

Chapter 3

Other provisions

Small business expertise

3.1 Schedule 3 of the bill amends the TPA and the *Australian Securities and Investments Commission Act 2001* to require that one of the ACCC's Deputy Chairpersons have knowledge of, or experience in, small business matters. Presently, the legal requirements include that:

- in appointing a member of the Commission, the Minister must consider whether the person has knowledge of, or experience in, small business matters (section 7(3b)); and
- at least one member of the ACCC must be a person who has knowledge of, or experience in, consumer protection (section 7(4)).

3.2 The Post Office Agents Association Limited strongly supported the bill's new requirement. It noted that avoiding unconscionable conduct is 'not always achieved in the current framework...especially...in situations where the supervisory authorities appear to be under-resourced to "prevent" the action'.¹ It argued that the bill's new requirement on small business expertise for the ACCC should enhance the ability of the Commission to deal with current and emerging issues.

3.3 Professor Zumbo does not see it as a positive move:

the appointment of a small business deputy chairman will add nothing to the current administration or enforcement of the Trade Practices Act on behalf of small business...there has been a small business commissioner since 1998. The concerns expressed by small business have grown during that time... The fact that that small business commissioner now will be upsized to a deputy will not change the fundamental problem with those key sections which prevent small business getting their cases heard... it does have the danger of acting to fracture the ACCC... the ACCC has one responsibility and one responsibility only, and that is to protect the consumer interest...Any other label or other labels are just a distraction from that paramount responsibility of commissioners to consumers.²

3.4 This objection could be over-stated:

1 Post Office Agents Association Limited, *Submission 2*, p. 3.

2 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 4.

this is not a label. There is no small business commissioner... What is being asked for is someone who has experience in that area. They may have experience in other areas [as well].³

3.5 The Consumer Action Law Centre are supportive of the bill requiring an ACCC commissioner with expertise in small business, but think the appointment of a commissioner with consumer experience should be similarly enshrined, rather than remaining a matter of convention.⁴

3.6 The importance of the measure should not be over-emphasised: the commission operates as a board. It is not as though the small business commissioner gets to make all the decisions that come before the commission about small business issues.⁵

Committee view

3.7 The requirement that an ACCC deputy chair have small business expertise will probably not make an enormous difference to the operations of the ACCC. But it is a useful signal to the ACCC, the small business sector and the general community that the parliament acknowledges the role of small businesses in keeping markets competitive and that trade practices legislation has an important role in preventing large businesses unfairly reducing competition in markets at their expense.

Repealing the thresholds for unconscionable conduct

3.8 The bill repeals the price thresholds that currently limit the protection afforded by section 51AC against unconscionable conduct. Section 51AC was introduced in 1998 to establish legal remedies for smaller businesses when they are subjected to unconscionable conduct. The factors that may constitute 'unconscionable conduct' are listed under sections 51AC(3)—relating to suppliers—and 51AC(4)—relating to acquirers. These factors include any relative imbalance in bargaining power and the ability of the smaller business to understand the terms of the transaction.⁶

3.9 The redress available to small businesses under section 51AC is limited by subsections 51AC(1) and 51AC(2), which excludes publicly listed companies, and subsections 51AC(9) and 51AC(10), which excludes dealings in excess of

3 Senator Doug Cameron, *Proof Committee Hansard*, 5 August 2008, p. 11.

4 Ms Catriona Lowe, Consumer Action Law Centre, *Proof Committee Hansard*, 5 August 2008, p. 41.

5 Ms Catriona Lowe, Consumer Action Law Centre, *Proof Committee Hansard*, 5 August 2008, p. 48.

6 *Explanatory Memorandum*, p. 8.

\$10 million.⁷ Consistent with the recommendation of the 2004 Senate inquiry, the bill repeals subsections 51AC(9) and 51AC(10) and section 12CC of the ASIC Act. At the time, the ACCC argued that these subsections were not necessary as the courts already have regard to the relative strengths of the bargaining positions of the companies under subsection 51AC(3)(a).⁸ The government argues that the reform will enhance the protection afforded by section 51AC 'by focusing the prohibition on the wrongdoing involved, rather than monetary thresholds'.⁹

3.10 Professor Zumbo did not oppose the measure, but saw its use as being part of a broader reform process:

unless you change the substantive meaning or the substantive flaws in 51AC as they currently exist—that is, a lack of definition of unconscionable conduct in the section itself—removing the cap will not be of any practical assistance.¹⁰

Jurisdiction – Federal Magistrates Court

3.11 The bill confers jurisdiction on the Federal Magistrates Court in matters arising under section 46. The goal is 'to provide a simpler and more accessible alternative to litigation in the superior courts'.¹¹

3.12 This idea appealed in some ways to one expert witness:

Part of what is attractive about the Federal Magistrates Court is that its approach is, on the whole, conciliatory. It looks to use mediation in other sorts of processes...¹²

3.13 However, he was cautious about some aspects of it:

you should think about resourcing, how that is going to fit within the jurisdiction and who is going to handle it. Maybe you need dedicated judges with a particular background in these issues... I think that court is specifically suited to matters currently within its jurisdiction.¹³

7 This threshold was increased from \$3 million to \$10 million last year (Trade Practices Legislation Amendment Bill (No. 1) 2007).

8 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. xv.

9 The Hon. Chris Bowen, Second Reading Speech, *House of Representatives Hansard*, 26 June 2008.

10 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 3.

11 *Explanatory Memorandum*, p. 17.

12 Mr Graham Maher, *Proof Committee Hansard*, 5 August 2008, p. 26.

13 Mr Graham Maher, *Proof Committee Hansard*, 5 August 2008, p. 26.

3.14 Professor Zumbo did not believe this change would be of much benefit given the other problems he raised:

access to the Federal Magistrates Court will deliver nothing of practical benefit because you just will not be able to bring section 46 cases; they are too difficult, given the very narrow interpretation given by the High Court to those two concepts of market power and take advantage.¹⁴

3.15 Another lawyer warned:

...section 46 cases usually go on appeal. This reflects the complexity of the law. So, if one starts off at the Federal Magistrates Court, there is going to be one extra layer of appeals to be dealt with. That is going to increase costs and delay.¹⁵

Committee view

3.16 It is hard to know beforehand how many cases will be able to be satisfactorily resolved in the Federal Magistrates Court without needing referral to the High Court. However, the committee believes measures with the potential to reduce the cost of parties seeking justice are worth at least trying.

ACCC's information gathering powers

3.17 The bill clarifies the timeframe under which the ACCC's powers to require the production of documents under section 155 can be exercised. It provides that the ACCC can exercise these powers until it commences proceedings or the close of pleadings.

3.18 One lawyer appearing as a witness raised some concerns, suggesting that:

it be made clear in the relevant provisions of the bill that nothing therein is intended to derogate from a court's power to control the procedures before it so that the court is aware that there is no conflict and the court is aware of its power to be able to ask the ACCC or direct the ACCC to expedite its investigations¹⁶

3.19 Other witnesses expressed no concerns about the provisions.

Recommendation 3

3.20 The committee recommends that the Senate support the provisions of the bill relating to requiring one of the ACCC deputy chairs to have small business expertise, repeal of the threshold for unconscionable conduct, extending jurisdiction to the Federal Magistrates Court and clarifying the ACCC's information gathering powers.

14 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 3.

15 Mr Ian Stewart, *Proof Committee Hansard*, 5 August 2008, p. 29.

16 Mr G Maher, *Proof Committee Hansard*, 5 August 2008, p. 21.

Senator Annette Hurley

Chair

