referred to as the Farrington Fayre Case, this matter was instituted by the ACCC in 1998 under s.51AA, against the landlord of the shopping centre formerly known as Farrington Fayre in Leeming, Perth, WA, namely CG Berbatis Holdings Pty Ltd, GPA Pty Ltd and P&G Investments Pty Ltd, and their representatives. It was alleged that the landlord implemented a strategy

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[12] ACCC v Berbatis Holdings Pty Ltd v ACCC [2001] FCA 757

in 1996 and early 1997 whereby they refused to grant renewals, variations or extensions of leases to three tenants of Farrington Fayre unless those tenants withdrew from legal proceedings before the WA Commercial Tenancy Tribunal. The shopping centre also wanted to impose certain conditions on any lease renewals that did take place. The ACCC argued that these tenants were at a special disadvantage when bargaining with the owners because of their financial dependence on the lease negotiations.

It was in ACCC v Berbatis Holdings Pty Ltd[13], that French J said:

> "…The function of the judge in applying s 51AA will differ little from that of judges deciding cases under s 51AB or s 51AC, albeit they do not have to consider the contemporary limits imposed on the application of unconscionable conduct by equitable doctrines."

He further stated that judges applying s 51AB or s 51AC would be required to make a primary judgment of unconscionable conduct, whereas the assessment of the judge under s 51AA will be at least notionally a second order or derivative assessment.[14] The judge deciding a case under s 51AA will have regard to the case law on unconscionable conduct generally, but in the end will make an assessment within the relevant class of case at equity.

French J also noted at p. 335 that the prohibition of unconscionable conduct in sections 51AB and 51AC was not limited by reference to 'specific equitable doctrines' and added that the Court could include undue influence and duress and other issues which fall outside the equitable doctrines, notably s 51AA, in determining whether there has been a contravention.[15]

French J handed down his decision in September 2000 that the conduct of the owners and their representatives, in one of the pleaded cases, was unconscionable. The landlord subsequently appealed to the Full Federal Court and the ACCC cross-appealed. The appeal was upheld and the ACCC's cross-appeal was dismissed. The ACCC subsequently filed a special leave application with the High Court and the decision was handed down in November 2003, dismissing our appeal.

ACCC v Samton Holdings Pty Ltd[16]

The Samton Holdings case was instituted in February 1999 under s.51AA, alleging a landlord company had engaged in unconscionable conduct towards a small business tenant. The matter centred on whether the action by the landlord, in extracting an additional $70,000 from the tenant to renew the lease once the tenant had inadvertently overlooked the deadline for the take-up option (referred to as 'key money'), was unconscionable.

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[13] Ibid
[14] Ibid
[15] ACCC v Berbatis Holdings Pty Ltd [2000] FCA 1376
[16] ACCC v Samton Holdings Pty Ltd (2000) ATPR 41-791

In November 2000 Carr J dismissed the ACCC's application against Samton Holdings Pty Ltd and the six individual landlords stating the conduct towards the lessors of a lunch bar was 'avaricious and harsh', but fell short of being unconscionable. The ACCC filed an appeal, which was heard by the Full Federal Court in May 2001. The decision was handed down on 7 February 2002. The Full Court dismissed our appeal.

The Full Court engaged in a lengthy discussion about the concept of unconscionability and concluded that, in effect, we had not been able to demonstrate any particular disadvantage that the tenants were suffering under. If anything, they noted the tenant was a relatively experienced businessman, who had access to competent legal advice. The option open to the tenant was to take a $145,000 loss, or the $75,000 loss offered by the landlords.

These decisions have made the ACCC pause in its views on the effectiveness of section 51AA.

ACCC v 4WD Systems Pty Ltd[17]

This company, and its directors Raleigh Hoberg and Thomas Hewitson, based in Adelaide SA, offered franchises around Australia for distribution and sales of 4 wheel drive parts and accessories.

An investigation of franchisee complaints by the Darwin office led to the ACCC instituting proceedings against the parties in the Federal Court on in September 2001. The ACCC alleged that the parties:

Refused to deliver, or were deliberately slow in delivering stock ordered by the franchisees pursuant to the franchise agreement;

Supplied stock to the franchisees which was regularly of poor quality or damaged or unable to be fitted to customers' vehicles, so the franchisees were regularly required to provide refunds to their customers;

- Refused to provide refunds to their franchisees for goods that were faulty;
- Falsely represented that differential locks it supplied to franchisees were of a particular standard, quality, value, grade, composition, style or model;
- Did not disclose to some of the complainants the significant supply difficulties in relation to the Lock Right and the first and second respondents continued to advertise and promote this product and insist on the complainants taking money from customers for orders despite the difficulty with supply;

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[17] [2003] FCA 850

- Represented to Page he had not purchased a franchise in circumstances where Page had paid a fee and been performing in a franchise for some time
- Represented to Werner that all of the other franchisees had a franchise agreement when they did not and threatened to stop supply of products to Werner if he did not sign a written franchise agreement
- Represented to some of the complainants that they had not been provided with franchise agreement due to upcoming change in the law but nonetheless refused to provide some of the complainants with franchise agreements after the change in the law
- Refused to provide franchisees with written franchise agreements;
- Refused to provide franchisees with a current disclosure document prior to entering their franchise agreements and refused to negotiate with franchisees in relation to the franchise agreements;
- Sold its products directly into the franchisee's franchised areas in contravention of the franchise agreements;
- Failed to meet the requirements of the applicable industry code;
- Exerted undue influence, pressure and/or unfair tactics on a franchisee; and
- Did not act in good faith in its dealings with franchisees.

We argued the parties' conduct was engaged in as part of a deliberate policy by the respondents to expand their franchise business by strategies the respondents knew or should reasonably have known would be prejudicial to the interests of the franchisees, including secret strategies not revealed to prospective franchisees prior to the relevant franchise agreements being entered into.

Justice Selway handed down his decision on 13 August 2003 and declared that 4WD Systems Pty Ltd had breached section 52 of the Trade Practices Act in that:

- it had misled a franchisee in relation to the time it would take to supply goods;
- it had misled a different franchisee as to the time it would take to supply goods, and as to the quality of those goods; and
- it had misled another franchisee as to quality of goods.

He further found that it had breached section 53(eb) by making a false representation about the place of origin of a four wheel drive differential lock and had contravened the Franchising Code of Conduct as it had not provided mandatory disclosure documents to a prospective franchisee.

Justice Selway issued injunctions against both companies restraining them for three years from entering into franchising agreements without giving to any prospective franchisee detailed information as to the quality of the goods that will be supplied and the time of delivery of such goods.

Mr Hoberg was found to be relevantly involved in the breaches and was ordered to disclose the proceedings against the companies to any prospective franchisee during the next three years. Mr Hewitson was also found to be relevantly involved but Justice Selway exercised his discretion not to make orders against him.

<u>But the court found that it was not satisfied that the conduct constituted unconscionable conduct under section 51AC of the Act.</u>

Justice Selway found that the evidence of Raleigh Hoberg, while at times false or misleading, generally was consistent with a salesman with an enthusiastic approach to business and in fact referred to some representations of Hoberg as "puffery" and, given his character, that he "was not deliberately dishonest or manipulative" and this was "only to be expected". The issue of Hoberg's credibility was a discretionary one for the judge to determine and it is notoriously difficult to over-rule.

The ACCC were concerned that, in this case, the judge appeared to deal with each incident individually or apparently collectively, rather than having regard or sufficient regard to "*all the circumstances"* as required by section 51AC without regard to the context and circumstances in which the particularised conduct took place as required by the section.

In our submission to the Senate Small Business Review, the ACCC did not call for widespread changes to the Act's unconscionable conduct provisions. We did recommend that the imposition or exploitation of an unfettered unilateral variation clause, by businesses in a superior bargaining position, should be a factor that a court may consider.

We are aware that a number of organisations did called for a number of issues to be addressed, these include:

- late payments;
- access to justice for small businesses;
- big businesses misusing a market power to the detriment of small businesses;
- termination of contracts without just cause or due process; and
- standard form contracts offered on a take it or leave it basis.

On the second of these points, the ACCC welcomes the recent legislative change which allowed state jurisdictions to draw down the unconscionable conduct provisions of the TPA. New South Wales, the ACT, Queensland and Victoria have already done this. By doing so, small businesses will have easier access to justice, often in a less expensive and quicker environment such as a tribunal. On this point, however, it is worth noting that the Senate Economics Reference Committee have recently recommended that the Federal Magistrates Court be given jurisdiction over unconscionable conduct matters, which should lead to a cheaper system of litigation within the Commonwealth jurisdiction anyway if it is ultimately adopted.

We will note with interest the outcomes in this area.

The Senate Committee brought down its report on 3 March 2004. It did make a small number of recommendations about section 51AC:

- Removal of the $3 million threshold test (the government senators' minority report recommended setting it at $10 million);
- The imposition or exploitation of unfettered unilateral variation clauses by businesses in a superior bargaining position should be a separate statutory factor for determining whether conduct is unconscionable; and
- That section 51AC should apply to government agencies.

So, it can be seen that the unconscionability laws still have a way to go in their development. We still believe, however, that in the same way that section 52 TPA has become the weapon of choice for breach of contract proceedings, Part IVA will eventually become the weapon of choice for unfair contract proceedings.

Merity has argued that:

> "Section 51AC will eventually become the remedy of choice in commercial matters involving mistake, duress, undue influence, forfeiture, penalty, unjust enrichment and estoppel in a commercial context."[18]

2. Section 46 – Misuse of market power

- Section 46 prohibits a corporation that has a substantial degree of power in a market from taking advantage of that power for the purpose of:
- eliminating or substantially damaging a competitor
- preventing the entry of a person into that or any other market, or
- deterring or preventing a person from engaging in competitive conduct in that or any other market.

The section is a necessary complement to other prohibitions against cartel arrangements and vertical restrictions. It is about protecting the process of normal competition, dealing with a situation where a business with substantial market power uses that power to damage a competitor.

It is important not to confuse the protection of competition with the protection of individual competitors.

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[18] Merity, P. The Return of the Conscience: Section 51AC of the Trade Practices Act 1974

Following recent disappointing court decisions on section 46 (particularly in the High Court), the ACCC believes that there is a need to give guidance to the courts and certainty to the business community, and to bring the section on to line with what we believe Parliament originally intended that the role of section 46 should be.

In our submission to the Senate Economics Reference Committee Review of Small Business and the TPA, we argued that further guidance could be provided to afford clarity for businesses and the courts on:

- the threshold of 'a substantial degree of power in a market' is lower than the former threshold of substantial control;
- that 'substantial market power' does not mean a business is absolutely free from constraint;
- that more than one business can have a substantial degree of power in a market; and
- evidence of a business' behaviour in the market is relevant to determining substantial market power.

There should also be clarification of the concept of ‘taking advantage' in regard to market power of section 46 as it has proved difficult to understand and has been creating uncertainty.

In addition, we argued that in predatory pricing cases a finding of recoupment of losses should not be required to establish a breach of the Act. Such an amendment would be consistent with Parliament's original, stated intent.

The Senate Committee’s report, handed down in March this year, recommended that the TPA be amended:

- to make it clear that the ‘substantial degree of market power’ threshold is lower than the pre-1986 threshold of substantial control, and set out various matters to be considered by a court in determining whether that threshold is met;
- to specify matters that the Court should consider in determining whether a company has taken advantage of its market power, including whether the conduct is materially facilitated by, or the company relied upon, its market power and would the company be likely to engage in particular conduct if it lacked a substantial degree of market power;
- to specify that the Court may have regard to the capacity of the company to sell goods or services below their variable cost, regardless of whether or not it would subsequently recoup any losses;
- to state that a company with substantial degree of market power in a market shall not take advantage of that power in any other market for a proscribed purpose.
- to specify that the ACCC or any private litigant can seek divestment as a remedy for a contravention of section 46.

Some of these recommendations were specifically rejected by the Dawson Report in 2003, so it is still not clear which elements of the report, which government senators attached their own separate report to, will be picked up and introduced as a bill into Parliament.

3. Mergers Issues

Under section 50 of the TPA, the ACCC may apply to the Federal Court for an injunction to prevent a corporate merger or acquisition that is likely to result in a substantial lessening of competition in a particular market.

Mergers which have anti-competitive effects, such as where the number of competitors is reduced, affect the incentives for firms to behave in a competitive manner. Anti-competitive mergers are prohibited because competition enhances consumer welfare through lower prices and greater choice, and market efficiency as competition puts pressure on firms to reduce cost.

Section 50 is without a doubt one of the more controversial provisions of the TPA. If you looked at the submissions to the Dawson Review of the TPA, it seems that more trees gave their lives to the section 50 debate than to any other.

3.1 Definition of 'market'

A key factor in determining whether section 50 is applicable is determining what is the relevant market that is affected by the merger or acquisition.

For mergers and acquisitions, the definition of a market has recently been extended from a substantial market in Australia, a State, or a Territory to also include "a region of Australia" **(s.50(6))**. Previously, 'market' was defined to only mean a 'substantial market for goods or services in Australia, in a State, or in a Territory'. The ACCC argued that a market can be less than a State or a Territory, and may be a particular region ('sub-markets') and what little judicial consideration there has been on the subject would appear to concur with this view.[19] The change therefore confirms the current practice of the ACCC and the courts in considering the competitive impact of proposed mergers or acquisitions on substantial regional markets. Note, however, that the 'substantial market' test still has to be satisfied, which means that the recognised economic fundamentals of what is a market (eg substitutability, and geographic dimension) must be present, and the market still needs to be substantial. An example would be the recent Healthcare/MN acquisition of Australian Hospital Corporation; it was deemed that the provision of private health care facilities in the Gold Coast area amounted to a substantial market and the ACCC required divestment.

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[19] Australia Meat Holdings Pty Ltd v TPC (1989) ATPR 40-932 at 50,011; Dowling v Dalgety Australia Ltd (1992) 34 FCR 109.

The Senate Economics Reference Committee has also made a number of recommendations in relation to the merger provisions of the TPA:

- That provisions should be introduced into the TPA to ensure that the ACCC has powers to prevent creeping acquisitions which substantially lessen competition in a market (although the government senators did not support this recommendation); and
- That the TPA be amended to provide the ACCC with ‘cease and desist’ powers like those held by the NZ Commerce Commission (this was not supported by the government senators, nor by the Dawson Committee and was not sought by the ACCC).