

## **Appendix I      Conduct of the inquiry**

---

### ***Terms of reference***

On 26 June 1996, the Minister for Small Business and Consumer Affairs, the Hon Geoff Prosser MP, wrote to the Chairman of the Committee, the Hon Bruce Reid MP, requesting the Committee to inquire into and report on the adequacy of existing protection for small firms against unfair conduct in commercial relationships. The specific terms of reference for the inquiry have been included in this report at page iii.

### ***Advertising the inquiry***

The inquiry was advertised nationally in major metropolitan newspapers on Friday 5 July and Saturday 6 July 1996. The Committee wrote to the relevant Commonwealth Ministers and to State and Territory Governments. In addition, over 500 potential stakeholders, including trade and industry associations, received invitations to make submissions to the inquiry.

### ***Evidence to the inquiry***

The Committee received submissions from 198 parties, most of which were authorised for publication but some of which were accepted in confidence. These submissions are listed in Appendix II.

The Committee received 419 letters from small businesses in Queensland supporting Submission No. 15.

The Committee received 278 exhibits to the inquiry, many of which were provided as attachments to written submissions. These are listed in Appendix III.

The Committee took evidence at public hearings in Sydney, Melbourne, Brisbane, Perth and Adelaide, as well as in Canberra. The Committee called 107 witnesses to give evidence at public hearings and 1105 pages of evidence were recorded by Hansard. Details of the hearings and witnesses appearing are in Appendix IV. The Committee also took *in camera* evidence.

The transcript of evidence taken at public hearings and copies of all written submissions on the public record will be made available for inspection at the Committee Office of the House of Representatives and at the National Library of Australia.



## Appendix II

## List of submissions

Sub	Name	Position	State	Received
1	<b>Confidential</b>		SA	12/07/96
2	Mr Isaiah Kumaravalli		NSW	18/07/96
3	Mr/Ms N J Sinnett	President Victorian Association of Bakers	VIC	26/07/96
4	Ms Rita Bentley		VIC	26/07/96
5	Mr Bill Hollier	Nauticalia Speciality Souvenirs & Gifts	NSW	31/07/96
5.1	Mr Bill Hollier	Nauticalia Speciality Souvenirs & Gifts	NSW	7/08/96
6	Mr Douglas Peak AM	Principal H & F Educational Services	QLD	6/08/96
7	Mr/Ms K G Goodman		WA	1/08/96
8	Mr Brian Crews		VIC	8/08/96
9	Mr David Edwards	Chief Executive Officer Victorian Employers Chamber of Commerce & Industry	VIC	8/08/96
10	Mr Dennis Cooke	Great Cuts Hairdressing	NSW	9/08/96
11	<b>Confidential</b>		VIC	9/08/96
12	Mr Tony Robinson		VIC	12/08/96
13	<b>Confidential</b>		ACT	13/08/96
14	Mr Wayne Ryan	Air Con Serve Pty Ltd	SA	13/08/96
15	Mr Peter Person		QLD	13/08/96
16	Mr Grahame Henderson	National Chairman Shell National Action Group	NSW	14/08/96
16.1	Mr Grahame Henderson	National Chairman Shell National Action Group	NSW	12/11/96
17	Mr John Farrell	ACT President National Federation of Independent Business Inc	ACT	14/08/96
17.1	Mr John Farrell	ACT President National Federation of Independent Business Inc	ACT	20/11/96
18	Ms Sandra Lazari		SA	14/08/96
19	Mr Michael McKibbin		WA	15/08/96
20	Mr Robert Butler	Executive Director Australian Dental Association Inc	NSW	15/08/96
21	Mrs N J Bickart	Secretary Textile Rental & Laundry Association (Vic) Inc	VIC	15/08/96

Sub	Name	Position	State	Received
22	Mr & Mrs John McElroy	McElroy Holdings Pty Ltd	NSW	15/08/96
23	Mr/Ms R G Richardson	Executive Director Australian Funeral Directors Association	VIC	16/08/96
24	Mr Keith Simpson	Chair Trade Practices Committee Chiropractors Association of Australia (National) Limited	NSW	16/08/96
25	Ms Elsa Atkin	Executive Director National Trust (New South Wales)	NSW	16/08/96
26	Mr M Breheny		WA	16/08/96
27	Mr Ross Robinson	Director The Horological Guild of Australasia	NSW	16/08/96
28	<b>Confidential</b>		WA	16/08/96
29	Ms Jean Sietzema-Dickson	Managing Editor Poetica Christi Press	VIC	16/08/96
29.1	Ms Jean Sietzema-Dickson	Managing Editor Poetica Christi Press	VIC	4/10/96
30	Mr & Mrs Rodger Fullard		VIC	16/08/96
31	Mr Martin Soutter	Assistant Director Business Council of Australia	ACT	16/08/96
32	Mr & Mrs Peter Willems	Director Errol Holdings Pty Ltd	WA	16/08/96
33	Mr Peter Walsh	General Manager Standards Operations Standards Australia	NSW	16/08/96
34	Mr Ian Gilbert	Director Legal Australian Bankers Association	VIC	16/08/96
34.1	Mr Ian Gilbert	Director Legal Australian Bankers Association	VIC	7/05/97
35	Mr Frank Zumbo	Lecturer School of Business Law & Taxation Faculty of Commerce & Economics	NSW	16/08/96
36	Mr John Kennedy	Chairman NSW Bookmakers Co- operative Ltd	NSW	16/08/96

Sub	Name	Position	State	Received
36.1	Mr John Kennedy	Chairman NSW Bookmakers Co- operative Ltd	NSW	27/09/96
37	Ms Roslyn Lanigan		QLD	16/08/96
38	<b>Confidential</b>		VIC	14/08/96
38.1	<b>Confidential</b>		VIC	15/01/97
39	<b>Confidential</b>		QLD	16/08/96
39.1	<b>Confidential</b>		QLD	15/11/96
40	Mr/Ms M Dwight	Showbits	WA	16/08/96
41	Mr Graham Poole	Chairman Retail Committee Small Business Association for the Hunter Region	NSW	19/08/96
42	<b>Confidential</b>		VIC	19/08/96
43	Mr Robert Gardini	Chairman Franchising Code Council Ltd	NSW	19/08/96
44	Mr Phil Naylor	Chief Executive Officer Australian Retailers Association	NSW	19/08/96
44.1	Mr Phil Naylor	Chief Executive Officer Australian Retailers Association	NSW	21/02/97
45	Mr Ray Herbert	Executive Director Master Plumbers & Mechanical Services Association of Australia	VIC	20/08/96
46	Mr Michael Peck AM	Chief Executive and National Manager Practice The Royal Institute of Architects	VIC	20/08/96
47	Ms Heather Howes	Strategy Adviser/Executive Officer Australian Council of Building Design Professions Ltd	VIC	20/08/96
48	Mr Neil Mitchell		VIC	21/08/96
49	<b>Confidential</b>		QLD	21/08/96
49.1	Mr John Lonergan	Director Jonlonco Pty Ltd	QLD	14/03/97
50	Mr Peter Hamilton	Executive Officer Queensland Chicken Growers Association	QLD	21/08/96

Sub	Name	Position	State	Received
51	Mr Andrew Young	Deputy General Manager the Queensland Chamber of Fruit & Vegetable Industries Co-operative Ltd	QLD	21/08/96
52	Mr Charlie Bell	Chairman Small Business Deregulation Task Force	ACT	21/08/96
53	Mr Ron Hardaker	Federal Director Australian Equipment Lessors Association	NSW	21/08/96
54	<b>Confidential</b>		NSW	21/08/96
55	Mr Tim Luckhurst	Executive Director Secretariat Australian Chicken Growers Council	NSW	22/08/96
56	Mr Andrew Terry	Director of the Centre for Franchising Studies Head of the School of Business Law & Taxation University of New South Wales	NSW	23/08/96
57	Mr Jim Champin	General Manager Marketing Australian Petroleum trading as AMPOL	NSW	21/08/96
58	Mr/Ms I F Baldock	Executive Director Queensland Retail Traders & Shopkeepers Assoc	QLD	23/08/96
59	Mr/Ms N B Fisher		WA	19/08/96
60	<b>Confidential</b>		WA	27/08/96
61	Mr John Brownsea	Executive Director Small Retailers Association of SA	SA	22/08/96
62	Prof Allan Fels	Chairman Australian Competition & Consumer Commission	ACT	23/08/96
62.1	Prof Allan Fels	Chairman Australian Competition & Consumer Commission	ACT	15/01/97
62.2	Mr Allan Asher	Deputy Chairman Australian Competition & Consumer Commission	ACT	14/03/97

Sub	Name	Position	State	Received
63	Mr Tony Conaghan	Partner Phillips Fox	QLD	28/08/96
64	Mr/Ms J W Madge		NSW	23/08/96
65	Mr Joseph Natoli	Queensland Fruit and Vegetable Traders Association	QLD	26/08/96
66	Ms Vicki Holliday	Director/Sec Port Stephens Sand Co Pty Limited	NSW	27/08/96
67	Mr George Etrelezis	Managing Director Small Business Development Corporation - Western Australia	WA	26/08/96
68	Ms Juliet Seifert	Executive Director The Proprietary Medicines Association of Australia Inc	NSW	26/08/96
69	Mr Stewart McFetridge	Chatsway Pty Ltd	SA	22/08/96
69.1	<b>Confidential</b>		SA	13/11/96
70	Mrs Donna Clark	Gifts R Us	WA	27/08/96
71	<b>Confidential</b>		WA	27/08/96
72	Mr Terry Chamberlain	National Industrial Relations Director Housing Industry Association Ltd	ACT	27/08/96
73	Mr Allan King	Senior Manager Government Relations ANZ - Group Public Affairs	ACT	27/08/96
74	Ms Soula George	Micro Business Consultative Group Office of Small Business, (c/- DIST)	ACT	27/08/96
75	Mr John Martin	Executive Director Australian Chamber of Commerce & Industry	ACT	28/08/96
75.1	Mr John Martin	Executive Director Australian Chamber of Commerce & Industry	ACT	21/02/97
76	<b>Confidential</b>		WA	28/08/96
77	Ms Yvonne Valentin	Commercial Manager - Western Region Laubman and Pank Optometrists Pty Ltd	WA	28/08/96

Sub	Name	Position	State	Received
78	Mr/Ms H Ben-Pelech	Owner Garden City News	WA	28/08/96
79	<b>Confidential</b>		SA	22/08/96
80	<b>Confidential</b>		WA	29/08/96
81	Mr Clive Bubb	General Manager Queensland Chamber of Commerce and Industry	QLD	30/08/96
82	Mr Len Patching		QLD	30/08/96
83	Mr Jim Starkey	Executive Director Australian Institute of Petroleum	VIC	2/09/96
84	Mr George Murphy	Executive Officer Australian Canvas and Synthetic Products Association Inc	VIC	2/09/96
85	Mr Terry Williams	Chairman/Secretary Amusement Machine Operators Association Limited	NSW	4/09/96
86	<b>Confidential</b>		VIC	16/08/96
87	Mr Harold Taylor		WA	22/08/96
88	Ms Leigh Cunningham	Chief Administrative Officer The Institute of Arbitrators Australia	VIC	22/08/96
89	<b>Confidential</b>		SA	22/08/96
90	<b>Confidential</b>		NSW	27/08/96
90.1	<b>Confidential</b>		NSW	16/10/96
91	<b>Confidential</b>		WA	29/08/96
92	Mr John Howie	Chief Executive Officer Australian Newsagents Federation Ltd	NSW	29/08/96
93	Mr Terry Harris		WA	29/08/96
94	<b>Confidential</b>		WA	29/08/96
95	<b>Confidential</b>		VIC	30/08/96
95.1	Mr Rod Hackett	Proprietor Far Horizons Pty Ltd	VIC	18/09/96
95.2	Mr Rod Hackett	Proprietor Far Horizons Pty Ltd	VIC	31/10/96
96	<b>Confidential</b>		WA	2/09/96
97	Mr G A Watts	General Manager Australian Petroleum Agents & Distributors Association	VIC	3/09/96



Sub	Name	Position	State	Received
97.1	Mr G A Watts	General Manager Australian Petroleum Agents & Distributors Association	VIC	4/11/96
98	<b>Confidential</b>		WA	30/08/96
99	<b>Confidential</b>		WA	4/09/96
100	Mrs Pam Archer	Director Carousel Florist	WA	5/09/96
101	Mr B W Hamilton JP		NSW	6/09/96
102	Mr Bill Frilay	Senior Business Analyst BP Australia Limited	VIC	6/09/96
102.1	<b>Confidential</b>		VIC	10/10/96
103	Mr Bruce Powell		WA	6/09/96
104	Mr Michael Delaney	Executive Director Motor Trades Association of Australia	ACT	9/09/96
104.1	Mr Michael Delaney	Executive Director Motor Trades Association of Australia	ACT	5/11/96
105	Mr Rob Bastian	Chief Executive Council of Small Business Organisations of Australia	ACT	9/09/96
105.1	Mr Rob Bastian	Chief Executive Council of Small Business Organisations of Australia	ACT	4/12/96
106	<b>Confidential</b>		VIC	10/09/96
106.1	<b>Confidential</b>		VIC	24/09/96
106.2	<b>Confidential</b>		VIC	21/10/96
106.3	<b>Confidential</b>		VIC	2/12/96
107	Mr William Carter	Sales & Commercial Director Veedol Lubricants Australia	NSW	10/09/96
108	<b>Confidential</b>		NSW	11/09/96
108.1	<b>Confidential</b>		NSW	16/10/96
108.2	<b>Confidential</b>		NSW	6/11/96
108.3	<b>Confidential</b>		NSW	13/03/97
109	Mr B Sedgeman		WA	11/09/96
110	Mrs & Mr D & R Sammut		VIC	12/09/96
111	Ms Lisa Michael	United Retailers Association Inc	VIC	12/09/96
111.1	Ms Lisa Michael	United Retailers Association Inc	VIC	4/12/96

Sub	Name	Position	State	Received
111.2	Mr Richard Rogalsky	Consultant United Retailers Association Inc	VIC	10/02/97
111.3	Mr Richard Rogalsky	Consultant United Retailers Association Inc	VIC	21/02/97
111.4	Ms Lisa Michael	United Retailers Association Inc	VIC	12/03/97
111.5	Mr Richard Rogalsky	Consultant United Retailers Association Inc	VIC	19/03/97
112	Mr Grant Garraway	General Manager Franchising Kleins Franchising Pty Ltd	VIC	12/09/96
112.1	<b>Confidential</b>		VIC	15/04/97
113	Mr Terry Pennington	Executive Officer Federal Chamber of Automotive Industry	ACT	19/09/96
113.1	Mr Terry Pennington	Executive Officer Federal Chamber of Automotive Industry	ACT	17/01/97
113.2	Mr Terry Pennington	Executive Officer Federal Chamber of Automotive Industry	ACT	1/04/97
114	Ms Linda Hewitt		NSW	19/09/96
115	Mr Stephen Greenwood	Executive Director The Pharmacy Guild of Australia	ACT	13/09/96
115.1	<b>Confidential</b>		ACT	11/12/96
116	Mr Michael Delaney	Executive Director Australian Automobile Dealers Association	ACT	20/09/96
117	Mr Kelvin Thomson MP		VIC	19/09/96
117.1	Mr Kelvin Thomson MP		VIC	10/10/96
118	Mr Michael Delaney	Executive Director Motor Trades Association of Australia	ACT	20/09/96
118.1	Mr Michael Delaney	Executive Director Motor Trades Association of Australia	ACT	1/04/97
118.2	Mr Michael Delaney	Executive Director Motor Trades Association of Australia	ACT	1/04/97

Sub	Name	Position	State	Received
119	Mr Peter Verwer	Chief Executive Property Council of Australia	NSW	17/09/96
119.1	Mr Geoff Deakin	Manager, Retail Policy Property Council of Australia	NSW	20/02/97
119.2	Mr Alan Briggs	Chairman ACSC Committee Property Council of Australia	NSW	12/03/97
120	Mr Michael Iaccarino	Deputy Director Council of Textile & Fashion Industries Ltd	VIC	24/09/96
121	Mr David Andrews	Holding Redlich on behalf of Cenebook P/L	VIC	26/09/96
122	Mr David Andrews	Holding Redlich on behalf of Winron P/L	VIC	26/09/96
123	Mr David Andrews	Holding Redlich on behalf of Trentvale Holdings P/L	VIC	26/09/96
124	Mr/Ms J A Greig		WA	27/09/96
125	Mr/Ms Laota Steenson		WA	27/09/96
126	<b>Confidential</b>		VIC	27/09/96
127	<b>Confidential</b>		WA	27/09/96
128	Mr Tony Garrison	Partner Russell Kennedy Solicitors	VIC	30/09/96
129	Mr Stephen Bishop	Bishops Solicitors on behalf of Mr & Mrs Bayley	NSW	1/10/96
130	<b>Confidential</b>		VIC	4/10/96
131	Mr Frank Huber		VIC	4/10/96
132	<b>Confidential</b>		NSW	11/09/96
133	Ms Jolyon Burnett	Chief Executive Officer Nursery Industry Association of Australia	NSW	23/09/96
134	<b>Confidential</b>		WA	30/09/96
135	<b>Confidential</b>		WA	30/09/96
136	<b>Confidential</b>		VIC	30/09/96
137	<b>Confidential</b>		NSW	3/10/96
138	<b>Confidential</b>		QLD	10/10/96
139	Mr L H Rathmann	Executive Officer WA Council of Retail Associations	WA	2/10/96
140	Mr Len Rathmann	Executive officer WA Retailers Association Inc	WA	2/10/96

Sub	Name	Position	State	Received
141	Mr David Roskell		NSW	11/10/96
141.1	<b>Confidential</b>		NSW	14/10/96
141.2	Mr David Roskell		NSW	15/04/97
142	Mr Bryan Nye	Chief Executive Officer National Secretariat, Aust. Institute of Valuers & Land Economists (Inc)	ACT	23/09/96
143	Mr Berridge Phillips	Executive Director Franchise Association of Australia & New Zealand	NSW	11/10/96
144	<b>Confidential</b>		QLD	17/10/96
144.1	<b>Confidential</b>		QLD	13/11/96
144.2	<b>Confidential</b>		QLD	23/04/97
144.3	<b>Confidential</b>		QLD	23/04/97
145	<b>Confidential</b>		NSW	18/09/96
146	Mr & Mrs C & T Hofmann		VIC	16/10/96
147	<b>Confidential</b>		VIC	16/10/96
148	<b>Confidential</b>		NSW	18/10/96
149	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	VIC	24/09/96
149.1	<b>Confidential</b>		VIC	18/11/96
150	Mr Ian McKenzie	External Relations Manager The Shell Company of Australia Limited	VIC	15/10/96
152	<b>Confidential</b>		TAS	23/10/96
152.1	Dr Leigh Miller	Director Parlco Pty Ltd	TAS	23/10/96
153	Mr Christopher Carroll		VIC	30/10/96
154	Ms Kate Carnell MLA	Chief Minister ACT Legislative Assembly	ACT	18/11/96
155	Mr Sam Richardson	General Manager Tasmanian Independent Wholesalers	TAS	18/11/96
156	Ms Edilia Ford		NSW	19/11/96
157	<b>Confidential</b>		VIC	27/11/96
151	Mr Richard Mulcahy	National Executive Director Australian Hotels Association	ACT	13/11/96
158	Mr N R Reaburn	Chairman, Business & Commercial Law Committee, The Law Society of Tasmania	TAS	9/12/96
159	Mr Michael Ahrens	Baker & McKenzie	NSW	28/11/96

Sub	Name	Position	State	Received
160	Ms Marsha Wajnsztajn	Vice President Australians for Banking Justice Assoc	NSW	12/12/96
160.1	<b>Confidential</b>		NSW	25/02/97
161	Name withheld		NSW	27/11/96
161.1	Name withheld		NSW	27/11/96
162	Professor Alan Millington		NSW	2/12/96
163	Mr John Wilson		NSW	17/12/96
164	<b>Confidential</b>		NSW	23/12/96
165	Mr Bruce Ford	Traztea Services Pty Ltd	NSW	23/12/96
166	<b>Confidential</b>		NSW	24/12/96
167	Mr/Ms J R Bryant		NSW	24/12/96
168	Mr David Parker	Assistant Secretary Competition Policy Branch Treasury	ACT	2/01/97
168.1	Mr David Parker	Assistant Secretary Competition Policy Branch Treasury	ACT	
169	<b>Confidential</b>		NSW	3/01/97
170	<b>Confidential</b>		NSW	6/01/97
171	<b>Confidential</b>		NSW	14/01/97
172	<b>Confidential</b>		NSW	14/01/97
173	<b>Confidential</b>		WA	17/01/97
174	<b>Confidential</b>		NSW	23/01/97
175	Mr Garth Griffiths	President Australian Institute of Business Brokers Inc	NSW	30/01/97
175.1	Mr Garth Griffiths	President Australian Institute of Business Brokers Inc	NSW	21/03/97
176	<b>Confidential</b>		VIC	29/01/97
176.1	<b>Confidential</b>		VIC	29/01/97
176.2	<b>Confidential</b>		ACT	29/01/97
176.3	<b>Confidential</b>		VIC	22/04/97
177	Ms Margaret Fanning	Assistant Secretary Business Environment Branch, Department of Industry, Science & Technology	ACT	6/02/97
178	Mr Paul Russo	Solicitor c/- Russo & Russo	VIC	11/02/97
179	Ms Louise Martin	Member Property Council of Australia	NSW	11/02/97

Sub	Name	Position	State	Received
180	Mr Peter Galton		WA	21/02/97
181	<b>Confidential</b>		WA	21/02/97
182	<b>Confidential</b>		NSW	21/02/97
183	Mr Colin Morley	Executive Officer National Meat Association of Australia	NSW	21/02/97
184	<b>Confidential</b>		VIC	25/02/97
185	Name withheld		QLD	12/03/97
185.1	<b>Confidential</b>		QLD	14/03/97
186	<b>Confidential</b>		SA	12/03/97
187	<b>Confidential</b>		QLD	12/03/97
187.1	Name withheld		QLD	12/03/97
188	<b>Confidential</b>		ACT	12/03/97
189	Mr Brian Harrison	Managing Director AMP Shopping Centres Pty Ltd	NSW	24/02/97
189.1	Mr Brian Harrison	Managing Director AMP Shopping Centres Pty Ltd	NSW	2/04/97
190	<b>Confidential</b>		ACT	13/03/97
191	Mr Robert Gardini	Gardini & Co	ACT	14/03/97
191.1	Mr Robert Gardini	Gardini & Co	ACT	21/04/97
192	Mr Max Baldock		SA	18/03/97
193	<b>Confidential</b>		VIC	26/03/97
194	<b>Confidential</b>		NSW	15/04/97
195	Mr J D Bayard	Company Secretary Toyota Motor Corporation Australia Ltd	VIC	15/04/97
196	Mr Noel Johnson	President Small Business Advisory Network	VIC	15/04/97
197	<b>Confidential</b>		NSW	16/04/97
198	<b>Confidential</b>		QLD	18/04/97

## Appendix III

## List of exhibits

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
1	Mr Bill Hollier	Nauticalia Speciality Souvenirs & Gifts	Woodgate Morgan Solicitors - Account	Legal costs associated with Mr Hollier and Black Marlin Marinas independent valuation. Dated 14 May 1996	5.1
2	Mr Tony Robinson		Various press clippings	4 press clippings relating to unfair trading practices dating from November 1994 to May 1995	12
3	Mr Tony Robinson		Extract from hansard transcript Victorian House of Assembly 10/5/95	Pages 68-90	12
4	Mr Peter Person		Submission to the Small Business Deregulation Task Force from Mr & Mrs Person	Ref/SB020 "SBDTF"	15
5	Mr Keith Simpson	Chair Trade Practices Committee Chiropractors Association of Australia (National) Limited	AMA 'Chiropractic in Australia'	Australian Medical Association dated September 1992	24
6	Mr Keith Simpson	Chair Trade Practices Committee Chiropractors Association of Australia (National) Limited	Chiropractors Fight Back - the response	Response to the Australian Medical Association's position paper 'Chiropractic in Australia' March 1993	24
7	Mr Keith Simpson	Chair Trade Practices Committee Chiropractors Association of Australia (National) Limited	"Family Physicians, Chiropractors, and Back Pain" by Peter Curtis MD and Geoffrey Bove DC.	The Journal of Family Practice, Volume 35 Number 5, 1992, pages 551 - 555.	24
8	Mr Ross Robinson	Director The Horological Guild of Australasia	Memorandum and Articles of Association of The Horological Guild of Australasia	draft issued 7/10/88	27
9	Mr Ross Robinson	Director The Horological Guild of Australasia	"WOSTEP Gathers disciples and trains them for a world wide mission" by John Murphy	Horological Journal, September 1994, page 532+	27
10	Mr Ross Robinson	Director The Horological Guild of Australasia	Horological Guild of Australasia Federal Council Service Standard	Draft work standard issued by the Federal Council in February 1995	27

*Finding a balance: towards fair trading in Australia*

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
11	Mr Ross Robinson	Director The Horological Guild of Australasia	Horological Guild of Australasia Federal Council Service Standard	Draft standard issued by Federal Council February 1995	27
12	<b>Confidential</b>				
13	Mr Frank Zumbo	Lecturer School of Business Law & Taxation Faculty of Commerce & Economics	"Unconscionability and Commercial Transactions: Exploring the need for further reform under the Trade Practices ACT" by Frank Zumbo	Australian Business Law Review Volume 22, October 1994, Number 5, pages 323- 344.	35
14	Mr Frank Zumbo	Lecturer School of Business Law & Taxation Faculty of Commerce & Economics	"Unconscionability with a Commercial Setting: An Australian perspective" by Frank Zumbo	Trade Practices Law Journal Volume 3, December 1995, Number 4, pages 183- 200	35
15	Mr Frank Zumbo	Lecturer School of Business Law & Taxation Faculty of Commerce & Economics	"Prohibiting harsh or oppressive conduct within commercial transactions: An example of Legislative Schizophrenia" by Frank Zumbo	Trade Practices Law Journal Volume 4, March 1996, Number 1 pages 13-20	35
16	Mr Frank Zumbo	Lecturer School of Business Law & Taxation Faculty of Commerce & Economics	"Unconscionability and commercial transactions" by Frank Zumbo	Australian & New Zealand Trade Practices Law Bulletin Volume 11, Number 4, August 1995, pages 37-39	35
17	Mr Frank Zumbo	Lecturer School of Business Law & Taxation Faculty of Commerce & Economics	"Prohibiting harsh or oppressive conduct" by Frank Zumbo	Australian & New Zealand Trade Practices Law Bulletin Volume 11 Number 7, November/December 1995, pages 77-81	35
18	Mr Frank Zumbo	Lecturer School of Business Law & Taxation Faculty of Commerce & Economics	"Better business conduct - a critique of the Trade Practices Amendment Bill" by Frank Zumbo	Australian New Zealand Trade Practices Law Bulletin Volume 11 Number 8, January/February 1996, pages 97-99	35
19	Mr Neill Buck	Executive Director Franchising Code Council Ltd	A fair deal in franchising	Mid year report on the period 1 January 1996 - 30 June 1996 from the Franchising Code Council Limited	43
20	<b>Confidential</b>				
21	<b>Confidential</b>				
22	<b>Confidential</b>				



No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
23	<b>Confidential</b>				
24	<b>Confidential</b>				
25	<b>Confidential</b>				
26	<b>Confidential</b>				
27	<b>Confidential</b>				
28	Mr Ron Hardaker	Federal Director Australian Equipment Lessors Association	Annual Review 1995/1996 Australian Equipment Lessors Association		53
29	Mr John Brownsea	Executive Director Small Retailers Association of SA	Small Retailers Association News Release dated 24/5/96		61
30	Mr John Brownsea	Executive Director Small Retailers Association of SA	Yellow Pages Australia Small Business Index August 1996		61
31	Mr John Brownsea	Executive Director Small Retailers Association of SA	Extract from Small Business Weekly 13 May 1996		61
32	Mr John Brownsea	Executive Director Small Retailers Association of SA	Miscellaneous extracts		61
33	Mr John Brownsea	Executive Director Small Retailers Association of SA	Small Retailer Vol 34/No8 August 1996		61
34	Mr Joseph Natoli	Queensland Fruit and Vegetable Traders Association	Appendix A: Predatory Pricing - various newspaper clippings		65
35	Mr Joseph Natoli	Queensland Fruit and Vegetable Traders Association	Appendix B: Predatory Practices in Advertising - various newspaper clippings		65
36	Mr Joseph Natoli	Queensland Fruit and Vegetable Traders Association	Appendix C: Extended Trading Hours - various newspaper clippings		65
37	Mr Joseph Natoli	Queensland Fruit and Vegetable Traders Association	Appendix D: Submission to the Inquiry into Extended Trading Hours		65
38	Mr Joseph Natoli	Queensland Fruit and Vegetable Traders Association	Appendix E: Proliferation of Shopping Centres - various newspaper clippings		65

*Finding a balance: towards fair trading in Australia*

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
39	Mr Joseph Natoli	Queensland Fruit and Vegetable Traders Association	Appendix F: Employment - newspaper clipping		65
40	Mr Joseph Natoli	Queensland Fruit and Vegetable Traders Association	Appendix G: External Forces - various newspaper clippings		65
41	Mr Joseph Natoli	Queensland Fruit and Vegetable Traders Association	Appendix H: Revenue		65
42	Mr Joseph Natoli	Queensland Fruit and Vegetable Traders Association	Appendix I: Social Aspects		65
43	Mr Joseph Natoli	Queensland Fruit and Vegetable Traders Association	Appendix J: Non-existent Political Support - various clippings		65
44	Ms Juliet Seifert	Executive Director The Proprietary Medicines Association of Australia Inc	PMAA Code of Practice		68
45	Ms Juliet Seifert	Executive Director The Proprietary Medicines Association of Australia Inc	1993/4 Annual Report - Self Regulation: Taking the Initiative		68
46	Prof Allan Fels	Chairman Australian Competition & Consumer Commission	Settlement Agreement		62
47	Prof Allan Fels	Chairman Australian Competition & Consumer Commission	Deli Franchisee Awarded \$102,109 - newspaper clipping		62
48	Prof Allan Fels	Chairman Australian Competition & Consumer Commission	Draft for Discussion - Re Section 52A of the Trade Practices Act 1974		62
49	Prof Allan Fels	Chairman Australian Competition & Consumer Commission	Small Business and the Trade Practices Act - a practical guide for small business		62
50	Prof Allan Fels	Chairman Australian Competition & Consumer Commission	Unconscionable Conduct in Commercial Dealings - a guide to section 51AA of the Trade Practices Act		62

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
51	Dr Jennifer McKay	Acting Head School of Law and Legal Practice University of South Australia	Classification of Australian Corporate and Industry Based Codes of Conduct	Article	
52	Mr Jim Starkey	Executive Director Australian Institute of Petroleum	Downstream Oil Industry Financial Survey January 1990-December 1995	Survey conducted by Ernst & Young on behalf of AIP	83
53	<b>Confidential</b>				
54	Mr Frank Zumbo	Lecturer School of Business Law & Taxation Faculty of Commerce & Economics	Industrial Relations Bill 1996 Part 9 Unfair contracts	Pages 53-55	35
55	<b>Confidential</b>				
56	Mr Michael Delaney	Executive Director Motor Trades Association of Australia	Trade Practices Amendment (Better Business Conduct) Bill 1995		104
57	Mr Bill Frilay	Senior Business Analyst BP Australia Limited	BP Enterprise Franchise Code of Conduct		
58	Mr Rodney De Boos	Partner Davies Ryan De Boos	Another Discussion Paper on - Heaven Forbid - Franchising		
59	Mr Tony Conaghan	Partner Phillips Fox	Franchising - More Legal Regulation? or (What's Love Got to Do With It?)	Commentary on Mr Rodney De Boos' "Another Discussion Paper on - Heaven Forbid - Franchising". Prepared for the 1996 Business Law Section, Law Council of Australia, Trade Practices Workshop.	
60	Mr Allan Asher	Deputy Chairman Australian Competition & Consumer Commission	Franchising Codes are Effective	1996 Trade Practices Workshop: 'Franchising' 23 August 1996 - Coolum	
61	Mr Richard Jensen		2x Classified advertisements in Business for Sale section of the Sydney Morning Herald 29 June 1996		90
62	<b>Confidential</b>				
63	<b>Confidential</b>				
64	<b>Confidential</b>				

*Finding a balance: towards fair trading in Australia*

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
65	Mr Richard Jensen		2 x 'What's New' Catalogues 1993		90
66	Mr Kelvin Thomson MP		Speeches by Mr K. Thomson to the Victorian Legislative Assembly 29/10/91, 5/10/94, 10/5/95.		117
67	Mr Kelvin Thomson MP		Speech by Mr K Thomson to the House of Representatives 17/9/96		117
68	<b>Confidential</b>				
69	<b>Confidential</b>				
70	Mr Peter Verwer	Chief Executive Property Council of Australia	Retail Market Competition: Reality or Myth?	The structure, performance, competitiveness, & efficiency of the Retail Property Services Market in Australia - a brief review. Produced by Access Economics October 1995	119
71	Mr Peter Verwer	Chief Executive Property Council of Australia	Building owner & Manager July 1996 pages 55 & 56		119
72	Mr Peter Verwer	Chief Executive Property Council of Australia	Property Council of Australia - Member Information Brochure		119
73	Mr Peter Verwer	Chief Executive Property Council of Australia	Retail Tenancies Act 1986 (Victoria)		119
74	Mr Peter Verwer	Chief Executive Property Council of Australia	Commercial Tenancy (Retail Shops) Agreements Act 1985 (Western Australia)		119
75	Mr Peter Verwer	Chief Executive Property Council of Australia	Retail Leases Handbook - Edition No. 1 1994	Written by Lexia Wilson BCom, LLB(UNSW). Minter Ellison Morris Fletcher	119
76	Mr Peter Verwer	Chief Executive Property Council of Australia	Retail Leases Act 1994 No. 46 (New South Wales)		119
77	Mr Peter Verwer	Chief Executive Property Council of Australia	Tenancy Tribunal Act 1994 No. 64 of 1994 (Australian Capital Territory)		119
78	Mr Peter Verwer	Chief Executive Property Council of Australia	Retail Shop Leases Bill 1995 (South Australia)		119

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
79	Mr Peter Verwer	Chief Executive Property Council of Australia	Retail Shop Leases Act 1994 No. 47 of 1994 (Queensland)		119
80	Mr Peter Verwer	Chief Executive Property Council of Australia	Fair Trading (Code of Practice for Retail Tenancies) Regulations 1996 (Tasmania)		119
81	<b>Confidential</b>				
82	<b>Confidential</b>				
83	<b>Confidential</b>				
84	<b>Confidential</b>				
85	<b>Confidential</b>				
86	<b>Confidential</b>				
87	<b>Confidential</b>				
88	Mr Bill Frilay	Senior Business Analyst BP Australia Limited	BP Enterprise Franchise Agreement Disclosure Statement		102
89	Mrs & Mr D & R Sammut		Personal references provided by Mrs Sammut	date range from 6 April 1987 to 23 May 1995	110
90	<b>Confidential</b>				
91	Mr Brian Crews		'CSR out to change the rules'	Excerpt from the Financial Review -date mid 1993	8
92	Mr Brian Crews		Correspondence from Mr G V Kells Managing Director of CSR Limited to Mr Brian Crews	dated 28 July 1993	8
93	<b>Confidential</b>				
94	Mr David Edwards	Chief Executive Officer Victorian Employers Chamber of Commerce & Industry	Competition - 'Watchdog guards fair conduct'	Herald Sun Monday 5 August 1996 - Small Business Adviser Pg 33	9
95	Mr Frank Huber		Documents relating to tenancy - Box Hill Central	Provided by Mr Frank Huber dated between June 1991 and July 1993	131
96	Mr Frank Huber		Victorian Retailer - 'Major Tenancy Report Released'	Official Journal of the Retail Traders' Association of Victoria May 1995 Issue	131
97	Mrs & Mr D & R Sammut		Various press clippings	Press clippings dated 25 September 1996 and 29 September 1996 from Mrs Dawn Sammut	110

*Finding a balance: towards fair trading in Australia*

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
98	Mr Bill Frilay	Senior Business Analyst BP Australia Limited	'There's no business like their business'	Article from Personal Investment dated May 1996 Pages 39, 40 42	102
99	Ms Leigh Cunningham	Chief Administrative Officer The Institute of Arbitrators Australia	The Institute of Arbitrators Australia - Arbitrators Mediators Conciliators	Information Brochure	88
100	<b>Confidential</b>				
101	<b>Confidential</b>				
102	<b>Confidential</b>				
103	<b>Confidential</b>				
104	<b>Confidential</b>				
105	<b>Confidential</b>				
106	<b>Confidential</b>				
107	<b>Confidential</b>				
108	Mr Graham Grant		Various Accountant & Financial statements relating to the Lighthouse Caravan Park	date range 4 June 1985 to 30 June 1989	108.1
109	Mr Michael Fardoulis		Various correspondence relating to the Trade Practices Act relevant to Mr Jim Fardoulis	date September 1996 to October 1996	144
110	Ms Jean Sietzema-Dickson	Managing Editor Poetica Christi Press	Letters relating to the Box Hill Central shopping centre	Letter from Mr Luis Jesus to Tony Christakakis of the Combined Retailers Association. Letter from P Maratheftis to the Hon Vin Heffernan, dated t December 1994. 2 letters from Mrs Jean Sietzema to Mr Robert Clarke Member for BoxHill dated 28/3/96 and 14/	29
111	<b>Confidential</b>				
112	<b>Confidential</b>				
113	Mr Joseph Natoli	Queensland Fruit and Vegetable Traders Association	'A Response to the Inquiry into the effect of Extended Trading Hours' from the Queensland Fruit & Vegetable Traders Assoc		65

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
114	Mr Graham Grant		Company Extract: Finance Corporation of Australia from the Australian Securities Commission		108
115	Mr Graham Grant		Extract: 'Banks accused of Plundering Accounts' (undated)		108
116	Mr Clive Bubb	General Manager Queensland Chamber of Commerce and Industry	'Regulatory compliance Costs and Other Burdens,' a survey report QCCI (July/August) 1996		81
117	Mr Clive Bubb	General Manager Queensland Chamber of Commerce and Industry	Queensland Pulse Vol 11 No 3, September 1996, 'Quarterly Pulse Survey of Queensland Business, QCCI'		81
118	Mr G A Watts	General Manager Australian Petroleum Agents & Distributors Association	APADA'S comments on the ACCC Report recommendations (dated 4 October 1996)		97
119	Prof Allan Fels	Chairman Australian Competition & Consumer Commission	'Unconscionable conduct in commercial dealings: a guide to section 51AA of the Trade Practices Act, (dated October 1993)		62
120	Prof Allan Fels	Chairman Australian Competition & Consumer Commission	'Small Business and the Trade Practices Act (dated November 1995)		62
121	Prof Allan Fels	Chairman Australian Competition & Consumer Commission	'Fair Trading: Codes of Conduct,' a guide prepared by Commonwealth, State and territory Consumer Affairs Agencies (dated October 1996)		62

*Finding a balance: towards fair trading in Australia*

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
122	Mr Len Rathmann	Executive officer WA Retailers Association Inc	'Commercial Tribunal of Western Australia. Report to the Hon. Attorney General for the year ended 30 June 1996'		140
123	Mr Len Rathmann	Executive officer WA Retailers Association Inc	'Commercial Tennancy (Retail Shops) Agreements Amendment Bill 1996		140
124	Mrs Donna Clark	Gifts R Us	'Ministry of Fair Trading Business Names Branch' - various documents dating from September 1986 to November 1992		70
125	Mr Michael Ratner	Managing Director Emaness Holdings Pty Limited	'The Retailers Digest' (dated October 1996		71
126	<b>Confidential</b>				
127	Mr Wayne Ryan	Air Con Serve Pty Ltd	Extract 'Help put the shonky out of business' (dated October 1996)		14
128	Mr Wayne Ryan	Air Con Serve Pty Ltd	Extract 'Bankruptcies at record level'		14
129	<b>Confidential</b>				
130	Mr Stewart McFetridge	Chatsway Pty Ltd	Multiple Site Franchise Systems in the Retail Petroleum Industry		69
131	Mr Stewart McFetridge	Chatsway Pty Ltd	Extract from SA Hansard 'Select Committee on Petrol Multisite Franchising' (dated 17 October 1996)		69
132	Mr Stewart McFetridge	Chatsway Pty Ltd	Letter from Manager of Yellow Cabs regarding LPG Purchases (dated 12 August 1996)		69
133	Mr Stewart McFetridge	Chatsway Pty Ltd	'What are the benefits of Shell FORCE?'		69
134	Mr Stewart McFetridge	Chatsway Pty Ltd	Memorandum dated 18 January 1995		69



No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
135	Mr Stewart McFetridge	Chatsway Pty Ltd	Shell Force form letter, dated 31 March 1994		69
136	Mr Stewart McFetridge	Chatsway Pty Ltd	Extract, dated 17 May 1995		69
137	<b>Confidential</b>				
138	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Report, 'Films: A report on the supply of films for exhibition in cinemas in the UK'		149
139	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Letter from Paul Rednev, ACCC to Martine west EIEA, dated 30 October 1996		149
140	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Letter from Stephen Basil-Jones Columbia Tristar Films, dated 24 September 1996		149
141	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Correspondence between Jan Stoeham and Ian Sands, dated from 7 May to 23 May 1996		149
142	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Extract, Malvern Prahan Leader, 16 October, 1996		149
143	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Extract, Variety Magazine, May 1996		149
144	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Extract, Newsletter Cinema Exhibitors' Association dated 24 September 1996		149
145	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Extracts, The Age, 30 March 1996		149
146	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Extracts, Financial Review 28 March 1996		149
147	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Document, 'Film Industry Review'		149

*Finding a balance: towards fair trading in Australia*

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
148	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Extract, Encore, 31 July 1995		149
149	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Report, 'Motion Picture Exhibition', Australian Bureau of Statistics 1993-94;		149
150	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Document 'Meeting - Film Industry Review'		149
151	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	Video: segment on independent cinemas which appeared on Channel Nine's "Small Business Show" Sunday 27 October, 1996		149
152	Mr Sam Richardson	General Manager Tasmanian Independent Wholesalers	Hydro-Electric Commission Retail Prices Investigation - Response to draft report	Prepared by Tasmanian Independent Wholesalers	155
153	Mr Sam Richardson	General Manager Tasmanian Independent Wholesalers	Submission to the Safe Food Handling Australia Discussion Paper	Prepared by Tasmanian Independent Wholesalers	155
154	Ms Kate Carnell MLA	Chief Minister ACT Legislative Assembly	Red Tape Task Force Report - 'From Red Tape to a Blue Print for regulatory reform'	From the ACT Government Department of Business, the Arts, Sport & Tourism	154
155	<b>Confidential</b>				
156	Mr Rod Hackett	Proprietor Far Horizons Pty Ltd	Extract: The Wall Street Journal, 'A Bit of Heartburn' dated Wednesday 17 April 1996		95.2
157	Mr Rod Hackett	Proprietor Far Horizons Pty Ltd	Extract: The Wall Street Journal, 'McDonald's Accelerates Store Openings in U.S. and Abroad, Pressuring Rivals' dated 18 January 1996		95.2

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
158	Mr Neil Mitchell		Correspondence between BP Australia and Mr Neil Mitchell dated 30 September 1996 and 13 October 1996 respectively		48
159	Mr A T Rigg		Extract: South Coast Register - 'Banking' - dated 18th December, 1991		148
160	<b>Confidential</b>				
161	Mr John Brownsea	Executive Director Small Retailers Association of SA	Small Retailers Association of South Australia Inc - advertising pamphlet		61
162	Mr John Brownsea	Executive Director Small Retailers Association of SA	Extracts: Various Newspaper articles and Media releases dating from 1993		61
163	Ms Jan Stoneham	Chief Executive Entertainment Industry Employers Association	List of Companies associated with EIEA (including EIEA members)		149
164	Mr Martin Soutter	Assistant Director Business Council of Australia	Industry Codes of Conduct - Industry Perspective	Savoy Park Plaza Hotel 22 November 1996	31
165	Mr Michael Ahrens	Baker & McKenzie	'The Growth of Legislation and Litigation' - The Australian Law Journal - Volume 69 January 1995		159
166	Mr Michael Ahrens	Baker & McKenzie	Martin Kreiwaldt Memorial Address Darwin 28 July 1994 - 'Individualized Justice - The Holy Grail' A M Gleeson		159
167	Mr Richard Mulcahy	National Executive Director Australian Hotels Association	"Tax Implications of Registered Clubs" - Report to the Australian Hotels Association	by Michael Quin FCPA (TAXATION) F.T.I.A	151
168	Mr Richard Mulcahy	National Executive Director Australian Hotels Association	Media Release 13 October 1996. 'Clubs Threaten Small Business in 30 Areas, Study Shows'		151

*Finding a balance: towards fair trading in Australia*

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
169	Mr Ian Gilbert	Director Legal Australian Bankers Association	'Should opportunistic conduct be outlawed? The proposal to proscribe harsh or oppressive conduct'		34
170	<b>Confidential</b>				
171	<b>Confidential</b>				
172	<b>Confidential</b>				
173	Mrs J Newell		ACCC Publication: Small Business & the Trade Practices Act, November 1995. Pages 20-22		38.1
174	Mrs J Newell		Press clippings provided by Mrs Newell re: ACCC dated between September 1995 and September 1996		38.1
175	Mr Grahame Henderson	National Chairman Shell National Action Group	Correspondence between Grahame Henderson, Franchisee and Shell. Dated December 1996.		16.1
176	Mr Michael Delaney	Executive Director Motor Trades Association of Australia	United Kingdom Trade and Industry Committee's sixth report on Petrol Retailing.		104.1
177	Mr Robert Bradshaw	Commissioner of Consumer Affairs Office of Consumer Affairs & Fair Trading Northern Territory Attorney-General's Department	Report of the Working Group appointed to review Tenancy Law in the Northern Territory, November 1993		
178	<b>Confidential</b>				
179	Professor Alan Millington		Retail Property in Australia - a review of the retail property market in Australia by Prof Alan F Millington dated January 1995.	This review was commissioned by the Retailers Council of Australia, 104 Franklin Street Melbourne	162

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
180	Mr Peter Verwer	Chief Executive Property Council of Australia	Unconscionable contracts: A comparative study of the approaches in England, France, Germany, and the United States. Authors A H Angelo & E P Ellinger		119
181	Mr Peter Verwer	Chief Executive Property Council of Australia	Commercial Property Leases in England & Wales - Code of Practice.		119
182	Mr Peter Verwer	Chief Executive Property Council of Australia	Letter from the International Council of Shopping Centers New York, to Mr Geoff Deakin of the Property Council of Australia, dated 7/1/97		119
183	<b>Confidential</b>				
184	Mr John Schroder	Deputy General Manager Westfield Shopping Centre Management Westfield Pty Ltd	Standard form of Disclosure Statement & Lease Propsal for Westfield Shoppingtown Marion		
185	Mr John Schroder	Deputy General Manager Westfield Shopping Centre Management Westfield Pty Ltd	Schedule of Works to be performed the the Lessor & Lessee Westfield Shoppingtown Marion		
186	Mr John Schroder	Deputy General Manager Westfield Shopping Centre Management Westfield Pty Ltd	Audit of operationg expenses for year ended 30 June 1996 Westfield Shoppingtown Marion		
187	Mr John Schroder	Deputy General Manager Westfield Shopping Centre Management Westfield Pty Ltd	Westfield Promotion Fund Management Pty Ltd Statement for Westfield Shoppingtown Marion		

*Finding a balance: towards fair trading in Australia*

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
188	Mr John Schroder	Deputy General Manager Westfield Shopping Centre Management Westfield Pty Ltd	"Let's Talk Outgoings' issue paper,		
189	<b>Confidential</b>				
190	Mr Brian Harrison	Managing Director AMP Shopping Centres Pty Ltd	Gardent City Shopping Centre Retail Outgoings for year ended 31 Dec 95	AMP letter dated 4/2/97	
191	Mr Brian Harrison	Managing Director AMP Shopping Centres Pty Ltd	AMP standard invitation to Lease	Letter dated 4/2/97	
192	Mr Brian Harrison	Managing Director AMP Shopping Centres Pty Ltd	Discloure Statement	AMP letter dated 2/4/97	
193	Mr Brian Harrison	Managing Director AMP Shopping Centres Pty Ltd	Proforma Bank Guarantee	AMP letter dated 4/2/97	
194	Mr Brian Harrison	Managing Director AMP Shopping Centres Pty Ltd	Section 7(1)(a) Reg.5 Notice of Election	AMP letter dated 4/2/97	
195	Mr Brian Harrison	Managing Director AMP Shopping Centres Pty Ltd	Garden City Trader Association (INC) Application Form	AMP letter 4/2/97	
196	Mr Brian Harrison	Managing Director AMP Shopping Centres Pty Ltd	Draft Lessee letter of acceptance	AMP letter dated 4/2/97	
197	Mr Stephen Harrison	Executive Director Institute of Chartered Accountants	Direct Debit Request Form		
198	Mr Brian Harrison	Managing Director AMP Shopping Centres Pty Ltd	Garden City Shopping Centre Standard Lease	AMP letter 4/2/97	
199	Mr Paul Russo	Solicitor c/- Russo & Russo	Statement of Claim - The Lord's Table Pty Ltd and Perpetual Trustees WA Ltd		178
200	Mr Paul Russo	Solicitor c/- Russo & Russo	Application - Jacara Pty Ltd and Auto-Bake Pty Ltd and Perpetual Trustees WA Ltd		178
201	Mr Paul Russo	Solicitor c/- Russo & Russo	Application - Robotis Nominees Pty Ltd and Perpetual Trustees WA Ltd		178
202	Mr Paul Russo	Solicitor c/- Russo & Russo	Potblack Investments Pty Ltd and Perpetual Trustees WA Ltd		178

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
203	Mr Paul Russo	Solicitor c/- Russo & Russo	Application - Gary Lee and Perpetual Trustees WA Ltd		178
204	Mr Paul Russo	Solicitor c/- Russo & Russo	Letter to Lessor from Lend lease re rental rebate		178
205	Mr Richard Rogalsky	Consultant United Retailers Association Inc	Case: QG.198 OF 1994, Japlalm Pty Ltd vs Hamilton Island Enterprise & John Palmer	the Hamilton Island (Mrs evans) Documents obtained from Federal Court Queensland	111.2
206	Mr Richard Rogalsky	Consultant United Retailers Association Inc	Letter from ACCC to Mr Rogalsky regarding section 52 of the Trade Practices Act 1974.		111.2
207	Mr Richard Rogalsky	Consultant United Retailers Association Inc	Correspondence between Mr Rogalsky and the ACCC regarding the Hamilton Island case, dated 5 August 1996 and 15 August 1996		111.2
208	Mr Richard Evans MP		Letter & Notice to tenants from Management Office Warwick Entertainment Centre dated 19 December 1996 related to trading hours over Christmas.		
209	Ms Louise Martin	Chief Executive Officer Lend Lease Property Management	Lend Lease Standard Retail Lease Agreement		179
210	<b>Confidential</b>				
211	Ms Louise Martin	Chief Executive Officer Lend Lease Property Management	Lend Lease - Charlestown Square Statement of Audited Outgoings as at 30/6/96.		179
212	Ms Louise Martin	Chief Executive Officer Lend Lease Property Management	Lend Lease Communications with Charlestown Square Tenants		179
213	Dr Clyde Croft	Vice President Australian Centre for International Commercial Arbitration	'Retail Tenancies' - Under the "Retail Tenancies Act 1986," by Clyde Croft. Second Edition		88

*Finding a balance: towards fair trading in Australia*

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
214	Dr Clyde Croft	Vice President Australian Centre for International Commercial Arbitration	1995 Supplement to the second edition 'Retail Tenancies' - Under the "Retail Tenancies Act 1986," by Clyde Croft.		88
215	Dr Clyde Croft	Vice President Australian Centre for International Commercial Arbitration	Commercial Tenancy Law in Australia, Second Edition by Bradbrook, Adrian, J and Croft, Clyde, E.		
216	The Hon David Beddall MP		'Voluntary Codes of Practice, ' a consultation paper	From the Office of Fair Trading dated December 1996.	
217	The Hon David Beddall MP		'A Guide to the Office of Fair Trading' - Protecting Consumers, Encouraging Competition		
218	Mr John Martin	Executive Director Australian Chamber of Commerce & Industry	ACCI submission to the Small Business Deregulation Task Force, June 1996		75.1
219	Mr Phil Naylor	Chief Executive Officer Australian Retailers Association	Commercial Property Leases in England & Wales - Code of Practice		44.1
220	Mr Phil Naylor	Chief Executive Officer Australian Retailers Association	British Retail Consortium 'Privity of Contract - A Guide to the Landlord and Tenant (Covenants) Act 1995'		44.1
221	Mr Phil Naylor	Chief Executive Officer Australian Retailers Association	Australian Retail Tenancies Legislation by Phillips Fox Solicitors		44.1
222	Mr Phil Naylor	Chief Executive Officer Australian Retailers Association	Response to the Access Economics Review - "Retail Market Competition: Reality or Myth?"	Report by the Retailers Council of Australia	44.1



No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
223	Mr Peter Verwer	Chief Executive Property Council of Australia	The Effect of Landlord and Tenants strategies on retail rents in shopping centres, dated February 1997	Report by Jebb, R T (Jebb Holland Dimasi Pty Ltd) Economists & Property Advisors	119
224	Mr R F Williams		Various papers submitted by Mr Williams		184
225	Mr Michael Lonie	Executive Officer Tenancy Australian Retailers Association	'1996 National occupancy cost survey regional centres' - Australian Retailers' Association Tenancy Forum - Melbourne, 27 February 1997		
226	Mr Michael Lonie	Executive Officer Tenancy Australian Retailers Association	'Retail Centres overdone, undervalued' by Michael Lonie	Papers published in the November 1996 issue of 'The Valuer'. Pages 305, 313-338.	
227	Mr Andrew Terry	Director of the Centre for Franchising Studies Head of the School of Business Law & Taxation University of New South Wales	'Unconscionable contracts in New South Wales: "The Contracts Review Act 1980," by A L Terry, LL.M. (Canterbury, N.Z.)		
228	Mr Andrew Terry	Director of the Centre for Franchising Studies Head of the School of Business Law & Taxation University of New South Wales	'Policy issues in franchise regulation: the Australian experience,' by Andrew Terry.	Article published in 'Journal of International Franchising & Distribution Law,' December 1991, pages 77-89.	
229	Mr Andrew Terry	Director of the Centre for Franchising Studies Head of the School of Business Law & Taxation University of New South Wales	'Problematic relations: Franchising and the Law of Incomplete Contracts' by Gillian K. Hadfield.	Stanford Law Review [Vol. 42:877], pages 927-992	

*Finding a balance: towards fair trading in Australia*

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
230	Mr Andrew Terry	Director of the Centre for Franchising Studies Head of the School of Business Law & Taxation University of New South Wales	'National Franchise Relationship Regulation?'	Business Franchise Guide, Edition No. 127 August 22, 1990. Text of Report by the House Committee on Small business entitled "Franchising in the U.S. Economy: Prospects and Problems," issued August 13, 1990.	
231	Mr Andrew Terry	Director of the Centre for Franchising Studies Head of the School of Business Law & Taxation University of New South Wales	Proposed 'Federal Fair Franchise Practices Act.' Text of H.R. 1717, introduced May 25, 1995 with introductory remarks. (USA)	Business Franchise Guide No. 187 June 22, 1995.	
232	<b>Confidential</b>				
233	Mr Geoff Deakin	Manager, Retail Policy Property Council of Australia	'Growth platforms for a competitive Australia,' - Incentives Aspirations Innovation	Report by the Mckinsey Global Institute and McKinsey's Australian Office.	
234	Mr Peter Hamilton	Manager Metropolitan and Regional Management Branch NSW Department of Urban Affairs and Planning	Retail Trends & Interstate Comparisons - December 1996 (Draft)	Prepared for: NSW Department of Urban Affairs and Planning	
235	Mr Peter Hamilton	Manager Metropolitan and Regional Management Branch NSW Department of Urban Affairs and Planning	'Outer Secondary Centres Study'	Prepared for Department of Urban Affairs and Planning by Leyshon Consulting Pty Ltd	
236	Mr Mark Overell	Research Officer Queensland Retail Traders & Shopkeepers Assoc	'Retales' extracts from Inside Retailing February 10 and 17 1997 issues. Page 2		
237	Mr Harvey Smith	Chairman Tasmanian Farmers & Graziers Association	Press release by the Tasmanian Farmers & Graziers Association, dated 7/3/97.		

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
238	Mr Harvey Smith	Chairman Tasmanian Farmers & Graziers Association	Extract 'Pig Industry faces collapse' Tasmanian Country, Friday March 7, 1997.		
239	<b>Confidential</b>				
240	<b>Confidential</b>				
241		Registrar QLD Department of Tourism, Small Business and Industry	'What you should know about retail shop leases'		
242		Press	Various press clippings relating to the refurbishment of the Mount Pleasant shopping, dating from March 1995 through January 1997		
243	<b>Confidential</b>				
244	Mr Allan Asher	Deputy Chairman Australian Competition & Consumer Commission	'Misuse of market power' Section 46 of the 'Trade Practices Act 1974.	a background paper - February 1990	62.2
245	Mr Allan Asher	Deputy Chairman Australian Competition & Consumer Commission	ACCC - Media Release dated 4 December 1995		62.2
246	Mr Allan Asher	Deputy Chairman Australian Competition & Consumer Commission	Various letters from Mr Michael Cosgrave Regional Director ACCC Victoria , relating to Mr Brian Crews, dated 4 march 1997		62.2
247	Mr Glenn Mitchell	IPR Shandwick Pty Ltd	Media relaease - Kleins Franchising Pty Ltd - dated 17 March 1997		
248	Mr Michael Delaney	Executive Director Motor Trades Association of Australia	Ford Motor Company of Australia review of Commission determination deying authorisation. Pgs 17,486 to 17,507 of Australian Trade Practices Reports		118.2

*Finding a balance: towards fair trading in Australia*

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
249	Mr Michael Delaney	Executive Director Motor Trades Association of Australia	Section 2-302 of the USA Uniform Commercial Code		118.2
250	Ms Andrea Pope	Minister for Small Business & Tourism	Retail Tenancies Act review - Media release dated 24 April 1997		
251	Mr Richard Rogalsky	Consultant United Retailers Association Inc	Extract Supreme Court of Victoria 1973 - Spurling v Development underwriting.		111.5
252	Mr Richard Rogalsky	Consultant United Retailers Association Inc	Extract High Court of Australia - Kentucky Fried Chicken Pty Ltd v Gantidis and Another, February and May 1979		111.5
253	Mr Robert Gardini	Gardini & Co	Opening Statement to the Fair trading inquiry public hearin on 24 March 1997		191
254	Mr Robert Gardini	Gardini & Co	Letter of advice from Don Harding, Freehill Holingdale & Page to Mr Neill Buck, Executive Director of the FCCC, dated 27November 1996		191
255	Mr Robert Gardini	Gardini & Co	Letters between The Hon Geoff Prosser and Robert Gardini, between 13/3/96 and 5/12/96 in relation to the FCCC.		191
256	Mr David Roskell		Various tenancyschedules - Fair shopping centre		141
257	Ms Catherine McCourt	Manager Business Environment Branch Department of Tourism Small Business and Industry	'A Retail industry strategy for Queensland' - Progress Report	This report is a discussion paper prepared by the Department of Tourism, Small Business and Industry in March 1997	

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
258	Mr Phil Naylor	Chief Executive Officer Australian Retailers Association	Letter to the Property Council of Australia dated 14 March 1997	Letter relates to resolutions passed at the tenancy forum.	44
259	Mr Phil Naylor	Chief Executive Officer Australian Retailers Association	Retail Tenancy Forum 27 February 1997 - Melbourne. Opening Speech by Antony Coote AM.		44
260	Mr Phil Naylor	Chief Executive Officer Australian Retailers Association	Australian Retailers' Association - Proposed model for national legislation - February 1997.		44
261	Mr John Hawes		Motor vehicle insurance repair rates as at 01/07/95		
262	Mr Robert Gardini	Chairman Franchising Code Council Ltd	Report of the Franchising Code's Disputes Review - November 1996		43
263	Mr Geoff Deakin	Manager, Retail Policy Property Council of Australia	Opening statement made to public hearing on 24 February 1997, by Mr Alan Briggs, Chairman of the Property Council of Australia		119.3
264	Mr Geoff Deakin	Manager, Retail Policy Property Council of Australia	2 Media releases from the Property Council of Australia dated 15 April 1997.		119.3
265	Mr Geoff Deakin	Manager, Retail Policy Property Council of Australia	Property Council of Australia - Summary of Dispute Resolution Procedures. Prepared by Minter Ellison		119.3
266	Mr Geoff Deakin	Manager, Retail Policy Property Council of Australia	Property Council of Australia - Summary of compensation for relocation and disturbance. Prepared by Minter Ellison		119.3

*Finding a balance: towards fair trading in Australia*

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
267	Mr Geoff Deakin	Manager, Retail Policy Property Council of Australia	Property Council of Australia - Summary of lease term statutory provisions. Prepared by Minter Ellison.		119.3
268	Mr Geoff Deakin	Manager, Retail Policy Property Council of Australia	the Effect of Landlord and Tenants strategies on retail rents in shopping centres. Prepared by R T Jebb (Jebb Holland Dimasi Pty Ltd) 14 February 1997		119.3
269	Mr Geoff Deakin	Manager, Retail Policy Property Council of Australia	Market Rent and Goodwill in retail tenancies: a valuer's perspective. Prepared by Hamiltions Valuers & Property Consultants		119.3
270	Mr Geoff Deakin	Manager, Retail Policy Property Council of Australia	Model lease developed by the Property Council (for NSW). Plus explanatory booklet.		119.3
271		Library Law Council of Australia	Law Council of Australia submission into the inquiry into takeover laws. May 1988		
272		Library Law Council of Australia	Law Council of Australia supplementary submission to the inquiry into takeover laws. July 1988		
273		Library Law Council of Australia	Law Council of Australia draft submission on Trade Practices Amendment Bill 1985. 29 November 1985.		

No.	Name	Position	Exhibit Title	Exhibit Desc	Related to Sub
274		Library Law Council of Australia	Law Council of Australia submission on Section 74 of the Trade Practices Act 1974. 29 April 1986		
275	Mr Michael Delaney	Executive Director Motor Trades Association of Australia	Correspondence between Michael Delaney and Michigan Automobile Dealers Association dated 28 April 1997.		118
276		Australian Law Reform Commission	Adversarial - background papers Nos 1, 2, 3, 4 and 5 dated December 1996		
277	Mr Michael Delaney	Executive Director Motor Trades Association of Australia	Correspondence from Michael Delaney relating to the the MTAA withdrawal form the OilCode. dated 24 Oct 1996, and 28 Oct 1996		118
278	<b>Confidential</b>				





## **Appendix IV      Witnesses at public hearings**

---

### ***Sydney, Wednesday 4 September 1996***

#### **Franchise Association of Australia & New Zealand**

- Mr Stephen Penfold, Chairman
- Mr Bob Peterson, Director
- Mr David Atchison, Joint Managing Director, Ice Creameries of Australia
- Mr Michael Ahrens, Senior Partner, Baker & Mackenzie, Solicitors

#### **Franchising Code Council Ltd**

- Mr Neill Buck, Executive Director
- Mr Robert Gardini, Chairman
- Mr Warwick Shedden, Board Member

#### **Phillips Fox**

- Mr Tony Conaghan, Partner.

### ***Sydney, Thursday 5 September 1996***

#### **Australian Petroleum trading as AMPOL**

- Mr Mark Kevin, National Retail Manager
- Mr Frank Topham, Government Affairs Manager

#### **Australian Retailers Association**

- Mr Michael Lonie, Executive Officer, Tenancy
- Mr David Shetliffe, Director

#### **University of New South Wales**

- Mr Andrew Terry, Director of the Centre for Franchising Studies, Head of the School of Business Law & Taxation
- Mr Frank Zumbo, Lecturer, School of Business Law & Taxation

**Melbourne, Friday 4 October 1996**

**Individuals**

- Mrs Mary Caruana
- Mr Brian Crews
- Mrs Clare Hofmann
- Mr Toni Hofmann
- Mr Franz Huber
- Rev Keith Ludgater
- Mr Raymond McCann
- Mr Neil Mitchell
- Mr Renato Sammut
- Mrs Dawn Sammut

**Amalgamated Roofing Tile Distributors Pty Ltd**

- Mr Neil Slattery, Managing Director

**Australian Bankers' Association**

- Mr Ian Gilbert, Director Legal

**BP Australia Limited**

- Mr Bill Frilay, Senior Business Analyst
- Mr Christopher Gillman, Marketing Development Manager
- Mr Shaun Zambuni, Franchise Programs Manager

**Law Institute of Victoria**

- Mr Tony Garrison, Committee Member
- Mr Philip Linacre, Member

**Poetica Christi Press**

- Ms Jean Sietzema-Dickson, Managing Editor

**Victorian Employers Chamber of Commerce & Industry**

- Ms Catrina Mulderry, Legal Research Officer
- Mr Steven Wojtkiw, Manager, Economics & Research Services

***Brisbane, Tuesday 22 October 1996***

**Individuals**

- Mr Peter Edwards
- Mr Graham Grant

**H & F Educational Services**

- Mr Douglas Peak AM, Principal,

**Queensland Chamber of Commerce and Industry**

- Mr Laurence Murray, Business Liaison Officer
- Mr Peter Ranson, Small Business Officer

**Queensland Chicken Growers Association**

- Mr Peter Hamilton, Executive Officer
- Mr Gary Sansom, President

**Queensland Fruit and Vegetable Traders Association**

- Mr Joseph Natoli, Chairman

**Queensland Retail Traders & Shopkeepers Assoc**

- Mr Mark Overell, Research Officer

**Canberra, Monday 4 November 1996**

**Australian Competition & Consumer Commission**

- Mr Allan Asher, Deputy Chairman
- Mr Bill Dee, Director, Liaison

**Australian Institute of Petroleum**

- Mr Ewen Macpherson, Manager, Government and Public Policy
- Mr James Starkey, Executive Director

**Australian Petroleum Agents & Distributors Association**

- Mr Gerald Watts, General Manager
- Mr Frank Zumbo, Consultant

**Motor Trades Association of Australia**

- Mr Michael Delaney, Executive Director
- Mr Bob Fairbairn, Director
- Mr John Rickus, Past President

**Micro Business Consultative Group, Office of Small Business, Dept Industry Science & Tourism**

- Mr Guy Barnett, Member
- Ms Soula George, Member

**Property Council of Australia**

- Mr Alan Briggs, Chairman, ACSC Committee
- Mr Geoff Deakin, Manager, Retail Policy
- Ms Louise Martin, Chief Executive Officer, Lend Lease Property Management
- Mr Dale McDermid

**Shell National Action Group**

- Mr Grahame Henderson, National Chairman
- Mr Bruce Howard, National Vice-Chairman

**Perth, Monday 11 November 1996**

**Individuals**

- Mr James Greig
- Mrs Josephine Grieg
- Mr Phillip Joubert
- Mr Pieter Willems

**Gifts R Us**

- Mrs Donna Clark, Owner

**Laubman and Pank Optometrists Pty Ltd (WA)**

- Ms Yvonne Valentin, Commercial Manager

**Showbits**

- Mrs Marion Dwight

**WA Council of Retail Associations**

- Mr Len Rathmann, Executive Officer

**Adelaide, Wednesday 13 November 1996**

**Individuals**

- Mrs Sandra Lazari

**Chatsway Pty Ltd**

- Mr Stewart McFetridge, Director

**SA House of Assembly**

- Mr Colin Caudell MP, former Chair, Select Committee on Petrol Multi-site Franchising

### **Small Retailers Association of SA**

- Mr Max Baldock, President
- Mr John Brownsea, Executive Director

**Canberra, Monday 2 December 1996**

### **Individuals**

- Professor Alan Millington

### **Australian Chamber of Commerce & Industry**

- Mr Ian Booth, Senior Adviser, Regulation & Environment
- Mr Brian Brocklebank, Project Manager
- Mr John Martin, Executive Director

### **Business Council of Australia**

- Mr Martin Soutter, Assistant Director
- Mr Robert Gardini, Consultant

### **Council of Small Business Organisations of Australia**

- Mr Rob Bastian, Chief Executive
- Dr Kim Houghton, Manager
- Mr Peter Judkins, Councillor
- Mr William Roberts, Vice-President, Hunter Small Business Persons Association

### **Federal Chamber of Automotive Industries**

- Mr John Bayard, Member, Legal Committee
- Mr Terry Pennington, Executive Officer
- Ms Alison Terry, Member Legal Committee

**Canberra, Monday 10 February 1997**

**Australian Competition & Consumer Commission**

- Mr Allan Asher, Deputy Chairman
- Mr Bill Dee, Director, Liaison

**Australian Institute of Business Brokers Inc**

- Mr Garth Griffiths, President

**Australian Institute of Valuers & Land Economists (Inc)**

- Mr Stephen Garmston, Associate Valuer
- Mr Denis Lovell, Member, National Valuation Board
- Mr Bryan Nye, Chief Executive Officer, National Secretariat

**Department of Industry, Science & Technology**

- Ms Margaret Fanning, Assistant Secretary, Business Environment Branch
- Mr Gordon Neil, Director, Business Law and Microeconomic Reform Section
- Mr Philip Noonan, First Assistant Secretary, Office of Small Business & Federal Consumer Affairs Division

**Canberra, Thursday 13 February 1997**

**Individuals**

Mr Kelvin Thomson MP

**Melbourne, Thursday 20 February 1997**

**Australian Centre for International Commercial Arbitration**

Dr Clyde Croft, Vice President

**Kleins Franchising Pty Ltd**

Mr Grant Garraway, General Manager Franchising

**United Retailers Association Inc**

- Ms Lisa Michael, President
- Mr Richard Rogalsky, Consultant
- Mr Paul Russo, Associate Vice-President

**Canberra, Thursday 24 February 1997**

**AMP Shopping Centres Pty Ltd**

- Mr Thomas Booter, Regional Manager
- Mr Neil Fagg, National Leasing Manager
- Mr Brian Harrison, Managing Director

**Lend Lease Property Management (Australia) Pty Ltd**

- Mr Christopher Carroll, General Counsel
- Mr Graham Dreverman, Marketing Director, Lend Lease Retail
- Ms Louise Martin, Managing Director

**Property Council of Australia**

- Mr Alan Briggs, Chairman, ACSC Committee
- Mr Geoff Deakin, Manager, Retail Policy
- Ms Louise Martin, Member
- Mr Dale McDermid

**Westfield Shopping Centre Management Co. Ltd**

- Mr Graeme Maher, Manager, Corporate Merchant Relations
- Mr Ian Newton, General Manager, Leasing Division



**Canberra, Thursday 27 February 1997**

**Attorney-General's Department**

- Mr Guy Aitken, Acting Senior Counsel, Office of General Counsel
- Ms Janine Ward, Principal Counsel, Courts, Tribunals and Administrative Law Branch

**Canberra, Thursday 6 March 1997**

**NSW Department of State and Regional Development**

- Mr Ken Carlsund, Registrar of Retail Tenancy Disputes

**Canberra, Monday 24 March 1997**

**Gardini and Co, Solicitors**

- Mr Robert Gardini

**The Treasury**

- Mr Jim Axiomakarou, Competition Policy Branch
- Ms Brendalyn Berkeley, Acting Assistant Secretary, Securities Markets Branch
- Mr David Maher, Competition Policy Branch
- Mr David Parker, Assistant Secretary, Competition Policy Branch



## Appendix V      Previous reports dealing with unfair business conduct

---

### *Introduction*

V.1    This appendix summarises, or reproduces relevant extracts from, previous reports covering the subject matter of the Fair Trading inquiry. These previous reports have been referenced in a number of submissions to the inquiry, but not always in a manner which does justice to their contents.

### **Trade Practices Act Review Committee (Swanson Committee), August 1976**

V.2    The terms of reference for the above Committee, announced by the then Minister for Business and Consumer Affairs, the Hon John Howard MP, on 1 April 1976 included:

- whether the Trade Practices Act was achieving its intended purpose of the development and maintenance of a free and fair market, and whether Australian consumers were benefiting from the Act;
- whether the Act was causing unintended difficulties or unnecessary costs to the Australian public, including Australian business.

V.3    According to the Swanson Committee a basic feature of the philosophy underlying Part IV of the Act is the concept of ‘competition’. The Committee believed that the then Trade Practices Tribunal had appropriately analysed the concept and cited the Tribunal, inter alia, as follows:

*. . . as is often said in US antitrust cases, the antithesis of competition is undue market power, in the sense of power to raise price and exclude entry. That power may or may not be exercised. Rather, where there is significant market power the firm (or group of firms acting in concert) is sufficiently free from market pressure to ‘administer’ its own production and selling policies at its discretion. . .*

V.4 The Tribunal continued:

*Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:*

- (i) the number and size distribution of independent sellers, especially the degree of market concentration;*
- (ii) the heights of barriers to entry, that is the ease with which new firms may enter and secure a viable market;*
- (iii) the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion;*
- (iv) the character of 'vertical relationships' with customers and with suppliers and the extent of vertical integration; and*
- (v) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.*

*Of all these elements of market structure, no doubt the most important is (ii), conditions of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.*

V.5 The Committee went on to examine a number of specific issues relevant to the Fair Trading inquiry. Firstly, the Committee was concerned about rights on the termination of franchise agreements (Chapter 5). The Committee noted that the term 'franchise' appeared to be used to describe one of, or a combination of, three types of business arrangements:

- *a product franchise is an arrangement whereby a distributor acts as an outlet, whether wholesale, retail or otherwise, for the product(s) of a manufacturer, often on terms that give the distributor the exclusive right to sell the product(s) within a specific market. Franchises of this nature are common, for example, in retailing motor vehicles and petrol.*

- *a systems franchise is an arrangement whereby a franchisor develops a unique or individual manner of doing business and permits the franchisee to use that system, in controlled fashion, in the operation of the franchisee's independently owned business. Examples of industries where franchises of this nature are common are fast food outlets, laundries and dry cleaners and motels. Sometimes the franchisor provides only the trade name and the pattern or formula of the business. In other cases the franchisee is required to sell goods or services provided by the franchisor.*
- *a processing or manufacturing franchise is an arrangement whereby the franchisor provides an essential ingredient or know-how to a processor or manufacturer. Franchises of this nature are common, for example, in the soft-drink industry.*

V.6 Franchises usually require considerable investment by the franchisee, both in monetary terms and in development of goodwill. Typically the goodwill of the business is inexorably associated with the franchise and with the trade name or mark of the franchisor. In those circumstances, the security of the investment of the franchisee may be dependent on the actions of the franchisor who normally has property rights over the trade name or mark. The terms of the contract relating to termination or non-renewal will often reflect a balance of power weighed heavily in favour of the franchisor.

V.7 Submissions to the Swanson Committee (para 5.4) expressed concern at the possibility of the termination of franchise agreements, or a refusal to renew, or an offer of renewal only on substantially disadvantageous terms, without adequate regard for the investment of the franchisee in the business. Having regard to the way the matter is dealt with in other countries, particularly the USA, the Swanson Committee considered that an opportunity for redress should be provided to franchisees as a matter of private right, to secure fair compensation for their investment, including goodwill, upon termination of their franchises. Such a provision should be read into every relevant contract. The Committee indicated that they were influenced not only by a consideration of fairness in commercial activities. They also saw social and economic advantages in encouraging franchisees to develop their own businesses: this must also be conducive to competition generally.

V.8 The Committee noted that there was no relevant State or Commonwealth legislation in Australia. The Committee also referred to the Fourth Report of the Royal Commission on Petroleum as highlighting the problem of franchisor/franchisee relationships in that industry (para 5.10). Whatever the outcome of the Royal Commission's Report the Committee believed that any move towards legislation to deal with rights upon the termination of franchises should be quite general in incidence, and not designed solely for a particular industry. Further the Swanson Committee believed that this type of legislation is best enacted at the Commonwealth level because such franchises operate across state borders.

V.9 The Swanson Committee (para 5.12) did not suggest that a franchisee should be entitled to compensation where the termination or refusal to renew was caused by the failure of the franchisee either to act in good faith in carrying out the terms of the franchise, or failure to comply substantially with an essential and reasonable requirement imposed on him by the franchisor under the franchise. The Committee proposed that the compensation should be that which the court considers just and reasonable in all the circumstances, including attempts to mitigate the loss, but in no case should it exceed the net loss on realisation, actual or notional, of the investment of the franchisee, including relevant goodwill.

V.10 In relation to consumer protection the Swanson Committee (Chapter 9) was conscious of the fact that in recent decades the balance of bargaining power between seller and buyer had altered to the benefit of the former. This imbalance had arisen from such factors as the substantial increase in the range of products available to consumers in a modern industrialised society, the bewildering array of available options, and the development, with the aid of mass-media, of sophisticated and persuasive mass-marketing techniques. Virtually all the submissions the Swanson Committee received on this subject accepted or argued for the retention of Part V of the Trade Practices Act and the Committee considered that retention of Part V should no longer have been in question. Indeed, the Committee considered that in some respects the consumer protection provisions contained in the Act needed strengthening and extending (para 9.2).

V.11 The Committee was not in favour of continuing a system whereby prohibitions of unfair practices are framed in different terms in the law of each of the States and the Commonwealth (para 9.11). The Committee strongly favoured uniform law on these matters.

V.12 The Committee (para 9.40) was strongly of the view that the definition of a 'consumer' should be sufficiently broad to provide protection to a range of business transactions, particularly purchases by small businesses. In the Committee's view one important function of the consumer protection provisions of the Act was to redress inequalities between supplier and customer in the technical expertise required to recognise, and the bargaining power to negotiate, a fair bargain. These inequalities were not necessarily limited either to 'traditional' consumers or to transactions involving what might be termed 'consumer' goods, in a narrow sense. For these reasons the Swanson Committee (para 9.41) did not agree with proposals that the definition of consumer be necessarily limited either to transactions where the goods or services involved are for 'personal, domestic or household use' or to transactions for 'non-commercial purposes'. The Committee also rejected the distinction between corporate and non-corporate purchasers, on the grounds that it is illogical and promotes form over substance. The Committee (para 9.43) considered that the best approach to the definition of consumer should be primarily by reference to the price paid by the consumer for the goods or services. The Committee recommended two general exclusions, firstly, the acquisition of goods for the purpose of re-supply and secondly, goods acquired for the purpose of being used up or transformed in a commercial process of production as an input into the repair, treatment or processing of goods, or of fixtures on land.

V.13 In relation to unconscionable practices a number of submissions asked the Swanson Committee (para 9.56) to give consideration to recommending the introduction of a section in the Trade Practices Act which would declare as unlawful, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. Such a provision would have been similar to section 5(a) (1) of the Federal Trade Commission Act (USA). A number of submissions (para 9.57) also recommended that the Trade Practices Act be amended to allow relief to be given against harsh or unconscionable contracts. The Committee (para 9.58) considered that a general prohibition of 'unfair' conduct, as contained in the US Federal Trade Commission Act, could, under Australian conditions, result in a considerable degree of uncertainty in commercial transactions. However, the Committee (para 9.59) did see advantages in prohibiting, unconscionable conduct or practices in trade or commerce, but as a civil matter only. The Committee recommended accordingly, to give the Trade Practices Act a greater ability to deal with the general disparity of bargaining power between sellers and buyers.

V.14 The Swanson Committee ( para 9.61) deliberately referred to 'unconscionable conduct or practices', in contrast to the common legislative formulation of 'harsh or unconscionable contracts'. The Committee did not wish to adopt the concept of 'harsh' for these purposes, on the basis of the uncertainty of that concept. The Committee (para 9.62) considered that fairly detailed legislative guidance should be given on what kind of conduct should be considered unconscionable. Factors such as the commercial nature and setting of the practice, the complexity of any contemplated or executed transaction and the relative ability of the parties to understand the transaction and protect their interests, were considered relevant.

### **Trade Practices Consultative Committee, *Small Business and the Trade Practices Act* (Blunt Committee), December 1979**

V.15 The terms of reference to this inquiry were set out in a letter to the Committee from the then Minister for Business and Consumer Affairs on 19 December 1978. Having regard to the high priority which the government gave to encouraging small business the Committee was asked to consider the relationship between the restrictive trade practices provisions of the Trade Practices Act and small business. Specifically, the Committee was asked to examine the prospect of improving the market position of small business consistent with the general with the general objective of the development and maintenance of free and fair competition in the Australian economy paying particular attention to the provisions of the Act dealing with monopolisation (section 46), exclusive dealing (section 47), price discrimination (section 49) and relevant ancillary provisions.

V.16 Subsequently it was decided to expand the terms of reference and this decision is reflected in a media statement by the Minister on 3 May 1979 indicating the Committee was considering whether the Commonwealth should introduce franchising covering such matters as the termination of a franchise, continuation of supply on just and equitable terms under a franchise, the assignment of a franchise and the property transactions upon which a franchise may be based. The Committee also examined problems relating to goodwill under franchise agreements.

V.17 In further correspondence on 13 July 1979 regarding the terms 'free and fair competition' the Minister said the Committee should take account of the general Government objective of developing and maintaining economic and efficient industry in Australia.

V.18 The Blunt Committee (para 2.15) believed that only small business problems related to market power can be addressed by the Trade Practices Act. The Committee believed that, while particular categories of small business were experiencing difficulties, those categories did not constitute a major proportion of all small businesses in Australia. Nonetheless, they contained a substantial number of small businesses (para 3.48). These categories were:

- small corner store type retailers, particularly of electrical goods or groceries, who believed their main problems were due to price discrimination; and
- franchised dealers (particularly in the motor trades) whose main problems were claimed to be price discrimination by their suppliers and their lack of bargaining power vis a vis their suppliers.

V.19 The Blunt Committee (para 4.1) believed that competition rules, like the provisions of Part IV of the Trade Practices Act and the US Anti-Trust laws, may be designed to seek a number of ultimate objectives. Competition laws could be seen as desirable because competition limits the accumulation and use of power, including 'social' power, by individual large firms. The justification for this approach would be the conviction that fragmented economic power with many independent proprietors, rather than economic concentration with power wielded by corporate bureaucrats, was desirable in itself. This assumption was principally structural and ignored how big business performed in terms of efficiency and growth or how it conducted itself in the market place. In the Blunt Committee's view it was inappropriate to have laws directed primarily at industry structure.



V.20 In relation to fair trading, the Blunt Committee (para 4.3) believed that the notions that businessmen, in similar situations, should receive equal treatment and that businessmen should deal ‘fairly’ with consumers was intuitively attractive. However, the Blunt Committee considered that the concept of fairness was elusive and not susceptible to objective assessment. The Committee went on to suggest that fairness resides only in the eye of the beholder and depends on the facts and circumstances of individual cases. The Committee was also concerned that proscribing business conduct according to a standard of fairness would require the replacement of competition by detailed regulation of individual transactions by either the courts or officials.

V.21 The Blunt Committee (para 4.11 - 4.15) acknowledged that some of the competitive provisions of the Trade Practices Act have elements that reflect a number of aims. For example, the Committee suggested that the aim of protecting small business (as well as promoting competition) underlies sections 46, 49, and 50. Nevertheless, the Blunt Committee (para 4.18) considered that the thrust of the provisions of Part IV of the Act was primarily against anti-competitive conduct that works against the attainment of economic efficiency. Nevertheless, the Committee recognised that this thrust was tempered to some extent to protect the market position of small business and promote fairness.

V.22 Under the heading of the ‘Abuse of Market Power’ the Committee (para 9.44) noted with interest a submission from the Law Council of Australia in which it argued that business would benefit from a general prohibition of harsh, unconscionable or unfair conduct irrespective of whether or not the conduct involved injury to competition or abuse of market power. The Committee (para 9.46) reiterated that it saw the aim of Part IV of the Act as being to promote efficiency through the maintenance of the competitive process. They saw a law prohibiting ‘unfair’ business conduct as going further and not being compatible with the provisions of Part IV because the provisions regulate conduct according to the competitive effect of the conduct and not, as a law based on ‘fairness’ would, on its morality. The Committee saw it as having a very wide impact beyond the then boundaries of Parts IV and V. However, the Committee (para 9.47) felt that there was great merit in exposing the proposal of the Trade Practices Committee of the Law Council of Australia for debate and discussion and considered it a worthwhile area for the Government to keep under active examination.

V.23 The Law Council Submission to the Blunt inquiry argued, inter alia, as follows:

4. *Nevertheless, it is desirable that the Act assist the economically weak to compete on an even footing with the economically powerful, and to do this without departing from the principle we have mentioned. In our view, this can be achieved by recognising that fairness in competition is a concept separate and distinct from freedom of competition and that both are vital. This requirement of the public interest is already recognised in the Act, in so far as Part V prohibits certain specific practices as unfair, even though competition may not be adversely affected.*

V.24 The Law Council's submission continued:

6. *Business generally would benefit from a general prohibition of harsh, unconscionable or unfair conduct which may or may not involve injury to competition or abuse of market power. This may be achieved by including a reference to such conduct in section 52 ...*
7. *In recommending a general prohibition of harsh, unconscionable or unfair conduct, we have taken into account paragraphs 9.56 to 9.62 of the Swanson Committee Report. As is apparent from this submission, we disagree that a general prohibition of 'unfair' conduct would result in a considerable degree of uncertainty in commercial transactions; we agree there are advantages in prohibiting as a civil matter unconscionable conduct or practices in trade or commerce; we prefer to retain the formulation 'harsh or unconscionable' and we do not consider that a fairly detailed legislative guidance should be given as to what kind of conduct should be considered harsh, unconscionable or unfair.*

V.25 The Law Council directed attention to the United States where a law of unfair competition had been widely developed both by the courts and by statute. In particular it drew attention to the definition of 'unfair' used by the US Federal Trade Commission and endorsed by the courts:

- *whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - whether, in other words, it is within the penumbra of some common law, statutory, or other established concept of unfairness;*
- *whether it is immoral, unethical, oppressive, or unscrupulous;*
- *whether it causes substantial injury to consumers (or competitors or other businessmen).*

V.26 The Law Council submission continued:

23. *The amendment should regulate business conduct in a way which supplements the operation of sections 45, 46, 47, 48 and 49 without detracting from the force of those sections which are primarily concerned with competition and abuse of market power.*

*It should regulate the conduct of franchisors in making, implementing and terminating franchise agreements and business discriminations not confined to price, credits, allowances etc, for example, the unfair allocation of petroleum products between owner operated and independent retail outlets.*

24. *The amendment would rectify deficiencies seen to exist in the Act and the law as it presently stands ...*

V.27 The Blunt Committee considered franchising in some detail in Chapter 11 of its Report drawing attention (para 11.38) to the Swanson Report recommendations regarding the termination of franchise agreements and to contemporary concerns regarding petroleum retailing. The petroleum retailing concerns were particularly about the termination of service station franchises because of the intention to close sites or an intention to develop sites for higher volume, faster throughput, company operations. In regard to the then Government's intention to enact a franchise law for the retail petroleum business, the Blunt Committee (para 11.48) believed that the Government should consider the Committee's views on a more general franchise law before it went ahead with that intention. The Committee had no doubt that the general trend in the US both at federal and state government level had been for greater government involvement in the franchise relationship by means of special statutory provisions, largely directed to maintaining a 'fair' position for the franchisee.

V.28 The Committee (para 11.23) believed that the principal problems with the franchise relationship concerned:

- adequate disclosure of relevant information by the franchisor to the franchisee before entering the relationship;
- the rights of the franchisor to terminate the relationship, and the right of the franchisee to compensation for unjustified termination; and
- right of assignment of a franchise.

V.29 The Committee also considered that any possible legislation should be included within the Trade Practices Act in order to maintain consistency of principle.

V.30 In respect of disclosure the Committee (para 11.26) recorded that by 1978, sixteen US States had general disclosure laws while eight had specific laws requiring disclosure to petroleum franchisees. The Committee (para 11.27) noted that pressure for State legislative action in the USA substantially died away after the Federal Trade Commission issued a Trade Regulation Rule on 'Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures' in December 1978.

V.31 While fraud was of concern to the Committee (para 11.28), of equal, if not greater importance, was accurate knowledge about the persons selling the franchise and the commercial viability of the franchise being sold. Both were considered necessary for a firm foundation for a long term business investment. The Committee considered that candour was in the interests of all and could see very little difference between the objectives of company law in this regard and the objectives of its proposal (para 11.32). The Committee considered that a realistic franchise disclosure law must impose a positive obligation on the vendor of the franchise to disclose all relevant facts, and to clearly identify any matters which form part of a sales promotion for the franchise and which are his own opinions or are not based upon fact. The Committee (para 11.36) suggested that the following were of prime concern to a person contemplating the purchase of a franchise:

- the terms and conditions of sale of the 'franchise';
- the background of the franchisor and its chief executives; and
- facts relevant to the viability of the business including its possible term of existence.

V.32 The Committee (para 11.38) went on to draw specific attention to paragraph 5.4 of the Swanson Report. That paragraph expressed concern that a franchisee, having invested substantial sums and performed their franchise obligations, could receive little or no compensation for the investment at the end of the franchise period. The Trade Practices Commission (para 11.39) in its submission to the Blunt Committee expressed a similar concern. The Commission saw such tenure matters - such as the potential loss of goodwill, inadequate knowledge as to contractual rights and general fear of confrontation - as highly significant and supported a law to stabilise such relationships and to reduce the importance of those factors.

V.33 The Blunt Committee (para 11.41) did not wish to inhibit free flowing contractual relationships designed by particular persons to suit particular situations.

However, the Committee felt that it would be of significant advantage to small business franchisees if the legislature could spell out a ‘shopping list’ of factors that would enable franchise relationships to be terminated, on the basis that termination outside those factors would be compensatable. A clear and, in the opinion of the Committee (para 11.41) highly desirable, precedent to be followed in this regard were the provisions on termination in the US Petroleum Marketing Practices Act 1978.

V.34 The Blunt Committee (para 11.42) went on to consider rights of assignment of a franchise. While the small business franchisee would wish to be able to get back his investment in a franchise by its sale to a new franchisee such a policy would directly conflict with respect for the property rights of the franchisor, particularly the highly valuable property rights in trademarks and tradenames. The Committee considered that it would be appropriate for the law to favour such assignments, provided equity could be done between the franchisee and the franchisor. Accordingly, the Committee (para 11.46) made recommendations as to the method of apportioning any goodwill between the franchisor and the franchisee upon termination or assignment of a franchise.

V.35 The Committee (para 11.47) recommended that the Trade Practices Act be amended to introduce a new Part VA, dealing with the protection of franchisees as follows:

- require a franchisor (and, in the case of a franchisee assigning the franchise, require a franchisee) to disclose certain matters to an incoming franchisee - (see section 2 of the draft legislation at paragraph 11.51 for a detailed description of the matters the Committee would see disclosed in pursuance of this obligation);
- that the law provide a ‘shopping list’ of situations which would permit a franchise relationship to be terminated or not renewed by the franchisor; termination or non-renewal outside of those situations would render the franchisor liable for damages for unjust termination or non-renewal;
- that a franchisee be permitted by law to assign his franchise to another person, subject to the consent of the franchisor, which consent should not be unreasonably withheld;
- that in both the assignment and the termination or non-renewal situations there be an apportionment of any goodwill between the franchisor and the franchisee on the basis of the principle of fair apportionment having regard to the relative inputs of the franchisee and franchisor, both of capital (including general marketing costs which the franchisor may have incurred to promote the tradename, etc.) and labour, so that any goodwill is apportioned having regard to that relationship.

V.36 The Committee (para 11.51) also made specific recommendations as to the clauses of that proposed new part.

## **Trade Practices Act: Proposals for Change, February 1984**

V.37 In February 1984 the Attorney General, the Minister for Home Affairs and Environment and Employment and Industrial Relations released a Green Paper containing proposals for changes to the Trade Practices Act.

V.38 That Green paper proposed firstly (clause 4) that the definition of a consumer be broadened by raising the existing monetary ceiling to \$200 000. Secondly, the Government proposed (Clause 20) that the Act be amended along the lines of the recommendations of the Swanson Committee, inserting a new Section 52A prohibiting corporations, in trade or commerce, from engaging in unconscionable conduct in relation to contracts.

V.39 The proposed clause read as follows:

### ***Unconscionable conduct relating to contracts and proposed contracts***

52A. (1) *A corporation shall not, in trade or commerce-*

- (a) *make a contract if the contract would be unconscionable in all the circumstances relating to the contract at the time it is proposed to be made (in this section referred to as the 'relevant time');*
- (b) *vary a contract, including a contract in force at the commencement of this section, if the contract would, as a result of the variation, be unconscionable in all the circumstances relating to the contract at the time of the variation (in this section also referred to as the 'relevant time'); or*
- (c) *otherwise engage in unconscionable conduct in relation to a contract (including a contract in force at the commencement of this section) or a proposed contract, whether or not the corporation is or is to be a party to the contract or the proposed contract.*

(2) *For the purposes of determining whether a corporation has contravened sub-section (1) in relation to a contract or a proposed contract, the Court shall have regard to all the circumstances of the case, including the weight to be given in the case to the principle of the need for certainty in commercial transactions and such following matters as it considers relevant:*

- (a) *the relative strengths of the bargaining positions of the parties to the contract or the persons who would be parties if the proposed contract were entered into (in this section referred to as the 'proposed parties');*
- (b) *whether any provisions of the contract or the proposed contract are or would be unreasonably difficult to comply with or are not or would not be reasonably necessary for the protection of the*

*legitimate interest of any party to the contract or proposed party to the proposed contract;*

- (c) *whether, in the case of a contract, prior to or at the relevant time, its provisions were the subject of negotiation and, if so, whether any party to the contract could have negotiated successfully for the addition, omission or variation of any provision;*
- (d) *in the case of a contract, the consequences reasonably foreseeable at the relevant time of compliance or non-compliance with, or contravention of, any or all of the provisions of the contract;*
- (e) *whether, in the case of a contract, any party to the contract, prior to the relevant time, failed to disclose information of a material kind to any other party to the contract;*
- (f) *whether any provisions of the contract limit or purport to limit or any provisions of the proposed contract would limit -*
  - (i) *the liability of any party to the contract or proposed party to the proposed contract for a breach of a provision of the contract: or*
  - (ii) *the remedies available in the event of such a breach;*
- (g) *whether -*
  - (i) *any party (other than a body corporate) to the contract or proposed party (other than a body corporate) to the proposed contract was not reasonably able to protect his interests; or*
  - (ii) *any person who represented any party to the contract or proposed party to the proposed contract was not reasonably able to protect the interests of the person whom he represented, because of his age or the state of his physical or mental capacity;*
- (h) *the relative economic circumstances, educational background and literacy of -*
  - (i) *each party (other than a body corporate) to the contract or each proposed party (other than a body corporate) to the proposed contract; and*
  - (ii) *any person who represented a party to the contract or proposed party to the proposed contract;*
- (i) [the original is misnumbered]

- (j) *where the contract or proposed contract is wholly or partly in writing - its form and intelligibility;*
- (k) *the extent (if any) to which the provisions of the contract or proposed contract and their legal and practical effect were accurately explained by any person to any party or proposed party and whether the party or proposed party understood the provisions and their effect;*
- (l) [the original is misnumbered]
- (m) *whether any undue influence or unfair pressure was exerted on, or unfair tactics were used against, any party to the contract or proposed party to the proposed contract -*
  - (i) *by any other party to the contract or proposed party to the contract;*
  - (ii) *by any person acting or appearing or purporting to act for or on behalf of any such person;*
  - (iii) *in the case of a contract - by any person to the knowledge of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract; or*
  - (iv) *in the case of a proposed contract - by any person to the knowledge of any other proposed party to the proposed contract or of any person acting or appearing or purporting to act for or on behalf of any other proposed party to the proposed contract;*
- (n) *if, in the case of a contract for the acquisition of goods or services, at the relevant time a contract for the acquisition of identical or equivalent goods or services could have been made with another supplier, the difference (if any) between the price of the identical or equivalent goods or services that would have been payable under the last-mentioned contract and the price of the goods or services payable under the first-mentioned contract;*
- (o) [the original is misnumbered]
- (p) *whether, and if so to what extent, the contract or proposed contract as a whole favours any party to the contract or proposed party to the proposed contract even if no single provision of the contract or proposed contract is unreasonable;*



- (q) *the commercial or other setting, and the purpose and effect, of the contract or proposed contract; and*
- (r) *the conduct of the parties to the contract or proposed parties to the proposed contract in relation to any similar or related contract to which any of them is or was a party or proposed contract to which any of them is or was a proposed party.*

(3) *Paragraphs (2) (a) to (r) are not intended to imply a limitation of the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened sub-section (1).*

(4) *A corporation shall not be taken for the purposes of this Act to engage in unconscionable conduct in relation to a contract by reason only that the corporation institutes legal proceedings in relation to the contract or refers a dispute or claim arising out of, or in relation to, the contract to arbitration in accordance with the contract.*

(5) *In determining for the purposes of this Act whether a contract is unconscionable, the Court shall not have regard to any oppressiveness or injustice arising from circumstances that were not reasonably foreseeable at the time when the contract was made or varied, as the case requires.*

(6) *In determining for the purposes of this Act whether a corporation has contravened sub-section (1), the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.*

(7) *This section does not apply to a contract of employment or service to the extent that, under any other Act or any law of a State or Territory, an industrial award, industrial agreement or industrial determination applies to that contract.*

### **Trade Practices Revision Act 1986**

V.40 In his second reading speech on 19 March 1986 the then Attorney-General, the Hon Lionel Bowen MP, said that the Government attached great importance to ensuring that the Act was effectively and appropriately achieving its dual aims of promoting efficiency through competition, and providing consumers and business people with an appropriate measure of protection against unscrupulous traders. The Bill represented the outcome of a major review of both the competition and consumer protection provisions of the Trade Practices Act which led to the Green Paper entitled *The Trade Practices Act: Proposals for Change*. The subsequent consultation was extensive and as a result a number of the provisions of the Bill differed in significant respects from the proposals which were put forward in the Green Paper.

V.41 The monetary limit in the definition of a consumer was extended from \$15 000 to \$40 000 to restore the protection given by the Act to consumers and small business purchasers.

V.42 The Green Paper proposed a prohibition on unconscionable conduct by corporations in relation to a contract or proposed contract. Following consultation with business, industry and consumer groups, the scope of this amendment was refined and the proposed section 52A prohibited, on a civil basis, unconscionable conduct by corporations in relation to consumer -type transactions only.

### **Exposure Draft Franchise Agreement Bill, 1986**

V.43 This exposure draft was discussed in detail in the 1990 report of the House of Representatives Industry, Science and Technology Committee summarised below.

### **Second Exposure Draft Franchise Agreement Bill, November 1986.**

V.44 This second exposure draft was also discussed in the 1990 report of the House of Representatives Industry, Science and Technology Committee summarised below.

### **1987 Ministerial Council Statement abandoning draft franchise legislation**

V.45 Presumably because of the criticism that both of the exposure drafts had generated, the Ministerial Council decided in May 1987 not to proceed with the proposed legislation and announced that it would ‘do no more than exempt franchise agreements from the “prescribed interests” provisions of companies and securities legislation and that that would be done by way of regulation’. In making that decision the Council decided that adequate legal remedies already existed to protect the parties to a franchise agreement and that remedy was s52 of the Trade Practices Act.

### **1989 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Mergers, Takeovers and Monopolies: Profiting from Competition?***

V.46 The Committee made only a short comment relevant to this inquiry as follows:

*4.6.31 In relation to the suggestion that the unconscionable conduct provisions in section 52A be extended to commercial situations, there is extensive opposition to the proposal. The Committee considers that if the TPC wished to pursue the proposal, it needs to develop persuasive arguments to counter the concerns of the business community and legal profession in this regard.*

### **TPC Discussion Paper, 1989**

V.47 Baker & McKenzie prepared a discussion paper for the Trade Practices Commission in 1989 to assist the Commission develop a proposal to expand section 52A of the Trade Practices Act to cover ‘small business dealings’. In the discussion paper Baker & McKenzie identified the following problem areas for small business:

- landlords and tenants;
- loan guarantees;
- franchising;
- manufactured goods - the exercise of buying power;
- government bodies; and
- petroleum industry.

V.48 In order to test the extent to which the existing remedies were available to provide relief for small business against conduct of the kind that may be considered 'unconscionable' in the broad sense, Baker & McKenzie prepared and settled with the Commission a list of examples. In its conclusions to the discussion paper Baker & McKenzie stated that many of the problems of small businesses identified in the paper arise from the structure of markets, the use by stronger suppliers or buyers of market power, and the forces of supply and demand. Baker & McKenzie stated that an extended section 52A would not provide relief simply because a small business may be disadvantaged as a result of those market forces. The firm suggested that other solutions would need to be found within the context of Part IV of the Trade Practices Act. In summary Baker & McKenzie concluded that section 52A could only provide an important, but only partial, solution to the various problems identified.

**Report of the House of Representatives Standing Committee on Industry, Science, and Technology, *Small Business in Australia - Challenges, Problems and Opportunities*, January 1990**

V.49 Small business was protected under the implied conditions and warranties provisions of the Trade Practices Act to the extent that it comes within the definition of 'consumer' contained in section 4B of the Act. However, this definition applied only to the end-user of goods, and did not extend to a person acquiring goods and services for resupply and resale. This definition was criticised to the IST Committee on the basis that each buyer in the chain of distribution is a consumer, not just the end-user. The Committee (para 4.9) considered that small business should have protection under the implied conditions and warranties provisions and suggested increasing the \$40 000 limit to \$200 000 as proposed in the 1984 Green Paper.

V.50 In relation to unconscionable conduct, the Committee (para 4.11) noted that Section 52A of the Trade Practices Act, which was adopted in 1986, covered unconscionable conduct towards consumers. Section 52A of the Act only applied to small business transactions in so far as the goods and services are ‘of a kind ordinarily acquired for personal, domestic or household use or consumption’. The supply of goods or possible supply of goods for ‘the purpose of re-supply or for the purpose of using them or transforming them in trade or commerce’ was specifically excluded. Anomalies (para 4.14) occurred where a small business had limited bargaining power against a large supplier in a strictly commercial agreement, such as occurs in commercial tenancy leases where a small business is disadvantaged in the same way as a consumer in that transaction. This is particularly the case where a large company is engaging in unconscionable conduct without necessarily transgressing ‘abuse of market power’ provisions in Section 46. The Committee recommended (para 4.16) that Section 52A be extended to include small business transactions including retail/commercial tenancy agreements, where a small business is disadvantaged in the same way as a consumer, in its dealings with other parties.

V.51 The IST Committee (para 4.46) received a substantial amount of evidence concerning the inequalities faced by small businesses in commercial leasing arrangements. The source of the inequalities lay in the disparity of bargaining power between small businesses and landlords. Two areas were brought to the Committee’s attention as being of special concern: leases in shopping centres and leases in the motel industry. The Shopping Centre Tenants Association of Australia (para 4.46) was sharply critical of the terms and conditions of retail leases offered to shopping centre tenants by landlords. The Association cited high rents and ‘outgoings’ (the shopping centre management costs shared by tenants) as the principle causes of complaints by tenants. The Association (para 4.47) stated that the practice of attracting major retailers to shopping centres to act as anchor tenants by offering low rents meant that smaller retailers were paying disproportionately high rents and, in effect, subsidising the large retailer. Additionally, costs which the Association believed should be borne by shopping centre management were being passed on to tenants. These costs include sinking funds, depreciation, insurance premiums and fittings to individual stores, such as ceilings. High rent increases during the term of a lease also had a severe impact on small retailers. The Association (para 4.50) asserted that this situation had arisen with the development of shopping centre complexes. A shopping centre, by its very nature, was an autonomous ‘market’ for retail space, owned by a landlord. Consequently, the landlord could set the terms and conditions for leases without the threat of competition, as there was no other ‘market’ for that retail space. The Committee (para 4.51) did not agree totally with this assertion, as shopping centres did not monopolise the available retail space. However, the Committee did consider that these centres offer prime retail space relative to traditional ‘strip’ retail shopping environs. The competition for space in centres is consequently more intense. Additionally, the management structure of centres, which had effectively one landlord owning all the retail space did place shopping centre landlords in a more powerful position over their tenants than landlords of ‘strip’ retail space.

V.52 The Shopping Centre Tenants Association of Australia (para 4.52) believed that landlords use this more powerful position to their own advantage, including

conditions in leases favourable to themselves and not taking into account the effect that these conditions had on their tenants. The net effect for the landlord was to increase the capital value of the centre at the tenants' expense (para 4.53). The Committee (para 4.59) considered that the disparity in bargaining power between small retailers and a shopping centre landlord could result in a landlord abusing his more powerful position by including unfair conditions into leases offered to smaller retailers. The Committee fully accepted the right of landlord and tenant to negotiate a lease, but considered that there should be an industry wide standard from which to begin negotiations, to protect the rights of both landlord and tenant.

V.53 Concerns with motel leases were also raised with the Committee (para 4.60). Ignorance of the motel industry by bankers and lawyers when advising clients, and a lack of understanding by motel brokers of leasing principles were cited as the principal problems in leasing a motel.

V.54 The Committee (para 4.68) recommended that the Commonwealth Attorney-General confer with State and Territory Attorneys-General to formulate a standardised rental lease for commercial properties. The Committee (para 4.72) also recommended that all State and Territory governments introduce shop lease tribunals to arbitrate in disputes between landlords and commercial tenants. The Committee (para 4.77) also considered whether the 'abuse of market power' provisions of Section 46 of the Trade Practices Act should be extended to assist shopping centre tenants. However, the Committee considered that this would not be appropriate, as it would alter the original intention of the Act. Conversely, the Committee considered that the 'unconscionable conduct' provisions of the Act (Section 52A), had the potential to provide greater protection for retailers, as unconscionable conduct by landlords would be easier to prove than contravention of Section 46. The Committee (para 4.79) recommended that Section 52A be extended to include retail and commercial tenants.

V.55 The IST Committee (Chapter 8) also gave detailed consideration to concerns expressed by small business organisations and trade associations (para 8.6) that franchise agreements led to franchisors taking unfair advantage of franchisees by including unnecessarily restrictive or onerous conditions in these agreements. In particular, the conditions in the agreements not only covered virtually all aspects of the franchisee's business, from the operational aspects, such as location of outlets, appearance of outlets and provision of goods and services, but also established the dominance of the franchisor by giving him or her the right to vary the terms of the agreement without consultation. Franchisees recognised that franchisors must exercise some control over the operation of franchise outlets but questioned the degree of control and the onerous restrictions normally contained in the agreements.

V.56 Three areas where franchise agreements acted against the interests of franchisees were outlined to the Committee (para 8.9):

- absence of any requirement for prior disclosure of information clearly outlining the rights and responsibilities of the two parties;
- unilateral alteration of the agreement by franchisors without prior notification; and
- lack of clear cut statements on the basis for renewal or the grounds for termination of agreements.

V.57 The Committee (para 8.12) noted that two reviews of the Trade Practices Act in the 1970s (the Swanson Committee in 1976 and the Trade Practices Consultative Committee in 1979) concluded that the Trade Practices Act should be amended to overcome the problems faced by franchisees. The Committee considered, however, that the problems of franchising systems could best be dealt with by separate legislation. This need for government regulation had been recognised by the Ministerial Council for Companies and Securities (para 8.13) when it released an exposure draft of a Franchise Agreements Bill for public comment early in 1986. The overall purpose (para 8.14) of that draft bill was to ensure that franchisors dealt fairly with franchisees throughout the length of the agreement. This was to be achieved by requiring the prior disclosure of relevant financial and management information, and the terms under which franchisee and franchisor carried on their dealings with each other. The main provisions of the draft bill were:

- that franchisees be supplied with a copy of the agreement and a prior disclosure document seven days before the agreement is executed;  
⇒ this prior disclosure document would contain relevant business information about the franchisor;
- a ‘cooling-off’ period of seven days after entering the agreement;
- no unilateral variation of the agreement;
- an equitable supply of goods amongst all franchisee outlets; and
- that a party seeking termination of the agreement must give the other party notice.

V.58 Because the majority of submissions on this draft either rejected it entirely or objected to the extent of the regulation contained in it, the Ministerial Council decided to release a second draft for comment (para 8.15). In its submission to the IST Committee, the Attorney-General’s Department (para 8.16) stated that the first draft was revised as it was ‘too onerous on franchisors and was an unwarranted interference on the parties’ freedom to contract’. The Department stated that a major difficulty in the first draft lay in defining the franchise agreement, which was ‘defined too widely in some respects and too narrowly in others’. This problem of definition, and the purpose of the intended legislation, was re-examined in the second exposure draft in November 1986.

V.59 The second draft bill (para 8.17) narrowed the purpose of the proposed legislation strictly to imposing an obligation on franchisors to disclose relevant financial information to franchisees prior to entering a franchise agreement. However, provisions dealing with prior disclosure of financial and managerial information were reduced on the grounds that this would place franchisors at a competitive disadvantage (para 8.18). It also reduced the number of requirements on franchisors for fair dealing with franchisees. Provisions concerning the protection of the interests of franchisees, such as the cooling off period, equitable supply of goods and services, termination of franchise agreements and related agreements, were deleted from the draft (para 8.19).

V.60 Reaction to the second draft was just as critical as to the first draft (para 8.23). The shift in focus of the draft legislation was seen by franchisee groups as having the effect of protecting the interests of franchisors rather than franchisees, thereby defeating the purpose of the legislation. Franchisee groups saw the narrowing of the focus of the draft bill to exclude the fairness provisions and the draft's recognition of the dominant position of the franchisor as a reaction by the Ministerial Council to 'pressure from franchisors, potential franchisors and presumably larger business interests'. In view of the criticism of the draft legislation, the Ministerial Council decided in May 1987 not to proceed with the legislation (para 8.24).

V.61 In evidence to the IST Committee, the Attorney-General's Department (para 8.25) indicated that the Ministerial Council took the view that, if the 'objective of franchise legislation was to impose an obligation to disclose and provide remedies when sufficient disclosure did not take place, remedies were already available'. The remedies were available under Commonwealth Trade Practices legislation under section 52, and State members of the Council were undertaking reforms of their Fair Trading legislation to bring it up to levels of the Commonwealth Trade Practices Act. The Attorney-General's Department (para 8.26) also indicated to the Committee that the major stumbling block encountered in circulating the two drafts was finding an adequate definition of franchising that would be suitable to both franchisees and franchisors, and capable of being framed in legislation. The Department concluded: 'There has not yet been a satisfactory definition of what is a franchising agreement'.

V.62 The IST Committee (para 8.27) did not agree that this was the case. Franchising legislation had existed in nearly all States of the United States for a number of years and, while possibly not being directly applicable to Australian franchising systems, would have provided the basis for a viable legal definition of the arrangement. Additionally, the Commonwealth had produced the Petroleum Retail Marketing Franchise Act, which detailed the terms of the agreement between the franchisees and franchisors in that industry. The common elements in franchise agreements could have been identified and used for framing legislation.



V.63 While the Trade Practices Act did impact on franchising operations, the Committee (para 8.29) considered that its primary role was not designed with a protective function in mind. The Act sought to promote efficiency in Australian industry by ‘replacing anti-competitive, collusive private regulation of the market with open competition as the market regulator’

V.64 The Act was not intend to ‘protect individual competitors or classes of competitors as such, but to promote free and fair competition’. In addition the submission from the Attorney-General’s Department (para 8.30) acknowledged that ‘certain conduct which may adversely affect or even cause the failure of a small business may nonetheless not contravene the Act because the conduct in question does not have the requisite effect on competition in the market’. Prosecuting under the Act relied on a franchisee proving that they have been unfairly treated in a micro level market-place under an Act that deals with a macro level economic environment. An additional consideration was that, while action could have been taken under the Act where a breach had occurred, often a franchisee may not have the additional funds available to pursue the franchisor through the courts.

V.65 The call for regulation of franchising was based on the need for preventative measures to forestall an ill-informed decision to enter a business enterprise (para 8.32). The Ministerial Council, conversely, had relied on measures that require a breach of law to protect the interests of franchisees, even though the law may not necessarily be cognisant of the specific economic and contractual obligations unique to franchise agreements.

V.66 The Committee (para 8.34) was not persuaded by the Ministerial Council’s statement, in abandoning draft legislation in 1987, that adequate remedies in law already existed to protect parties in franchise agreements. Clearly the Swanson Committee in 1976 and the Trade Practices Consultative Committee in 1979 did not believe this to be the case. Nor did the State and Commonwealth Attorneys-General when they went through a process of extensive inquiry, legislative drafting and consultation over several years. The IST Committee had been presented with no evidence arguing that the need for such remedies or legislation had diminished and, indeed, it suspected that the need may have increased. The IST Committee suspected that, after the genuine and concerted attempts made to draft satisfactory franchise legislation resulted in an outcome which pleased neither franchisee nor franchisor, the attempt was abandoned for reasons having little to do with ‘the adequacy of existing remedies at law’.

V.67 The IST Committee (para 8.38) recommended that the Commonwealth Attorney-General and Ministerial Council re-examine the case for specific franchise agreement legislation which would contain:

- prior disclosure documentation;
- a cooling-off period;
- conditions for alteration to the agreement; and
- conditions for termination/renewal or transfer of franchises.

V.68 This discussion paper was released as part of the process leading to the development of the July 1991 Report of the Trade Practices Commission to the Attorney-General and the Minister for Small Business and Customs, *Unconscionable Conduct and the Trade Practices Act: Possible extension to cover commercial transactions*. In brief the Commission indicated:

*Many complaints related to consumer matters which fell within section 52A of the Act. However approximately one third of complaints received were about commercial transactions where the complainants alleged that the conduct of the trader was unconscionable. Following a discussion of the Commission's complaints experience at the workshop in March, the TPC analysed its complaints database. . . The Commission, whilst unable to quantify the number of transactions which may fall within an extended section 52A, is nonetheless persuaded that a substantial problem exists.*

**Government Response to the Report of the House of Representatives Standing Committee on Industry, Science and Technology, November 1990**

V.69 The Government's response was to await the conclusion to an examination of the issue by the Trade Practices Commission before acting on the recommendation.

***Unconscionable Conduct and the Trade Practices Act: Possible extension to cover commercial transactions*, Report of the Trade Practices Commission to the Attorney-General and the Minister for Small Business and Customs, July 1991**

V.70 The Commission noted at the outset that unconscionable conduct is fundamentally different in nature from anti-competitive conduct. Unconscionable conduct occurs in relation to a transaction between two parties. As such, the factors relevant to an assessment of the conduct focus on the circumstances surrounding the transaction and not on the effect on competition in a market. The Commission also commented that unconscionable conduct involved essentially moral issues requiring a value judgement as to what offends the conscience in all the circumstances. In the end it was essentially a political decision as to whether unconscionable conduct should be regulated in broader social policy terms beyond that considered appropriate in the Commission's report.

V.71 The Commission's report acknowledged persistent small business problems arising from a disparity of bargaining power in :

- commercial tenancy arrangements;
- loan agreements;
- small business loans;
- franchising;
- small manufacturers and suppliers;
- government bodies;
- rural producers;
- petroleum industry; and
- building industry.

V.72 Most remained unresolved as they tended to fall outside the Trade Practices Act.

V.73 The Commission concluded that, on balance, there were economic benefits to be gained from the regulation of unconscionable conduct in commercial transactions in circumstances where the weaker party to a transaction suffers from an inability to protect its interests and advantage is taken of the circumstances.

V.74 The Commission concluded that the most appropriate means of regulating such conduct was to create a new part of the Trade Practices Act. Although the equitable jurisdiction had shown itself to be adept at developing economically justifiable doctrines in relation to unconscionable conduct, the jurisdiction was still developing in a somewhat piecemeal and unpredictable process. The rationalisation and codification of the relevant principles developed in the TPC's report would have done much to increase the predictability and certainty of their application by providing a guide to the courts in interpreting unconscionable conduct. The involvement of the Commission would have increased the business sector's awareness of unconscionable conduct through its high profile, its compliance programs and litigation where appropriate. In relation to the option of State legislative action, there could have been potential problems of uniformity giving rise to uncertainty in commercial transactions. As a final point the Commission was strongly of the view that any potential benefits to be gained from regulating unconscionable conduct in commercial transactions could have been neutralised unless there was meaningful access for small business to the legal remedies involved.

**Report by the Senate Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies & Acquisitions: Adequacy of Existing Legislative Controls*, December 1991**

V.75 On 16 May 1991 the Senate referred the following matters to the Committee:

- (a) the adequacy of the existing legislative controls in the Trade Practices Act 1974 over mergers and acquisitions, with particular reference to:
  - (i) the appropriate test that should apply; and
  - (ii) whether compulsory pre-merger notification should be introduced and, if so, in what circumstances;
- (b) whether, in situations of existing market dominance, the Trade Practices Commission should be able to examine conduct in addition to that already covered by s.46, and, if so, what action (including divestiture) might be taken as a result of such examination;
- (c) the extension of section 52A (unconscionable conduct) to all commercial dealings;
- (d) any other matters (including review mechanisms) considered by the Committee to be relevant to any or all of these matters.

V.76 The Senate Committee noted a number of objections which had been raised against any extension of section 52A to commercial dealings:

- that replicating or ‘codifying’ existing equitable principles was unnecessary and undesirable - the Australian courts had shown a capacity to intervene in appropriate commercial circumstances, and a willingness to expand existing doctrines and develop new doctrines when necessary (para 6.17);
- uncertainty would arise within commercial dealings (para 6.19);
- the principles governing the regulation of business in its relations with consumers should be quite separate from those governing relations between businesses, as even small firms necessarily possessed a level of commercial sophistication not possessed by consumers (para 6.23);
- simple extension of section 52A would have had detrimental effect on its use by consumers (para 6.24);

- in the absence of any economic analysis it was difficult to determine the financial impact that an extended provision would have on business (para 6.26);
  - ⇒ the Law Council believed that an extended provision would have increased the risk and the legal cost of doing business, and would have compounded economic inefficiencies in carrying on business (for example, through being forced to compromise rights to avoid legal costs and delay);
- it was likely that an extended statutory provision would have been used extensively in commercial disputes, with the potential to increase costs and delay and frustrate the enforcement of legal rights (para 6.33);
  - ⇒ the Law Council observed that an extended section 52A would have been pleaded and could not have been easily dealt with summarily. Unconscionability was essentially a question of fact. If pleaded as a defence in enforcement proceedings it would probably have necessitated either a full trial or perhaps more likely a settlement;
- extension of statutory unconscionability would have provided an ineffective remedy, particularly for small business (para 6.34); and
- the existing equitable principles dealing with unconscionable conduct, together with the traditional remedies for fraud, misrepresentation, duress, undue influence and mistake, estoppel, and section 52 of the Act, in combination, provided an avenue for relief in most, if not all serious, cases where unconscionability arose.

V.77 The Senate Committee noted, on the other hand, that extending the statutory prohibition against unconscionable conduct to commercial dealings was supported by a number of submissions:

- viewing the existing provision as arbitrary and illogical, Professor Clarke observed that, although the section did not cover commercial dealings, it might nevertheless be used by businesses when they acquired ‘consumer’ goods and services. An individual could probably have relied on it when guaranteeing a loan for the purchase of a house, but not in connection with a business (para 6.38);
- were section 52A to have general application, then Professor Clarke suggested that it would have become as ubiquitous a remedy as section 52 had become, and uncertainty in the law would have been reduced (para 6.39);
- the Trade Practices Commission considered that there were net economic benefits in regulating unconscionable conduct in commercial transactions; and

- the Attorney-General's Department saw no argument of principle against a prohibition on 'unconscionable conduct' in commercial as well as consumer transactions, and accordingly favoured a prohibition on such conduct in trade and commerce generally. Any attempt to limit the extension to small business was considered artificial and arbitrary (para 6.42).

V.78 In conclusion the Committee (para 6.45) acknowledged that it would have been consistent with the position at common law to introduce a statutory prohibition on 'unconscionable conduct' in commercial as well as consumer transactions. The Committee (para 6.46) also noted the claims that there could be benefits in introducing such a prohibition. These benefits were said to include:

- *increased business awareness of unconscionable conduct, both through the public profile, education and compliance programs of the TPC, and through TPC representative actions and litigation;*
- *the likelihood that TPC involvement might lead to the negotiation of disputes before they were litigated;*
- *the conferring of jurisdiction on the Federal Court; and*
- *additional statutory remedies becoming available.*

V.79 The Committee (para 6.48) accepted that any attempt to confine a statutory prohibition against unconscionable commercial conduct to small business would be arbitrary, artificial and productive of uncertainty. There was also the question of what was a small and what was a large business. Again many of the problems faced by small businesses were simply inherent in the competitive process, and there was no competition policy principle which dictated or supported the preferential treatment of small business over large business.

V.80 The Committee (para 6.50) also commented section 52A had been rarely used as a remedy and that it did not enhance the protection afforded by the common law. The Committee believed that relying on the common law alone appeared to be a reasonable option, particularly as it believed the courts in Australia have shown a willingness to expand the existing doctrines and to develop new equitable doctrines where justified. The Committee accepted (para 6.51) that there could be advantages in conferring standing on the TPC to institute representative actions on behalf of parties who were the victims of unconscionable conduct as that was recognised by the common law.

V.81 Consequently, the Committee (para 6.56) recommended that section 52A of the Trade Practices Act be repealed and that the Trade Practices Commission be given the ability to bring proceedings on behalf of a person who has a right of action at common law arising from the unconscionable conduct of another. The Committee also recommended that appropriate funds be made available to the Trade Practices Commission to enable this to be done. The Committee (para 6.58) considered that in making its recommendation in this form, many of the disadvantages raised would be avoided. The continuing development of equitable principles would remain unaffected. There would be no corresponding erosion in business certainty. In addition, any development of voluntary industry codes of conduct would remain unaffected.

***Report by the Franchising Task Force to the Minister for Small Business and Customs, the Hon David Beddall MP, December 1991***

V.82 The report of the Franchising Task Force 1991 said :

*The level of concern expressed by franchisees that have entered into inappropriate, fraudulent or misrepresented systems cannot be ignored. There are also Franchisors at the present time, who on submission presented, failed to provide appropriate disclosure, have not become members of the Franchisors Association of Australia and have not committed to any code of ethics or practices and for whom there is no monitoring mechanism.*

V.83 The Supplement to the Franchising Task Force Final Report, March 1992 observed:

*While franchisees have a vastly superior survival record compared with new franchised firms, among those who have failed there is some consistent evidence of poor and unsupportive relationships with their franchisors. If this evidence can be verified by the use of larger samples, there would seem to be a problem that needs to be addressed for the good of franchising as a whole.*

## **Review of the Franchising Code of Practice, Robert Gardini, October 1994**

V.84 Mr Gardini reported that the main weakness of the Code had been its failure to provide sufficient coverage across the franchising sector. The Review estimated that there were approximately 40 to 50 per cent of franchisors who had chosen not to register under the Code. Importantly, the motor vehicle industry had decided not to participate in the Code as had significant areas of the real estate sector. He considered that given additional time, the Code would have achieved greater coverage, but that it was unlikely to achieve more than 70 per cent coverage of franchisors.

V.85 The Review also considered the conduct of franchisors not registered under the Code. Evidence produced to the Review by franchisees and advisers indicated that there was a significant number of non-registered franchisors who:

- *fail to provide adequate disclosure;*
- *fail to offer a cooling-off period for new franchise agreements; and*
- *fail to observe the standards of conduct contained in the Code.*

V.86 The Review also found that the standards of conduct provisions contained in the Code had not been effective in addressing serious franchise disputes. The unconscionable conduct provision contained in the Code was too limited in its application, and the general standards of conduct provisions offered little practical assistance to franchisees who were in serious dispute with franchisors. The consultant considered that any attempt to strengthen the standard of conduct provisions within the context of a voluntary code would result in a loss of registrations under the Code.

V.87 The Gardini Report also listed the areas of most common complaint from franchisees. These were:

- charging excessive prices for goods supplied to franchisees;
- secret rebates and commissions from suppliers;
- discrimination in terms of trading between company owned outlets and franchised outlets;
- encroachment on the franchisees' geographic trading area;
- failing to address lack of viability of franchised outlets;
- making substantial increases to renewal fees;
- failing to provide adequate service and support to franchisees;
- unwilling to discuss and negotiate problems;
- using advertising levies for other purposes;
- intimidation and victimisation of franchisees;
- unfair terminations.

V.88 Mr Gardini made fifteen recommendations including a proposal that only those franchisors who registered with the Franchising Code of Practice should qualify for the exemption for franchising contained in the Corporations Regulations.



**Report by Working Party to the Minister for Small Business, Senator Schacht on the Need to Amend Section 51AA, February 1995**

V.89 This Report argued that Section 51AA of the Trade Practices Act was extremely limited in its application and was not addressing the problems with which it was intended to deal. In these circumstances, the Working party considered that Section 51AA should be amended so that it would afford remedies to persons who are subject to harsh and unconscionable conduct; in broader statutory context not limited to the restrictive equitable meaning of unconscionability contained in section 51AA.

V.90 While business large and small was concerned about the need for certainty in commercial transactions the Working Party considered that an examination of cases taken under section 88F demonstrated that a broader concept of unconscionability could adequately deal with an unacceptable corporate behaviour without leading to commercial uncertainty. Given the detailed examination by Frank Zumbo of the working of a broader statutory provision of unconscionability, the Committee considered that the concern about commercial uncertainty was misplaced.

V.91 While a statutory prohibition against unconscionable conduct had also been the subject of controversy in the United States, almost all of the United States jurisdictions had adopted a general provision dealing with unconscionability.

V.92 The Working Party recommended that:

1. *Section 51AA be amended by deleting the existing provision and inserting the following new provision:*

*A corporation must not in trade or commerce, engage in conduct that is unconscionable, harsh or oppressive.*

2. *Section 51AA be separated from section 51AB and be inserted into a new Part of the Trade Practices Act 1974 headed - 'Small Business Protection'.*
3. *The Government appoint a full-time or part-time Commissioner to the Trade Practices Commission with knowledge and experience of small business problems.*
4. *The Government provide a specific direction to the Trade Practices Commission pursuant to section 29(1)(b) of the Act requiring the Commission to fully enforce the Small Business Protection Part of the Trade Practices Act.*
5. *The Government provide the Trade Practices Commission with adequate resources for the proper enforcement of an amended section 51AA.*

**Supplementary Report by the Section 51AA Working Party to the Minister for Small Business, Senator Schacht on the Need to Amend Section 51AA, May 1995**

V.93 This supplementary report was prepared to address issues not included in their earlier report due to time constraints, and developments which occurred after that Report was prepared. These issues included:

- a response by the working party to arguments opposed to a widening of section 51AA;
- the review of the Franchising Code of Practice;
- an analysis of the economic impact of widening section 51AA as proposed by the Working Party; and
- the concern that section 51AA in its present form was unconstitutional.

V.94 The Working Party considered that comments made by Baker & McKenzie (Attachment A of the Report by the Trade Practices Commission in July 1991 to the Attorney-General and Minister for Small Business) in relation to the then proposed extension of section 52A had equal application to section 51AA and demonstrated that:

- before section 51AA was enacted the severe limits on the operation of the equitable remedy of unconscionability were well known to the Trade Practices Commission; and
- the administration and judicial interpretation of Section 51AA since its enactment had confirmed its shortcomings as predicted by Baker & McKenzie.

V.95 The Working Party considered that the view of VECCI - that the intended emphasis of the Trade Practices Act to concentrate on market structures would correctly address issues of unconscionable conduct which flow from such structures - was mistaken. The Working Party believed that there was no or little relationship between market structures and unconscionable conduct. Further, to propose that the Trade Practices Act focus on market structure rather than conduct was to grossly misunderstand the nature and scope of the Trade Practices Act. Only section 50 of the Trade Practices Act dealt with the issue of market structure; the balance of the provisions in Part IV were concerned with conduct.

V.96 The Working Party went on to say that given an appropriate legal sanction it was likely that for risk management reasons parties would assess their market conduct before engaging in conduct, and there would be a preparedness to negotiate with another party if there was likelihood of legal proceedings.

V.97 The Working Party also considered that VECCI's concern that the lack of precision in definitions of what was unconscionable, harsh and oppressive would represent too large an obstacle in mounting a successful case, failed to acknowledge that such words had a long history of judicial interpretation both in terms of section 275 of the Industrial Relations Act (NSW), the Corporations Law and in retail tenancy legislation. The distinction between conduct that is unconscionable and conduct that was harsh was made clear in the case of *Melveston v Commonwealth Development Bank of Australia* (1989) ASD 55-921, where Hodgson J held that a bank had insufficient notice of the plaintiff's ignorance and misunderstanding to allow relief under the *Amadio* doctrine, but held that the bank knew enough about the circumstances to make the mortgage transaction unjust, in the sense of 'harsh', within the meaning of the *Contracts Review Act 1980* (NSW).

V.98 The Working Party in recommending the addition of the word 'harsh and oppressive' to unconscionable was mindful of the need for commercial certainty for both parties to a transaction. In choosing these words regard was had to judicial interpretation of these words in a number of statutes. The word 'harsh' appears in section 275 of the NSW *Industrial Relations Act 1991* and cases decided under that statute were referred to in the earlier report of the Working Party. In addition, the word 'harsh' was used in the *Contracts Review Act 1980* (NSW). While the words 'harsh and unfair' were used in section 275 of the Industrial Relations Act, the Working Party considered that for reasons of commercial certainty that it would not recommend the use of the word 'unfair' but use the word 'oppressive' instead. The reason for this was that notwithstanding the judicial interpretation given the word 'unfair' in section 275 of the Industrial Relations Act the use of the word 'unfair' would lead to substantial criticism from sectors of big business as to the meaning of notions of unfairness.

V.99 While the Working Party acknowledged that there would be some business uncertainty if the recommendation of the Working Party were adopted such criticism had to be balanced by consideration of the need to do justice. The Working Party considered that the failure of section 51AA to address what constitutes a wider statutory concept of unconscionability left many parties without an effective legal remedy.

V.100 The Working Party considered that the failure of section 51AA to properly address unconscionable business conduct had been impliedly recognised by recent initiatives of state and territory governments in taking separate legislative action in relation to retail and commercial disputes. While such legislation adopted a broader statutory concept of unconscionability that that contained in section 51AA it only provided relief in one of the problem areas identified by the Trade Practices Commission over a considerable period of time. In these circumstances, a widening of section 51AA was seen as a necessary national initiative given the continued existence of such conduct across many trades and industries.

V.101 In early 1995 the Small Business Forum Working Party on s.51AA of the TPA sought advice from Access Economics on unconscionability and commercial transactions. Access Economics advised, inter alia:

*If it is accepted that individuals as consumers can require legal protection against unconscionability in transactions with businesses, it seems sensible, a priori, to conclude that similar protection should be available to individuals as producers of goods and services as well.*

*At the end of the day, the type of damage done to individuals as consumers as a result of unconscionability in transactions (loss of income, capital, reduced living standards, etc) is economically indistinguishable from damage done to businesses and the individuals that own those businesses - as a result of unconscionability in commercial transactions.*

*People are hurt in the same way in both cases. In both cases, similar remedies should be available*

*This principle suggests the same basic rules in relation to unconscionability in commercial transactions should apply to all parties to economic transactions, whether they be people as consumers, as employees, as principles of businesses, or as representatives of governments.*

*Provided that adverse consequences for economic efficiency do not arise, measures that operate to improve fairness (horizontal equity in this case) as between business involved in commercial transactions should be regarded as worth pursuing. Horizontal equity is a well established distributional objective to which public policy should have regard. Appeals to equality of opportunity might be made in this context. Quantifying the net economic benefits to the economy from promotion of horizontal equity will be difficult. That inherent difficulty attaches to most distributional questions, without denying their acceptance as criteria for legislation.*

*Some may argue that, from an economy-wide perspective, unconscionability in commercial transactions is not a major issue. That contention presumably would rest on some notion that unconscionability in commercial transactions is a zero-sum issue with one party gaining at the expense of another party, and little or no change in welfare for the economy as a whole.*

*Those holding that view can only object to measures that promote horizontal equity if:*

- *enhancing horizontal equity is at the expense of significant additional regulatory or other costs that impair efficient business operations (eg. as a result of vexatious litigation, onerous regulation, etc);*
- *in that case there is a need to balance efficiency costs against equity improvements.*

*Some have argued that the additional uncertainty that would flow from legislation to strengthen protection against unconscionability in commercial transactions is a reason for not taking such action.*

*That argument needs close scrutiny. Depending upon how any legislation is drafted, the result may be either less uncertainty overall, or at least a more even distribution of uncertainty as between the parties to a commercial contract, rather than the claimed increase in uncertainty. We would want to review the reasoning advanced for claims of increased uncertainty in order to assess the strength of any such case. That said, we recognise that the precise drafting of any legislative amendments, and their application, could have potentially important efficiency implications.*

**Better Business Conduct Discussion Paper, Department of Industry, Science and Technology, *Freedom to Choose*, 25 October 1995.**

V.102 According to this paper Australian courts have traditionally resisted interfering in commercial bargains. The paper argued that this reluctance stemmed from recognition that such interference may allow parties to unfairly avoid situations of their own making. Bargains fairly entered into, with full knowledge and disclosure of terms and conditions must be allowed to stand, lest the fabric of commercial activities be subject to excessive levels of uncertainty. The paper suggested that the law recognised that, particularly in business, a party must be free to make its own mistakes. The paper cited the High Court:

*The law in general leaves every man at liberty to make such bargains as he pleases and to dispose of his property as he chooses. However improvident, unreasonable or unjust such dispositions may be, they are binding on every party to them unless he can prove affirmatively the existence of one of the recognised invalidating circumstances' [Salmon J in Brusewitz v Brown [1923] NSWLR 1106 at p109 cited with approval by Brennan and Toohey JJ in Louth v Diprose (1992) 110 ALR 1, pp8-9, p26.*

V.103 The paper argued that liberty to make mistakes stems from the concept of practical choice. Where a firm was denied practical choice, so that it was unable to adequately protect its own interests (ie it was subject to 'economic ransom'), a significant policy question arose. In particular, this paper looked at the impact of 'economic ransom' on the franchising, petroleum and retail tenancy sectors.

V.104 The paper considered that the issues of contestability and economic ransom provided an economic rationale for change. The paper went on to explain that contestability was the degree of ease with which firms could enter or leave an industry. A number of elements needed to be present to secure 'perfect' contestability.

V.105 These included:

- an absence of sunk costs;
- potential entrants needing only to consider pre-entry prices (market participants cannot raise prices when faced with a new competitor); and
- all firms being subject to the same conditions; and consumers being indifferent between suppliers (no brand loyalty).

V.106 The paper argued that in a perfectly contestable market, a firm would not be able to impose harsh or oppressive terms on another. The other party would be able to leave an industry without significant economic penalty where the economic returns from a proposed arrangement were not in keeping with the party's expectations. But in reality, the conditions for perfect contestability cannot be met, and Government initiatives under the banner of competition policy, are sometimes necessary to improve contestability and restore choice in commercial relationships. The importance of gaining an adequate return on sunk costs was significant for small businesses, as they often used finance borrowed against the family home to enter a market. The sunk costs of a business then created a barrier to market exit which restricted their commercial flexibility and left them open to exploitation.

V.107 Disparity of bargaining power, whilst not in itself a bad thing, could therefore give rise to opportunities for abuse. Sunk costs undermined 'perfect' contestability, allowing a stronger party to exploit another in a manner that was harsh or oppressive. This could allow the stronger party to achieve outcomes that were out of kilter with prevailing market conditions. Were it not for the presence of a pre-existing commercial arrangement, characterised by sunk costs, a party dissatisfied with the terms of a contract or by another party's conduct could walk away from the relationship. However, due to the pre-existing commercial relationship, circumstances could arise where the weaker party had no practical choice but to agree to any terms and conditions dictated by the stronger party, or to accede to whatever course of business conduct the stronger party proposed.

V.108 Thus the abuse of relative bargaining power, in such a way as to remove choice from a commercial arrangement for one party, impacted negatively on contestability. The policy aim of encouraging free and fair competition therefore justified legislation to proscribe conduct or provide relief from the consequences of abuse in order to restore choice to both parties to the relationship.

V.109 The paper included an exposure draft of a Bill to amend the *Trade Practices Act 1974* to insert a new section Part IVB - Harsh or Oppressive conduct. The draft Bill was revised prior to its introduction into the Parliament in 1995.

#### ***Trade Practices Amendment (Better Business Conduct) Bill 1995***

V.110 The text of the proposed provisions in this Bill are reproduced in Appendix VII of this report.





## Appendix VI Retail tenancy legislation

VI.1 The terms of reference for the Fair Trading inquiry require the Committee to take into account existing State and Commonwealth legislative protections, in considering whether or not there is a need for further Government action to address the business conduct issues affecting small business. This appendix outlines the existing protections available to retail tenants under State retail tenancy legislation and codes. The relevant legislation in place in each State and Territory is as follows:

State	Retail Tenancy Legislation
Australian Capital Territory	<i>Tenancy Tribunal Act 1994</i> and <i>Commercial and Retail Leases Code of Practice</i> <sup>1</sup>
New South Wales	<i>Retail Leases Act 1994</i>
Northern Territory	There is no specific retail tenancy legislation. Provisions of the Tenancy Act apply in relation to repossession and rights of association. <sup>2</sup>
Queensland	<i>Retail Shop Leases Act 1994</i> <sup>3</sup>
South Australia	<i>Retail Shop Leases Act 1995</i> <sup>4</sup>
Tasmania	<i>Fair Trading (Code of Practice for Retail Tenancies) Regulations 1997</i> <sup>5</sup>
Victoria	<i>Retail Tenancies Act 1986</i> and <i>Retail Tenancies Regulations 1987</i> <sup>6</sup>
Western Australia	<i>Commercial Tenancy (Retail Shops) Agreement Act 1985</i> <sup>7</sup>

1 Kate Carnell MLA, Chief Minister of the ACT, informed the Committee at the end of 1996 that the ACT Government had appointed a working party to review the Act and the Code. *Submission No. 154.*

2 *Exhibit No. 177.*

3 The Queensland Department of Tourism, Small Business and Industry is in the process of preparing a retail industry strategy. The *Retail Shop Leases Act 1994* is being reviewed in this context (*Exhibit No. 241*).

4 A Joint Committee of the South Australian Parliament reported on retail shop leasing issues in July 1996. Inter alia, the Committee made recommendations on lease renewal, rent review, outgoings, disclosure of tenancy mix and fitout requirements, also mediation.

5 At the time of writing, these regulations had not come into effect.

6 At the time of writing, the Victorian Minister for Small Business and Tourism had just established a working party to review the *Retail Tenancies Act 1986* (*Exhibit No. 250*).

## **General protections available to retail tenants**

VI.2 There is considerable similarity in the provisions in State and Territory retail tenancy legislation.

### **Scope of legislation**

VI.3 Retail tenancy legislation is designed to protect small specialty retailers. In most States, the provisions apply to shops of less than 1000 square metres. In some jurisdictions, there are special provisions applying to retail leases in shopping centres.

### **Disclosure**

VI.4 Lessors are required to provide prospective tenants with a disclosure statement before a lease is entered into, containing details prescribed in a schedule or regulations. In most jurisdictions, this must be provided at least seven days before the lease is entered into. In NSW, the disclosure statement must contain details of:

- the lease period and any options;
- the fitout to be provided by the tenant;
- the rent and the method for calculating rent;
- details of variable outgoings with annual estimates for different items;
- details of the shopping centre, including parking facilities, whether any redevelopment is planned, the tenancy mix, whether or not there is a tenants' association;
- the amount of any contribution required for the promotional budget of the shopping centre; and
- details of any representations made by the lessor to the prospective tenant including undertakings as to exclusivity or limitations on competing uses.

VI.5 If a tenant is not provided with a disclosure statement or if the statement contains false or misleading information, then the tenant generally has the right to terminate the lease within the first one to three months (depending on the jurisdiction) and, in some jurisdictions, to claim compensation.

VI.6 There are also requirements in most jurisdictions for prospective tenants to be provided with a copy of the lease at some stage in negotiations, or as part of the disclosure statement.

---

7 A Discussion Draft Amendment Bill to the *Commercial Tenancy (Retail Shops) Agreements Act 1985* was released in 1996; there followed a public consultation process and a report to the Minister was imminent at the time of writing (*Exhibit No. 123*).

### Minimum term of lease

VI.7 In some jurisdictions, the minimum term of a retail shop lease is specified to be five years. There are exceptions - for example, in NSW a tenant can opt out of the minimum term (and a lawyer must certify that the provision in the legislation has been fully explained to the lessee). There are no rights to renewal.

VI.8 The Property Council of Australia provided the Committee with a summary of provisions in State and Territory legislation on lease terms and this is reproduced as Table VI.1 below.<sup>8</sup>

### Key money outlawed

VI.9 'Key money' is a premium paid by the lessee to the lessor for the granting, renewal, extension or assignment of a lease. Lessors are prohibited from asking for key money and, in some jurisdictions, are also not allowed to ask for a payment for goodwill.

### Rent and rent reviews

VI.10 All jurisdictions have provisions dealing with rent. Most jurisdictions include provisions for calculating 'turnover rent', which is based on a percentage of gross receipts or gross takings. There are also requirements protecting the commercial confidentiality of merchants' sales data.

VI.11 The most significant provisions are those dealing with rent reviews. The common types of rent review requirements provide that:

- leases cannot provide a discretion to either party as to which of two or more methods of rent review is to apply (or to provide for the 'higher of' two methods to apply);
- the timing of rent reviews must be stated in the lease and in some jurisdictions rent reviews can only take place once a year; and/or
- ratchet clauses (which ensure that rent never decreases under the rent review formula) are prohibited in many jurisdictions.

VI.12 All jurisdictions except Victoria provide for reviews on the basis of current market rent - that is, the rent that would be reasonably expected to be paid for the shop if it were unoccupied and offered for renting. Some jurisdictions have particular mediation procedures or options for independent valuation in the event of a rent review dispute. In NSW and South Australia, there is provision for market rent review to take place prior to the exercise of an option.

---

8 *Submission No. 119.1.*

## **Outgoings**

VI.13 In all jurisdictions, there are a series of provisions relating to outgoings. Common and key clauses provide:

- that capital costs and depreciation are not recoverable from lessees; and
- that tenants must be provided with estimates of outgoings and audited statements of actual outgoings.

## **Redevelopment and relocation**

VI.14 All jurisdictions cover the situation in which a tenant suffers loss as a result of disturbances to trading caused by actions of the property owner or manager.

VI.15 All jurisdictions except Western Australia provide some protection to tenants who are compulsorily relocated.

VI.16 For example, in NSW, a lessee cannot be forced to relocate unless:

- the lessee has been provided with details of a genuine proposed refurbishment, development or extension;
- the lessor has given at least three months' written notice of relocation; and
- the lessee has received an offer of a new lease on an alternative shop on the same terms and conditions.

VI.17 In some jurisdictions, there is provision for compensation to be paid to tenants for loss suffered as a result of relocation and the ACT provides for the payment of relocation costs.

VI.18 The Property Council of Australia provided the Committee with a detailed analysis of the provisions in retail tenancy legislation covering compensation for relocation and disturbance and this is reproduced as Table VI.2.<sup>9</sup>

## **Assignment of lease**

VI.19 All jurisdictions provide the sitting tenant with the right to assign the lease, subject to the right of a lessor to withhold consent on reasonable grounds. In NSW, South Australia and the ACT, retail tenancy legislation gives guidance on the range of circumstances in which a lessor could withhold consent on reasonable grounds - for example, if the proposed lessee intends to change the use of the shop or has retailing skills inferior to the sitting tenant.

---

9 *Submission No. 119.1.*

**Termination of lease**

VI.20 The only protection afforded to tenants at the end of the lease is prior notice of the landlord's intentions.

**Dispute resolution**

VI.21 Retail tenancy legislation provides for mediation or arbitration of retail tenancy disputes as an alternative - sometimes a mandatory alternative - to costly court action. Dispute resolution procedures differ from State to State.

VI.22 The Property Council of Australia provided the Committee with a detailed analysis of the dispute resolution procedures in each State and Territory and this is reproduced as Table VI.3.<sup>10</sup>

**Right to form trader associations**

VI.23 Retail tenancy legislation generally voids provisions of leases that stop tenants from being part of a merchants' association.

---

10 *Submission No. 119.1.*

# **Property Council of Australia**

## **Summary of Lease Term Statutory Provisions**

### **Key Features:**

- **In all States (except Qld) the tenant has a right to a 5 year retail lease.**
- **In the majority of States the tenant has the right to waive the 5 year term.**
- **In all States the landlord must give the tenant advance notice as to whether they intend to extend or renew a lease.**

**Prepared by Minter Ellison**

**Table VI.1 Summary of lease term statutory provisions**

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>WA</b>	<b>SA</b>	<b>TAS*</b>	<b>ACT</b>
<b>Legislation</b>	<i>Retail Leases Act 1994</i>	<i>Retail Tenancies Act 1986</i>	<i>Retail Shop Leases Act 1994</i>	<i>Commercial Tenancy (Retail Shops) Agreements Act 1985</i>	<i>Retail Shop Leases Act 1995</i>	<i>Code of Practice for Retail Tenancies (1 Jul 97)</i>	<i>Commercial &amp; Retail Leases Code of Practice</i>
<b>Lease Term</b>	Tenant has the right to a 5 year lease.	Tenant has the right to a 5 year lease.	No minimum term.	Tenant has the right to a 5 year lease.	Tenant has the right to a 5 year lease.	Tenant has the right to a 5 year lease.	Tenant has the right to a 5 year lease.
	If the lease term is less than 5 years the term is automatically extended.	Tenant has a statutory right to renew a lease so the total term is 5 years.		Similar to Victoria.	Similar to NSW.		Similar to NSW.
	This provision doesn't apply to a lease containing an option to renew where the term plus the option amount to 5 years or more.	Tenant may exercise this option, by giving the landlord 90 days notice before the current term ends.					

\*Tasmanian Legislation not yet enacted.

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>WA</b>	<b>SA</b>	<b>TAS*</b>	<b>ACT</b>
<b>Tenant's Right to Waive 5 Year Term</b>	Tenant can waive 5 year term, after being advised by a lawyer not acting for the landlord.				Tenant can waive 5 year term, after being advised by a lawyer not acting for the landlord.	Tenant can waive 5 year term, after being advised by a lawyer not acting for the landlord.	Tenant can waive 5 year term, after being advised by a lawyer not acting for the landlord.
<b>Lease Renewal</b>	If a lease doesn't contain an option to renew or extend, the landlord must notify the tenant <b>6 months</b> in advance as to whether they intend to extend or renew the lease.	If a lease doesn't contain an option to renew or extend, the landlord must notify the tenant <b>3 months</b> in advance as to whether they intend to extend or renew the lease.  The notice must specify the terms and conditions of the new lease.	If a lease doesn't contain an option to renew, the tenant may ask the landlord <b>2 months</b> prior to the lease ending, whether the landlord intends to extend or renew the lease.  The notice must specify the terms and conditions of the new lease.	Similar to Qld.	Similar to NSW.	Similar to Vic.	Similar to Qld.





# **Property Council of Australia**

## **Summary of Compensation for Relocation and Disturbance**

### **Key Features:**

- **In all States there are statutory provisions for compensation for disturbance to the tenant's enjoyment of the lease.**
- **In all States (except WA) there are statutory provisions for compensation if the tenant is required to relocate.**
- **In the majority of States the tenant may terminate the lease on receipt of a relocation notice.**

**Prepared by Minter Ellison**

**Table VI.2 Summary of compensation for relocation or disturbance**

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>WA</b>	<b>SA</b>	<b>TAS*</b>	<b>ACT</b>
<b>Legislation</b>	<i>Retail Leases Act 1994</i>	<i>Retail Tenancies Act 1986</i>	<i>Retail Shop Leases Act 1994</i>	<i>Commercial Tenancy (Retail Shops) Agreements Act 1985</i>	<i>Retail Shop Leases Act 1995</i>	<i>Code of Practice for Retail Tenancies (operating 1 Jul 97)</i>	<i>Commercial &amp; Retail Leases Code of Practice</i>
<b>Relocation</b>	<b>The tenant is entitled to compensation</b> for the reasonable costs of relocation (fitouts etc.), including legal costs..	<b>The tenant is entitled to compensation</b> for loss due to the landlord not renovating within a reasonably practicable time after tenant ceasing to occupy retail shop.	<b>The tenant is entitled to compensation</b> for the loss or damage suffered in the relocation of their business.	No mention in the Act.	<b>The tenant is entitled to compensation</b> Similar to NSW.	<b>The tenant is entitled to compensation.</b> Similar to NSW plus the tenant is entitled to compensation for the loss of profits during relocation.	<b>The tenant is entitled to compensation.</b> Similar to NSW.

\*Tasmanian Legislation not yet enacted.

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>WA</b>	<b>SA</b>	<b>TAS*</b>	<b>ACT</b>
<b>Relocation</b>	<p>If the lease contains a relocation clause the Act requires as a minimum:</p> <ul style="list-style-type: none"> <li>• tenant to be provided with genuine proposal for refurbishment;</li> <li>• 3 month's notice of relocation</li> <li>• the tenant must be offered new lease of the alternative shop on the same terms as the existing lease</li> </ul> <p>If the tenant receives a relocation notice the tenant may terminate the lease 1 month after receiving the notice.</p> <p>If the lease doesn't contain a relocation clause, the tenant cannot be moved.</p>						

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>WA</b>	<b>SA</b>	<b>TAS*</b>	<b>ACT</b>
<b>Disturbance</b>	<p><b>Tenant is entitled to compensation</b> if the landlord:</p> <ul style="list-style-type: none"> <li>• inhibits access to the shop;</li> <li>• inhibits/alters customer flow;</li> <li>• causes disruption of trading;</li> <li>• fails to prevent disruption;</li> <li>• fails to rectify equipment breakdown;</li> <li>• fails to maintain common areas of a shopping centre.</li> </ul> <p>Compensation may be limited/excluded if the likelihood of disturbance is drawn to the attention of the tenant before the lease is entered into.</p>	<p><b>Tenant is entitled to compensation.</b></p> <p>Similar to NSW.</p>	<p><b>Tenant is entitled to compensation.</b></p> <p>Similar to NSW.</p> <p>Also a tenant is to be compensated if the landlord causes the tenant to vacate the shop before the end of the lease because of extensions, refurbishment, or demolition.</p>	<p><b>Tenant is entitled to compensation.</b></p> <p>Similar to NSW.</p>	<p><b>Tenant is entitled to compensation.</b></p> <p>Similar to NSW.</p>	<p><b>Tenant is entitled to compensation.</b></p> <p>Similar to NSW.</p> <p>Plus a tenant is to be compensated if the landlord:</p> <ul style="list-style-type: none"> <li>•fails to ensure the premises are kept in good order and repair;</li> <li>•fails to rectify a defect in the shopping centre.</li> </ul>	<p><b>Tenant is entitled to compensation.</b></p> <p>Similar to NSW.</p>

# **Property Council of Australia**

## **Summary of Dispute Resolution Procedures**

### **Key Features:**

- **In all States there are statutory provisions for mediation/conciliation.**
- **In all States (except Vic) the first stage of dispute resolution costs applicant not more than \$105 (in three States it is free).**
- **The majority of disputes submitted for mediation are resolved successfully (available success rates range from 65% to 91%).**

**Prepared by Minter Ellison**

**Table VI.3 Summary of dispute resolution procedures**

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>WA</b>	<b>SA</b>	<b>TAS*</b>	<b>ACT</b>
<b>Legislation</b>	<i>Retail Leases Act 1994</i>	<i>Retail Tenancies Act 1986</i>	<i>Retail Shop Leases Act 1994</i>	<i>Commercial Tenancy (Retail Shops) Agreements Act 1985</i>	<i>Retail Shop Leases Act 1995</i>	<i>Code of Practice for Retail Tenancies (from 1 Jul 97)</i>	<i>Tenancy Tribunal Act 1994</i>
<b>Step1: Informal Mediation</b>	Tenant/landlord may approach the Registrar of Retail Tenancy Disputes.				Tenant/ landlord may apply to the Office of Consumer and Business Affairs for conciliation.	Tenant/ landlord may request the Office of Consumer Affairs to investigate the dispute.	Tenant/landlord may apply to the Registrar of the Tenancy Tribunal for mediation.
<b>Costs</b>	Nil				Nil	Nil	Application Fee: \$105
<b>Percentage successfully resolved</b>	Not available				76%	N/A	65%

\*Tasmanian Legislation not yet enacted.

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>WA</b>	<b>SA</b>	<b>TAS*</b>	<b>ACT</b>
<b>Step 2: Mediation/ Conciliation</b>	If not resolved, tenant/landlord may apply for mediation by the Registrar of Retail Tenancy Disputes.	Tenant/landlord may apply to the Australian Centre for International Commercial Arbitration for conciliation.	Tenant/landlord may apply to the Retail Shop Lease Registry for mediation.	Tenant/ landlord may apply to the Registrar of the Commercial Tribunal for mediation.	Tenant/ landlord may apply to Commissioner for Consumer and Business Affairs for mediation.	Tenant/ landlord may refer dispute to Retail Tenancies Monitoring Committee for conciliation.	The Registrar may refer the dispute to a mediator.
<b>Costs</b>	Application Fee: \$150	Application Fee: \$250	Application Fee: \$100	Application fee: \$29		Nil	Application Fee: \$105
	Mediation fee: \$250 per hr. Parties pay equally	Conciliation fee: \$150-\$300 per hr. Parties pay equally	No mediation fee	No mediation fee	Mediation fee: \$400 (pre-mediation conference and 3hrs of mediation) Parties pay equally		No mediation fee



	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>WA</b>	<b>SA</b>	<b>TAS*</b>	<b>ACT</b>
<b>Step 3: Tribunal/ Arbitration</b>	If a dispute is not resolved by mediation, a tenant/landlord may lodge a retail tenancy claim with the Commercial Tribunal of NSW.	If a dispute is not resolved by conciliation it will move to arbitration. The arbitrator's decision is legally binding.	If no resolution or tenant/ landlord fail to abide by agreement, the dispute will be referred to the Retail Shop Lease Tribunal.	The Registrar may refer a dispute to the Commercial Tribunal in a number of situations.			The Registrar may refer a dispute to the Tenancy Tribunal in a number of situations.
<b>Costs</b>	Filing fee: \$110 each party to bear own costs	Application fee: \$100 to be paid by the applicant.  Arbitrators fee: \$150-\$300/hr. Parties pay equally	No application fee. Each party to bear own costs	Initial application fee: \$29. Each party to bear own costs			Initial application fee of \$105. Each party to bear own costs unless the Registrar orders otherwise

	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>WA</b>	<b>SA</b>	<b>TAS*</b>	<b>ACT</b>
<b>Step 4: Court</b>	Tenant/landlord may refer a dispute to a court if it remains unresolved.	A party may appeal an arbitrator's decision in the Supreme Court of Victoria.	The Retail Shop Lease Tribunal's order is final and binding on each party.	The Commercial Tribunal's decision may be appealed in the District Court.	Tenant/landlord may initiate proceedings in the Magistrates Court.	Tenant/ landlord may refer a dispute to a court if it remains unresolved.	A decision of the Tenancy Tribunal may be appealed in the Supreme Court.
<b>Costs</b>	Each party must bear their own costs.	Each party must bear their own costs.		Each party must bear their own costs.	Each party must bear their own costs.	Each party must bear their own costs.	Each party must bear their own costs.
<b>Mediation</b>	A dispute must be mediated first, unless the court is satisfied mediation is unlikely to resolve the dispute.	A dispute must be referred to conciliation or arbitration first.	Tenant/landlord may ask the court to refer the dispute to the retail shop lease tribunal.	Court may refer the dispute back to the Registrar for determination.	Court may refer the dispute back to mediation.	A dispute must be referred to the Office of Consumer Affairs first.	Magistrate may refer dispute back to mediation.

\*Tasmanian legislation not yet enacted.

## Appendix VII      Unconscionability provisions of the *Trade Practices Act 1974*

---

VII.1 Part IVA of the Trade Practices Act deals with ‘unconscionable conduct’ in commercial and consumer transactions. The relevant provisions are reproduced below.

### Unconscionable conduct in commercial transactions

*51AA.(1) A Corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.*

*(2) This section does not apply to conduct that is prohibited by section 51AB.*

### Unconscionable conduct in consumer transactions

*51AB. (1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.*

*(2) Without in any way limiting the matters to which the Court may have regard for the purposes of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the ‘consumer’), the Court may have regard to:*

- (a) the relative strengths of the bargaining positions of the corporation and the consumer;*
- (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;*
- (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;*
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation 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 consumer could have acquired identical or equivalent goods or services from a person other than the corporation.*

*(3) A corporation shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.*

*(4) For the purposes of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person:*

- (a) *the court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and*
- (b) *the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.*

*(5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.*

*(6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or the purpose of using them up or transforming them in trade or commerce.*

*(7) Section 51A applies for the purposes of this section in the same way as it applies for the purposes of Division 1 of Part V.*

## **Specific proposals for the amendment of the Trade Practices Act**

VII.2 Chapter 6 of this report discusses options for amending Part IVA of the Trade Practices Act. Two of the draft amendments proposed are reproduced below.

### **Mr Frank Zumbo's Proposal**

*5IAB.(1) A corporation shall not, in trade or commerce, engage in conduct that is, in all the circumstances, unconscionable, harsh, or oppressive.*

*(2) Without in any way limiting the matters to which the Court may have regard for the purposes of determining whether a corporation has contravened sub-section (1), the Court may have regard to -*

- (a) the relative strength of the bargaining positions of the corporation and the other person;*
- (b) whether, as a result of conduct engaged in by the corporation, the other person was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;*
- (c) whether the other person was able to understand any documents;*
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the other person by the corporation or a person acting on behalf of the corporation; and*
- (e) the amount for which, and the circumstances under which, the other person could have acquired identical or equivalent goods or services from a person other than the corporation.*

*(3) A corporation shall not be taken for the purposes of this section to engage in unconscionable, harsh or oppressive conduct by reason only that the corporation institutes legal proceedings or refers a dispute or claim to arbitration.*

(4) For the purposes of determining whether a corporation has contravened sub-section (1) -

- (a) the Court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- (b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

VII.3 Mr Zumbo also suggests that a provision promoting Court-endorsed conciliation could take the following form:

**51AC. (1)** *The Court may require the corporation and the other person to undertake conciliation of a matter under this Part.*

### **Trade Practices Amendment (Better Business Conduct) Bill 1995**

#### ***Harsh or oppressive conduct***

**51AC (1)** *This section applies to a corporation if:*

- (a) *the corporation and another person (**the other person**) are or were in a commercial relationship that involves or involved the supply of goods or services by the corporation to the other person on a regular or continuous basis; and*
- (b) *the commercial relationship is or was of major significance to the commercial activities of the other person; and*
- (c) *the nature of the commercial relationship and the circumstances of the other person are such that the other person's freedom of action is or was substantially reduced.*

(2) *For the purposes of subsection (1), a commercial relationship does not include negotiations relating to the formation of a relationship between the corporation and the other person.*

(3) *A corporation to whom this section applies must not, in trade or commerce:*

- (a) *knowingly engage in conduct that is harsh or oppressive in relation to the other person; or*

- (b) *engage in conduct that the corporation ought reasonably to have known to be harsh or oppressive in relation to the other person.*

(4) *Without in any way limiting the matters to which the Court may have regard for the purposes of determining whether conduct of a corporation is harsh or oppressive in relation to another person, the Court may have regard to:*

- (a) *the relative strength of the bargaining positions of the corporation and the other person; and*
- (b) *the impact of the conduct on the other person; and*
- (c) *any standard generally regarded in the area of trade or commerce in which the corporation is involved as representing a standard of acceptable behaviour in trade or commerce; and*
- (d) *the extent to which the conduct of the corporation is consistent with any code of practice adopted by, or applying to, participants in the area of trade or commerce in which the corporation is involved; and*
- (e) *the extent to which the conduct of the corporation is consistent with its conduct towards persons who have entered into commercial relationships with the corporation that are the same as, or substantially similar to, the commercial relationship between the corporation and the other person; and*
- (f) *whether the other person has taken reasonable steps to protect the person's interests; and*
- (g) *in relation to a contract - the extent to which the corporation was prepared to negotiate with the other person in relation to the terms and conditions of the contract.*

(5) *In a proceeding for a contravention of subsection (3), the Court must not make a finding that conduct of the corporation contravenes subsection (3) unless the Court is satisfied that, in the context of the commercial relationship considered as a whole, a reasonable person would conclude that the conduct went beyond what was considered reasonably necessary for the protection of the present or future legitimate interests of the corporation.*

(6) *This section does not apply to conduct engaged in after the commencement of this section if the conduct engaged in is conduct that gives effect to, or involves the enforcement of, a provision of a contract that was entered into before the commencement of this section.*

***Mere institution of legal proceedings not harsh or oppressive conduct***

***51AD(1)*** A corporation is not to be taken, for the purposes of paragraph 51AC(3)(a), to engage in harsh or oppressive conduct in relation to another person by reason only that the corporation institutes legal proceedings against the other person or refers a dispute or claim involving the other person to arbitration.

***(2)*** A corporation is not to be taken, for the purposes of paragraph 51AC(3)(b), to engage in conduct that the corporation ought reasonably to have known to be harsh or oppressive in relation to another person by reason only that the corporation institutes legal proceedings against the other person or refers a dispute or claim involving the other person to arbitration.