



Harper Panel

The appropriate small business reform agenda

This submission is being made by me in my individual capacity and not as either representing the Law Council of Australia, nor my firm Herbert Smith Freehills. It represents the views about the above subject matter that I have held for many years, during the time that I was Chairman of the then Trade Practices Commission (the TPC- now the Australian Competition & Consumer Commission (the ACCC)) and since as a member of the profession. I maintained this view whilst I was partner of two law firms (Allens Arthur Robinsons and Freehills (now Herbert Smith Freehills) as well a member of the executive of the Business Law Section of the Law Council of Australia, and a practitioner interested in competition law .

My strong belief is that we need to adopt a new approach in this country dealing with some of the problems concerning the small business community (I use the term in a global sense and I do not attempt to define it – the question of the definition represents a considerable task for the review panel.

I have discussed my views with the current chairman of the ACCC, Rod Sims, as well as certain ex-commissioners that body. I have also discussed it with my colleagues in the profession and the members of the two law firms in which I have been a partner. It is inappropriate, in my view, for further reforms to be included into the competition statute (now the *Competition and Consumer Act – the CCA and* associated legislation, to cope with the difficulties that the small business community face in a number of different scenarios.

The current Minister for Consumer Affairs, who is also responsible for the root and branch review of competition law and policy , Mr Bruce Wilson, has been an outspoken



champion for the small business sector and believes that it is feasible to include in the CCA a range of reforms to enhance the unconscionable conduct provisions now contained in the Australian Consumer Law, as well as other reforms. His position is enhanced by the current inquiry into the introduction of unfair contract law. I have not supported the view and do believe that we should promote the interests of small business, and provide protection and comfort to the small business sector where they feel they are disadvantaged in contractual relationships. By relying on the competition statute. I was an outspoken critic, during my term as chairman of the TPC, of the attempts by the then Federal Government (the Hawke government) to introduce reforms into the Trade Practices Act (the TPA) which were aimed at 'protecting' small business activity in this country by relying on that legislation and the TPC, and the ACCC, as the main " forums" and avenues to achieve these aims. One of the last documents I signed as Chairman of the TPC was a report, agreed to by all of the commissioners of the TPC, in which we strongly recommended against the introduction of unconscionable conduct provisions in the TPC to protect the position of small business activity where the relevant conduct/ terms of dealing etc were regarded as unfair or unconscionable.. The government did not accept our advice.

A few years later a further report was prepared for the Federal government by a committee of the Parliament, recommending what became section 51AC of the then TPA to be introduced. That legislation was opposed by me at the time as I had foreshadowed whilst chairman of the TPC; I believe that it was also opposed by the then Trade Practices Committee of the Law Council of Australia (now the Competition and Consumer Law Committee); I believe that many sections of the business community were concerned about that provision being included in the TPA..

The major reason for our opposition (and this is still my position today) was that the relevant provisions focused on the need to protect individual competitors rather than furthering the policy underpinning the legislation – the promotion of competition. This policy was highlighted eloquently, in my view, by the High Court of Australia in the



Queensland Wire case – competition is a ruthless process and is not intended to protect individual competitors. Section 46 of the TPA in its early form, and in its current form, as well as its current form, may suggest to some that individuals should be "protected" in certain scenarios not linked to assessing the competitive process, but that was not a true reflection of the intention of the legislation.

Our courts, including our High Court, have continually rejected the proposition that the section is intended to protect individual competitors – it is intended to protect the competitive process. The introduction of a section like the former s51AC (now sections 21-22 of the Australian Consumer Law) creates a very real dilemma for our courts and those advising in this area.

Although the original sections (s.51AA of the TPA) are now is present in the Australian Consumer Law their main is still to protect individual businesses (and of course consumers) but in a context where it appears that the individual players are not necessarily effected by the rigour of the competitive process, but in the main simply having to face the brutality of competing against larger or more efficient businesses who seek to enhance their position in the market by the use of sensible and efficient business activities. There is, in my view, no reason strike down these actions because competition is not being lessened in any significant way and consumers are usually advantaged bythe operation of a strong competitive process resulting in lower prices, a range of competitive terms and a more vibrant set of market conditions.

In addition, our courts have regrettably not interpreted the unconscionable conduct provisions of the current legislation in the manner that reflects the intention of Parliament, both at the time of the introduction of the original pieces of legislation, as well as the amendments which were intended to enhance its operation and to ensure that the courts provided a more generous interpretation of the concept of unconscionability than they had been doing for years.



The decision of the Chief Justice of the New South Wales Supreme Court, Spigelman CJ, in the case of *Attorney Generals (NSW) v World Best Holdings Limited [2005] NSWCA 261* qualified the language as used by Parliament in the unconscionable conduct provisions which now were to be found in a range of statutes, by the introducing the concept of 'moral obloquy' [see para 121]. This intervention was misconceived in my view. It has had a damaging impact on the way the section has been interpreted. The Full Federal Court in the recent decision of the *ACCC v Lux Distributors Pty Ltd [2013] FCAFC 90*, seems to have provided a possible 'correction' in the way the courts may interpret the notion of unconscionable conduct. However, more recently, in the Victorian Court of Appeal in *Director of Consumer Affairs v Scully (2013) 303 ALR 168*, that court seems to have discounted the more generous interpretation of the Full Federal Court led by Chief Justice Allsop. We shall have to wait and see how the High Court deals with this particular question if given an opportunity (leave to appeal the Lux decision was denied) – the High Court has certainly provided some less than encouraging views in the *Kavakas v Crown Melbourne Limited (2013) 87 ALJR 708* (a decision delivered well before the Lux decision)..)

Part of our problem in the interpretation of the unconscionable conduct provisions is that some of our judges (indeed the majority of them it would appear) believe that the introduction of the unconscionable conduct concept " could result in the transformation 'of commercial relationships in a manner which ... was not the intention of the legislation (see *Attorney General (New South Wales) v World Best Holdings Limited [at para 121]*). Chief Justice Spigelman was concerned the contract law would be considerably undermined. With respect that is not accurate or a correct reflection of what Parliament intended as the amendments to the legislation clearly indicated by providing the courts with a list of criteria they could and should take into account in evaluating whether a contract is unconscionable. (see my recent comment on these matters in (2014) ALJ pp396-399).



I support the proposal that small business should be appropriately protected in ways that are reasonable and do not undermine the effective workings of one of the most significant and important pieces of commercial legislation we have – the *Competition and Consumer Act*; concepts of fairness and related matters are dealt with in a number of different ways by the law. The common law recognises the concepts of economic duress; New South Wales has had in place for some years the *Contracts Review Act* – and it appears to be operating effectively; there are provisions in a range of statutes in which concepts of unconscionability and similar issues are addressed in an effective and sensible way, in my respectful view; and it would be far better if changes in the ways small businesses are to be treated in the context of the enquiry being conducted were taken out of the competition statute (where there will be a resistance shown by judges to modify the notion that competition can be ruthless and that competitive activity should be assessed in the context of a substantial lessening of competition context and not by looking at the individual scenarios faced by a small or large businesses alike.

It would be better if these issues were addressed not through the Competition and Consumer Act but by separate legislative regimes, if it is thought that a legislative regime is necessary. After all as noted earlier there is a major reform proposal on the table right now to assess how best to introduce unfair contract reform for business to business dealings and contracts.

I do not have any strong views against the introduction of a sensibly drafted regime but it should certainly be removed from the potential influence of the competition statute, or at the predilection of actually undermining that particular statute.

I fully understand the views of Rod Sims and the ACCC that it wishes to have a major say in this area. I am not sure that it is the most appropriate body to deal with these concepts; I would have little difficulty in it having a part to play in seeking remedies that may be included in separate legislation.



I recognise that the ACCC will argue that the recent decision to bring unconscionable conduct provisions, relying on the small business unconscionable conduct concepts, against the Coles Corporate Group, will give it an opportunity to have this law tested. But it may take years before that decision is finalised. Any decision in this case, unless it turns on very narrow grounds, is likely to be appealed and the appeal route may be a very long one.

I conclude this short, but what I hope will be a useful submission, by suggesting that any reform processes that are instigated in this area are pursued through a separate legislative route. I do not wish to see the proliferation of new agencies are necessary but, to ask the ACCC to become an agency that deals with all of these issues may place it in a similar position to that faced by the Australian Securities and Investments Commission where it becomes too many obligations which result in it becoming very unwieldy to deal with major responsibilities that it needs to address as has been illustrated by the recent Senate Economic References Committee Report "Performance of the Australian Securities and Investments Commission."

In my view, if we do continue with the process of amending the unconscionable conduct provisions to add new criteria which the courts may interpret in the context of the small business fragility, I suspect that our courts will find ways to continue to read such legislation in a negative or conservative fashion similar to the views that our courts have taken in interpreting the unconscionable conduct provisions as discussed above. We should not try to continue with the idea of fitting a square peg into a round hole.