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Monday, 8 September 2003

Ms Sarah Bachelard,
Secretary,
Senate Economics References Committee,
Room SG64,
Parliament House,
Canberra ACT 2600

Dear Ms Bachelard,

RE: SUBMISSION TO INQUIRY INTO THE EFFECTIVENESS OF THE TRADE PRACTICES ACT 1974 IN PROTECTING SMALL BUSINESS, ITEM 1(b) TERMS OF REFERENCE

I refer to Friday's conversation.

As a small business owner and professional advisor, I submit time cannot come soon enough to settle once and for all "whether Part IVA of the Act deals effectively with unconscionable or unfair conduct in business transactions". To date, from my experience at the coalface, the current Act is left wanting.

As you may be aware, the NSW Government is currently conducting submissions regarding its Retail Leases Act under the National Competition Policy review. Their request for public submissions falls squarely on matters the subject of your inquiry, under the heading of the NSW Government's objective to "promote fairness". It is in the context of retail leases I make this submission. Enclosed is a copy of my submission to NSW Government regarding the Retail Leases Act of NSW.

In my view, Federal *and* State Governments must take a leading role in shaping the landscape of commercial transactions. All commercial transactions must be governed by a public policy setting that offers to the *layman* the concept of *fair* conduct. Sadly, the Courts find that its legal bedfellow, *unconscionable* conduct, has an entirely different meaning and thus public policy as highlighted is one thing, where in practice, it is another.

My biggest worry is this debate is that a fresh argument proffered by the Shopping Centre Council ("SCCA") of Australia opposes the introduction of the concept of "harsh or unfairness" because they say it will open up an unworkable legal Pandora's box. Not surprisingly, the SCCA says the current unconscionable conduct provisions of the Trade Practices Act are adequate. I submit that this view is largely self-serving and simply wrong.

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In the retail property context, the Courts are littered with cases where to the average person, the actions of landlords seem terribly unfair and destructive to tenants, but those landlords have not according to the judiciary acted *unconscionably,* despite the discretionary nature of the law's application. In many cases, the Courts find landlords' management practices appalling, but fall short of declarations of unconscionable conduct. In other words, community standards expectations are not played out in the Courts where legal meanings are quite separate with an entirely different standard of application in practice. That is the real reason the SCCA would resist any further changes to the Trade Practices Act - adoption of *unfairness* exposes key imbalances within their systems – information that its members would want to keep secret for their own purposes. Its been my experience, especially in the hyped up shopping centre industry, landlords so regularly take advantage of small business people because of financial, information and skill level imbalances that its practically cliché.

Despite its apparent novelty, the interpretation of unfairness as a legal concept is *not* a new one. You would be aware that in NSW, since 1948, the Industrial Relations Commission of NSW ("IRC") has had the power to void, vary and set aside contracts or arrangements that were or have become unfair including leases. Formerly s88F, then s275 and now s106 of the Industrial Relations Act of NSW, this is a common route for franchisees and lessees in disputes with landlords if their lease contract leads to work in an industry or where the Administrative Decisions Tribunal's of NSW ("ADT") mandate on unfairness is left wanting as in JET BLACK TWO PTY LIMITED -V- STAR CITY PTY LIMITED & ANOR [2003] NSWADT 129 and WORLD BEST HOLDINGS -V- AWAD [2001] NSWADT 140.

In fact, because the IRC's jurisdiction on this type of behaviour has been around for many years, it has developed a robust set of principles that put lie to the scare mongering that harsh and unfairness as a legal concept is unworkable. I have highlighted the words of those standards set by the IRC in ALLEN, ROBERT JOHN -V- THE SECRETARY, PENRITH DISTRICT RLFC & ANOR [1995] NSWIRC 217: -

> The concept of "fairness" was examined recently by the Full Court of this Court in Baker v National Distribution Services Ltd (1993) 50 IR 254. The joint Judgment of Fisher CJ and Hungerford J considered a number of earlier pronouncements on the subject. It seems clear from their Honours' Judgment that in determining whether a contract or arrangement is unfair for the purpose of s275 one looks not only to the specific circumstances of the parties to the contract or arrangement but also to "general standards or levels of what is considered to be fair" (@ 270). There is a reference to "the commonsense approach characteristic of the ordinary juryman" and to the fact that the determination was to be "a plain matter of morals not law", citing extracts from earlier decisions. In particular their Honours quoted with approval what was said by Beattie J in Agius v Arrow Freightways Pty Ltd (1965) AR NSW 77 @ 89 where His Honour said that

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the matter was to be determined "in each particular case by the application of the tribunal's commonsense and sense of justice whether a particular transaction is unfair, harsh and unconscionable..."

"...the reference to general standards or levels of what is considered to be fair and the common sense approach characteristic of the ordinary jury person brings into play community standards as to what is unfair harsh or unconscionable. However those community standards cannot be applied in a vacuum or stated categorically as matters of principle without having regard to the particular circumstances which are pertinent to the particular proceedings..."

In BAKER, K N -V- NATIONAL DISTRIBUTION SERVICES LTD (MAJ) [1993] NSWIRC 70 IRC FULL COURT FISHER CJ, HILL J and HUNGERFORD J said: -

"The test of unfairness within the meaning of s.88F of the industrial Arbitration Act, and hence s.275 of the present Act, has received much attention by the Court and by the previous Industrial Commission over very many years, but, in our review of the cases, the approach stated by Sheldon J. in Davies v. General Transport Development Pty. Limited over twenty-six years ago has endured; his Honour commented that unfairness of a contract or arrangement was to be determined according to "the common sense approach characteristic of the ordinary juryman ... It is a plain matter of morals not law. "

His Honour cautioned, however, that the section's "massive power makes it imperative that it should be exercised with proper restraint ... it should not permit itself to become a refuge for those who are merely disgruntled with a bargain entered into on even terms...the discretion should be exercised to protect victims of wrong dealing not to prescribe anodynes." Those words by his Honour echoed what had been said earlier by Beattie J. in Agius v. Arrow Freightways Pty. Limited that it was a matter of deciding "in each particular case by the application of the tribunal's common sense and sense of justice whether a particular transaction is unfair, harsh and unconscionable."

The nature of the unfairness attracted by s.88F was considered later by the IRC (Perrignon and Dey JJ., Cahill J. dissenting) in A. & M. THOMPSON PTY. LIMITED V. TOTAL AUSTRALIA LIMITED as follows:

"It has been said that fairness is determined by the commonsense approach of a juryman and that it is a moral and not a legal issue (Davies, Case). Whether this be so or' not, it does seem that in distinguishing between what is fair and what is not fair the Judge must apply standards which appear to him to provide a proper balance or division of advantage and disadvantage between the parties who have made the contract or

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arrangement. In doing so he would always have to bear in mind the conduct of the parties, their capability to appreciate the bargain they had made and their comparative bargaining positions when entering into the contract or arrangement. As it seems to us, the determination whether unfairness had occurred has been related to the conduct of the parties, the relative bargaining position between the parties in terms of advantage and disadvantage, the surrounding circumstances and the manner of performance or operation of the contract or arrangement on a case-by- case basis."

In summary, I would urge the Senate Economics Reference Committee to take on board the observations of dissenting Kirby J of the High Court in ACCC V CG BERBATIS HOLDINGS PTY LIMITED [2003].

"Yet again the Court has before it an appeal concerning the application of the Trade Practices Act 1974 (Cth) ("the Act"). On this occasion the issue involves s 51AA of the Act which incorporates a statutory prohibition of unconscionable conduct, as such conduct is understood in the unwritten law of Australia. *Yet again this Court has a choice between affording a broad and beneficial application of the relevant provision of the Act, as opposed to a narrow and restrictive one* [my emphasis added] ...

...In a passage cited earlier in these reasons, the primary judge commented on the relationship between the emerging case law interpreting and applying s 51AA of the Act, and the existing doctrines of the unwritten law. This is an issue that will warrant further examination. It may be that the different policies and concerns that motivate the provision of relief in equity and under the Act, would also translate into subtle differences in the characterisation of conduct as unconscionable. The concern of equity is limited to justice in the individual case given the potential for inadequate results by reason of some of the rules of the common law. Therefore, even if conduct otherwise exhibits the elements of unconscionable dealing as understood in equity, it may still not receive that characterisation if the traditional equitable remedies (such as setting aside the transaction for instance) are not appropriate in the circumstances of the case. The Act on the other hand provides a wider set of procedures and remedies (as this appeal illustrates) designed to enhance the "educative and deterrent effect of [the] legislative prohibition..."

...It follows that this Court should approach a case such as the present, brought under the Act, recognising that its importance extends beyond the humble case of the Roberts. By upholding the rights of the Roberts - on the face of things small and objectively of limited significance - a message is delivered that the Act is not to be trifled with...

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> ...In enacting a prohibition against unconscionable conduct in s 51AA, the Parliament invoked the principle of unconscionability and applied it in the context of "trade and commerce" without apparent differentiation. However, what is "unconscionable" conduct of a corporation in its dealings with another corporation of roughly equal size - and especially a large trading corporation well able to be advised and look after its own interests - will be quite a different matter when compared to a context in which the complaining party is an individual trader of modest means and known circumstances of vulnerability, with restricted economic power and limited facilities to receive effective legal advice, dealing with an economically superior well-advised market player...
>
> ...It is the serious or "gross inequality of bargaining power" in the relationship between parties that refines and sharpens issues of conscience and the need to provide remedies, whether in equity or under provisions such as s 51AA of the Act. The special position of the Roberts enlivens the need to consider the complaint of unconscionability in the conduct of the respondents. Their position as small traders involved precisely the kinds of circumstances that the legislature had in mind when enacting s 51AA, given that consumers already had access to a broader prohibition of unconscionable conduct on the part of corporations."

Strong words? You bet. But now the debate must be settled clearly and quickly. The lead role must be taken by the Federal Government now because as is our legal system, the above High Court case has now found its way as the pointer to the lower Courts and Tribunals. As late as 4 July 2003 in WALL'S TOBACCO AND GIFTS PTY LIMITED V WARRINGAH MALL PTY LIMITED AND ANOR heard before the ADT under the Retail Leases Act NSW.

> "The choice made by Mr Hynes reflects poorly on this lessor's commitment to good management practices, but we are not satisfied that it is so inequitable as to warrant a finding of 'unconscionable' conduct. We have noted that the High Court has recently taken a cautious approach to the question of the point at which commercial dealing can be regarded as 'unconscionable': Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd [2003] HCA 18; (2003) 77 ALJR 926. (The circumstances were different there as is the text of the relevant statutory provision, a Federal one providing that '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'.)

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Boiled down, many unconscionable conduct applications fail because unfairness is not unconscionable despite the judiciary finding respondents have acted ruthlessly and unfairly - but nearly always falling short of the old standard of unconscionable. Isn't it high time that unfairness should be clearly spelt out in a modern context and put this question to bed once and for all?

Yours sincerely,
AUSTRALIAN RETAIL LEASE MANAGEMENT

Stephen Spring
For and on behalf of Marina Efthimiou and Paul Drackis

Encl.