Chapter 4

Arguments against amending section 51AC

4.1 This chapter presents the arguments put to the committee opposing any amendment (including definitions or examples of terms) to 51AC of the Trade Practices Act. There are three lines of argument. The first is that the section works well currently, it has changed industry behaviour and the courts' interpretation has been clear. The second is that any amendment to the section would create uncertainty and confusion. The third position is that while the courts have been too cautious on section 51AC, they—and the current provision—need more time to develop this area of the law.

If it ain't broke…

4.2 The committee received submissions from various organisations arguing that there is no justification for amending section 51AC because it already provides adequate guidance for the courts. These groups included the Business Council of Australia, the Law Council of Australia, Colonial First State Property Management, the Shopping Centre Council of Australia, the Franchise Council of Australia and the law firm Freehills.

4.3 The Shopping Centre Council of Australia argued in its submission that there have been 15 litigated actions by the ACCC under section 51AC, 13 of which have been either successful in the courts or settled by consent. These rulings have provided 'significant guidance' on section 51AC and 'is not evidence that the ACCC is having difficulty in bringing successful prosecutions'.[1] The Council argued that the reason for the relatively small number of section 51AC actions is the small number of complaints, not that the section is an ineffective remedy to unconscionable conduct. It noted that between 1 July 2002 and 30 June 2007, the ACCC received 'only' 179 complaints relating to retail tenancy of which 108 were immediately assessed as not amounting to a breach of the Act.[2] This was despite the ACCC's 'comprehensive publicity and education campaigns' to make small business aware of the provisions of section 51AC.

4.4 The Franchise Council of Australia also argued that the current section 51AC is working well, citing the recent *Hoy Mobile v Allphones Retail Pty Ltd* and *ACCC v*

---

1 Shopping Centre Council of Australia, *Submission 17*, p. 3.

2 Shopping Centre Council of Australia, *Submission 17*, pp. 4–5.

Simply No Knead cases. It claimed that the ACCC is 'an effective regulator' and has achieved 'considerable success' in unconscionable conduct cases relating to franchising.[3] The Law Council of Australia, similarly, cited the Hoy Mobile phone case as evidence that the Act is working as intended and argued that the ACCC has been vigorously investigating and prosecuting cases of unconscionable conduct.[4]

Changed industry behaviour

4.5 A related argument in favour of the existing section 51AC is that it has changed industry behaviour. The committee received a submission from Colonial First State Property Management which argued that the current provisions in the TPA dealing with unconscionable conduct have achieved their purpose 'by successfully changing business behaviour'.[5]

4.6 Similarly, the Shopping Centre Council argued in its submission that section 51AC has achieved its purpose. In its experience, 'there is no doubt that section 51AC has contributed to a change in behaviour in key industries including retail leasing'.[6] The Council's submission cited a supporting view from the Productivity Commission in its recent report into the market for retail tenancy leases:

> While some suggested that the current concept of unconscionable conduct sets too high a hurdle, given the substantial incentive for centre landlords to settle an accusation of unconscionable conduct before it proceeds to court, the Commission's assessment is that the current provisions are influencing conduct and reducing costs associated with unnecessary disputation.[7]

4.7 The Shopping Centre Council claimed that the small number of prosecutions under section 51AC were the product of four factors:

- the small number of complaints actually made to the ACCC, which reflects 'that the incidence of such behaviour has always been vastly exaggerated';
- the wide availability of alternative forms of relief under the Trade Practices Act and other statutes;
- a better educated and better informed small business constituency; and

---

3 Franchise Council of Australia, *Submission 19*, p. 2.

4 Law Council of Australia, *Submission 28*, p. 1.

5 Colonial First State Property Management, *Submission 2*, p. 1.

6 Franchise Council of Australia, *Submission 19*, p. 8.

7 Productivity Commission, *The Market for retail tenancy leases in Australia*, August 2008, p. xxiv.

- a more heavily regulated market.[8]

4.8 The committee points out that it is easier to claim that the law has changed business behaviour than to prove it. It does seem likely, however, that some businesses may have altered their practices to fit within the courts' rulings on section 51AC. As Dr Cousins and Mr Bhojani flag in their submission:

> It is difficult to assess the impact of the introduction of S 51 AC, or of the unconscionable conduct provisions more generally, in the absence of comprehensive surveys of behaviour before and after adoption of the legislation. It could be expected that the legislation would have had some impact on business behaviour. The Australian Competition and Consumer Commission (ACCC) has taken a number of cases to court over the past decade which has reinforced awareness of the law and tested its interpretation by the judges.[9]

Legal concerns with amending section 51AC

4.9 There are also legal concerns that statutory definitions of 'unconscionable conduct' and 'good faith' and a list of statutory examples of 'unconscionable conduct' are unnecessary, would use vague terms and create unnecessary confusion and uncertainty.

A definition of 'unconscionable conduct'

4.10 The Law Council of Australia put two arguments in opposition to a definition of 'unconscionable conduct' in the Trade Practices Act. Firstly, codification would not pick up developments in the definition of unconscionable conduct at common law. An inflexible definition could undermine one of the objectives of section 51AA which is to broaden the scope of remedies available at common law.[10] And secondly, 'unconscionability' is not an express statutory obligation capable of precise definition but 'a norm of conduct of general application'.

4.11 Accordingly, the Law Council argued that any attempt to define the concept, even through examples, will lead to loss of flexibility in interpretation and loss of guidance on the norm provided by the legal precedent. It noted that section 52 of the TPA dealing with 'misleading and deceptive' conduct works well despite there being no definition of these terms.[11]

---

8 Shopping Centre Council of Australia, *Submission 18*, p. 1.

9 Dr Cousins and Mr Bhojani, *Submission 30*, p. 1.

10 Law Council of Australia, *Submission 28*, p. 2.

11 Law Council of Australia, *Submission 28*, p. 4.

4.12 The Shopping Centre Council reasoned in its submission to this inquiry that because section 51AC was introduced to provide an avenue for small businesses to pursue remedies against large businesses guilty of 'unconscionable' conduct, it should not be amended to address conduct which might subjectively be assessed as 'harsh' or 'unfair.' It also argued that the strength of section 51AC is its lack of prescription. The section takes into account 'all of the circumstances' and as a result, it tends to be 'a law of last resort'. The Council added: 'Well advised litigants typically choose more prescriptive, albeit more limited, causes of action where available'.[12]

4.13 The Shopping Centre Council also accused Associate Professor Zumbo of rehashing old arguments made to the 2004 Senate Economics Committee inquiry into the TPA. It cited the committee's report and the basis for its rejection of the terms 'harsh' and 'unfairness' to describe 'unconscionable conduct'.[13]

Examples of 'unconscionable conduct'

4.14 The Law Council of Australia argued that a statutory list of examples of unconscionable conduct (as proposed by Associate Professor Zumbo, paragraph 3.27) would unnecessarily lower the threshold from 'unconscionability' to something more like 'unfairness'.[14] It claimed that the list of non-exhaustive factors in sections 51AB and 51AC 'strike an appropriate balance' between providing the courts with guidance on the one hand and flexibility on the other.[15]

4.15 The Law Council also warned that a list of examples of 'unconscionable conduct' would be inflexible. It argued that these examples would be confined to a specific set of facts and would not cover all the situations in which conduct might be unconscionable. Further, recasting the current list of factors in 51AC(3) and 51AC(4) as examples would unfairly capture cases where unequal bargaining power and a unilateral variation of contract are both a common and necessary part of commercial transactions.[16]

4.16 The Shopping Centre Council of Australia argued that a list of examples of 'unconscionable conduct' would 'immediately put section 51AC in a straightjacket'. It shared the Law Council's concerns that a list of examples risked restricting the courts'

12 Shopping Centre Council of Australia, *Submission 18*, p. 7.

13 Shopping Centre Council of Australia, *Submission 18*, p. 9.

14 Law Council of Australia, *Submission 28*, p. 6.

15 Law Council of Australia, *Submission 28*, p. 2.

16 Law Council of Australia, *Submission 28*, p. 6.

(current) consideration of all the circumstances of the dispute, and that Associate Professor Zumbo's list would elevate those factors to 'ethical norms'.[17]

4.17 The Council also took exception to the example of the supplier's conduct towards the business consumer being significantly inconsistent with the supplier's conduct in similar transactions. It noted that these differences can occur as a consequence of changed economic conditions, rather than unconscionable conduct. It highlighted the ACCC's statement that 'one business may simply have been able to negotiate a better deal than another similar business'.[18]

4.18 Along similar lines, the Franchise Council of Australia argued in its submission that any attempt to amend the 'unconscionable conduct' provisions in section 51AC 'is likely to lead to…increased uncertainty and unnecessary additional cost'.[19] It identified 'significant legal certainty' from the section 51AC cases to date and argued that the motive to broaden the application of the section was misguided. Accordingly, it rejected both a statutory definition of 'unconscionable conduct' and examples to try and define the concept. It claimed that the Franchising Code of Conduct, together with the current provisions of sections 51AC and 52, are a strong legislative framework. It warned that any move to define 'unconscionable conduct' could 'easily upset' the pre-contractual disclosure process.[20]

'Good faith'

4.19 As with a definition of 'unconscionable conduct', some submitters expressed concern that a statutory definition of 'good faith' would also have adverse consequences. The Franchise Council of Australia warned in its submission that:

> …any move to write a good faith clause into the Franchising Code of conduct would have immediate negative effects on the stability of the franchising sector, casting doubt on the status of thousands of existing franchise agreements. Similarly, the FCA regards any attempt to redefine the unconscionable conduct provisions of s.51AC as likely to create doubt and uncertainty in an area of law in which there is precedent and no lack of clarity in the eyes of the courts and the primary policing body, the ACCC.[21]

4.20 The Shopping Centre Council emphasised that the term 'good faith' was not clear and has not been properly defined by the courts. It urged the committee to be

17 Shopping Centre Council of Australia, *Submission 17*, pp. 11–12.

18 Shopping Centre Council of Australia, *Submission 17*, p. 12.

19 Franchise Council of Australia, *Submission 19*, p. 1.

20 Franchise Council of Australia, *Submission 19*, p. 2.

21 Franchise Council of Australia, *Submission 19*, p. 1.

vary of Associate Professor Zumbo's confidence in the courts' understanding of the concept and cited the comments of various legal commentators which underlined their uncertainty of the common law interpretation. The Council noted that their legal advisers have concluded that the phrase 'good faith' takes on different meanings depending on its context:

> In the view of our legal advisers the exact content of any implied obligation of good faith depends on the type of contract, the factual matrix, the parties involved and so on. An obligation of good faith cannot stand on its own. There must first be an agreement with an objectively ascertainable common purpose(s) with respect to which the parties must be able to be 'faithful'. It makes no sense to simply say that parties must perform in good faith. Rather "[w]e must know what terms they will be performing. If we are then requiring those terms to be performed in good faith, really all we are doing is explaining the standard to which they must perform."[22]

The ACCC's view

4.21 The ACCC also cited legal concerns with definitions of 'unconscionable conduct' and 'good faith' and other efforts to codify section 51AC. In evidence to the committee, Mr Scott Gregson of the ACCC's Enforcement and Compliance Division explained:

> There are two risks in the ACCC's view as to codifying conduct from the more general prohibition, as is currently the case, to the more specific prohibitions. Firstly, appreciating the difficulty in identifying upfront all scenarios that might be considered, there is potential to exclude forms of conduct that a general prohibition would allow the court to consider—that is, carving out things that should really be caught by the legislation. Secondly, and almost the other side of that coin, is that in being specific without allowing the court to consider all the circumstances, there is potential for the prohibitions to catch conduct that, in all the circumstances, were not intended to be caught—that is, grabbing too much in by being quite specific…While trying to provide greater clarity, care needs to be taken in relation to some suggestions such as thresholds, fair play and good faith, that they do not introduce more uncertainty, particularly in a scenario where those are concepts that can currently be taken into account in the factors considered under both sections 51AB and 51AC.[23]

22 Shopping Centre Council of Australia, *Submission 18*, p. 15.

23 Mr Scott Gregson, *Proof Committee Hansard*, 3 November 2008, p. 9.

4.22 The ACCC made clear, however, that the question of where the threshold of 'unconscionable' should be set is ultimately a matter for policymakers and government.[24]

Judicial caution

4.23 Freehills' submission is a significant departure from this argument that no definition is needed because the courts have done their job. Professor Bob Baxt, Partner at Freehills, argued that rather than inserting a definition of 'unconscionable conduct', the courts need to concentrate on developing the interpretation of the current provisions. He claims that there is no reason why section 51AC should not be given 'a much more comprehensive and appropriate interpretation' than in the past. Indeed:

> …were it not for the fact that some of our judges are just too timid in interpreting these provisions in an appropriate fashion, there would be many more successful decisions under s 51AC of the TPA than is currently the position.[25]

4.24 Professor Baxt uses the example of the decision of the Full Federal Court in *ASIC v National Exchange Ltd (2005).* Although the case considered the expression of 'unconscionable conduct' in the context of the Corporations Law, it has parallels with the TPA. While the Court found in favour of the company, it argued there was no doubt that its conduct in question was unconscionable.[26] Professor Baxt expresses concern that:

> the introduction of a new definition will slow down, rather than accelerate, the possible interpretation of s 51AC along the lines suggested by the Full Federal Court in the National Exchange case… Australia has a tendency of being over-prescriptive in its legislative initiatives. We tend to change our legislation too often. This tends to delay the proper and considered interpretation of the legislation that we have in place. The fact that some cases are lost when judges form a particular view is not necessarily a good reason for simply changing the legislation. Sometimes it does take a little bit of time, and a bit of imagination and bravery on the part of judges, to ensure that legislation is interpreted in an effective fashion.[27]

---

24 Mr Scott Gregson, *Proof Committee Hansard,* 3 November 2008, p. 9.

25 Freehills, *Submission 21,* p. 1.

26 The judgment was made on the basis of a technical problem in relation to whether the relevant conduct was in 'trade or commerce'.

27 Freehills, *Submission 21,* p. 2.

Conclusion

4.25 The committee received several submissions which argued that the current section 51AC is working well and that no amendments are needed. They emphasised the risks inherent in codifying the section. Definitions, principles and examples could have the effect of limiting the courts' scope to interpret 'unconscionable conduct', or they could capture conduct which should be allowed. The best option, they argue, is to continue developing case law and leave it to the courts to decide 'in all the circumstances' of each particular case.