HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Reference: Fair trading

CANBERRA

Thursday, 27 February 1997

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Members:

Mr Bruce Reid (Chair)

Mrs Bailey	Mr Jenkins
Mr Baldwin	Mrs Johnston
Mr Beddall	Mr Allan Morris
Mr Martyn Evans	Mr Nugent
Mr Richard Evans	Mr O'Connor
Mr Forrest	Mr Zammit
Ms Gambaro	

The committee will inquire into business conduct issues arising out of commercial dealings between firms, including claims by small business organisations that some firms are vulnerable to and are not adequately protected against 'harsh or oppressive' conduct in their dealings with larger firms.

1. The committee is asked to investigate and report on:

the major business conduct issues arising out of commercial dealings between firms including, but not limited to, franchising and retail tenancy;

the economic and social implications of the major business conduct issues particularly whether certain commercial practices might lead to sub-optimal economic outcomes.

2. The committee is asked to examine whether the impact of the business conduct issues it identifies is sufficient to justify Government action taking into account, but not limited to :

existing State and Commonwealth legislative protections;

existing common law protections;

overseas developments in the regulation of business conduct.

3. The committee is asked to examine options and make recommendations on strategies to address business conduct issues arising out of dealings between firms in commercial relationships, taking into account, but not limited to:

the potential application of voluntary codes of conduct, industry self-regulation and dispute

resolution mechanisms, including alternatives to legislation and court-based remedies, and mechanisms to support these measures;

legislative remedies.

4. In developing options, the committee will seek to ensure certainty in the market place, contract dealings and other commercial transactions, minimise the regulatory burden on business, and keep litigation and costs to a minimum.

WITNESSES

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

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CANBERRA

Thursday, 27 February 1997

Present

Mr Reid (Chair)

Mr Bob Baldwin	Ms Gambaro
Mr Beddall	Mrs Johnston
Mr Martyn Evans	Mr Allan Morris
Mr Richard Evans	Mr O'Connor
Mr Forrest	Mr Zammit

The committee met at 1.00 p.m.

Mr Reid took the chair.

AITKEN, Mr Guy Macdonald, Acting Senior General Counsel, Office of General Counsel, Attorney-General's Department, Robert Garran Offices, Barton, Australian Capital Territory 2600

WARD, Ms Janine, Principal Counsel, Courts, Tribunals and Administrative Law Branch, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory 2600

CHAIR—I declare open this public hearing of the inquiry into fair trading. Welcome. Thank you for your willingness to advise the committee on some of the legal issues and, in particular, the constitutional issues that have arisen in the fair trading inquiry.

Committee proceedings are recognised as proceedings of the parliament and warrant the same respect as proceedings in the House of Representatives itself demand. Witnesses are protected by parliamentary privilege in respect of the evidence they give before the committee. You will not be asked to take an oath or make an affirmation. You are reminded, however, that false evidence given to a parliamentary committee may be regarded as a contempt of parliament.

The committee prefers that all evidence be given in public but, should you at any stage wish to give evidence in private, you may ask to do so and the committee will give consideration to your request. Would you care to make an opening statement before we commence questions?

Mr Aitken—To the extent that I am really here to answer specific questions, it might be best to if we go straight to the questions.

CHAIR—Thank you very much. I am pleased that you are able to be here. During the course of the inquiry we heard evidence from Mr Frank Zumbo, a lecturer in law at the University of New South Wales. He submitted to the inquiry that, following the High Court decision in 1995 in the state of Western Australia v the Commonwealth, section 51AA of the Trade Practices Act may be unconstitutional. We want to hear your view on that. Also, what is the risk factor of a challenge to section 51AA being successful on these grounds? In any event, would it be preferable to remove the reference to the common law from the act and to provide a statutory standard? Perhaps you could address that question first.

Mr Aitken—Certainly. We have looked at the issues raised by Mr Zumbo and, in light of that investigation, we think it unlikely that section 51AA would be held to be unconstitutional. He relies on the High Court case of Western Australia v the Commonwealth and, in particular, the High Court's consideration of section 12 of the Native Title Act. In that case, the High Court unanimously held section 12 to be unconstitutional. Various grounds were put forward by the court as to why section 12 was unconstitutional. As is the case with some joint judgments, it may be that different judges had different objections to the provision. But it seems that one of the key objections which the court had to section 12 was that it purported to give force of law to the common law, ostensibly for the purpose of overriding state laws. That is, it was an attempt to invoke section 109 of the constitution, and the court obviously regarded that as not the ordinary function of the common law.

The court did, however, point out that it had no difficulty with section 4.1 of the Commonwealth

Places (Application of Laws) Act. By analogy, it would seem that, if that permission is constitutional, then there would not really be any objection to section 51AA—in the sense that section 51AA has simply used the common law as a dictionary to give content to a substantive statutory provision. If section 51AA were unconstitutional, then also unconstitutional, as I mentioned before, would be several other statutory provisions which are of very great importance to the Commonwealth functioning of laws, such as the Commonwealth Places (Application of Laws) Act and also section 79 of the Judiciary Act. There has never been any suggestion that those laws are unconstitutional.

CHAIR—None of them has been challenged?

Mr Aitken—No, none of them has been challenged. We have, however, prepared a written opinion on the constitutionality of section 51AA, and I will make that available to the committee if it wishes to have it. I will send that to the secretary of the committee. It might be helpful.

CHAIR—Yes, if you could do that.

Mr Aitken—Because the principles involved are rather complex and there is a limit to how much you can grasp without actually looking at it.

CHAIR—If you could make it available to the committee and forward to the secretariat, we would like to have that example as well. Thank you.

Mr Aitken—The key point is that in our view it is unlikely that 51AA is unconstitutional.

CHAIR—Thank you for that. The other issue that arose was the potential for enforcing industry codes of conduct. Some of our submissions suggested that codes of conduct—for example, the franchising code of conduct—needed to be backed up by legislation. But the Department of Industry, Science and Tourism raised a number of constitutional issues in relation to proposals to give industry codes of conduct legislative backing. Part of the reason for that was that it would move it away from the executive arm of government.

Would you be able to advise the committee how seriously you might consider each of the issues that we will raise with you now? They are: that legislative underpinning would involve the transfer of the responsibility of law-making outside the realm of the executive and that the Commonwealth could only give legislative force to a code of practice that was covered by specific heads of power—for example, things like telecommunications, banking or corporations; and that the Commonwealth would need the cooperation of the states to enforce general industry codes of conduct. I will leave it at those two, and there is one other that I will come back to.

Mr Aitken—The first question raises the general issue of abdication of legislative power. There is a constitutional principle that, while parliament can delegate legislative power—and, in fact, it does in relation to regulation-making provisions—it cannot totally abdicate its legislative power. The submission from DIST suggests that any wholesale delegation of power in relation to the code may well infringe the constitutional principle against abdication of legislative power. From what we can tell from recent High Court statements, the High Court appears to be relatively relaxed about abdication of legislative power.

Indeed, in the most recent case considering the issue, three justices of the High Court said there were very considerable difficulties in the concept of an unconstitutional abdication of power by parliament. As long as parliament retains the power to repeal or amend the authority which it confers upon another body to make laws with respect to a head or heads of legislative power entrusted to the parliament, it is not easy to see how the conferral of that authority amounts to an abdication of power. Essentially, that means that, so long as parliament retains the power to repeal the provisions which allow this code to be made and enforced, then probably there is no difficulty with an abdication of legislative power.

On that basis, I would not be quite as concerned as DIST appear to be in their submission about the constitutional problems in relation to formulating a code and giving it some legislative backing. Obviously, there needs to be some legislation simply to give statutory effect to the code as it is developed and as it proceeds.

CHAIR—That takes us on to the next point. There has been a lot of talk about underpinning codes of conduct in legislation. Could you give us an idea of how the Commonwealth could pass a legislative provision to that effect, that the codes of conduct be authorised by the Trade Practices Commission so that they are mandatory?

Mr Aitken—Essentially, all you would need is a Commonwealth statutory provision saying that the code of practice was to have the force of law and that people needed to comply with those provisions as if it were law of the Commonwealth parliament. That would give statutory effect to the code.

Mr BEDDALL—Is that similar to division 7, I think it is, in the New South Wales fair trading act?

Mr Aitken—I understand that is the case, yes. If I can round off my discussion of abdication of legislative power, if there was a very broad delegation of power to a body which was completely removed from the executive government, then there may be some constitutional doubt over that.

CHAIR—I want to ask you about the unconscionability provisions in the Trade Practices Act. Could the Commonwealth amend those provisions to say that the courts must have regard to industry codes of conduct when determining whether or not the conduct is in fact unconscionable?

Mr Aitken—Yes. I do not see any objection to that.

CHAIR—So you could do that by way of legislation and say that the courts would have regard to certain provisions that may be taken into consideration?

Mr Aitken—Yes, provided those considerations were not inconsistent with an exercise of judicial power. They would need to be fairly precise, in the sense that they could not require the court probably to take into account just general public policy considerations.

CHAIR—In your experience, how effective would that be—writing in provisions that would be taken into consideration by the court in a court judgment? On past experience—obviously it has been done in other matters—how much regard would the court take of that sort of provision in an act?

Mr Aitken—I am speaking only very generally here.

CHAIR—Yes, I just want a general view.

Mr Aitken—Provided the intention is made clear enough, the court would see it as its duty to apply them. When you have a common law concept like conscionability in legislation, the court is naturally attracted to apply its own common law concepts which it has developed.

CHAIR—If I could follow that a little further, when a minister introduces legislation and makes a second reading speech which spells out a lot of these things, how much notice is taken in the courts of the minister's intention in the second reading speech?

Mr Aitken—Different judges take different notice of it. Some judges very rarely refer to second reading speeches, on the basis of their belief that they should be interpreting what is in the law, rather than what parliament may have intended the law to mean. Other judges are far more ready to actually take notice of extrinsic materials.

CHAIR—So the provisions in the legislation would have to be clearly spelt out, because that would be the most accurate guide for the courts?

Mr Aitken—It is always dangerous to rely simply on extrinsic materials to influence a court's thinking.

CHAIR—Thank you.

Mr Aitken—The second issue was relating to legislative power of the Commonwealth. The Commonwealth can rely on all available heads of power to enact any piece of legislation, so it is not confined to one or more specific heads of power. In this area, powers such as interstate trade and commerce as well as industry specific powers, such as banking and insurance, and the trading and financial corporations power may be relevant to that.

I would need to have a closer look at what the code was designed to cover, but our experience has nevertheless been that, in relation to business, a comprehensive and uniform code ordinarily involves some cooperation and legislation from the states, in the sense that, generally speaking, once you move outside an industry specific area which is specified in the constitution—such as insurance and banking—the Commonwealth generally has no power in relation to intrastate trading by individuals.

CHAIR—We need to know a little more about that. Could you add some more to that? You are talking of interstate?

Mr Aitken—Intrastate, actually: small traders who carry on business in an individual capacity, solely within the confines of one state. In relation to many industries, the Commonwealth would not have an available head of power.

CHAIR—What about in a national code of conduct, if that were introduced? What requirements would the states have to fall in line with? We are talking about the introduction of a code of conduct which is enforced by Commonwealth legislation. The states then have a clear responsibility, do they, to fall into line with that Commonwealth legislation?

Mr Aitken—No, that would be a political judgment for them.

CHAIR—That would be difficult?

Mr Aitken—Yes.

CHAIR—So we would have to get the agreement of the states to do that?

Mr Aitken—Yes.

Mr BEDDALL—Any national franchise operation or any significant large business would be caught up by the Trade Practices Act, wouldn't it?

Mr Aitken—Yes, on the basis that—

Mr BEDDALL—This is just if one small trader is dealing with another small trader, when there may be some—

Mr Aitken—If they are not corporations.

Mr BEDDALL—Yes. But, when we are talking about any corporation or larger business, is there no problem with Commonwealth law?

Mr Aitken—No; I would not have thought so.

Ms GAMBARO—If we apply the Corporations Law to franchising, does that mean that a franchise group would have to issue a prospectus, similarly, if they were soliciting franchisees? Is that how it would work?

Mr Aitken—I might have to take that on notice, I am sorry. I do not know, but I will get back to you.

CHAIR—You will be able to respond to the secretariat, will you?

Mr Aitken—Yes.

CHAIR—Thank you for that offer. One of the other topics that I would like to move on to is that many of the witnesses to this inquiry pointed out to the committee that small businesses cannot afford to enforce their rights in the court, because of the prohibitive legal costs involved and the long delays which are

sometimes involved and which cost them many thousands of dollars and take them so long to get the matter to court that they run out of dollars; whereas, the large corporation, maybe, that they have the action against can hold out for a substantially longer time. Is there any provision for small business being eligible for any form of legal aid, that you are aware of?

Ms Ward—No.

Mr RICHARD EVANS—Has it ever been sought?

Ms Ward—I really cannot answer that. We will have to get back to you on that.

CHAIR—Perhaps you could respond to us on that one as well.

Mr Aitken—Certainly.

CHAIR—We are tapping into your legal knowledge here. Do you have any suggestions as to how small business proprietors can obtain access to justice which they can afford?

Ms Ward—There are two initiatives in the pipeline which will probably assist small businesses. The first of these is the establishment of a small taxation tribunal as a division of the Administrative Appeals Tribunal. That is currently before parliament in the Law and Justice Legislation Amendment Bill, and provides that, where the level of taxation in dispute is less than $5,000, people can take their claims to the small taxation tribunal. There is a lower fee of $50, as distinct from the current fee before the AAT, which is $500. That $50 fee will be a non-refundable fee, and there will be simplified procedures in that tribunal, with the focus being on mediating claims.

Another initiative that we are looking at is the development of a federal magistracy, which would allow claims to be dealt with more quickly. But that would only apply to claims under federal legislation. To the extent that claims arise under a state or territory legislation, there is not really a lot that the Commonwealth can do in those areas.

CHAIR—Could you recall a case that may have come before that court or tribunal under the AAT? Would you describe it as a tribunal?

Ms Ward—It is a tribunal.

CHAIR—Could you give us a typical example of what might have been brought before them?

Ms Ward—It has not actually been established yet. But, for example, there might be a dispute with the taxation commissioner about the amount of tax a small business trader has to pay. This will allow them to resolve those disputes quicker.

Mr BEDDALL—In relation to Commonwealth law, say, the Trade Practices Act, where a small trader is in dispute with a large trader the large trader can use delaying tactics in the litigation process to

virtually starve the other person into submission. Where in Commonwealth law does that person access justice?

Ms Ward—I understand there is concurrent jurisdiction both in the Federal Court and—

Mr BEDDALL—You missed my point. My point is that a large company, through its legal processes, can stall or delay in any federal court for some considerable amount of time. In most of the instances where there is a dispute between a small trader or a large trader, time is of the essence. Where does that person get justice under the current federal system in order to bring that to trial quickly or to get assistance?

Ms Ward—It would be up to the small trader to make an application to the court to get the matter to move along quickly. That would be their only remedy, I suggest.

Mr ZAMMIT—But there is absolutely nothing that is available federally to assist a small trader who disagrees with a major trader to have the matter dealt with at a cost they can afford. That is the biggest problem, isn't it? It is not so much expediting, even though expediting is very important. But the chances of you having the matter expedited are extremely limited, unless you can demonstrate that it is a matter of life or death, which is hardly the case. There seems to be nothing to assist a small trader financially to take on someone who has unlimited money and knows that all they have to do is hold out and the small trader will collapse. In fact, small traders are in the situation where they go and see a solicitor who says, 'If you take the big trader to court, it is going to cost you $50,000, $60,000, $80,000, $100,000. You are disputing $20,000. It is better that you lose your $20,000 than lose $100,000.' So they do not even go to court.

Mr O'CONNOR—Why would it be any different for business than it is for individuals? If an individual wants to bring a corporation to task on an issue, there is a David and Goliath situation.

Mr BEDDALL—An individual can get legal aid.

Mr O'CONNOR—They certainly can, but not all individuals can get legal aid.

Mr BOB BALDWIN—On small matters there are small claims tribunals under the state fair trading systems.

CHAIR—I want to return to the question of the underpinning of the codes of conduct. The franchising code of conduct has received a fair amount of attention and a fair amount of evidence has been given to this committee. Could you address the question of whether the franchising code of conduct could be enforced through the Corporations Law by amending the existing exemption for franchising contained in the Corporations regulations to only apply to franchisors registered with the body enforcing franchising codes?

Mr Aitken—Yes, if you are asking whether in the constitution that is possible. Subject to the constitutional issues I have discussed earlier, I cannot see why it would not be possible constitutionally.

CHAIR—It could be?

Mrs JOHNSTON—Could you speak up a bit?

CHAIR—Yes, we are all having trouble hearing you; the acoustics in these rooms are pretty bad.

Mr Aitken—Subject to the consideration I mentioned earlier, I cannot see any reason why, constitutionally, that could not be done.

CHAIR—That could be done?

Mr Aitken—Yes.

CHAIR—This may be something that you can answer for us; then again, it may be more appropriate to direct it to the business lawyers in Treasury. Some submissions to us have argued that amending the Trade Practices Act to proscribe harsh and oppressive or unfair conduct would undermine the freedom of contract and/or create uncertainties in commercial contracts. Do you have any views on whether that could be happen?

Mr Aitken—I think it would probably be more appropriate for the policy areas to comment on that matter.

CHAIR—We heard evidence from Professor Andrew Terry on the basis of his experience with the New South Wales arbitration act. He has argued that the threat—certainly in commercial activities—from more directly addressing the problem of unfair conduct had been overstated and that the courts would handle such a power in a responsible manner. That was his view. Is that a view that you share?

Mr Aitken—To the extent that I do not think a court would singularly seize upon the words 'oppressive' or 'unfair' to set aside contracts which they personally did not agree with, then it is probably a fair comment that the courts would continue to act judicially.

CHAIR—Thank you.

Mr ALLAN MORRIS—Going back to the question of access to justice, one of the methods that was used by the legal aid bodies in some cases, particularly with things like property settlement, was that they would finance or they would back a case on the basis that on conclusion, if successful, the funds would then be repaid. I do not think it happens now; I think no-one gets funded any more. But that kind of model was quite effective because it certainly made people realise that there was a capacity available and that there were more people prepared to negotiate because there was a capacity to defend. It also protected the revenues, if you like, in the sense that the first condition of legal aid is that the case must have a reasonable chance of being successful. In other words, if you could not get legal aid, then your case was not very good. Would that kind of model be one that could be thought about or be worth considering in these small business environments?

Ms Ward—It may be. We will have to get back to you because legal aid is not my area of expertise. But we will raise it.

Mr ALLAN MORRIS—And whether or not there could be safeguards? Is my interpretation of it correct: that the first criterion is that there has to be a reasonable chance of success before it is even considered?

Ms Ward—Yes, there is a merits test.

CHAIR—There being no other questions, I thank you both for attending today's hearing and for your additional offer to respond to further inquiries from the secretariat. We look forward to receiving those further opinions from you. I thank you for your time and for your assistance to this committee of inquiry.

Resolved (on motion by **Mr Beddall**):

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 1.30 p.m.