
WORKING PAPER

**THE ACCC COMPLIANCE AND
ENFORCEMENT PROJECT:**

**ASSESSMENT OF THE IMPACT OF
ACCC REGULATORY ENFORCEMENT
ACTION IN UNCONSCIONABLE
CONDUCT CASES**

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TABLE OF CONTENTS

1.	Introduction: Assessment of the ACCC’s Enforcement of the TPA Prohibitions on Unconscionable Conduct	4
1.1	Introduction	4
1.2	Background: The History and Rationale for the Prohibition on Unconscionable Conduct under the TPA	5
1.3	Section 46 and the Unconscionable Conduct Provisions Compared	9
1.4	ACCC and the Pyramid of Enforcement and Compliance Strategies Available in relation to Unconscionable Conduct	11
1.5	The Case Studies Examined in this Paper and Research Methodology	15
2.	The Impact of ACCC Enforcement Action in Unconscionable Conduct Cases: Case Studies in Retail Leasing, Franchising and Consumer Transactions	17
<u>2.1</u>	<u>Retail Leasing Case Studies</u>	<u>17</u>
2.1.1	The Farrington Fayre Case	17
2.1.2	The Lunch Bar Case	22
2.1.3	The Food Plaza Case	28
2.1.4	Conclusions on the Impact of the ACCC in Retail Leasing Cases	29
<u>2.2</u>	<u>Franchising Case Studies</u>	<u>31</u>
2.2.1	Cheap as Chips Case	31
2.2.2	Simply No Knead Case	34
<u>2.3</u>	<u>Consumer Transaction Case Studies</u>	<u>39</u>
2.3.1	The Two-Tier Marketing Case	39
2.3.2	The Horse Race Betting Software Case	43
2.3.3	The McDonald’s Case	48
2.3.4	The Lux Case	55
2.3.5	The Radio Rentals Case	57
2.3.5	Conclusions on the ACCC’s Impact in Consumer Transaction Cases	59
3	Conclusion: The Impact of ACCC Enforcement Action in Unconscionable Conduct Cases	61

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1. INTRODUCTION: ASSESSMENT OF THE ACCC'S ENFORCEMENT OF THE TPA PROHIBITIONS ON UNCONSCIONABLE CONDUCT

1.1 Introduction

The unconscionable conduct provisions of the *Trade Practices Act 1974* (Cth) (TPA) (ss51AA, 51AB an 51AC: see below) prohibit strong parties from engaging in conduct that seeks to dominate or exploit weak parties, and arms weak parties with the means to resist such conduct. A weak party may resist attempts to dominate it by either commencing, or threatening to commence, legal proceedings against a strong party for its violation of the TPA provisions against unconscionable conduct. Under section 80 a party may obtain an injunction to stop or prevent a party from breaching the TPA.¹ Under section 82 a party may obtain an order for damages to compensate that party for costs or loss or damage, including personal injury, incurred as a result of a party's conduct in breach of the TPA.² Finally, under section 87 a party may obtain any other orders that the court thinks appropriate to compensate, prevent or reduce the damage suffered by that party as a result of a party's conduct in breach of the TPA. These orders may include, for example, declaring a contract void or otherwise varying the terms of a contract or directing the offending party to refund money or provide specified services.

The prohibition of unconscionable conduct and the many remedies on offer under the TPA, however, are of little assistance if the weaker party is ignorant of the law and/or lacks the resources to commence legal proceedings. The TPA therefore gives the Australian Competition and Consumer Commission (the 'ACCC') the role of administering the TPA.³ This role includes, educating the public about their rights and obligations under the TPA and enforcing the provisions of the TPA, including the unconscionable conduct provisions either on its own behalf or as the representative of a wronged party. Ultimately, the function of the ACCC is to change and reinforce certain norms of behaviour in the business community. This paper evaluates the success of the ACCC in changing and reinforcing norms of business behaviour in relation to avoiding unconscionable conduct.

The remainder of Part One of this paper introduces the unconscionable conduct provisions in the TPA and the reasons why they were added to the TPA, as well as a brief overview on the way in which the ACCC has enforced them. In Part

¹ See for example *Miller v Gunther* [2005] QSC 090 (an injunction to restrain respondents from taking steps to enforce mortgages), *Hoppers Crossing Club Ltd v Tattersalls Gaming Pty Ltd* [2005] VSC 114 (injunction to restrain defendant from removing gaming machines from plaintiff's premises), *Boral Formwork & Scaffolding Pty Ltd v Action Makers Ltd & Anor* [2003] NSWSC 713 (an injunction to prevent the second defendant from paying the first defendant a certain sum of money), *Softplay Pty Ltd v Perpetual Trustees (WA) Pty Ltd* [2002] NSWSC 1059 (injunction to restrain activities of lessor), *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd & Anor* [1999] FCA 903 (injunction sought restraining first respondent from giving effect to termination of agreement), *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380 (injunction to restrain payment of guarantee moneys) and *Gregg v Tasmanian Trustees Ltd* (1997) 143 ALR 328 (injunction to restrain bank from engaging in conduct seeking to enforce or retain benefit of mortgage).

² See TPA, section 4K, *Pritchard v Racecage Pty Ltd* (1997) 142 ALR 527 (damages sought for death of an official at a car rally) and *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445 (damages for mental stress).

³ TPA, Part II.

Two we use empirical evidence to evaluate the success of the ACCC in enforcing the unconscionable conduct provisions in a number of key cases. We divide the cases into those concerning retail leasing, franchising and consumer transactions. Our empirical evidence comes from interviews with ACCC staff who were involved in the various unconscionable conduct cases, business people who have been prosecuted (personally or their business) for breaching the unconscionable conduct provisions of the TPA, and lawyers who have acted for the ACCC or those prosecuted in these cases. (Section 1.5 provides further detail of the methodology used for this study.) Part Three concludes.

1.2 Background: The History and Rationale for the Prohibition on Unconscionable Conduct under the TPA

The Addition of the Unconscionable Conduct Provisions to the TPA

The *Trade Practices Act 1974* (Cth) (TPA) was enacted by the Commonwealth Government with the stated aim of enhancing ‘the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.’⁴ The provisions protecting Australian consumers and businesses from unconscionable conduct, however, did not come into existence until over a decade after the enactment of the TPA and after considerable debate. The table below lists the numerous reports, presented to the government, recommending either for or against the insertion of a provision prohibiting unconscionable conduct. Those reports, which recommended the insertion of such a provision, considered that the provision was necessary to protect in particular small businesses from exploitation by larger or more powerful businesses. Those reports, however, which were against the insertion of the provision argued that the provision would conflict with the anti-competitive provisions of the TPA and/or undermine certainty in business transactions.

The question of whether the TPA should provide for the prohibition of unconscionable conduct was first raised in August 1976 in a report of the Trade Practices Act Review Committee to the Minister for Business and Consumer Affairs (the ‘Swanson Committee Report’).⁵ The Swanson Committee recommended that the TPA be amended to prohibit unconscionable conduct. It was thought by the Committee that such a provision might enable the TPA to combat the disparity of bargaining power that generally exists between buyers and sellers. In 1979, however, the Blunt Committee stated in its report that it considered such a provision to be in conflict with Part IV of the TPA, which prohibits anti-competitive conduct. The Committee argued that Part IV regulated conduct on the basis of its impact on market competition, whereas the proposed provision prohibiting unconscionable conduct would regulate conduct according to the dictates of morality, and these two sets of provisions would conflict with one another. As we shall see, the inclusion of the more ethically based prohibition on unconscionable business conduct alongside the more economically based prohibitions on anti-competitive conduct was controversial from the start. It created a situation in which the ACCC was expected by the

⁴ TPA, section 2.

⁵ Trade Practices Act Review Committee, Parliament of Australia, *Swanson Committee Report* (1976).

Commonwealth Government and by small business to run enforcement cases to develop and test the law on unconscionable conduct.⁶ Yet at the same time some commentators and some in business opposed the development of this aspect of the TPA.

Summary of Government Reports		
Date	Report	Recommendation
August 1976	Swanson Committee	Recommended the insertion of a provision prohibiting unconscionable conduct
1979	Blunt Committee	Recommended against the insertion of any provision prohibiting unconscionable conduct
1984	Green Paper	Insertion of a provision prohibiting unconscionable conduct. Provided a draft of such a provision that was later inserted into the TPA and numbered section 52A.
1989	Griffiths Committee	Considered an extension of section 52A to include business transactions and noted that there was significant opposition to such an extension.
1990	Beddall Committee	Recommended the extension of section 52A to cover small business transactions.
1991	Wright Report	Recommended the extension of section 52A to protect small businesses from unconscionable conduct by suppliers.
July 1991	Trade Practices Commission Report	Recommended the extension of section 52A to protect small businesses.
December 1991	Cooney Report	Condemned any suggestion of an extension of section 52A and recommended that section 52A be removed from the TPA.
1997	Reid Report	Recommended that the TPA be further amended to protect small businesses.
April 2003	Dawson Review	Recommended that guidelines be provided on the operation of the provisions prohibiting unconscionable conduct.

⁶ See the direction by the Minister for Customs and Consumer Affairs, Warren Truss, to the ACCC in the *Commonwealth of Australia Gazette* (No GN 35 2 September 1998), 3010.

Prohibition on Unconscionable Conduct in Consumer Transactions: s51AB (52A)

In 1984, a Green Paper considered the issue again and recommended the insertion of a provision prohibiting unconscionable conduct.⁷ However, because of the many submissions received from business organizations expressing fear that such a provision would create business uncertainty, the provision was limited to consumer transactions when it was finally inserted into the TPA in 1986.⁸ At the time of its insertion the section was numbered 52A, but was renumbered 51AB when the TPA was amended again later.⁹ Section 52A prohibits corporations from engaging in unconscionable conduct in the supply, or possible supply, of goods or services to consumers. The TPA does not provide a definition of the term ‘unconscionable conduct’. Instead section 52A lists the factors the court may take into account in determining whether a corporation has engaged in unconscionable conduct. These factors include, inter alia, the disparity of bargaining power between the parties and whether the corporation used any unfair tactics.

Prohibition on Unconscionable Conduct in Relation to Small Business: ss51AA and 51AC

Following the insertion of section 52A into the TPA, debate increased as to whether the prohibition should be extended to include business transactions. In 1989, the Griffiths Committee considered a proposed extension of section 52A to include business transactions and recommended that if the then Trade Practices Commission wished to pursue the matter it would need to find ‘persuasive arguments to counter the extensive opposition within the business community and legal profession.’ In its report in 1990, the Beddall Committee recommended an extension of section 52A to cover small business transactions including commercial leases where it considered small businesses to be disadvantaged in the same way as consumers.¹⁰ In 1991, the Wright Report recommended an extension of section 52A to protect small businesses from unconscionable conduct by suppliers. In July 1991, the Trade Practices Commission (‘TPC’) delivered a detailed report to the government on unconscionable conduct.¹¹ In this report the TPC noted that they had received a ‘stream’ of complaints over the years from small businesses alleging unconscionable conduct by larger or more powerful businesses. The areas in which the TPC considered that small businesses were particularly vulnerable to unconscionable conduct included, inter alia, commercial leases, franchising, small business loans and loan guarantees. The TPC ultimately recommended an extension of section 52A, by creating a new part to the TPA, to protect small businesses from unconscionable conduct. In December 1991, however, the Cooney Report condemned this suggestion and even went so far as to

⁷ Parliament of Australia, *The Trade Practices Act – Proposals for Change* (1984), 194.

⁸ *Trade Practices Revision Act 1986* (Cth) 1986 (Act No 17 of 1986).

⁹ By section 8 of the *Trade Practices Legislation Amendment Act 1992* (Cth) (Act No. 222 of 1992).

¹⁰ House of Representatives Standing Committee on Industry, Science and Technology, Parliament of Australia, *Small Business in Australia: Challenges, Problems and Opportunities*, (1990) (‘Beddall Report’).

¹¹ Trade Practices Commission, Parliament of Australia, *Unconscionable Conduct and the Trade Practices Act: Possible Extension to Cover Commercial Transactions*, (July 1991).

recommend the repeal of section 52A.¹² The Report argued that protection against unconscionable conduct had long been provided by equity so that a legislative prohibition against unconscionable conduct would amount to an ‘unnecessary duplication’ of the law.¹³ The report went on to argue that such a provision would create uncertainty in business transactions particularly if the courts were to regard the provision ‘as a legislative charter for judicial intervention whenever ethics dictate.’¹⁴

In 1992, as a compromise, the government inserted section 51AA into the TPA.¹⁵ Section 51AA does no more than to incorporate the equitable doctrine of unconscionable conduct into the TPA so that businesses might have access to the wide range of remedies available under the TPA.¹⁶ Under the equitable doctrine of unconscionable conduct the courts have held conduct to be unconscionable where a party obtains, or retains, some benefit from a transaction with another party where that party was laboring under some kind of ‘special disability’.¹⁷

The insertion of section 51AA, however, did nothing to halt the debate about the protection of small businesses. In 1997, the Reid Report found section 51AA to be generally inadequate in protecting small businesses from unconscionable conduct.¹⁸ Accordingly the Reid Report recommended, among other things, that the TPA be amended to give small businesses greater protection against unconscionable conduct. In response to the Reid Report, the TPA was amended in 1998 to insert section 51AC.¹⁹ Section 51AC prohibits corporations and persons from engaging in unconscionable conduct in commercial transactions with small businesses. Section 51AC can only be invoked by businesses that are not publicly listed companies and only in relation to transactions involving the supply of goods or services of no more than \$3 million. Like section 51AB (formerly section 52A), section 51AC does not contain or refer to any comprehensive definition of unconscionable conduct. Instead it lists a number of factors the court may take into consideration in determining whether a corporation or person has engaged in unconscionable conduct. Not unlike section 51AB these factors include, inter alia, the disparity of bargaining power between the parties and the extent to which the corporation or person acted in good faith.

Despite the insertion of section 51AC, the debate about the protection of small businesses continues today. In 2003, the Dawson Review, evaluating the anti-competitive provisions of the TPA, was released. Although outside the scope of its inquiry, the Review noted that, it had received a few submissions suggesting further amendments to section 51AC to provide greater protection to small

¹²Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls* (1991) (‘Cooney Report’).

¹³ *Ibid*, 106.

¹⁴ *Ibid*, 108.

¹⁵ *Trade Practices Legislation Amendment Act 1992* (Cth) (Act No. 222 of 1992).

¹⁶ Explanatory Memorandum, *Trade Practices Legislation Amendment Bill 1992* (Cth), paragraph 41.

¹⁷ See *Louth v Diprose* (1992) 175 CLR 621, 637 (Deane J), 626 (Brennan J), 650 Toohey J).

¹⁸ House of Representatives Standing Committee on Industry, Science and Technology, Parliament of Australia, *Finding a Balance – Towards Fair Trading in Australia* (1997) (‘Reid Report’).

¹⁹ *Trade Practices Amendment (Fair Trading) Act 1998* (Cth) (Act No. 36 of 1998).

businesses. In particular, the Review noted that it was submitted that section 51AC should be amended to prohibit certain practices in relation to contracts such as the unilateral variation of contracts or the presentation of ‘take or leave it’ contracts. It was also submitted that a new Part IVB should be inserted into the TPA to deal with unfair contractual terms. The Review concluded that the scope of its inquiry prevented it from providing any detailed evaluation of the provisions prohibiting unconscionable conduct, but did recommend that guidelines be developed as to the enforcement of the provisions. The current Treasurer, Mr Peter Costello, tabled a bill in parliament to incorporate some of the suggestions made by the Dawson Review in relation to the anti-competitive provisions of the TPA.²⁰ Mr Costello has also stated that amendments will be made to section 51AC, increasing the cap on the size of the transactions from \$3 million to \$10 million.²¹ As indicated in one newspaper article these ‘changes come as sections of the coalition backbench are becoming restive about the need to address small business’ complaints.’²² One important issue is the extent to which the unconscionable conduct provisions are compatible with, or might be used as an alternative to s46 of the TPA (the prohibition on misuse of market power). Certainly the ACCC has had more success in litigating the unconscionable conduct provisions of the TPA than s46.

1.3 Section 46 and the unconscionable conduct provisions compared

Section 46 of the TPA is somewhat similar to the unconscionable conduct provisions in that it seeks to protect the freedom of people and corporations’ from domination by more powerful corporations. However, it has also been argued that section 46 is fundamentally different in focus from the unconscionability provisions, and that the unconscionability provisions detract from or conflict with section 46.

Section 46 prohibits a corporation with a ‘substantial degree of power in a market’ from misusing that power ‘for the purpose of’ eliminating or substantially damaging a competitor or preventing or deterring a person from entering the market or from engaging in competitive conduct. The focus or object of section 46 has been held by the courts to be purely economic. As outlined by Deane J in *Queensland Wire Industries v BHP*:²³

the essential notions with which section 46 is concerned and the objective which the section is designed to achieve are economic and not moral ones. The notions are those of markets, market power, competitors in a market and competition. The objective is the protection and advancement of a competitive environment and competitive conduct.

In contrast to section 46, the purpose or object of the unconscionability provisions have been held by the courts to be moral. Section 51AA is drawn from the equitable doctrine of unconscionable conduct and section 51AB and 51AC are broadly drawn from the ideas underpinning the doctrine. In the case of

²⁰ Now passed as the *Trade Practices Legislation Amendment Act* (No. 1) (Cwth) 2006.

²¹ Mark Davis ‘Costello Backs Small Business on Competition’, *Australian Financial Review*, 14 September 2004, 1.

²² *Ibid.*

²³ (1989) ATPR 40-925.

Blomley v Ryan, Kitto J has held that under the doctrine of unconscionable conduct ‘the principle applied is not one which extends sympathetic benevolence to a victim of undeserved fortune; it is one which denies to those who act unconscientiously the fruits of their wrongdoing.’²⁴ In other words unlike section 46 which looks to the economic impact only of a party’s actions, unconscionable conduct looks only to the unconscionability or wrongness of a party’s actions and not to whether or not the actions produced a good economic result.

Consequently, as outlined above, several committees or reports, such as for example the Blunt Committee, that have considered the insertion of the unconscionability provisions have argued that such provisions would conflict with section 46. Despite these objections the provisions came to be inserted as a result of intense lobbying by consumer and small business groups. Further the Reid Report, noting in particular the complaints of small businesses about section 46, suggested that section 46 and the unconscionability provisions might be more complementary rather than, as has been asserted, contradictory. The Report argued that it is ‘naïve to expect small businesses to survive unrestrained ‘competition’ without some form of protection from the worst excesses of the exercise of economic power.’²⁵

The unconscionability provisions can complement the operation of section 46 because it can deal with wrongdoing that injures consumers and businesses but which falls short of the high threshold contained in section 46. The ACCC has complained that enforcement of section 46 has been difficult largely because of the difficulty in proving purpose.²⁶ It follows that section 51AC, which is substantially similar in its aim to that of section 46, can be used as an alternative to section 46 in protecting small businesses from dominating behaviour. As discussed above section 51AC, like section 46, applies in circumstances in which there is a disparity of power between the parties and where the stronger party has misused such power. Unlike section 46, however, section 51AC is not hindered by a ‘purpose test’. The court, in determining whether a corporation has breached section 51AC, is only to have regard to the actions of a corporation and not its intent.

1.4 The ACCC and the Pyramid of Enforcement and Compliance Strategies Available in relation to Unconscionable Conduct

In this paper we focus on evaluating the impact of ACCC enforcement proceedings in unconscionable conduct cases. But the ACCC is not the only institution or person that plays a role in promoting compliance with the TPA, and the unconscionable conduct prohibitions in particular. Nor is enforcement litigation the only way in which these provisions are implemented and enforced. The strategies available for encouraging and enforcing compliance with the prohibition on unconscionable conduct can be described in terms of an

²⁴ (1956) 99 CLR 362, 429.

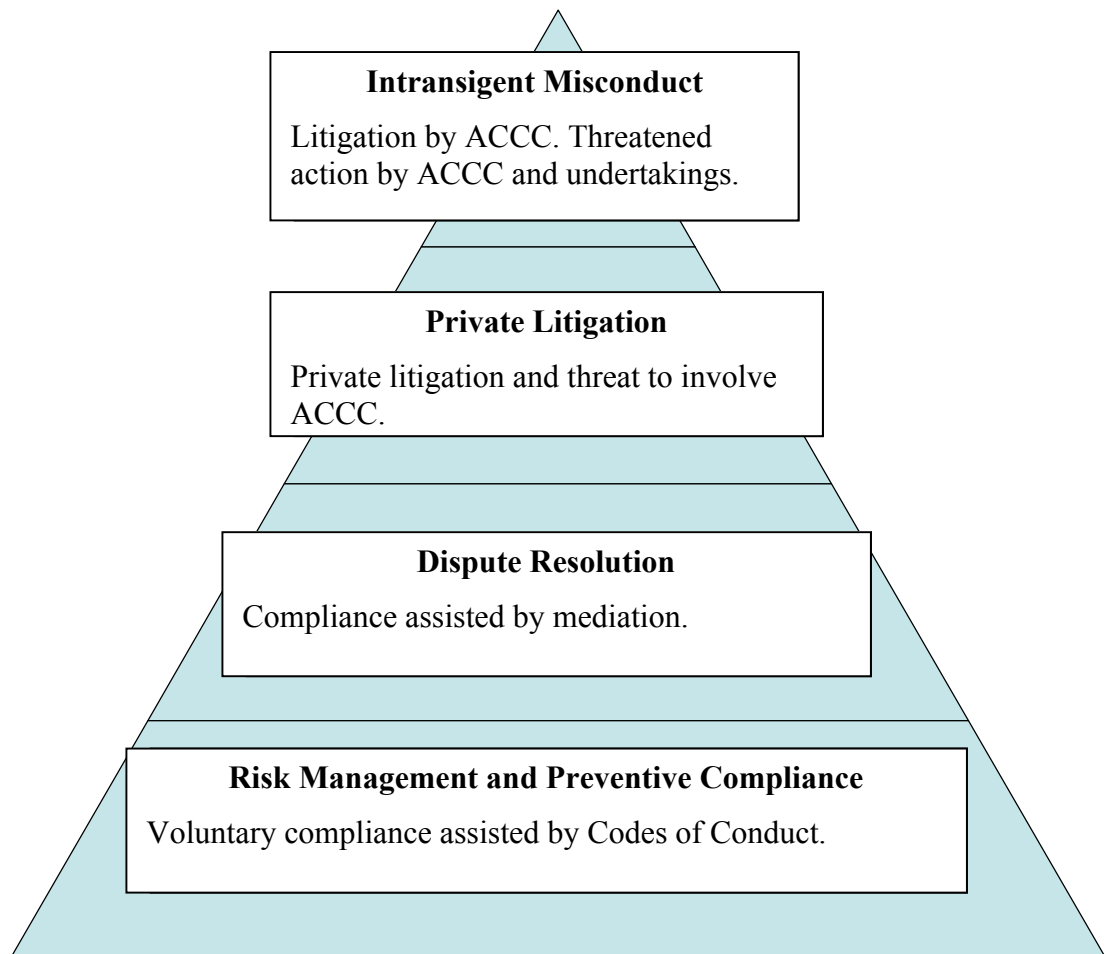
²⁵ Reid Report, as above n18, 135.

²⁶ Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act (2003)* (the ‘Dawson Review’) 77.

enforcement pyramid as shown in Diagram One below ranging from more voluntary and cooperative means of achieving compliance that are used in most cases (hence they represent the broad base of the pyramid) through to more coercive and punitive sanctions used in only a few cases (the tip of the pyramid).²⁷ The relationship between the layers of the pyramid is dynamic: Action higher up the pyramid is likely to influence the way in which compliance is interpreted and implemented further down the pyramid. On the other hand, to the extent that satisfactory compliance with the law can be achieved through less coercive mechanisms lower down the pyramid, enforcement action higher up the pyramid may not be necessary. Therefore in examining the impact of ACCC enforcement action at the tip of the pyramid, it is important to put it in the context of other action to promote and enforcement compliance lower down the pyramid.

²⁷ For the concept of the ‘enforcement pyramid’ see Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 35.

Diagram One: Pyramid of Enforcement and Compliance Strategies for Unconscionable Conduct



First, the base of the pyramid represents the ‘risk management’ and preventive compliance work undertaken to establish good norms of conduct within the business community including compliance with prohibitions on unconscionable conduct. Activity at this level of the pyramid includes voluntary compliance by the business. This may be facilitated by advice on compliance from business’ own lawyers, as well as the ACCC’s educational activities and dissemination of information about the provisions of the TPA.²⁸ The ACCC has developed and circulated a range of publications informing people of their rights and obligations under the unconscionable conduct provisions of the TPA.²⁹ The ACCC also maintains a web site that provides current information about the unconscionable conduct provisions of the TPA and the role of the ACCC in enforcing the provisions. In particular, the web site informs the public about any

²⁸ TPA, section 28.

²⁹ See for example ACCC, *Fair Game or Fair Go?: Avoiding and Dealing with a Hard Bargain* (1999) ACCC <http://www.accc.gov.au/content/index.phtml/itemId/142> and ACCC, *A Guide to Unconscionable Conduct in Business Transactions* (1998) ACCC <http://www.accc.gov.au/content/index.phtml/itemId/142>

enforcement action it has taken against a person or corporation for breaches of the TPA. However it is important to note that legal advice and education about voluntary compliance do not stand alone: Court cases on unconscionable conduct, including especially ACCC enforcement action at the tip of the pyramid, will often be important in making business people and their lawyers aware of the prohibitions on unconscionable conduct, and clarifying the extent of the law and how it applies to business conduct.

Risk management and preventive compliance in relation to unconscionable conduct also occur through the operation of voluntary, and sometimes mandatory, codes of conduct.³⁰ The ACCC is often involved in helping industry bodies to develop or review codes of conduct. It also has a role in administering and enforcing mandatory codes of conduct. Currently, the only mandatory code of conduct that exists under the TPA is the Franchising Code of Conduct.³¹ The Franchising Code of Conduct protects franchisees from unconscionable conduct by detailing the kind of conduct expected of franchisers. There are many voluntary codes of conduct that have been ‘authorized’ by the ACCC such as the film distribution and exhibition code of conduct³² and the code of conduct governing drug companies’ dealings with doctors.³³ The ACCC has the power to authorize³⁴ codes of conduct where aspects of the code may contravene the anti-competitive conduct provisions of the TPA. While authorization is only obtained after a consideration of the net public benefit in respect of the provisions concerned, such authorization only extends so far as conferring immunity from prosecution for the provisions the subject of the authorization application. It does not otherwise ‘endorse’ or sanctify the code as a best practice model. In reality however, applying the public benefit test may often act as a functional equivalent of endorsement. The ACCC has also recently adopted and published guidelines for industry to develop its own voluntary codes of conduct.³⁵

Second, the center of the pyramid represents the resolution of disputes between the parties. For example, under codes of conduct like the Franchising Code of Conduct, disputes can be mediated. A separate agency, the Office of the Mediation Advisor (Franchising) was set up by the Australian Government Office of Small Business to facilitate dispute resolution under this code.³⁶ Sometimes the ACCC uses codes as an alternative to enforcement via litigation. If there is a code in place that has worked well in the past, yet the ACCC begins to receive a lot of complaints about conduct that should be governed by the

³⁰ TPA, Section 51AE(b).

³¹ *Trade Practices (Industry Codes – Franchising) Regulations 1998* (1998 No 162).

³² ACCC Media Release, ‘Film Distribution and Exhibition Code of Conduct’, 13 August 1998.

³³ ACCC Media Release, ‘ACCC Authorizes Code of Conduct Governing Drug Companies’ Dealings with Doctors’, 18 November 2003.

³⁴ Pursuant to its powers under Part VII of the Act, the ACCC can, in respect of conduct which may otherwise contravene the Act, grant immunity from prosecution.

³⁵ ACCC, *Guidelines for Developing Effective Voluntary Industry Codes of Conduct* (February 2005). See also Christine Parker, John Braithwaite and Natalie Stepanenko, *ACCC Enforcement and Compliance Project: Working Paper on ACCC Compliance Education & Liaison Strategies*, April 2004. See also Len Gainsford, ‘The Australian Competition and Consumer Commission’s Proposed Industry Codes of Conduct – A Compliance Solution?’ (2004) 3 *Journal of Financial Law and Management* 8.

³⁶ See <http://www.mediationadviser.com.au> (10 August 2006).

code, it might go to the code administrators first to review the code and its implementation, rather than taking enforcement action. Similarly, in emerging areas of difficulty, the ACCC might be able to work with some businesses or an industry association to develop a code that is aimed at nipping non-compliance in the bud.

Third, the area immediately above the center of the pyramid describes the place that private litigation, or the threat of private litigation, has in compelling compliance with the TPA as described above. The only place that the ACCC has in relation to this kind of compliance is in the threat, express or implied, of its involvement that may assist in persuading the parties to resolve the dispute.

Fourth, and finally, the apex of the pyramid describes the few cases in which the ACCC threatens to commence legal proceedings and actually does commence legal proceedings. We focus on the impact of this type of enforcement activity in this paper.

The ACCC may commence legal proceedings against those who have breached the provisions of the TPA either on its own behalf³⁷ or on behalf of those who have been wronged by such conduct.³⁸ The government may also, as it has done from time to time, direct the ACCC to commence legal proceedings against those who have breached the TPA.³⁹ In 1998, the government, in a general direction to the ACCC, requested the ACCC to commence legal proceedings against any person or company that might have breached the TPA for the purpose of establishing legal precedent under section 51AC 'on matters of specific relevance to small business.'⁴⁰ A budget of \$2 million was given to the ACCC to cover the cost of such proceedings.⁴¹ Pursuant to the direction, the ACCC have commenced legal proceedings for breaches of the unconscionable conduct provisions of the TPA with mixed success.

The total number of proceedings commenced by the ACCC during the period covered by this research - from the time section 51AC was inserted into the TPA in 1998 until the middle of 2004 - was thirty.⁴² As at July 2004 the ACCC had only been completely successful in two of these cases and partially successful in another. It has been completely unsuccessful in one case, with six other cases still continuing.

Out of the 30 proceedings commenced by the ACCC, 17 have been settled between the parties. The terms under which these cases have settled reflect the greater remedies or powers at the disposal of the ACCC under the TPA than that available to a private litigant. The ACCC may apply to the court for a non-punitive order to be made against a party in breach of the TPA.⁴³ This may involve an order for community service, probation, disclosure of certain

³⁷ TPA, section 86.

³⁸ TPA, section 87.

³⁹ TPA, section 29.

⁴⁰ *Commonwealth of Australia Gazette* (No GN 35 2 September 1998), at 3010.

⁴¹ Bob Wilson, 'Watchdog Targets Bad Landlords', *Courier Mail*, 16 April 1999.

⁴² This was the time frame for the larger ACCC Compliance and Enforcement Project.

⁴³ TPA, section 86C.

information or the publishing of a specified advertisement. Alternatively, the ACCC may apply to the court for a punitive order to be made.⁴⁴ This may involve an order that a party disclose certain information to certain persons or publish a specified advertisement. Out of the number of cases settled between the parties, twelve were settled by way of consent orders, one of which included a punitive order. The remaining five were settled by way of enforceable undertakings, two of which also involved court orders being made.

1.5 The Case Studies Examined in this Paper and Research Methodology

The content of these orders and their effectiveness in changing business culture in Australia and increasing compliance with the TPA is examined below on the basis of case study evidence. We examine ten of the most significant unconscionable conduct cases brought by the ACCC between 1998 and 2004 in three categories (see below). These include cases that were settled by the ACCC, as well as those that did not settle and were fully litigated by the ACCC.

The ten cases chosen for study were:⁴⁵

Retail Leasing: The Farrington Fayre, Lunch Bar and Food Plaza cases.

Franchising: The Cheap as Chips and Simply No Knead cases.

Consumer Transactions: The Two-Tier Marketing, Horse Race Betting Software, McDonalds (McMatch and Win Competition), Lux and Radio Rentals cases.

These ten cases were chosen on the basis that they were the ones with the highest profile among all the ACCC's unconscionable conduct cases. They were referred to frequently in the ACCC's own literature as examples and warnings, and were also those that were most frequently referred to in scholarly and practitioner literature on unconscionable conduct. Given their high profile, it was expected that these cases were those that were most likely to have had a greater impact on business norms and conduct. We have excluded any cases where unconscionable conduct allegations were only a small part of the ACCC's case.

The research reported in this paper forms part of a larger project, the *ACCC Enforcement and Compliance Project*,⁴⁶ which uses both qualitative and quantitative research methods to evaluate the impact of ACCC enforcement strategies on compliance with the Trade Practices Act. This paper provides a preliminary analysis of qualitative data on the compliance impact of ACCC enforcement activity in unconscionable conduct cases.

The ten cases chosen for study in this paper were identified on the basis of a thorough review of the ACCC's own literature, as well as interviews with thirty-

⁴⁴ TPA, section 86D.

⁴⁵ Full reference details for each case are given as each case is introduced below.

⁴⁶ Further information about the project can be obtained at <http://www.cccp.anu.edu.au/projects/project1.html> (10 August 2006).

five current and former ACCC staff (including several commissioners) and twenty-eight trade practices lawyers and compliance advisers completed as part of the larger *ACCC Compliance and Enforcement Project*.⁴⁷ For each of the eight cases chosen for case study, an exhaustive literature review and web search was conducted to obtain as much as possible of the scholarly, practitioner and ACCC literature, newspaper and magazine articles and other documentary material on each case. The sixty-three interviews mentioned above also contained much information on the cases from the point of view of ACCC officers involved in the cases and lawyers on the other side. These interviews had been organized on the basis of asking interviewees what they thought were the three or four most significant ACCC cases they had been personally involved in, and then asking them to go through in detail what had happened in those cases they identified and why they thought they had had a significant impact, for good or for ill. A further eight interviews with ACCC staff, lawyers and industry people were also conducted in order to obtain further information from different points of view on some of the cases chosen for examination in this paper.

An interview protocol was approved by the Australian National University's human research ethics committee for the interviews. It involved a guarantee of anonymity for all participants and all cases mentioned unless the participant consented or the material was already on the public record. Where interviewees must remain anonymous, code numbers for interviewees and dates of interviews are given in footnotes. The place of interview has not been given, as this might compromise anonymity.

⁴⁷ A preliminary analysis of the results of these interviews was reported in Christine Parker and Natalie Stepanenko, *Compliance and Enforcement Project: Preliminary Research Report* (2003). Available at SSRN: <http://ssrn.com/abstract=906945>. Further information on the research methodology used can be obtained there.

2. THE IMPACT OF ACCC ENFORCEMENT ACTION IN UNCONSCIONABLE CONDUCT CASES: CASE STUDIES IN RETAIL LEASING, FRANCHISING AND CONSUMER TRANSACTIONS

2.1 RETAIL LEASING CASE STUDIES

2.1.1 The Farrington Fayre Case

Case Overview

Case Outcome

On 6 April 1998 the ACCC instituted proceedings against C G Berbatis Holdings Pty Ltd and P&G Investments Pty Ltd who were the landlords of the Farrington Fayre Shopping Centre at Leeming in Perth, Western Australia. Certain directors of the landlords and the asset manager, that had represented the landlords in its dealings with tenants, were also joined to the proceedings. The ACCC alleged that the respondents had engaged in unconscionable conduct against the tenants of the shopping center in breach of section 51AA of the TPA.

On 18 October 1999 the hearing was adjourned to consider the constitutional validity of section 51AA. Section 51AA was subsequently found to be constitutional.⁴⁸ A hearing followed, and French J found that the respondents had engaged in unconscionable conduct against only one of three tenants.⁴⁹ The respondents appealed the decision and the ACCC launched a cross-appeal. The court upheld the respondents' appeal and dismissed the ACCC's cross-appeal. The ACCC unsuccessfully appealed to the High Court. The High Court found that the respondents had not engaged in any unconscionable conduct because it considered that the tenants were not laboring under any special disability as required by section 51AA.⁵⁰

The Alleged Unconscionable Conduct

The ACCC alleged that the respondents had engaged in unconscionable conduct against three tenants of the shopping center by requiring the tenants to cease litigation against the landlords before their leases would be renewed. These tenants included Mr and Mrs Roberts who traded as Leeming Fish Supply, Mr and Mrs Raitt who, through their company Banlon Pty Ltd, traded as Farrington Dry Cleaners and Mr and Mrs Ternet who traded as Leeming Hardware.

From 1990 a number of tenants at the shopping center had become concerned about some of the charges being levied against them under their leases by the landlord. In January 1996, proceedings had been commenced by these tenants against the landlords in the Commercial Tenancy Tribunal for breaches of the Commercial Tenancy Act. The landlords advised these tenants, through its Asset Manager, that it would not renew their leases unless it ceased litigation and released them from any future threat of litigation. Mr and Mrs Raitt and Mr and Mrs Ternet did not accept this condition and both eventually sought business premises elsewhere.

⁴⁸ *ACCC v C G Berbatis Holdings Pty Ltd (No 2)* [2000] FCA 2 ('*Berbatis 2*').

⁴⁹ *ACCC v C G Berbatis Holdings Pty Ltd (No 3)* [2000] FCA 1376.

⁵⁰ *ACCC v C G Berbatis Holdings Pty Ltd* (2003) 197 ALR 153 ('*Berbatis*').

Mr and Mrs Roberts, however, did accept the landlord's condition. The Roberts' daughter had fallen seriously ill and required expensive medical treatment. They had decided to sell their business and had received a good offer. As might be expected, the ability of the Roberts' to sell their business as a going concern depended upon the continuance of their lease. The first attempt by the Roberts' to sell the business failed because the landlords insisted on the release and, as a result, the Roberts' could not guarantee that the lease would be renewed and assigned to the purchaser. The landlords then seemingly dropped their demand for a release and a second attempt was made to sell the business. Naturally, the contract of sale was made subject to the condition of the lease being assigned to the purchaser. Shortly after the contract had been concluded between the parties, and the purchaser had begun to move into the premises, the landlords presented the Roberts' with the documents to extend the lease that included, without warning, the release. The Roberts' reluctantly signed these documents in order to preserve the contract of sale.

Strategies Employed

The Farrington Fayre Case was the first case taken on by the ACCC after being directed by the government, in September 1998, to commence representative actions with a view to developing legal precedent on matters of concern to small business. As one senior ACCC person involved in the case commented:

Following the Reid Report, there obviously was a political focus on small business...(s)o there was a push in the ACCC to get some runs on the board to protect small business. In the past small business had often been victims of the TPA. We felt pressure as staff to do something to protect small business.⁵¹

The ACCC Chairman at the time, Professor Allan Fels had foreshadowed that 'a retail tenancy dispute will most likely be the test case'⁵² and later that this was 'a high litigation priority area'.⁵³ Accordingly, the ACCC chose to commence legal proceedings against the respondents in the Farrington Fayre Case.

The ACCC's 'motive' as noted by one lawyer was to 'build up a body of law that will establish how far the unconscionable conduct provisions in the Trade Practices Act can protect small businesses in their dealings with larger organisations'.⁵⁴ The ACCC chairman, Mr Fels, himself stated that 'the Commission is committed to pursuing opportunities to test the law'.⁵⁵

In the proceedings the ACCC chose to argue that the respondents had engaged in conduct against its tenants that was unconscionable within the meaning of the

⁵¹ 01-030 interviewed by Christine Parker, 26 February 2003.

⁵² Kate Cummins, 'ACCC Crackdown on New Fair Trading Codes', *Australian Financial Review*, 6 October 1998, 42.

⁵³ Wilson, as above n 41.

⁵⁴ Katrina Barrymore, 'Cases to Test Landlord Behaviour', *Australian Financial Review*, 11 March 1999, 49, Mr Peter Macmillan, solicitor, Clayton Utz.

⁵⁵ Cummins, as above n52.

unwritten law as expounded by cases such as *Blomley v Ryan*⁵⁶ and *Commercial Bank of Australia Ltd v Amadio*.⁵⁷ In the cases of *Ryan* and *Amadio* the courts have held that a party has engaged in unconscionable conduct when that party takes advantage or exploits the ‘special disability’ of another. The ACCC had formed the view that the tenants of the shopping center were under a ‘special disability’ or ‘at a special disadvantage when bargaining with the Owners (the landlords) because of their financial dependence on lease negotiations’.⁵⁸

The ACCC also sought five different kinds of remedies from the court. First, the ACCC sought a declaration from the court that each of the respondents had engaged in unconscionable conduct in breach of section 51AA of the TPA. Second, the ACCC sought an injunction against each of the respondents restraining them for a period of three years from engaging in, or being a party to:

conduct which requires as a condition of the grant of a new lease to a tenant or their assignees, that the tenant do release the Respondents from any claims arising under the existing lease in circumstances where the Respondents know, or ought to know that the tenant is suffering from a situational disadvantage and thereby to engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories, in contravention of s51AA.⁵⁹

Third, the ACCC sought a publication order requiring the respondents, at their own expense, to publish twice in the West Australian newspaper a notice publicizing the fact that the respondents had been found by a court to have acted unconscionably. Fourth, the ACCC sought an order requiring the fourth, fifth, sixth and eighth respondents to attend a trade practices compliance seminar. Fifth, the ACCC sought an order requiring the respondents to pay the ACCC’s legal costs.

The ACCC was initially successful in its claim against the respondents but only in relation to one of the three tenants claimed to have been subject to unconscionable conduct. Justice French readily granted the ACCC the declaration it sought in relation to that one tenant, the Roberts. Justice French, however, was not as accommodating with respect to the other remedial orders sought by the ACCC. Justice French flatly refused the ACCC’s request for an injunction against the respondents. Justice French referred to section 80 and the considerations to be taken into account by a court in making an order under the section listed under section 80(4). These considerations are whether it appears that a person intends to engage in the conduct again, whether that person has engaged in such conduct previously and whether there is an ‘imminent danger of substantial damage’ to any person if that person engages in the conduct again. Justice French considered that although there might be some risk of the respondent’s engaging in unconscionable conduct in the future he thought that the ‘specific constellation of

⁵⁶ (1956) 99 CLR 362.

⁵⁷ (1983) 151 CLR 447.

⁵⁸ ACCC Media Release, ‘Federal Court Finds Landlord Acted Unconscionably by Exploiting Vulnerable Tenant’, 28 September 2000.

⁵⁹ *ACCC v Berbatis Holdings Pty Ltd* [2000] FCA 1893.

facts' that gave rise to the finding of unconscionable conduct by the respondents, against the Roberts, made it unlikely that the respondents would engage in such conduct again.⁶⁰ Justice French also declined the ACCC's request for a publication order. Justice French considered that the outcome of the case had been adequately reported and that, consequently, there was little benefit to be derived from a public notice. In relation to the ACCC's request for an order requiring the fourth, fifth, sixth and eighth respondents to attend a trade practices compliance seminar, Justice French did think that such an order would be useful given that these respondents continued to operate in the industry. Since the ACCC was only successful in relation to one of the tenants, Justice French also granted the ACCC's request for the respondents to pay the ACCC's legal costs but only one third of these costs.

As indicated above, the ACCC then launched an unsuccessful cross-appeal to the Full Federal Court followed by an unsuccessful appeal to the High Court. Consequently, the judgment orders of Justice French were ultimately overturned.

Successful Enforcement Impacts

The ACCC succeeded, to some extent, in the Farrington Fayre case in achieving its threefold objective of making the community aware of the existence of the unconscionability provisions of the TPA, in providing a catalyst for change in business values and in contributing to the development of legal precedent under section 51AA.

The ACCC's proceeding against the respondents, and the first instance decision of Justice French, attracted considerable attention by the media, lawyers and academics alike. At one stage the case was optimistically predicted to 'mark a turning point in the relationship between shopping center landlords and tenants.'⁶¹

As noted by one lawyer there is a great disparity of power between landlords and tenants, providing landlords with the 'ultimate weapon in commercial negotiation'.⁶² Justice French's decision in the Farrington Fayre case was seen to indicate 'that regardless of bargaining power, a party must act fairly under all circumstances.'⁶³ As a result landlords were warned that they ought to educate themselves as to their liabilities under the TPA and urged to 'implement changes in corporate culture'.⁶⁴ Another lawyer ominously declared that the Farrington Fayre case 'could open up a whole new area of law which could radically change how big businesses and small businesses interact'.⁶⁵ The ACCC Commissioner, Mr Sitesh Bhojani, himself also claimed that the case 'will have a big effect on the big business-small business debate which has been playing out in this country for well over a decade'.⁶⁶ One ACCC officer considered that the case 'helped to

⁶⁰ Ibid, para 8.

⁶¹ Michael Cave, 'Fair Deals Demanded of Landlords and Tenants', *Australian Financial Review*, 9 April 1998, 36.

⁶² Ibid, Mr Max Cameron, partner, Freehill Hollingdale & Page.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Barrymore, as above n54.

⁶⁶ Toni O'Loughlin, 'Regulator Faces High Court Watershed', *Australian Financial Review*, 6 January 2003, 4.

inform people that they had rights and that the ACCC was there to help them defend those rights.’⁶⁷

On the handing down of Justice French’s decision the then Acting ACCC Chairman, Mr Allan Asher, noted, in a ACCC media release, the significance of the case in developing legal precedent;

(t)he Courts are fleshing out the meaning of unconscionable conduct in the Act which will allow the ACCC to better protect the interests of small businesses in their dealings with big business or businesses with market power.⁶⁸

One lawyer also expressed the view that the High Court decision offered ‘some clarity’ in determining when conduct may be regarded as unconscionable.⁶⁹ The senior ACCC person quoted previously, also pointed to the benefits of the decision for the ACCC in handling complaints when he stated that:

While the loss was unfortunate, it means we can at least say to small business we are keen to help and we have the provisions in the Act, but this is what the law means according to the courts. Small business quote Samton Holdings and Farrington Fayre all the time. We used to get some stick from small business in 1998/1999/2000, but now that has improved.⁷⁰

The ACCC was, however, ultimately unsuccessful and the Farrington Fayre case may not have made as great a contribution as it could have in developing legal precedent if the ACCC had chosen to approach the case differently.

Unsuccessful Enforcement Impacts

As indicated above the ACCC chose to argue that the case fell within the narrow scope of unconscionable conduct, as defined in the cases of *Blomley* and *Amadio*. Despite this, at first instance Justice French took a wide approach to section 51AA arguing that ‘(t)he reference to these two cases...does not map out the full extent of the...application of unconscionability.’⁷¹ French J finally concluded that unconscionability ‘ultimately refers to the normative characterisation of conduct by a judge.’⁷²

On appeal the majority of the High Court, however, was content to confine its decision on the construction of section 51AA to the narrow scope of the doctrine as argued by the ACCC.⁷³ As noted by one academic ‘(n)ot only did this allow the High Court to avoid a wider analysis and interpretation of s51AA of the Act, but it also allowed the majority judges especially to approach the case with blinkered

⁶⁷ Interview of 01-031 by Christine Parker, 26 February 2003.

⁶⁸ ACCC Media Release, ‘Federal Court Finds Landlord Acted Unconscionably by Exploiting Vulnerable Tenant’, 28 September 2000.

⁶⁹ Don Davies and Paul Holmes, ‘Unconscionable Conduct in Business Transactions: The *Berbatis* Decision’, (November 2003) *Australian Property Journal* 613, 614.

⁷⁰ Interview, as above n51.

⁷¹ *Berbatis 2*, as above 48, 23.

⁷² *Ibid*, 26.

⁷³ *Berbatis*, 162, 165 (Gummow and Hayne JJ) and 194, 198 (Callinan J).

vision, causing them to ignore or overlook normatively sensitive features of the ACCC's claim.⁷⁴

The end result was that the ACCC missed an opportunity to truly test the limits of section 51AA and in doing so also limited the ability of future parties, including itself, to obtain relief under the section from unconscionable conduct. The ACCC Commissioner, Mr Sitesh Bhojani, was quoted by a newspaper as saying, before the High Court's decision was handed down that '(i)f the ACCC wins, we will have some teeth; but if we don't get up on appeal, it may well spell the death knell for the [section 51AA] unconscionable conduct provisions'.⁷⁵ Mr Bhojani later explained that:

we were trying to get guidance as to how the three provisions (sections 51AA, 51AB and 51AC) interacted...So we put forward an Amadio type interpretation or approach but the High Court rejected it and didn't comment on its reach. This was very disappointing. The High Court didn't have to say anything of course but they usually do say something in obiter that would have given us some guidance. In hindsight we could have reached further, taken a broader approach of the section.⁷⁶

2.1.2 The Lunch Bar Case

Case Overview

Case Outcome

On 26 February 1999 the ACCC brought proceedings against Samton Holdings Pty Ltd alleging that Samton had engaged in unconscionable conduct in its dealings with the tenant of a lunch bar in breach of section 51AA of the TPA. The ACCC also joined each of the landlords, members of the Parasiliti and Sciarretta families, and their legal adviser, Mr Neil Philip Gentilli, of Jackson MacDonald, to the proceedings alleging that they were knowingly concerned with and/or a party to the unconscionable conduct.

On 24 December 1999 proceedings were stayed pending the decision in the Farrington Fayre case as to the constitutional validity of section 51AA. On 29 November 2000, after the proceedings had resumed, Justice Carr held that while Samton had struck a hard bargain with the tenants, Samton's conduct fell short of being unconscionable.⁷⁷ The ACCC unsuccessfully appealed the decision of Justice Carr in the Full Federal Court.⁷⁸

The Alleged Unconscionable Conduct

In 1996 a company called Executive Bloodstock Pty Ltd bought a lunch bar business for a substantial sum of money. Executive Bloodstock was owned by Mr and Mrs Ranaldi who borrowed heavily to buy the business. The business was run

⁷⁴ Rick Bigwood, 'Curbing Unconscionability: *Berbatis* in the High Court of Australia', (2004) 28 *Melbourne University Law Review* 203, 230.

⁷⁵ O'Loughlin, as above n 66.

⁷⁶ Interview of Mr Sitesh Bhojani by Michelle Sharpe on 22 May 2006.

⁷⁷ *ACCC v Samton Holdings Pty Ltd & Ors* [2000] FCA 1725.

⁷⁸ *ACCC v Samton Holdings Pty Ltd & Ors* [2002] FCA 62.

from premises leased from the second to seventh respondents. The first respondent, Samton, was a related company of the landlords. The lease of the premises expired shortly after the business was purchased by Executive Bloodstock but the lease contained an option to renew for a further seven years. Executive Bloodstock, however, failed to exercise the option within the period required by the lease and the landlords refused to extend the time in which the option could be exercised.

Eventually, the landlords did agree to an arrangement in which the lease was extended but only on the condition that Executive Bloodstock pay the landlords an additional sum of \$70,000. This payment, however, would have breached the legislative prohibition in Western Australia on a tenant being required to pay 'key-money'.⁷⁹ Consequently, the landlords, on the advice of their solicitor, devised a way around the prohibition by granting the lease to Samton Holdings, a shelf company under its control, which then in turn granted the lease to the tenants for an additional \$70,000. Executive Bloodstock complied with the landlords' request and paid Samton Holdings the \$70,000.

Strategies Employed

The ACCC chose to commence proceedings against Samton Pty Ltd, the landlords and their solicitor. The ACCC, as they did in the earlier Farrington Fayre case, argued that the tenant was in a situation of special disadvantage compared to Samton which Samton and the landlords well knew or ought to have known. In a media release announcing the institution of proceedings, the ACCC declared that it believed 'that the tenant was at a special disadvantage when dealing with Samton Holdings because of his financial dependence on extended tenure of the business premises and having regard to the level of debt.'⁸⁰ Further, the ACCC alleged that it was unconscionable for Samton to exploit its 'superior bargaining position'.⁸¹ The ACCC argued that the landlords and their solicitor were all knowingly, either directly or indirectly, concerned in or a party to Samton's conduct.

The ACCC, again as in the Farrington Fayre case, sought a wide range of orders. These orders included:

- declarations that Samton had engaged in unconscionable conduct and the landlords and their solicitor had been involved in that conduct;
- injunctions preventing the repetition of similar conduct;
- the publishing of public notices;
- the institution of corporate compliance programmes;
- compensation, under section 87(1A), for loss incurred by the tenant, including the repayment of the \$70,000; and
- payment of ACCC's legal costs.

The ACCC were unsuccessful both at first instance and on appeal to the Full Federal Court and so were unable to obtain these orders.

⁷⁹ *Commercial Tenancy (Retail Shops) Agreement Act 1985* (WA), sections 3 and 9.

⁸⁰ ACCC Media Release, 'ACCC Acts to Protect WA Small Business – Unconscionable Conduct Claims', 2 March 1999.

⁸¹ *Ibid.*

On the first day of the proceedings, however, the ACCC chose to dismiss its claim against the solicitor by consent. A senior ACCC person who was involved in the case explained that ‘all of a sudden he [the solicitor] waived privilege’ over some documents and made them available to the ACCC to inspect which revealed that ‘he wasn’t knowingly concerned although he’s structured the deal.’⁸² These documents were the correspondence between the landlords and the solicitor. The ACCC had believed that the solicitor would have been aware of the meetings between the landlords and the tenants in which the tenants told the landlords that they were financially destitute. The ACCC argued that the straitened financial circumstances of the tenants amounted to a special disability. However, as ‘there was nothing in the documents to show he knew’,⁸³ the claim against the solicitor was withdrawn.

Successful Enforcement Impacts

Again, as in the Farrington Fayre Case, the ACCC were to some extent successful in achieving its threefold objective of making the community aware of the existence of the unconscionability provisions of the TPA, in providing a catalyst for change in business values and in contributing to the development of legal precedent under section 51AA. In addition the Lunch Bar Case also raised some awareness, or least debate, within the legal community about the vulnerability of lawyers to enforcement action by the ACCC for breaches of the TPA.

The Lunch Bar Case, like the Farrington Fayre Case, attracted a great deal of attention from the media,⁸⁴ lawyers⁸⁵ and academics.⁸⁶ This attention not only highlighted the existence of the unconscionability provisions of the TPA but also had the effect of prompting some change in business culture. As noted in one newspaper article ‘(w)hile this action may be a one off, it highlights the exposure of parties to actions under the Trade Practices Act if they take a hard line in

⁸² Interview, as above n51.

⁸³ Ibid.

⁸⁴ Max Cameron and Verran Fehlberg, ‘Taking a Hard Line with Tenants Can Backfire’, *Australian Financial Review*, 23 April 1998, 35 and Barrymore, above n54.

⁸⁵ See for example Victorian Bar, ‘Unconscionable Conduct and the Trade Practices Act’ (2003) 89 *Australian Construction Law Newsletter* 34, Maddock Lonie & Chisholm Lawyers, ‘ACCC Unsuccessful in Expanding Unconscionable Conduct Laws’, (2002) *Retail Issues*, Allens Arthur Robinson, ‘Unconscionable Conduct – Part III’ (2002) Issue 4, *Focus Leasing*, Blake Dawson Waldron Lawyers, ‘Unconscionable Conduct – Landlords Remain Under Fire’, (2002) [Property@BDW](#) and Grant Levy and Milton Cockburn, ‘The Case For Good Conduct’, (2002) Property Council of Australia publication.

⁸⁶ See for example Philip Tucker, ‘Unconscionability: the hegemony of the narrow doctrine under the Trade Practices Act’, (2003) 11 *Trade Practices Journal* 78, James McConvill and Mirko Bagaric, ‘The yoking of unconscionability and unjust enrichment in Australia’, (2002) 7 *Deakin Law Review* 225, Bill Dixon, ‘Commercial vulnerability of a tenant?: a special disadvantage?’ (2002) 23 *Queensland Lawyer* 55, Jan McDonald, ‘The Australian Competition and Consumer Commission v Samton Holdings’ (2002) 10 *Trade Practices Law Journal* 234, Lynden Griggs, ‘A comment on undue harassment and unconscionability’, (2002) 9 *Australian Property Law Journal* 228, Max Cameron and Jennifer Blom, ‘What constitutes section 51AA unconscionable conduct?’, (2002) 16 *Australian Property Law Bulletin* 61, Lynden Griggs, ‘The unconscionability provisions of the Trade Practices Act 1974: contrasting judicial developments’, (2002) 9 *Competition and Consumer Law Journal* 241, Sarah Kelly, ‘A new light on unconscionability?: Recent Developments’, (2001) 17 *Australian and New Zealand Trade Practices Law Bulletin* 11 and Eileen Webb, ‘Fayre play for commercial landlords and tenants: lessons for lawyers’, (2001) *Australian Property Law Journal* 99.

negotiations'.⁸⁷ The article goes on to note that 'although these actions have been initiated by the ACCC, a tenant would also be able to initiate action against a landlord.'⁸⁸

The ACCC's decision to join the solicitor to the proceedings was generally seen as an effective means by which to enforce compliance with the TPA. One lawyer, Peter Macmillan from Clayton Utz, commented on radio that it was a 'canny move' by the ACCC to bring a claim against the solicitor.⁸⁹ Mr Macmillan stated that 'they're using the lawyers as a means of ensuring compliance, which must multiply their effectiveness, the ACCC's effectiveness, for securing compliance with the Act, which is its No. 1 objective.'⁹⁰ Another solicitor interviewed who was part of the local legal community where the case occurred also stated that '(i)t certainly was an effective strategy by the ACCC because no lawyer wants to be sued by the ACCC.'⁹¹

Although the ACCC was not ultimately successful in the Lunch Bar Case, it did succeed in clarifying, to some extent, the law in relation to unconscionable conduct under the TPA. The lawyer quoted above acknowledged that 'Samton clarified the law and it is the ACCC doing its job to clarify the law.'⁹² Mr MacMillan noted that the case would 'provide important guidance on the sorts of behaviour that are lawful and those that are not.'⁹³ Likewise, the ACCC Chairman, Professor Allan Fels, himself stated that '(a)lthough disappointed the Full Federal Court did not accept the conduct amounted to unconscionable conduct the decision has clarified the limitations of section 51AA'.⁹⁴

Unsuccessful Enforcement Impacts

As in the Farrington Fayre Case, the ACCC might have made a greater contribution to the development of legal precedent under section 51AA if it did not take a narrow approach to the case. As indicated above, the ACCC argued that the tenants were in a 'situation of special disadvantage' compared with Samton and the landlords and that they had 'exploited that special disadvantage by conduct which, according to equitable principles, was unconscionable.'⁹⁵ Carr J, at first instance, found that the tenants were in a situation of special disadvantage and that Samton and the landlords were well aware of this situation. Carr J went on to find, however, that although Samton and the landlords

adopted an avaricious opportunistic approach and struck a very hard bargain. But, in my opinion, their conduct fell short, though not far short, of being the sort of conduct which Equity would regard as unconscionable.⁹⁶

⁸⁷ Cameron and Fehlberg, *ibid.*

⁸⁸ *Ibid.*

⁸⁹ 'The ACCC Sets Sights on Lawyers', *The Law Report*, interview of Peter Macmillan by Susanna Lobez, 15 June 1999.

⁹⁰ *Ibid.*

⁹¹ 03-013 interviewed by Christine Parker February 2003.

⁹² *Ibid.*

⁹³ Barrymore, above n54.

⁹⁴ ACCC Press Release, 'ACCC v Samton Holdings & Others', 7 February 2002.

⁹⁵ *ACCC v Samton Holdings Pty Ltd & Ors* [2000] FCA 1725, paragraph 55.

⁹⁶ *Ibid.*, paragraph 99.

The Full Federal Court considered that although Samton and the landlords had ‘acted in a way that many fair-minded people would condemn’ they had not acted unconscionably.⁹⁷ This was also the view of an (anonymous) interviewee close to the landlords’ side of the case who commented that the conduct in the case ‘wasn’t a prize-winning piece of morality, but it wasn’t unconscionable conduct.’⁹⁸ The Full Federal Court accepted that ‘the categories of special disadvantage are open’ and that they may include ‘situational disadvantage’ but the court ultimately held that the tenants were not in a position of special disability.⁹⁹ The court was of the view that the tenants were business people who were in a difficult situation because of their own failure to exercise the option to extend the lease in time and who, as a result, had made a considered commercial decision to pay the landlords the additional \$70,000.

The senior ACCC person interviewed in relation to this case also thought it was significant that the tenants were later able to sell the lunch bar at only a relatively small loss of \$20,000. This interviewee thought that in cases of unconscionable conduct ‘if the judge knows he’s survived, then he’s (sic) less likely to see it as unconscionable conduct, but at the time the conduct actually occurs we don’t know what the impact is going to be.’¹⁰⁰

A further unsuccessful enforcement impact might also have arisen from the ACCC’s decision to bring proceedings against the solicitor. The ACCC’s decision to bring proceedings against legal practitioners, as noted above, generally seems to be thought of as being effective in increasing compliance with the TPA. However, where proceedings are brought against a party, solicitor or otherwise, who is attempting to cooperate with the ACCC this may not only have the effect of tarnishing the reputation of the ACCC but also in ultimately decreasing community compliance with the TPA. In these circumstances the ACCC will appear to the community as an organization that is not as concerned with protecting vulnerable sectors of the community from harm as it is with political expediency. In viewing the ACCC in this way the community, or at least some individuals within the community, will be less inclined to adopt those values enshrined in the TPA and more inclined adopt the façade of compliance or to actively conceal non-compliance. There is some evidence from our interviews that this may have been the case here. One lawyer close to the case commented that this case would not stop them giving advice like that given by the lawyer in the Lunch Bar Case but that they ‘would give it chapter and verse now’ (to create a documentary trail that it was legal). If enforcement of the unconscionable conduct provisions in the TPA was intended to inculcate a more ethical spirit in business (and in the advice provided by lawyers to business as to how to comply with the TPA), then this response would suggest that this did not occur for this lawyer in this case.

⁹⁷ *ACCC v Samton Holdings Pty Ltd & Ors* [2002] FCA 62, paragraph 58.

⁹⁸ Interview as above n 91.

⁹⁹ *Ibid*, paragraph 64.

¹⁰⁰ Interview, as above n51.

2.1.3 Food Plaza Case

Case Overview

Case Outcome

On 2 February 1999 the ACCC commenced proceedings against Leelee Pty Ltd alleging that Leelee had engaged in unconscionable conduct against its tenant, under a retail lease, in breach of section 51AC of the TPA.

On 6 May 1999 Leelee brought an application to permanently stay the action and strike out the ACCC's statement of claim. Mansfield J allowed Leelee's application to strike out the statement of claim but granted the ACCC leave to file and serve an amended statement of claim.

On 13 June 2000 the parties agreed to a number of consent orders that included a declaration that Leelee had engaged in unconscionable conduct, an injunction preventing Leelee from engaging in similar conduct in the future and an order requiring Leelee to make a contribution to the ACCC's costs of the proceedings.

The Alleged Unconscionable Conduct

Since 1987, Leelee had been a lessee of premises at Moonta Street, Adelaide from which it conducted a business as landlord and liquor licensee and food stall operator under the business name 'Adelaide International Food Plaza'. Leelee's business included leasing food stalls to food stall proprietors. Kwee-Sang Choong and Lang-Hwa Guay ('the Choongs'), from 7 January 1991 until 6 January 1999, were stallholders of stall number 8 by underlease from Leelee, operating a business under the name of 'Blessing Noodle Bar'. The terms of the underlease included, inter alia, that the Choongs were permitted to sell certain Chinese foods only and specified the minimum price at which the Choongs were permitted to sell the food. In return, Leelee covenanted that no other stallholder would be permitted to sell those specified foods without the Choongs prior consent. Nevertheless, Leelee permitted, without the Choongs consent, three other stallholders to sell the food that was to have been the exclusive entitlement of the Choongs and allowed one stallholder to sell the food below the minimum price applicable to the Choongs.

Strategies Employed

The ACCC commenced legal proceedings against Leelee alleging breaches of section 51AC. The ACCC also chose to issue a number of press releases in which it publicly announced the commencement, and progress, of its proceedings against Leelee.¹⁰¹

It is unclear from the material available whether or not the ACCC sought to resolve the dispute by any other means prior to commencing legal action.

Successful Enforcement Impacts

The Food Plaza Case clearly had a successful enforcement impact on those parties immediately involved in the case, namely the Choongs. The Food Plaza Case,

¹⁰¹ ACCC Press Release, 'ACCC acts against landlord for alleged unconscionable conduct', 5 February 1999, ACCC Press Release, 'Court declares landlord's conduct unconscionable', 16 June 2000 and ACCC Press Release, 'ACCC takes action on unconscionable conduct', 16 June 2000.

however, also had a wider successful enforcement impact. The Food Plaza Case is the first case brought by the ACCC alleging breaches of section 51AC. The case, therefore, as noted by then ACCC Chairman, Professor Allan Fels, was ‘the first step in creating laws in this particularly difficult area’.¹⁰² The case also enabled the ACCC to issue several press releases in which the ACCC were able to demonstrate to the business community its commitment to enforcing section 51AC and the kind of conduct that might be in breach of the section. The ACCC were also able to refer to the case as an example of unconscionable conduct in various publications and presentations to businesses.¹⁰³

Unsuccessful Enforcement Impacts

The outcome in the Food Plaza Case was reached by consent between the parties and, as a result, the scope of section 51AC was not tested in court. It follows that the Food Plaza Case is of limited assistance in determining what kinds of conduct amount to unconscionable conduct under section 51AC.

2.1.4 Conclusions on the Impact of the ACCC in Retail Leasing Cases

The cases undertaken by the ACCC in the area of retail leasing have enabled the ACCC to make the community more aware of the existence of the unconscionability provisions and, in so doing, have helped to effect some change in the business culture of retail leasing. This change in the business culture, however, appears to only be slight for two reasons. First, because the cases examined above give limited guidance on the kinds of conduct that are unconscionable and, second, the ACCC’s enforcement activity in the area of retail leasing has been sparse.

One lawyer interviewed commented that cases like Farrington Fayre ‘went some distance to explain what unconscionability means but its very, very hard to translate it into anything on the ground’.¹⁰⁴ He went on to note the ACCC’s enforcement activity, or *lack* of enforcement activity, in the area of retail leasing generally stating that ‘we don’t get to see much of the ACCC in respect of retail leasing at all’.¹⁰⁵ He saw this as ‘quite an omission considering what came out of that House of Representatives Report which revealed appalling shopping center behaviour. I would have expected something along the lines of directives in relation to leasing, certainly revamped guidelines.’¹⁰⁶

In the absence of much enforcement activity by the ACCC in relation to s51AC (unconscionable conduct in relation to small business) and retail leasing in particular, a number of states have enacted their own legislation prohibiting

¹⁰² ACCC Press Release, ‘Court declares landlord’s conduct unconscionable’, 30 May 2001.

¹⁰³ See for example ACCC, *Guide to Unconscionable Conduct*, October 2004, 12, Mr John Martin, Commissioner, ‘Trade Practices Act and retail tenancy – is it really working?’, Seminar Paper, ARA Managing the Asset Retail Tenancy Forum, 27 February 2001, Mr Bruce Brown, General Manager, Legal, ‘Trade Practices Act and Small Business’, Seminar Paper, Accounting At The Top Conference, 11 June 2004 and *News for business: commercial unconscionable conduct*, 30 September 2001.

¹⁰⁴ Interview of Dr Clyde Croft by Michelle Sharpe on 7 March 2006.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

unconscionable conduct in retail leases¹⁰⁷ and many states have set up their own means of enforcing this prohibition and/or resolving disputes.¹⁰⁸ For many states this includes the creation of a state regulatory body. For example, in Tasmania there the Office of Consumer Affairs has been created, in New South Wales, the Registrar of Retail Tenancy Disputes and in Victoria, the Office of Small Business Commissioner.

The more proactive, preventive approach taken by these state regulators appears to have had a greater impact on unconscionable conduct in relation to small business than the ACCC's more sparse and reactive enforcement litigation. An interviewee from one of these state regulatory bodies commented that the 'cases litigated by the ACCC and enforceable undertakings have an impact on big businesses but have not had a huge impact on the small businesses we see. Small businesses often start as home businesses and many of these businesses are not even aware of what it takes to set up a business much less the case law on unconscionable conduct.'¹⁰⁹ These state regulatory bodies are probably more successful in dealing with the business community to change norms of conduct than the ACCC because their style is to investigate complaints and find settlements that solve problems rather than having 'to prove who's right or wrong':

Our initial approach in a matter is not to go in "guns blazing", not to catch them out – we make preliminary inquiries. The ACCC first response is to go in "guns blazing". We have the "common touch" and are extremely approachable. The ACCC can't replicate this. The culture of the ACCC is very structured and affects the way they communicate with the public. The ACCC won't talk to people they want people to write responses to them... We are very consultative. We have heads of organizations stepping into our office to speak with the [head of the agency]. The ACCC's role is far more restrained.¹¹⁰

Similarly, the lawyer quoted above reported that the 'general consensus is that Mark Brennan [the Victorian Small Business Commissioner] is doing a superb job in Victoria and is very much on the ground, being very approachable and very sensible.'¹¹¹ He thought that the ACCC did have a role to play in changing the business culture in retail leasing in Victoria but that it should be in 'partnership' with the Small Business Commissioner.

Similarly the state small business regulator interviewed also considered that there is a place for the ACCC, and that they 'complement the work of the ACCC': 'The

¹⁰⁷ *Retail Leases Act 1994* (NSW), Part 7A, *Retail Shop Leases Act 1994* (Qld), Part 6, Division 8A, *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas), Schedule 1, Part 2, clause 3, *Retail Leases Act 2003* (Vic), Part 9.

¹⁰⁸ *Retail Leases Act 1994* (NSW), Part 8, *Retail Shop Leases Act 1994* (Qld), Part 9, Division 2, *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas), Schedule 1, Part 4 *Retail Leases Act 2003* (Vic), Division 2 and 4, *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), section 22.

¹⁰⁹ Interview with a senior regulator by Michelle Sharpe on 9 May 2006.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

ACCC flick us a lot of matters that are not illegal as such but have more to do with the business culture. We flick matters to the ACCC that involve something illegal and need some kind of sanction.¹¹²

2.2 FRANCHISING CASE STUDIES

2.2.1 Cheap As Chips Case

Case Overview

Case Outcome

On 30 June 1999 the ACCC commenced proceedings against Cheap as Chips Franchising Pty Ltd ('CAC Franchising') and its director, Mr Peter Hudousek, alleging that CAC Franchising and Hudousek had engaged in conduct in its dealings with franchisees in breach of sections 51AC(1) and 51AD of the TPA.

After extensive discussions the parties agreed to a range of consent orders. The court made the orders on 14 March 2001.

The Alleged Unconscionable Conduct

The CAC Franchising is a franchisor of mobile general cleaning services, both residential and commercial, and of cleaning agents, equipment and other related products.

The ACCC alleged that from 7 July 1997 CAC Franchising engaged in unconscionable conduct against three of its franchisees; Stephen Dengate, Taishun International Pty Ltd and Annvid Pty Ltd. The ACCC alleged that this conduct included:¹¹³

- terminating a franchise over a dispute about the payment of \$803.75;
- threatening to terminate franchisees rather than negotiate disputes about issues such as monies owed and attending seminars unrelated to carpet cleaning;
- threatening to suspend franchisees rather than negotiating disputes about issues such as the distribution of promotional leaflets and the quantities of chemicals and equipment to be carried in franchisees vans;
- threatening to suspend franchisees for associating with other franchisees;
- requiring franchisees to attend seminars unrelated to carpet cleaning;
- refusing to negotiate about matters in dispute with franchisees in contravention of the Franchising Code of Conduct; and
- refusing franchisees access to financial records to verify that all payments that they were entitled to had been paid.

Strategies Employed

The ACCC commenced proceedings against CAC Franchising for breaches of section 51AC. The matter was later settled with CAC Franchising agreeing to a wide range of consent orders and a written undertaking.

¹¹² Ibid.

¹¹³ Written Consent Orders

The consent orders provided a declaration by the court of unconscionable conduct by both CAC Franchising and Hudousek in breach of section 51AC and of conduct in breach of the Franchising Code of Conduct. The orders restrained CAC Franchising and Hudousek for a period of three years from engaging in certain conduct such as attempting to dissuade franchisees from associating with each other, threatening franchisees with suspension or termination, refusing to negotiate with franchisees and from imposing any new obligations on franchisees without first giving franchisees one month's written notice. Further to this CAC Franchising was required to make its financial records in relation to a franchisee's territory available to that franchisee upon one week's written notice by the franchisee. CAC Franchising was also required to notify all of its current franchises by letter of the outcome of the proceedings. The orders also provided that CAC Franchising and Hudousek were to pay compensation totaling \$82,000 to the three franchisees and to pay a contribution to the ACCC's costs in the amount of \$86,000.

In the written undertaking CAC Franchising agreed to develop and implement a trade practices compliance program and to maintain the program for eighteen months. The program had to be approved by a qualified compliance professional and CAC Franchising had to appoint a compliance officer to maintain the program. The program involved not only the education of CAC Franchising's employees but also the review of CAC Franchising's activities in relation to franchisees to ensure compliance with the TPA.

Successful Enforcement Impacts

The Cheap as Chips case had a successful enforcement impact not only for the franchisees of CAC Franchising, or even just franchisees generally, but also for the broader business community. The ACCC were successful in obtaining compensation for the three franchisees that were the subject of unconscionable conduct by CAC Franchising. Further, in having CAC Franchising implement a trade practices compliance program it is likely that the ACCC would have been successful in changing the culture within CAC Franchising and thereby improving the lot of all of its franchisees.

The case may also have been useful in changing the culture within the business community generally. The case showed the business community that the ACCC would 'vigorously pursue franchisors' who have engaged in unconscionable conduct.¹¹⁴ Further, the case itself provided a useful example to the business community of the kinds of conduct that amounted to unconscionable conduct. The case was subsequently referred to by the ACCC in a number of publications informing the public about their obligations under section 51AC.¹¹⁵

¹¹⁴ ACCC Press Release, 'Franchisees Awarded \$82,000 Compensation for Unconscionable Conduct', March 2001.

¹¹⁵ Commissioner John Martin, 'Commercial Unconscionability & The Trade Practices Act', *Australian Equipment Lessors Association Leasing Technical Conference Sydney*, 15 November 2001, ACCC, 'ACCC update 10', February 2002, ACCC, 'Commercial Unconscionable Conduct', *News for Business*, September 2002, ACCC, *Small Business and the Trade Practices Act*, November 2004, ACCC, *Fair and Square: A Guide to the Trade Practices Act for the Real Estate Industry*, May 2005.

Unsuccessful Enforcement Impacts

The Cheap as Chips case was settled and did not go to court. Therefore we do not have a court decision as to whether the conduct alleged to have occurred in that case was unconscionable or not. Indeed in some ACCC enforcement cases in other areas, businesses have settled with the ACCC by agreeing to various remedies, and then later stated that they did not believe the ACCC actually had a good case against them, but that they had settled for commercial reasons because they did not want to have ACCC enforcement proceedings hanging over their business.¹¹⁶ Where cases have been settled, there is no authoritative court decision that the ACCC's allegations were or were not correct, and therefore the cases do not give as clear and authoritative message to other businesses about acceptable norms of conduct as a court case might do.

The Cheap as Chips Case, together with the Simply No Knead Case outlined below, were two cases commenced by the ACCC shortly after a direction by Minister Warren Truss to the ACCC to seek to build up a body of law under the then newly enacted section 51AC. It is unclear to what extent the ACCC sought to resolve either matter or to hear the other side's point of view in either case before commencing proceedings. It might be suggested, given the time at which the proceedings were issued in both cases, that the proceedings were commenced quickly to enable the ACCC include the proceedings in its Annual Report. A criticism that was commonly made of the ACCC by both the business and legal communities during the period of the events described in this paper was that the ACCC may at times not give a party an opportunity to put their side of the case before the ACCC commences proceedings against them. It was suggested in some interviews that Minister Truss's direction to run some unconscionable conduct cases may have meant that the ACCC felt under pressure to commence proceedings in some cases in a rush to fulfill the political directive rather than listening to the other side first. But if the ACCC has not heard the other side's point of view before issuing proceedings, this makes it more likely that the allegations made in the proceedings are biased or mistaken in some way. This in turn also makes it more dangerous to accept a remedy from the alleged offender, and settle the matter, without testing the case in court. If proceedings were issued hastily without hearing the other side's point of view, then this would undermine the legitimacy of the ACCC enforcement action, especially where the case has then been settled, rather than fully determined by a court.

2.2.2 Simply No Knead Case

Case Overview

Case Outcome

On 16 June 1999 the ACCC commenced proceedings against Simply No Knead Franchising Pty Ltd ('SNK Franchising') and its director, Mr Cameron Bates, alleging that SNK Franchising and Mr Bates had engaged in conduct in its dealings with franchisees in breach of sections 51AC(1) and 51AD of the TPA.

¹¹⁶ See Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement?' *Law & Society Review*, 2006, forthcoming.

In September 2000 Justice Sundberg of the Federal Court concluded that the conduct of SNK Franchising amounted to unconscionable conduct in breach of section 51AC. Accordingly, his honour made the declarations sought by the ACCC and ordered SNK Franchising and Mr Bates to pay the ACCC's costs of the application.

The Alleged Unconscionable Conduct

The ACCC alleged that SNK Franchising and Mr Bates had engaged in unconscionable conduct against 5 of its franchisees. The conduct identified by the ACCC to be in breach of section 51AC included;

- refusing to deliver franchised products to franchisees in order to pressure franchisees to comply with its demands;
- deleting telephone numbers of franchisees from Telstra's 013 Telephone Directory Assistance Service without the knowledge or consent of franchisees;
- unreasonably refusing requests by franchisees to negotiate matters in dispute or discuss matters of concern to franchisees;
- omitting the names of franchisees from promotional material;
- actively operating in competition with the franchisees; and
- refusing to provide current disclosure documents to franchisees.

Strategies Employed

The ACCC chose to begin proceedings against SNK Franchising and Mr Bates immediately after they became aware of a dispute with the franchisees without first attempting to negotiate a settlement with the franchisor. The solicitor acting for SNK Franchising, Mr Ron Willemsen of Macpherson & Kelley, claimed that he was told by the ACCC in a conference call that the ACCC intended to institute proceedings against their client regardless of whether or not their client was prepared to give any undertakings.¹¹⁷

As noted by one trade practices lawyer, Peter Macmillan of Clayton Utz, the case was mounted by the ACCC in pursuit of two objectives:

The first is to make the business community aware that the new provisions are now law... The second is to seek a series of court decisions which indicate clearly what types of behaviour are unconscionable.¹¹⁸

In their claim the ACCC sought the following orders;

- a declaration that SNK Franchising had engaged in conduct in contravention of section 51AC(1) of the TPA;
- a declaration that SNK Franchising had engaged in conduct in contravention of section 51AD of the TPA;
- a declaration that Mr Bates was, within sections 82 and 87 of the TPA, a person involved in SNK Franchising's contravention; and
- that SNK Franchising and Mr Bates pay the ACCC its legal costs.

Successful Enforcement Impacts

¹¹⁷ Jason Clout, 'ACCC Acted Unfairly, Franchisor Alleges', *Australian Financial Review*, 13 July 1999, 40.

¹¹⁸ Annie Lawson, 'Franchise Test Case', *Herald Sun*, 28 June 1999, 26.

The Simply No-Knead Case was significant in that it was the first case to have been decided under section 51AC. The ACCC was highly successful in the proceedings against SNK Franchising and Mr Bates. SNK Franchising was wound up shortly before the decision was handed down and Mr Bates chose not to attend the hearing. The judge, Sundberg J, held that the evidence ‘discloses an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour in relation to each franchisee that amounts to unconscionable conduct’.¹¹⁹ An officer of the ACCC noted that ‘(t)he judgment on the case was very definitive’ and at ‘the Trade Practices Practitioner’s Committee meeting that took place the day after the judgment the practitioners were taken by the definitive character of it.’¹²⁰

The case was also successful in highlighting the existence of the unconscionability provisions and in changing business practices. The ACCC officer noted that the case was ‘well publicized and it shook up the businesses and practitioners.’¹²¹ Mr John Martin, ACCC Commissioner for Small Business and Franchising, and Mr Nigel Ridgeway, then national manager of the Small Business Program ACCC, have said that the case sent a ‘clear message (that) will encourage traders to behave reasonably with small businesses with whom they deal.’¹²² Another ACCC officer noted that:

(s)hortly after the judgment came down, the Franchising Council had a meeting that discussed it. There were also quite a few articles in the law journals that I saw on it and a lot of the firms wrote guidelines for their clients on franchising and what they could and couldn’t do.¹²³

A number of law firms issued circulars to their clients advising them to ‘take careful note’ of the case.¹²⁴ The case also attracted a good deal of media¹²⁵ and academic attention.¹²⁶ Although the case was treated favorably, or at least not unfavorably, by academic writers it received more mixed treatment by the media.

¹¹⁹ *ACCC v Simply No-Knead (Franchising) Pty Ltd & Anor* (2000) ATPR 41-790, paragraph 51.

¹²⁰ Interview of 01-011 by Christine Parker, 24 July 2002.

¹²¹ *Ibid.*

¹²² Small Business Centre, online interview, 8 October 2000.

¹²³ Interview of 01-017 by Christine Parker, 21 August 2002.

¹²⁴ Anna van Holst Pellekaan, Gadens Lawyers publication, ‘ACCC Launches First Action For Breach of the Franchising Code of Conduct’, *Franchising Update*, June 1999. See also for example Lunch Meyer Lawyers publication, ‘Thuggish Behaviour – Unconscionable Conduct Update’, Arthur Allen Robertson publication, ‘Simply No Knead For That!’, *Focus on Leasing November 2000*, and Freehills publication, ‘Unconscionable Conduct Under the Trade Practices Act’, 13 December 2000.

¹²⁵ See for example Anita Savage, ‘ACCC vs. Simply No Knead & Cameron Bates’, *Small Business Centre*, 7 December 2000; Jason Clout, ‘ACCC Court Action Meets Franchisees’ Knead’, *Australian Financial Review*, 22 June 1999; Annie Lawson, ‘Franchise test case’, *Herald Sun*, 28 June 1999; ‘No Knead to Defend Conduct Test Case’, *Foodweek*, 28 June 1999; ‘ACCC Slammed for Test Case’, *Food Week*, 12 July 1999; Jason Clout, ‘ACCC Acted Unfairly, Franchisor Alleges’, *Australian Financial Review*, 13 July 1999; ‘Unconscionable Conduct Court Decision Delayed’, *Foodweek*, 29 November 1999.

¹²⁶ See for example Frank Zumbo, ‘Franchising and Retail Tenancies: A New Ethical Dimension’ (2002) 30(1) *Australian Business Law Review* 68, Kelly Godfrey, ‘Unconscionability: Better Described Than Defined’, (2001) 81 *Australian Construction Law Newsletter* 5, Stephen Giles and Greg Hipwell, ‘Franchising and The Trade Practices Act: Disclosure, Good Conduct, Good Faith And Good Luck’ (2001) 75(2) *Law Institute Journal* 52, Sarah Kelly, ‘Any New Light On Unconscionability? Recent Developments’ (2001) 17(2) *Australian And New Zealand Trade Practices Law Bulletin* 11, Stephen Pallavicini & Dennis Bluth, ‘Small Businesses in Big Wins Under the Trade Practices Act’, (2000)

Unsuccessful Enforcement Impacts

An unsuccessful enforcement impact has been some negative reporting of the case, prior to the court hearing, in which the ACCC was portrayed as being an organization more concerned with political expediency than fairness.

In several newspaper articles SNK Franchising was reported as accusing the ACCC of acting unfairly in its handling of the case. Mr Bates is reported to have said that the ACCC 'sought to publicise its legal action immediately after the service of notices on him and his company' and that the ACCC's 'approach had made it difficult for his lawyers or himself to respond to the publicity.'¹²⁷ In a subsequent article SNK Franchising through its solicitors 'launched a broadside' at the ACCC.¹²⁸ The solicitors, Macpherson & Kelley, claimed that the ACCC had made no attempt to negotiate with them and that the case had been brought by the ACCC in 'its enthusiasm to launch test cases to define new Trade Practice Act provisions.'¹²⁹ In another article SNK Franchising was again said to have 'strongly criticised' the ACCC.¹³⁰ SNK Franchising again claimed that the ACCC 'did not allow it time to put its side of the story, nor did it promote mediation between Simply No Knead and its franchisees despite such a process being recommended by the franchising code of conduct.' SNK Franchising's solicitor, Mr Ron Willemsen of Macpherson & Kelley, was reported saying that '(t)he ACCC was not prepared to listen to what we had to say. It was if our client was guilty until proven innocent.'¹³¹

It is important to note that the comments made by SNK and its solicitors were made prior to the court hearing. It is, therefore, possible that the statements were made simply as part of the 'posturing' that parties typically engage in prior to a hearing and/or part of an attempt to put pressure on the ACCC to settle or otherwise withdraw its claim. Indeed, the fact that SNK or its solicitors did not make any further comment to the media after the court hearing suggests that this maybe the case. If, however, the allegations made by SNK are true then they suggest that the ACCC may have failed to act neutrally and fairly in bringing proceedings against SNK.

2.2.3 Conclusions on the Impact of the ACCC in Franchising Cases

Like its enforcement activity in retail leasing, the ACCC's activity, examined above, made the community aware of the existence of the prohibition on unconscionable conduct and demonstrated that the ACCC was prepared to enforce the prohibition. The ACCC appear to have made a greater impact in

38(11) *Law Society Journal* 64, Konrad Chmielecki, 'Protection Against Unconscionable Conduct', (2000) 16(16) *National Accountant* 34, Ron Willemsen, 'Unconscionable Conduct Or Not? A Landmark Decision', (2000) 74(5) *Law Institute Journal* 76, 'ACCC Acts on Alleged Breaches of Franchising Code' (1999) 2(7) *Inhouse Counsel* 83.

¹²⁷ 'No Knead to Defend Conduct Test Case', *Foodweek*, 28 June 1999

¹²⁸ 'ACCC Slammed for Test Case', *Foodweek*, 12 July 1999

¹²⁹ *Ibid.*

¹³⁰ 'ACCC Acted Unfairly, Franchisor Alleges', *Australian Financial Review*, 13 July 1999.

¹³¹ *Ibid.*

changing the business culture of franchising than it did in retail leasing. But this may have occurred more through the fact that the ACCC administers the Franchising Code of Conduct than through its enforcement litigation. Franchise groups have commented that the Franchising Code of Conduct together with the creation of the Office of the Mediation Advisor (a separate office that facilitates mediation of disputes between franchisors and franchisees) have had a significant impact on the business culture of franchising. In particular a member of one Franchising Group has noted that the Code “has forced them to look at their procedures and policies and forced them to adopt clearer compliance rules”¹³².

Although the ACCC has achieved some degree of success in changing the business culture of franchising there are broadly three aspects of its enforcement strategy that may be counterproductive to enforcement.

First, the ACCC may commence proceedings prematurely without first seeking to negotiate a settlement with the party that has allegedly breached the law, or the ACCC may simply refuse to negotiate with the alleged offender and instead issue legal proceedings. This strategy may result in two different kinds of damage. First, it may result in significant financial hardship, or even ruin, to a party who must expend resources to finance its defence. In contrast, as noted by one legal advisor, the ACCC is not only better resourced than many private parties, but also receives legal services at a discount rate from law firms and legal counsel for repeat work. Further, an additional financial burden on franchisors, identified by franchise groups, is the potential damage to a franchisor’s brand. Second, it may result in damage to the ACCC’s reputation or credibility in the business community. To the business community the ACCC’s conduct may appear unreasonable, unfair or capricious and contrary to the principle of the model litigant. One legal advisor considered that the ACCC had a poor reputation in the business community generally and noted the ‘sense of glee’ business people he knew had whenever the ACCC received unfavorable media attention.

Second, some of the allegations made by the ACCC against some franchisors have been considered by some within the community to push the boundaries of what kinds of conduct are to be regarded as unconscionable. While, undoubtedly, it is the role of the ACCC to seek to develop the law in relation to the unconscionable conduct provisions in the TPA, some legal advisors have stated that they consider the ACCC has on occasion brought proceedings in cases that are frivolous or wrong. The legal advisors maintain that in such cases the ACCC harms its credibility with the court and community generally. Several legal advisors have suggested that the ACCC may sometimes commence proceedings that are frivolous because ACCC officers lack the necessary objectivity to determine whether proceedings in a case with which they have been working closely ought to be brought or the manner in which they are to be brought. These advisors also complain that the ACCC does not obtain the advice of independent legal counsel until either late in the proceedings or only in relation to a limited, specific question or issue in the proceedings. The ACCC instead prefer to consider themselves to be the expert in the area of compliance with the TPA and that they

¹³² Interview on 21 February 2006 by Michelle Sharpe.

and not legal counsel are running the proceedings. In other words, legal counsel is only to act as specifically instructed by the ACCC. It has been reported by some legal advisors that in some instances where legal counsel refuse to comply with ACCC instructions, believing the claim to be frivolous or wrong in law, that the ACCC will stop briefing that counsel in future matters.

Third, franchising groups complain that the education material produced by the ACCC is not helpful in identifying the kinds of conduct that will attract the attention of the ACCC. One member of a franchising group complained that most of the material produced by the ACCC on unconscionable conduct was composed of case studies arguing, “going to court is the last process, it’s the ones that touch the edge that get the interest of the ACCC that are the ones that I am interested in, because they’re the ones that we need to educate the sector that if you get close to this line then the ACCC get interested in you – so what’s the line?”¹³³ Franchising groups suggest that the ACCC should produce something akin to an operating manual which describes the kinds of conduct that the ACCC deem to be unconscionable and will likely take enforcement action against.

2.3 CONSUMER TRANSACTION CASE STUDIES

2.3.1 The Two-Tier Marketing Case

Case Overview

Case Outcome

On 13 November 2001, the ACCC commenced proceedings against three companies and a number of individuals associated with these companies for alleged misleading and deceptive conduct in breach of section 52 of the TPA and/or being knowingly involved in or aiding and abetting misleading or deceptive conduct. These parties included:

- Real estate marketer Oceana Commercial Pty Ltd (which at the relevant time was named Coral Reef Group Pty Ltd) and its director Christopher Bilborough;
- Finance Consultant Markfair Pty Ltd (at the relevant time trading as Investlend (Australia)) and its manager Dudley James Quinlivan;
- Property developer Advanced Commercial Developments Pty Ltd (at the relevant time named Redwind Pty Ltd) and its directors Dean Cornish and John Grounds; and
- Lawyers Gregory Pointon and Rodney Johanson.

The ACCC also brought proceedings against the Commonwealth Bank of Australia (‘CBA’) for alleged unconscionable conduct in breach of sections 51AA and 51AC of the TPA.

At first instance, Justice Kiefel held that both Mr Bilborough and Mr Quinlivan had engaged in misleading and deceptive conduct. Justice Kiefel further held that although she considered that Mr Pointon had not engaged in conduct in breach of

¹³³ Ibid.

the TPA that his conduct was, nonetheless, misleading and should be investigated by the Law Society of Queensland.¹³⁴ The ACCC otherwise failed in its claim against the other parties it had alleged had engaged in conduct in breach of the TPA.¹³⁵ In particular, it is important to note in light of the focus of this paper, that the ACCC was entirely unsuccessful in its claim for unconscionable conduct against the CBA finding that the CBA was under no obligation to tell the Gleasons it had valued the property at less than they had paid for it.¹³⁶ The ACCC appealed the decision of Justice Kiefel but was unsuccessful.¹³⁷

The Alleged Unconscionable Conduct

Oceana ran a 'two-tier' marketing scheme. The scheme was 'two-tier' because property on the Gold Coast was offered at two different prices depending on whether or not the prospective purchaser was local to the area. Purchasers from interstate were usually offered property at a higher or inflated price than local purchasers who were more likely to know the true value of the property.

Under this scheme the respondents would run investment seminars across the country inviting people to try negative gearing by investing in property on the Gold Coast. The respondents would then contact the attendees of these seminars offering them a free or heavily subsidized trip to the Gold Coast. On arrival in the Gold Coast the respondents would take these people to view a string of properties without giving them a chance to be alone or to think. They would then be taken to a financial adviser, a solicitor and then a bank so that they would be signed up to purchase a property in the quickest time possible. To achieve this both the solicitors and financial advisers had agreed to make themselves available to Oceana on weekends. In return the solicitors and financial advisers charged purchasers grossly inflated fees for their services.

More importantly, however, for the purpose of this paper the banks did not tell purchasers that they were buying the property at an inflated price. Although it was never alleged that the banks were involved in the scheme, bank procedure required the bank to obtain an independent valuation of the property before approving a loan, which revealed that the property was being sold at a greatly inflated price. The bank never revealed this information to the purchaser because it was used only as a tool to assist banks in the process of approving loans and, as the loans were often secured against the family home, the bank never saw the transaction as being a risk to its own interests. Indeed, the bank only stood to

¹³⁴ Justice Kiefel could not make any orders against Pointon under the Trace Practices Act, however and the ACCC could not seek orders against him under the appropriate Act, the Queensland Fair Trading Act. Much later (11 July 2005) Pointon entered into an enforceable undertaking with the Queensland Department of Fair Trading under the Queensland Property Agents and Motor Dealers Act 2000 in relation to failure to properly disclose to clients a relationship between himself and the vendor of property being sold to the clients. On 28 March 2006 a real estate industry group reported that a number of other Queensland lawyers have also been required to enter into enforceable undertakings for similar conduct. One lawyer was disciplined by the Legal Services Commission: see Tim O'Dwyer, 'Serial Offending Solicitors' at www.jenman.com.au/NewsArticlesPrint.php?id=180 (at 15 September 2006).

¹³⁵ Justice Kiefel found that although the promoters of the scheme had engaged in misleading and deceptive conduct in some respects, the ACCC had not proved that the price paid by the Gleasons was substantially more than market value.

¹³⁶ *ACCC v Oceana Pty Ltd & Ors* [2001] FCA 1516.

¹³⁷ *ACCC v Oceana Pty Ltd & Ors* [2004] FCAFC 174.

profit from the transaction. As observed by solicitor and head of commercial litigation for Slater & Gordon, Rob Lees ‘(t)he profits to the banks would be staggering...Banks have, at best, turned a blind eye to two-tier marketing, or, at worst, have actively encouraged these marketers to boost their loan books.’¹³⁸

The two-tier scheme was extremely successful.

Strategies Employed

According to a senior ACCC officer, although the scheme had been ‘bubbling along for many years’ the ACCC did not take any action at the time when the Queensland state government was attempting to deal with the problem itself. Accordingly, complaints received by the ACCC about the conduct were forwarded on to the state government. The state government, however, had difficulties in dealing with these complaints. The state government assembled a task force and then an advisory committee all of which had limited success.

The ACCC eventually became involved, when approached by influential financial journalist Paul Clitheroe. ACCC staff asked Mr Clitheroe whether he had a complaint ‘from someone reliable who would make a good witness.’¹³⁹ Mr Clitheroe eventually provided the ACCC with the names of Stephen and Marie Gleeson who had purchased a unit through the scheme in September 1998 for \$164,000. The ACCC, began a lengthy investigation, and although the case had risk, decided to commence proceedings.¹⁴⁰

The ACCC commenced proceedings against those companies and individuals involved in organising the scheme and against those who assisted the scheme for misleading and deceptive conduct. The ACCC also commenced proceedings against the CBA for unconscionable conduct under sections 51AA and 51AC. Although there were many banks that, like the CBA, did not inform the purchaser of the inflated price of the property, it was the CBA that dealt with the Gleesons’ and it was the Gleesons’ who were giving evidence of the scheme.

The ACCC pleaded in its claim that the ACCC had engaged in unconscionable conduct because, by reason of their own valuation of the property they knew, or had reason to believe, that the Gleesons’ were unaware that the purchase price of the property was in excess of its fair market value and that it was likely that they had been misled. Further the ACCC pleaded that the CBA knew, or had reason to believe, that had the Gleesons been aware of this they would not have completed the transaction and that the Gleesons’, as CBA customers, would have relied on the CBA to tell them if it knew of evidence of any misleading conduct.

Consequently, the ACCC argued in its submissions to the court that CBA had breached section 51AA because the Gleesons were under a special disadvantage and that further, or in the alternative, CBA had breached section 51AC, in particular section 51AC(3)(i), because it had ‘unreasonably’ failed to disclose the valuation.

¹³⁸ Turi Condon, ‘Property Sharks’, *BRW*, 7 February 2002, 48.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

Successful Enforcement Outcomes

The case had several successful enforcement outcomes. The case attracted a great deal of media attention prompting many individuals who ran ‘two-tier’ schemes to flee Queensland for other Australian states and New Zealand.¹⁴¹ Consequently, the sale of property on the Gold Coast ‘plummeted’ from 995 in the March period in 2000 to 495 transactions in June quarter in 2000.¹⁴² Media attention also prompted many purchasers who bought property under the scheme to seek legal advice and commence their own proceedings.

The case also had some successful enforcement outcomes in the banking industry. The executive manager of CBA, Bryan Fitzgerald, said that as a result of the case the bank had issued new lending procedures to deal with two-tier schemes. Under these new lending procedures borrowers must provide CBA with written confirmation that they are satisfied that the investment property represents fair market value.¹⁴³ The general manager for mortgage provider Origin, Craig Price, also said that after becoming aware of the existence of two-tier schemes in the media, Origin changed its lending policies. Origin would no longer accept business from known two-tier marketers and required formal valuations for all investment properties. Further to this, Origin planned to advise borrowers if their valuation was 10% or more below the purchase price and would be introducing new training and accreditation schemes for its staff and mortgage managers. Mr Price noted that any association by Origin with two-tier marketing ‘has the potential to severely damage our brand and reputation.’¹⁴⁴

Unsuccessful Enforcement Outcomes

The regional director for the ACCC in Queensland, Alan Ducret, noted that the decision in the case was ‘very mixed’ and that the ACCC had ‘won some and lost some.’¹⁴⁵ The ACCC had lost in its claim for misleading and deceptive conduct against several respondents, such as for example the solicitors who were involved in the conveyance of the property. The ACCC had also lost in its claim against the CBA for unconscionable conduct.

Justice Kiefel found at first instance that the CBA had not engaged in any unconscionable conduct in breach of section 51AA of the TPA because the Gleesons were not suffering from any special disadvantage or disability as narrowly defined by the court in *Amadio*:

the bank had been informed by its valuer that he considered that the Gleesons had probably contracted to pay substantially more for the unit than it was worth. It was also informed by the valuer that the reason for this would be their lack of knowledge of the local market conditions...

¹⁴¹ See Condon, as above n138.

¹⁴² Kathy Mac Dermott, ‘Land and Home Package Sales Hit By Two-Tier Scams’, *Australian Financial Review*, 25 September 2000, 18 and see also Kathy Mac Dermott, ‘Victory in Marketing Scam’, *Australian Financial Review*, 8 March 2002, 69 and Kathy MacDermott, ‘Tribunal Ruling Opens Door for Claims’, *Australian Financial Review*, 2 April 2002, 60.

¹⁴³ Condon, as above n138.

¹⁴⁴ *Ibid.*

¹⁴⁵ Tina Perinotto, ‘CBA Let Off Hook in Court Case’, *Australian Financial Review*, 19 December 2003.

The knowledge that the bank had without more, would not have required it to disclose its valuation or the advice that it had received. The disadvantage that the Gleesons laboured under, which might be said to be evident to the bank, was not such as to seriously affect their ability to make a judgment as to their interests. They were able to form that judgment and protect their interests if they had obtained necessary information. That they did not do so does not constitute the disability or weakness of which the cases speak.

Justice Kiefel considered that the Gleesons could have easily obtained such information by seeking the advice of an independent valuer on the Gold Coast. Justice Kiefel also held that CBA had not engaged in any unconscionable conduct in breach of section 51AC. Justice Kiefel considered that CBA had, in no way, acted ‘contrary to good conscience’ and that again, the Gleesons could have engaged an independent valuer themselves.

The ACCC appealed the decision without success. The full court of the Federal Court affirmed Justice Kiefel’s decision in finding that the CBA had not engaged in any unconscionable conduct in breach of section 51AA or 51AC. In addition to supporting Kiefel’s opinion, the full court also noted that the ACCC had relied in particular on section 51AC(3)(i) which provides that in determining whether conduct is unconscionable, a court is to have regard to the extent to which a party has ‘unreasonably’ failed to disclose any intended conduct or risks that might affect the interests of the other contracting party. The court held that it failed to see how CBA could be thought to have ‘unreasonably’ failed to disclose a valuation that it told the Gleesons it would not be disclosing. However, it is more significant to note, for the purpose of this paper, that the court considered that:

More fundamentally, it distorts the proper operation of s 51AC to search through the twelve criteria set out in subs (3), find one that seems to fit the case in hand, and then move to a conclusion of unconscionable conduct. Quite apart from the fact that Parliament has expressly stipulated that the twelve criteria do not limit the matters to which the court may have regard, many of the stipulated criteria, when applied in the present case, would tell against a finding of unconscionable conduct.

It follows that the ACCC repeated the same mistake that it had made in the Farrington Fayre case in taking an unduly narrow approach to unconscionability under the TPA. As in the Farrington Fayre case the ACCC took a narrow approach to section 51AA in arguing that the Gleesons’ suffered from a special disadvantage as understood by such cases as *Amadio*. Further, the ACCC took a narrow approach to section 51AC by focusing on only one of the twelve criteria set out in section 51AC(3). The ACCC failed to argue a broader, more conceptual understanding of unconscionable conduct and consequently failed to grasp the opportunity to further develop this concept.

The ACCC’s loss to CBA has also had an impact on public opinion of the ACCC. The media have noted that ‘(s)ome have slammed it (the case) as a bitter

disappointment'.¹⁴⁶ Solicitor, Tim O'Dwyer, has said that the ACCC 'failed miserably' with what was 'more an embarrassing show trial than any groundbreaking test case'.¹⁴⁷ Mr O'Dwyer believes that '(a)n awful lot of banks are no doubt now breathing a collective sigh of relief.'¹⁴⁸ In relation to the orders sought by the ACCC Mr O'Dwyer has also observed that:

Apart from the possible orders for costs, the ACCC sought only declarations and not any pecuniary penalties. There is nothing in these 'blind Freddy' declarations for the ACCC to be proud of.¹⁴⁹

The ACCC has also been criticised for its slowness in bringing proceedings against the banks and others who were involved in the two-tier marketing scheme in the first place. One victim of the scheme has said that:

we feel very strongly that the regulatory authorities failed to address this problem (the scheme) that has affected so many other people until it was too late...The ACCC could have done a great deal more a great deal earlier.¹⁵⁰

2.3.2 The Horse Race Betting Software Case

Case Overview

Case Outcome

From February to April 1999 the ACCC had investigated Acepark Pty Ltd ('Acepark') for possible breaches by Acepark of sections 51AB, 52, 53 and 59 of the TPA in selling certain software to the public. After a meeting between the representatives of the ACCC and Acepark, on 29 April 1999, Acepark gave the ACCC an enforceable undertaking, dated 6 July 1999, pursuant to section 87B of the TPA. Under the undertaking Acepark was required to discontinue all proceedings against three of its customers for recovery of the purchase price of the software, refund any payments made to the purchase price by these three customers and to compensate them for losses made by them using the software. Acepark was also required to review its advertising and selling practices and to implement a system to handle complaints.

¹⁴⁶ Ibid.

¹⁴⁷ Hedley Thomas, 'Court Condemns Marketeers', *Courier Mail*, 4.

¹⁴⁸ Ibid.

¹⁴⁹ Perinotto, as above n145.

¹⁵⁰ Hedley Thomas, 'Angry Retiree Finds Little Justice in Consumer Victory', *Courier Mail*, 4.

Acepark failed to comply with the undertaking. On 29 June 2001 the ACCC brought proceedings against Acepark and two related companies; Offtrack Investments Pty Ltd ('Offtrack') and Solutions Software International Pty Ltd ('Solutions'). The ACCC also brought proceedings against Mr Robert Price, who was the mastermind behind the sale of the software, and Mr Ronald Curtin, an employee of Acepark and Offtrack, and Mr William Millar, a director and employee of Solutions. The ACCC claimed that the respondents had engaged in misleading and deceptive conduct in breach of sections 52, 53 and 59 of the TPA and in unconscionable conduct in breach of sections 51AB and 51AC.

On 30 August 2002, Mr Millar gave an enforceable undertaking under section 87B in which he consented to court orders being made declaring that he aided in the contravention of the TPA and an injunction restraining him from engaging in the same kind of conduct in the marketing of similar software and requiring him to attend a trade practices compliance seminar. Mr Millar also undertook to perform 72 hours of community service for a charity raising money for gambling addicts.

On 2 September 2002 the court ordered by consent an injunction against Mr Price and Mr Curtin. Under the injunction Mr Price and Mr Curtin were restrained from engaging in any misleading or deceptive conduct in any marketing of the software or any other substantially similar software. Mr Price and Mr Curtin also consented to an order requiring them to attend a trade practices seminar.

On 3 September 2002 the court held that Acepark, Offtrack and Solutions had engaged in misleading and deceptive conduct in breach of sections 52, 53 and 59 and that Mr Price was knowingly concerned in and a party to these contraventions. The court also held that Acepark had engaged in unconscionable conduct in breach of section 51AC and that Mr Price was knowingly concerned in and a party to this contravention. In relation to Acepark, Offtrack and Solutions the court made orders restraining the companies from promoting the software or any substantially similar software as a low risk investment program and from claiming affiliations with the TAB. The court further ordered that the companies pay the ACCC its costs. In relation to Mr Price, the court ordered, by consent, that he also be restrained from promoting the software, that he publish a prescribed notice in a number of named newspapers, and that he pay the ACCC costs in the amount of \$37,200.

The Alleged Unconscionable Conduct

Acepark sold software to the public that, it claimed, would predict the winner of any given horse race with a 75% to 90% chance of success. Acepark also claimed that a user of the software could earn between \$4,000 and \$8,000 per month. Acepark sold the software to users for a fee of up to \$12,500.

The ACCC alleged that Acepark had engaged in unconscionable conduct in selling the software to several people who the ACCC claimed were under a special disadvantage or disability. Among them was Ms Angela Booth. The ACCC claimed that Acepark was aware of the fact that Ms Booth had limited financial resources because it had taken out a bill of sale over her car to secure payment of the balance of the purchase price of the software. The ACCC also claimed that Acepark was aware of the fact that Ms Booth had purchased the

software because she wished to generate enough income to stay at home to care for her terminally ill partner.

Further, as outlined above, Acepark had given an enforceable undertaking, in July 1999, in which Acepark had undertaken to discontinue proceedings against Ms Booth for recovery of the purchase price of the software, to refund payments made by Ms Booth to the purchase price and to compensate her for losses she incurred as a result of using the software.

Strategies Employed

In 1999 the ACCC spent three months investigating Acepark's activities before holding a conference with Acepark's representatives on 29 April 1999. As a result of the conference, Acepark gave an enforceable undertaking pursuant to section 87B. The ACCC chose to accept the enforceable undertaking because as one of the ACCC officers involved explained 'it was meant to be a quick fix at that stage because (we) didn't have widespread complaints at that stage'.¹⁵¹

Acepark, however, later failed to comply with the undertaking and the ACCC brought proceedings against Acepark and Mr Price who 'ran the scheme'.¹⁵² However Mr Price ran the scheme through a series of 'phoenixed' companies – when one company got into trouble, he transferred the business to another.¹⁵³ The ACCC, however, only chose to bring proceedings against two of these companies in addition to Acepark, these companies being Offtrack and Solutions. Although these companies were ultimately abandoned by Mr Price, the ACCC 'still had to prove our case against these companies for precedent value.'¹⁵⁴

The ACCC also chose to join two other people in addition to Price, namely Mr Curtain and Mr Millar. An ACCC interviewee described Mr Millar as having been charmed and lured by Mr Price into taking a position as director of Solutions. This position, however, carried no decision making power. In relation to Mr Curtin, the ACCC interviewee noted that he:

was smart enough to come in himself and ask for leniency after we instituted proceedings. We got good affidavit evidence out of his cooperation. He was able to say that Mr Price was involved in the making of the misrepresentations all along.¹⁵⁵

Despite Mr Curtain's cooperation Mr Price fought the ACCC's claim '(a)ll the way until right before court'.¹⁵⁶ Mr Price eventually yielded, however, giving the ACCC 'everything...including full admissions of facts plus wide ranging injunctions.'¹⁵⁷ The ACCC got corrective advertising in conjunction with its New Zealand counterpart, the New Zealand Commerce Commission, because Mr Price had traded there as well. The ACCC did not seek an order against Mr Price

¹⁵¹ Interview of 01-005 by Christine Parker, 2 October 2002.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

requiring him to attend a trade practices compliance seminar ‘because Dowsett J had previously expressed doubt about the value of sending certain people to compliance training.’¹⁵⁸

Successful Enforcement Impacts

The case had four related successful enforcement impacts. First, the ACCC were successful in obtaining some compensation for the victims of the respondents and in compelling the respondents from discontinuing its legal proceedings against these victims.

Second, the ACCC appear to have eventually been successful in stopping the marketing of the software to the public in this case. It seems likely that Mr Millar, given his cooperation with the ACCC, and Mr Curtin, given his consent to an order for community service, will in the future comply with the provisions of the TPA. In contrast to Mr Millar and Mr Curtin, it seems less likely that Mr Price will in the future comply with the TPA, especially given Justice Dowsett’s comments about his attitude in court.

The case, however, also serves as a warning to others who would seek to engage in similar conduct to that of the respondents. The ACCC has noted in press releases that ‘there exist a number of operators promoting such gambling schemes’ and has warned that ‘(t)hese operators need to be aware that if they adopt similar business practices they run the real risk of breaching the Act and an ACCC investigation.’¹⁵⁹ The case also served as a warning to such operators that enforceable undertakings were taken seriously by the ACCC. In commenting on the progress of the case, the ACCC has declared that ‘(b)usinesses need to be aware that enforceable undertakings are not to be regarded as a “soft option” and the ACCC will not hesitate to apply to the Court for appropriate orders if it believes that the terms of such undertakings have been breached.’¹⁶⁰

Third, the case attracted a good deal of media attention and debate and, as a result, the case was successful in educating the public about their rights under the TPA and in warning the public about the existence of such schemes. In an internet article the ACCC has said that it ‘could not explain the recent wave of discussion over the controversial software, but said that it gets about three calls a week from consumers on the matter and described it as “definitely” a hot topic.’¹⁶¹ In media releases the ACCC has warned that ‘consumers...should take some steps to protect their investments and carefully consider all claims made by such operators before handing over their hard-earned money.’¹⁶²

Fourth, the case had a successful impact in promoting cooperation between the ACCC and its New Zealand counterpart, the Commerce Commission. Mr Price had been a citizen of New Zealand and had also marketed the software in New Zealand. The Commission had received complaints from New Zealand consumers and after some investigation of its own discovered that Offtrack was a company

¹⁵⁸ Ibid.

¹⁵⁹ ACCC Press Release, ‘ACCC Acts Against Sellers of Horse-Betting Scheme’, 10 August 1999.

¹⁶⁰ ACCC Press Release, ‘ACCC Curbs Punting Software Representations’, 24 September 2001.

¹⁶¹ Rachel Lebihan, ‘Offtrack Legal Proceedings on Track’, *ZDNet Australia*, 5 March 2002.

¹⁶² ACCC Press Release, as above n159.

registered in Australia. The Commission then contacted the ACCC to advise of its investigation and to request that the New Zealand consumers be included in the ACCC's own investigation. The Commission later assisted the ACCC in collecting affidavit evidence from these New Zealanders that was used in the proceedings against the respondents. The Commission's director, Ms Deborah Battnell, has said that '(t)his is cross-border co-operation working at its best. We overcame jurisdiction limitations and worked with our Australian counterparts to achieve a good outcome.'¹⁶³

Unsuccessful Enforcement Impacts

The main unsuccessful enforcement impact arising from the case was the initial failure by the ACCC to obtain an enforceable undertaking from Mr Price personally at the same time that an enforceable undertaking was accepted from Acepark. As the ACCC discovered, there is '(n)o point getting a s87B from the company if it is not mirrored by undertakings from the individual.'¹⁶⁴ A company can very easily cease to exist making the enforcement of the enforceable undertaking impossible or pointless because it no longer continues to trade or hold assets.

Consequently, when the ACCC attempted to enforce the enforceable undertaking against Acepark 'the company metamorphosed into something else. The money was in a trust fund.'¹⁶⁵ The ACCC interviewee explained that '(t)he case originally included a component enforcing the s87B but we withdrew it because of comments by Dowsett J about the utility of enforcement against the company.'¹⁶⁶ This interviewee concluded that '(i)f the ACCC had spent time getting a formal interview from Mr Price and joined him to the EU [enforceable undertaking] it would have been better.'¹⁶⁷

Since the ACCC had failed to get an enforceable undertaking from Mr Price what was meant to be a 'quick fix' to breaches of the TPA by the respondents became a much more lengthy and expensive task in enforcement. There was a period of two years between the enforceable undertaking given by Acepark in July 1999 until the ACCC commenced proceedings against the respondents in June 2001. In that time the respondents had continued to operate, both in Australia and New Zealand, in breach of the TPA to the cost of many more customers.

The decision by the ACCC to accept an enforceable undertaking from Acepark has also exposed the ACCC to criticism from the public because of Price's subsequent misbehaviour. As a result the ACCC has had to publicly defend its decision to enter into the enforceable undertaking.¹⁶⁸

¹⁶³ Commerce Commission Press Release, 'All Bets are Off! International Co-operation Results in Successful Court Action Against ex-New Zealander', 2002/35.

¹⁶⁴ Interview of 01-005 by Christine Parker, 2 October 2002.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ See Andrew Colley, 'Aust Court Knocks Offtrack Off Track for Good', *ZDNet Australia*, 9 September 2002.

2.3.3 The McDonald's Case

Case Overview

Case Outcome

On 24 September 1999 the ACCC filed proceedings against McDonald's in the Federal Court for breaches of the misleading and deceptive conduct and unconscionable conduct provisions of the TPA. However, on 17 August 2001 the ACCC declared that it would not be proceeding with its action against McDonald's because the fast food chain had taken steps to compensate consumers and had developed a set of best practice guidelines for the running of national competitions.¹⁶⁹ Another reason for not taking the case any further was that a private group action alleging unconscionable conduct by McDonalds in relation to the same set of facts had failed.¹⁷⁰ This case has been included in this report because, although the ACCC ran the case primarily as a misleading and deceptive conduct case, the private action for unconscionable conduct was an important aspect of what happened with the ACCC case, and was also important for the development (or failure of development) of the law on unconscionable conduct.

The Alleged Unconscionable/Misleading and Deceptive Conduct

In 1999 McDonald's ran a 'McMatch and Win' promotion. In this game participants would collect tokens on purchasing food at McDonald's and on collecting a certain sequence of tokens could win a particular prize. These tokens resembled tokens used by McDonald's in a similar promotion the previous year. Consequently, many participants presented claims to McDonald's that were made up from tokens issued the previous year together with those issued that year. McDonald's, however, rejected most of these claims by relying on a clause in the terms and conditions of the game that gave McDonald's a very broad discretion to reject claims that did not meet its 'verification and security checks'.

Strategies Employed

On 1 July 1999, the ACCC announced, in a Press Release, that it was investigating the 'McMatch and Win' promotion run by fast food chain McDonald's after receiving numerous complaints from consumers.¹⁷¹ In a further press release on 9 July 1999 the ACCC declared that it considered that there were 'still serious questions to be answered' and that it was considering taking legal action.¹⁷² Finally on 23 September 1999 the ACCC publicly announced that it was taking legal proceedings against McDonald's for misleading and deceptive conduct, but not in a representative capacity.¹⁷³ At that time group proceedings for unconscionable conduct against McDonalds were already under way in the Brisbane Federal Court that could have provided consumers with a greater array of remedies than a representative action.¹⁷⁴ On 24 September 1999 the ACCC filed its claim against McDonald's.

¹⁶⁹ ACCC Press Release, 'Consumers Benefit from Goodwill Gesture', 17 August 2001.

¹⁷⁰ *Hurley & Ors v McDonald's* [1999] FCA 1728; *Hurley v McDonalds* [2001] FCA 209.

¹⁷¹ ACCC Press Release, "'McMatch and Win' Under ACCC Scrutiny', 1 July 1999.

¹⁷² ACCC Press Release, 'ACCC Says Questions To Be Answered on McDonald's', 9 July 1999.

¹⁷³ ACCC Press Release, 'ACCC To Institute Proceedings Against McDonald's', 23 September 1999.

¹⁷⁴ See above n 170.

Some 23 months later the ACCC withdrew its claim after the private group action had failed, and McDonald's had undertaken to the ACCC to compensate some of the aggrieved consumers and had developed best practice guidelines for the running of national competitions.¹⁷⁵ The compensation offered by McDonald's to consumers, as a 'goodwill gesture', was a gift voucher valued at \$100. The best practice guidelines developed by McDonald's were posted on the ACCC's website and distributed through McDonald's administration offices. McDonald's undertaking was entirely informal and never formed part of any court order or enforceable undertaking.

Successful Enforcement Impacts

It is interesting to compare the outcome of the group proceedings with that of the ACCC's proceedings.

In the group proceedings, the consumers, led by Ms Hurley, argued that McDonald's had, inter alia, breached sections 51AB and 51AC in rejecting their claims.¹⁷⁶ The court held that for conduct to be unconscionable under either section 51AB or 51AC it must be shown that such conduct amounts to 'serious misconduct or something *clearly unfair or unreasonable*'.¹⁷⁷ The court argued that Hurley could not assert that McDonald's had acted unfairly in rejecting her claim when her entitlement to the claim arose under a contract which was subject to McDonald's discretion. The court considered that 'there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract "unfair" or "unreasonable" or "immoral" or "wrong"'.¹⁷⁸

In contrast to the group proceedings, the ACCC succeeded in obtaining some compensation for consumers and in changing business norms, through the development of the guidelines for competitions, although there was no adjudication of the dispute, or formal consent orders.

Unsuccessful Enforcement Impacts

The compensation offered to consumers was small, particularly when compared to the value of some of the prizes claimed by them. It is also unclear how many consumers were provided with compensation.

Although the ACCC were successful in changing to some extent business norms, the ACCC lost an opportunity to further develop legal precedent under sections 51AB and 51AC. The ACCC, however, did not have many options available once the private action against McDonalds in relation to the same facts had failed. One interviewee from the ACCC reported that some staff found the ending of this case, with the withdrawal of legal proceedings, and no formal enforcement action taken, particularly frustrating given the effort that had been put into it at the beginning.

¹⁷⁵ ACCC Press Release, 'Consumers Benefit from Goodwill Gesture', 17 August 2001.

¹⁷⁶ *Hurley & Ors v McDonald's* [1999] FCA 1728.

¹⁷⁷ *Ibid*, para 22.

¹⁷⁸ *Ibid*, para 31.

2.3.4 The Lux Case

Case Outline

Case Outcome

On 27 July 2000, the ACCC commenced proceedings in the Federal Court against vacuum cleaner manufacturer, Lux Pty Ltd, and vacuum cleaner door-to-door salesman, Mr Denis Bodger, for alleged conduct in breach of section 51AB of the TPA.

On 16 July 2004 Justice Nicholson held that both Lux and Mr Podger had engaged in conduct in breach of section 51AB.¹⁷⁹ Both Lux and Mr Podger later unsuccessfully sought to appeal the decision.

The Alleged Unconscionable Conduct

Lux is a vacuum cleaner manufacturer and Mr Podger was a vacuum cleaner door-to-door salesman and an agent for Lux. On the morning of 26 August 1999 Mr Standing approached Mr Podger in a McDonald's restaurant in Port Pirie. Mr Standing, noting Mr Podger's Electrolux badge, told Mr Podger that he and his wife had an Electrolux vacuum cleaner that was 'playing up' and invited Mr Podger to come to his place to take a look at it later that day. Mrs Standing was present during the conversation, sitting at a table nearby, but did not speak to Mr Podger.

Mr Podger attended the Standings home in the afternoon of 26 August 1999. At that time Mr Standing was not at home. Mrs Standing invited Mr Podger into the Standings home and showed Mr Podger the vacuum cleaner. Mrs Standing gave evidence that Mr Podger, after having examined the vacuum cleaner, stood close to her and told her in a loud voice, scaring her, that the cleaner was going to blow up. Mr Podger then showed Mrs Standing a new model vacuum cleaner and offered her \$50 cash on the old vacuum cleaner as a trade in. Mr Podger produced a credit application for Mrs Standing to complete. Mrs Standing told Mr Podger that she couldn't read or spell too well. Mr Podger completed the form for Mrs Standing but did not explain its terms or inquire whether Mrs Standing could afford the new vacuum cleaner.

Enforcement Strategy

The ACCC chose to commence legal proceedings against Lux and Mr Podger seeking declarations that both Lux and Mr Podger had engaged in unconscionable conduct in breach of section 51AB.

At a directions hearing, before trial, an order was made for the matter to be referred to mediation in accordance with Federal Court Rules. The ACCC subsequently unsuccessfully brought a motion seeking the order for mediation be set aside. The ACCC argued that mediation was inappropriate in this matter for three reasons.¹⁸⁰ First, that mediation is inappropriate where the complaint involves a person suffering from an intellectual disability. Second, the ACCC could not meet its function, of ensuring compliance with the TPA, unless

¹⁷⁹ *ACCC v Lux Pty Ltd* [2004] FCA 1344.

¹⁸⁰ See *ACCC v Lux Pty Ltd* [2001] FCA 600, paragraphs 12-15.

recourse could be had by it to the judicial process to prosecute instances of illegal conduct. Third, mediation was inappropriate in matters where there is great dispute over the issues and facts and where, consequently, the chances of settlement are minimal. The ACCC had told the respondents it was only prepared to mediate with them if they admitted breaching the TPA and this, the respondents refused to do.

Successful Enforcement Impacts

The ACCC achieved three main successful enforcements from the case. First, the ACCC were ultimately successful in obtaining court declarations that the respondents engaged in unconscionable conduct in breach of section 51AB of the TPA. Second, the case provides further clarification on the scope of section 51AB and the kinds of conduct that might be regarded as unconscionable. Third, the case enabled the ACCC to issue press releases demonstrating to the community that the ACCC were active in enforcing the prohibition against unconscionable conduct.¹⁸¹

Unsuccessful Enforcement Impacts

The most significant unsuccessful enforcement impact arising from the case is the ACCC's unsuccessful motion to set aside the order to attend mediation and the negative reaction that this received in the community, in particular the legal community.

Justice Nicholson, in dismissing the ACCC's motion, strongly rejected the ACCC's submission that mediation was inappropriate where there was significant dispute about the issues, in particular where the ACCC had insisted on an admission of wrongdoing as a precondition to mediation. Justice Nicholson held that

It is not the case that mediation can only be ordered where respondents admit the whole or part of the case against them or that it should not be held even where an applicant has a reasonable prospect of success. The point of mediation is that there is give and take on both sides and that neither party enters a mediation session with any prescription.¹⁸²

Justice Nicholson also rejected the ACCC's submission that its "public interest functions" made settlement of litigation inappropriate and so mediation was inappropriate.¹⁸³ Justice Nicholson appeared to accept the ACCC's submission that it was different from a private litigant and that in certain circumstances mediation might not be appropriate. Ultimately, however, Justice Nicholson concluded that mediation in the circumstances of this particular case would not be inappropriate because, even in the absence of settlement, mediation would achieve a number of purposes. These purposes included a consideration of issues defined by the parties' experts and a consideration of whether certain issues

¹⁸¹ ACCC Press Release, 'Federal Court finds Lux Acted Unconscionably in Door-to-door Vacuum Sale to Vulnerable Consumer', dated 19 July 2004 and ACCC Press Release 'Lux Appeal Against Unconscionable Conduct Dismissed', dated 24 February 2005. The case also attracted some academic interest: see for example Tina Cockburn, 'Home Alone', (2004) 77 *Law Society Journal* 76.

¹⁸² *ACCC v Lux*, as above n180, paragraph 28.

¹⁸³ *Ibid*, paragraph 30.

could be agreed on between the parties so that a person with an intellectual disability need not have to give evidence. Justice Nicholson, further held that:

To conclude that the formation by the applicant of the view that the matter requires curial resolution in a manner thought by the applicant to meet its public interest obligations would fail to recognise the competing public and curial interest in the mediation process as an important (if not vital) part of curial requirements. There is no necessary reason why the former public interest objective could not be met in the give and take of true mediation.¹⁸⁴

Some commentators have criticized the ACCC's decision in *Lux* to refuse to mediate while other commentators have been more sympathetic to the ACCC's position. One commentator who has been very critical of the ACCC's decision is Professor Warren Pengilley. Professor Pengilley has argued that:

There is no reason why the ACCC should not search for means of settling litigation in accordance with the Attorney-General's Directions in relation to litigation. And, of course, the ACCC has required mediation in many codes of conduct as a method of settling industry disputes. Given the ACCC's strongly expressed views as to the benefits of mediation in this context, it is difficult for the writer to understand why, to date, the ACCC has not embraced mediation with equal enthusiasm as a method of discussing, and hopefully resolving, disputes with those it takes, or intends to take to court.¹⁸⁵

One commentator, however, who has been more sympathetic to the ACCC's position is Laurence Boule. Although Mr Boule considers that the judgment of Justice Nicholson 'reflects the wisdom of mediation experience' he makes the point that 'there is also little doubt that in certain circumstances public authorities will not feel free to compromise on their statutory obligations and this could be a compelling consideration in refusing an order to mediate.'¹⁸⁶

2.3.5 The Radio Rentals Case

Case Outline

Case Outcome

The ACCC commenced proceedings against Radio Rentals Ltd and Walker Stores for conduct it claimed was unconscionable and in breach of sections 51AA and 51AB of the TPA.

On 24 August 2005 Finn J handed down his judgment in which he found that Radio Rentals had not breached sections 51AA and 51AB of the TPA.¹⁸⁷ Accordingly Finn J dismissed the ACCC's claim and ordered that the ACCC pay Radio Rentals and Walker Stores their legal costs of the proceedings.

¹⁸⁴ Ibid, paragraph 31.

¹⁸⁵ Warren Pengilley, 'ACCC and Mediation of Court Proceedings', (2002) 17 (8) *Trade Practices Law Bulletin* 79, 80.

¹⁸⁶ Laurence Boule, 'Revisiting the Mediation Referral Order', (2001) 4 (4) *The ADR Bulletin* 46

¹⁸⁷ *ACCC v Radio Rentals Ltd* [2005] FCA 1133.

The Alleged Unconscionable Conduct

Mr Groth had both an intellectual disability and a schizophrenic illness and lived in the poor socioeconomic suburb of Elizabeth in South Australia. Both Radio Rentals and Walker Stores leased out, electrical goods. In the period from November 1996 to October 2002 Mr Groth entered into 15 rental, 2 loan and 19 service agreements with Radio Rentals and 3 rental agreements with Walker Stores. All of these agreements were in relation to the purchase or hire of electrical goods and the payments made by Mr Groth under the agreements totaled \$20,700.43. The ACCC claimed that in entering into and enforcing the agreements Radio Rentals and Walker Stores had engaged in unconscionable conduct in breach of section 51AA and 51AB of the TPA.

Enforcement Strategy

The ACCC chose to commence proceedings against Radio Rentals and Walker Stores for alleged breaches of sections 51AA and 51AB of the TPA.

In its pleadings the ACCC claimed that Radio Rentals and Walker Stores knew, or ought to have known, on entering into the agreements with Mr Groth that Mr Groth suffered from a special disability. The ACCC claimed that Radio Rentals and Walker Stores knew, or ought to have known, of Mr Groth's special disability from his presentation and verbal skills and from the financial hardship that Mr Groth experienced because of the level of his monthly rental liability as revealed in his credit applications.¹⁸⁸ In oral submissions to the court, counsel for the ACCC, Ms Elspeth Strong QC, also argued that Radio Rentals and Walker Stores would have known of Mr Groth's special disability to conserve his own interests because they knew of his straitened circumstances.¹⁸⁹

It is unclear from the material available to what extent attempts were made by the ACCC to obtain an enforceable undertaking or otherwise settle the matter before trial.

Successful Enforcement Impacts

The Radio Rentals Case was successful in that it provided an opportunity, albeit a small one, to demonstrate to the public the ACCC's continuing commitment to enforce the unconscionability provisions of the TPA. The ACCC issued a press release publicizing the commencement of proceedings against Radio Rentals¹⁹⁰ and a further press release publicizing the decision handed down by Finn J.¹⁹¹

Unsuccessful Enforcement Impacts

The Radio Rentals Case had largely unsuccessful enforcement impacts for two main reasons. First, Finn J did not find that Radio Rentals or Walker Stores had engaged in any conduct in breach of sections 51AA or 51AC of the TPA, and he did so in circumstances that do not shed much, if any, light on the scope of those sections. Finn J found on the evidence before him that although Mr Groth clearly

¹⁸⁸ Ibid, paragraph 186.

¹⁸⁹ Ibid.

¹⁹⁰ ACCC Media Release, 'ACCC Alleges Unconscionable Conduct by SA's Biggest Retailer of Electrical Goods', 12 December 2003.

¹⁹¹ ACCC Media Release, 'Decision in ACCC's Action Against Radio Rentals', 17 August 2005.

had both a learning disability and a mental illness neither of these afflictions were apparent to staff of either Radio Rentals or Walker Stores. Accordingly, Finn J concluded that, without knowledge of Mr Groth's special disability, neither Radio Rentals nor Walker Stores could be said to have engaged in conduct in breach of sections 51AA or 51B.

Second, the oral submission made by Ms Strong on behalf of the ACCC that Radio Rentals or Walker Stores knew, or ought to have been aware of Mr Groth's special disability because of his financial hardship was dismissed by Finn J for procedural reasons. Finn J stated that the respondents 'properly in my view' objected to the submission because it was not pleaded by the ACCC.¹⁹² The argument put by Ms Strong of inflicting financial hardship is quite different from the first argument, as pleaded by the ACCC, that Mr Groth's financial hardship, together with his verbal skills, put staff on notice of his special disability. Finn J considered that '(i)f that case had been properly pleaded and pursued, this would have been a very different proceeding from that which I entertained. As I foreshadowed, it is far too late and unfair for the ACCC to be allowed to run it now.'¹⁹³

The ACCC's failure to plead this case as put by Ms Strong provides a very good example of the criticism made by legal advisors about the strategy that the ACCC appears to have employed in enforcement. Namely, that the ACCC has chosen not to engage independent counsel until late in the proceedings when much of the foundation of a case, such as the pleadings, have already been laid down. Further, the ACCC's failure to plead the case demonstrates that the ACCC may not always be the best judge of how a case should be run.

2.3.6 Conclusions on the ACCC's Impact in Consumer Transaction Cases

The ACCC has been able to attract the most media attention in relation to its enforcement of the prohibition against unconscionable conduct in consumer transactions. The ACCC have used this media attention very effectively to educate the community about the existence of the prohibition and the existence of certain kinds of conduct that may be in breach of the prohibition. Further, the ACCC, on receiving a complaint of unconscionable conduct has been largely successful in stopping the conduct complained of. In most cases the party that has engaged in unconscionable conduct not only ceases the conduct but also engages in some kind of activity to better educate itself or the community about trades practices compliance.

In a small number of cases, however, where the party engaged in the unconscionable conduct is what might be described as a 'crook' – that is someone intentionally engaged in a dishonest scheme for making money - the ACCC, as might be expected, has only been successful in stopping the conduct in that city it was first discovered or in Australia. It appears, from the cases examined above, that where the ACCC is dealing with the latter kind of party that a different

¹⁹² *Radio Rentals*, above n187, paragraph 187.

¹⁹³ *Ibid*, paragraph 190.

approach is warranted. For example, a trade practices compliance program is not likely to be effective to reform a committed ‘crook’ nor are enforceable undertakings, given by his or her company, when a new company can easily be formed. In such cases more stringent deterrents should be considered such as penalties.

Further, the ACCC in enforcing the prohibition against unconscionable conduct in consumer transactions have been unsuccessful in four main, and seemingly contradictory, ways.

First, in at least one case, the Two-Tier Marketing Case, the ACCC was criticized for being too slow to act where some of the conduct complained of was clearly in breach of the TPA. This slowness attracted negative media reports and created some resentment and frustration in the community. The slowness in relation to the Two-Tier Case, however, is in part understandable in that there was some confusion between the relative responsibilities of the state consumer watchdog and the ACCC in addressing the conduct. The ACCC clearly need to develop a good working relationship with other regulatory organisations and they do appear to be currently engaged in this task.

Second, in some cases examined above, the ACCC may have been too quick to commence proceedings against some parties. The ACCC in taking on large organisations, such as McDonalds, creates an opportunity to demonstrate to the community that the ACCC is willing to enforce the prohibition against unconscionable conduct even against very large organisations. Where proceedings are commenced prematurely without adequate evidence or without hearing the alleged offenders’ point of view, however, the ACCC can end up appearing to be over zealous or more concerned with achieving political objectives (like running a high publicity case or a test case) than investigating the individual case and tailoring an appropriate solution to any problems uncovered. This may undermine cooperation with the ACCC in the future, and also undermine perceptions of the legitimacy of the ACCC’s enforcement actions. News of the ACCC’s failure, or appearance of failure, to accord procedural fairness passes quickly through the business community. The business community as a result is more likely to view the ACCC with fear and concern, rather than respect. The community is also more likely to give the appearance of compliance with the TPA rather than work cooperatively with the ACCC, thereby exposing itself, to ensure actual compliance.

Third, the ACCC have at times chosen their legal conceptualization of their case in proceedings poorly. The ACCC have either taken an overly narrow approach to unconscionable conduct and/or have made frivolous claims or claims that cannot be supported by the evidence available. This suggests that sometimes the ACCC may have either failed to maintain objectivity and/or failed to obtain good external legal advice. The Radio Rentals Case is a good example of this. In doing this, the ACCC not only loses some credibility with both the community and the courts, but it also has lost its opportunity to meaningfully develop the law in the area.

Finally is the significant issue of whether, or to what extent, the ACCC should participate in a court ordered mediation. The ACCC in the Lux Case argued that it

is different from a private litigant and that it has special public duty functions that do not permit it to bargain away liability under the TPA. The ACCC may be correct in arguing that it cannot bargain away liability, but negotiation about ultimate issues of liability is not necessarily the sole purpose of mediation. As stated by Justice Nicholson in the Lux Case, mediation has a variety of purposes aside from the purpose of complete and final settlement. The parties in mediation may agree on a number of facts or issues that may significantly shorten the duration and cost of a trial or eliminate the need to call certain vulnerable witnesses.

3. CONCLUSION: THE IMPACT OF ACCC ENFORCEMENT ACTION IN UNCONSCIONABLE CONDUCT CASES

In the period under study, the ACCC certainly demonstrated its willingness to take enforcement action in relation to unconscionable conduct. The ACCC has, through its enforcement activity, succeeded in raising awareness of the prohibition against unconscionable conduct, and its role in enforcing those provisions. However, the ACCC did not have much success in actually winning unconscionable conduct cases. Therefore it has made a limited contribution to developing the law on unconscionable conduct and sending out a clear message about what amounts to acceptable or unacceptable business conduct in this area. Moreover, the ACCC has been criticized in relation to some unconscionable conduct cases for commencing cases too quickly, for not giving alleged offenders an adequate chance to put their point of view, and for refusing to negotiate settlements or mediate cases in certain circumstances – all criticisms that might undermine the perceived legitimacy of the ACCC’s enforcement activity. These failures could ultimately lead to failure to achieve deep change in business culture because the ACCC will not have been able to clarify what kinds of conduct are unconscionable or to secure the cooperation of a suspicious community that considers the ACCC to be more political than regulatory.

There is evidence that the ACCC’s activities have had an effect on the advice that lawyers give their clients in relation to unconscionable conduct, and therefore on business clients’ behaviour. Consider for example the following quote from a senior trade practices lawyer:

I often act for [named two very large, well-known Australian companies] and they often get met with unconscionable conduct, and often we’ll be asked to review documents and terms and conditions... [They] often had to look at things and ask whether it was unconscionable conduct, so it has definitely affected their behaviour... I don’t think there’s any doubt that its affected behaviour because it is always pleaded and you can bet your bottom dollar that lawyers are advising clients.¹⁹⁴

However, it is important to note that legal advice will only have an impact on those businesses (usually larger, better resourced businesses) that regularly take

¹⁹⁴ Interview of 04-002 by Michelle Sharpe, 28 February 2006.

legal advice. Businesses who rarely or never use a lawyer are less likely to have been influenced by the ACCC's enforcement action in unconscionable conduct cases.

There is some evidence of business behaviour being directly influenced by the ACCC's enforcement action in unconscionable conduct cases, especially those businesses that were the targets of the enforcement action, or were close to those that were targets. For example, bank behaviour changed as a result of the two-tier marketing case. And of course, some cases have led some businesses and business people who were alleged to have been engaging in unconscionable conduct out of business, or at least into other jurisdictions.

However, there is more evidence of less formal and coercive regulatory activity further down the pyramid having more of an impact on business behaviour in relation to unconscionable conduct than the ACCC's enforcement proceedings. For example, it is widely believed that the Franchising Code of Conduct has been relatively successful in improving conduct in that industry. Consider the following comments by an industry leader in franchising on the industry's change of attitude and behaviour, albeit a grudging change:

After the initial pushback [industry opposing the introduction of a mandatory franchising code], we have seen the maturing of the sector where they in fact embrace the Code. They don't do it openly but what it has done has forced them to adopt clearer compliance rules so much so that franchisees comply more effectively to their [franchisors'] operations and also the reporting processes and they now spend more time on recruitment ... - the type of person they are bringing into the sector. So what this has meant is that the whole sector has improved and so it has become a more recognized sector for small business now.¹⁹⁵

We also saw in relation to retail leasing that it was believed by interviewees that the relatively new small business regulators introduced by state governments have been more effective than the ACCC at actually changing business behaviour because of their more proactive, approachable role in resolving disputes.

However, it is somewhat unfair to criticize the ACCC for failing to play the same dispute resolution role as the small business regulators. Ultimately it must be the role of the ACCC, as the federal enforcement agency for the TPA, to enforce the unconscionable conduct provisions through litigation where necessary. Previous research published as part of the *ACCC Enforcement and Compliance Project* has demonstrated that voluntary codes and other compliance education activities have worked most successfully to improve compliance with the TPA where they were first initiated because of ACCC enforcement activity, where the ACCC has played an ongoing role in monitoring their effectiveness, and where there has been a credible threat of enforcement litigation by the ACCC if voluntary compliance fails.¹⁹⁶

¹⁹⁵ Interview of 05-006 by Michelle Sharpe, 21 February 2006.

¹⁹⁶ See Christine Parker et al above n 35.

The ACCC's role in administering the Franchising Code of Conduct is probably a good example of this. The Code states that parties should first try to resolve disputes directly with each other and then use mediation to attempt to resolve the dispute. Therefore when parties make complaints to the ACCC, the ACCC generally refers them first to direct negotiation and then to compulsory mediation. It is the role of the separate Office of the Mediation Advisor to assess complaints and appoint a third party mediator. It is only where a dispute involves illegal conduct and cannot be resolved through mediation that the ACCC will become involved. It can do so either by enforcing the code (which has the status of law as a mandatory code) or by taking action under the TPA. It is clearly very important that the ACCC be seen as being ready, willing and able to take enforcement action where a party is abusing its power or acting unconscionably, otherwise the whole Code and mediation system could easily be abused.

In other words, the ACCC bears ultimate responsibility for making sure that there is a credible threat of enforcement action at the tip of the pyramid in order to facilitate the successful operation of the lower levels of the pyramid. However, the ACCC has faced two problems in fulfilling this role in relation to unconscionable conduct: First, its lack of success on the merits in unconscionable conduct cases and secondly, criticisms that it has been too quick in its decision to escalate matters to the top of the pyramid without adequately hearing the other side of the case, or allowing for the possibility of settlement. We deal with these two criticisms, and the ways the ACCC might address them, in turn below.

First, it is true that the ACCC has not had a great deal of success in winning unconscionable conduct cases on the merits (that is, where the cases have gone to a full hearing and been decided by the court). The ten case studies examined here included the only three cases where the ACCC has won on the merits after a full hearing in unconscionable conduct cases – Simply No Knead, the Horse-Race Betting Software case and Lux. The ACCC was also partially successful against some defendants in the Two-Tier Marketing Case, but unsuccessful in other claims. It was unsuccessful at trial in the Radio Rentals and the Lunch Bar cases and also, on appeal in Farrington Fayre. The other three cases were settled without opportunity for the court to decide their merits. Overall, as mentioned in the introduction, seventeen of the thirty cases brought by the ACCC that have included unconscionable conduct allegations have been settled, rather than won after a trial.

It is true, as the ACCC has pointed out, that even an ACCC enforcement action that ultimately fails can be an important test case that clarifies the law, and therefore helps business understand their compliance obligations under the TPA. Nevertheless, we have seen that in some losing cases, the ACCC might have put forward a different theory for their case that may have been more successful, or at least have allowed the court to develop and elucidate the law better than the relatively conservative way in which it was argued. Where the ACCC settles cases, of course, it means that there is no opportunity for this development to occur at all (although of course there are other good reasons for settlement, which we will refer to below).

It is easy to criticize the way a case has been framed in hindsight. But the ACCC's failures in court with its unconscionable conduct cases do raise the question of whether the impact of ACCC action might have been improved by involving more experienced and creative lawyers (possibly external senior counsel) much earlier in the investigation and development of the unconscionable conduct cases. This might have ensured that as the case was developed and facts were gathered, the case was conceptualized in a more legally robust way, with a range of legal arguments available to the ACCC. Among the lawyer interviewees there was some criticism that the ACCC had involved external legal advisors in the process much too late for them to make a significant difference to the way the case was argued, and that this had hindered counsel's ability to argue the ACCC's case in a winning way. Involving senior counsel (or other very experienced and capable lawyers) earlier on might also have meant that the ACCC abandoned less substantiated claims earlier. This would address some of the criticisms of the ACCC's fairness in the way it has investigated unconscionable conduct cases and decided whether to issue proceedings or not. We turn now to this criticism.

Second, the ACCC has been criticized for being overly enthusiastic to commence proceedings against certain parties or to make some claims that were not supported by the evidence available or were otherwise frivolous. It has also been suggested that the ACCC has in some cases refused to give the alleged offending party an opportunity to answer to complaint before a decision has been made to commence legal proceedings. These criticisms occurred not only in relation to unconscionable conduct cases, but across a range of the ACCC's enforcement activities in the period under study.¹⁹⁷ For example, Karen Yeung examined the way the ACCC has used publicity in enforcement proceedings (which had attracted criticism in the period covered by this study) and whether it was against the ethics of procedural fairness expected of public prosecutors in criminal cases. She concluded that:

The Commission's media strategy has a Janus-like quality. Viewed from the perspective of regulatory effectiveness, the Commission's proactive media usage has contributed to its credibility as a powerful, proactive regulator, vigorously endeavoring to protect competition and the interests of consumers. But viewed from the perspective of constitutional principle, its pursuit of publicity may have a tendency to undermine its credibility as an even-handed law enforcement agency committed to ensuring that those at risk of violating the TPA are fairly treated.¹⁹⁸

¹⁹⁷ Other publications that have come out of the ACCC Enforcement and Compliance Project have examined some of these criticisms: see for example Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable undertakings' (2004) 67 *Modern Law Review* 209; Parker 'The Compliance Trap' above n 116. Further analysis of the quantitative data from the survey conducted as part of this research will be able to establish how widely held are these views in the business community and what impact they are likely to have on business attitudes towards compliance. For a preliminary analysis of the quantitative survey data, see Vibeke Nielsen and Christine Parker, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings* (2005).

¹⁹⁸ Karen Yeung, 'Does the Australian Competition and Consumer Commission Engage in "Trial by Media"?' (2005) 27 *Law & Policy* 549, 574.

If it is true, as some of the interviewees and newspaper reports quoted above suggested, that the ACCC had commenced proceedings before hearing the alleged offenders' point of view, this certainly would detract from the fairness of the ACCC's decision-making about issuing proceedings, as the ACCC may not have the full story before deciding to issue proceedings. It is also likely to make business and their lawyers more suspicious and less cooperative with the ACCC. On the other hand, it must be recognized that in some circumstances an uncooperative or intentionally dishonest business person may not wish to cooperate with the ACCC's investigation and may not even take seriously the ACCC's investigation until proceedings have been issued. There may also be circumstances where there are reasonable grounds for believing that the harm being caused to victims of the alleged offenders' conduct is so great that the ACCC should take immediate steps to get an injunction to stop it. However, in the ordinary course of an investigation, the ACCC should take every opportunity to hear the alleged offender's point of view.

The more difficult problem for the ACCC to address is the extent to which it should engage in negotiation with the other side to try to settle matters before issuing proceedings and the extent to which mediation and settlement negotiations are appropriate after issuing proceedings. As we have seen, the ACCC has been criticized for not providing enough opportunities for business to negotiate a settlement of potential enforcement proceedings before proceedings are issued, for refusing to negotiate at all unless the alleged offender admits liability and for arguing that it should not be ordered by the court to participate in mediation. There is always likely to be a tension between an enforcement agency's desire to try to negotiate a solution to alleged misconduct that will give victims a remedy and prevent the problem recurring on the one hand, and the desire to prosecute so that the facts and applicable law are authoritatively determined by a court. On the one hand, a negotiated settlement will often solve the problems in the particular case better than court orders as well as saving time, money and anguish for both the regulator and the alleged offender.

But on the other hand, using negotiated settlements all the time means that case law is not developed, and there are no authoritative determinations as to what the law means and how it applies to business conduct. It is also difficult for the enforcement agency to use a case where there has been a negotiated settlement as an example to other business or as a deterrent threat. Because settled cases have not been decided in court, the business involved might say that they do not agree that their conduct was actually illegal. Negotiated settlements also leave enforcement agencies open to the criticism that they may have abused their discretion and 'bullied' businesses into the settlement, in comparison to a court finding that the alleged offence occurred after the merits have been fully argued.¹⁹⁹

Yet, where an enforcement agency issues proceedings too frequently and refuses to settle, this too can be seen as bullying behaviour. One former ACCC Commissioner has pointed out that an enforcement agency with a strong culture

¹⁹⁹ See Justin O'Brien, 'Securing Corporate Accountability or Bypassing Justice? The Efficacy and Pitfalls of Pre-trial Diversion' (2006) 19 *Australian Journal of Corporate Law* 161; see also Parker, 'The Compliance Trap' above n 116.

and shared belief among staff that it is doing the right thing can sometimes lead to problems:

Although a strong culture – i.e. one in which staff share values – is usually a strength, it can be dangerous if it leads to groupthink, where everyone in the organisation approaches issues in such a similar manner that changes in the external environment, and possible new and better ways of doing things, are ignored. Again, awareness of this risk needs to be imbued in the top leadership of the organisation without disturbing the commitment of the staff more generally.

For example, it is useful for agency staff to believe strongly in the rightness of what they do, to be determined to stamp out anti-competitive behaviour and to pursue wrong-doers vigorously. This can often lead to a sceptical [sic] and aggressive approach to businesses being investigated for breaching the competition laws. This is all right if not taken to extremes, manifesting itself in gratuitous rudeness or even bullying of firms. It is up to the agency's senior management to encourage such determination and commitment while maintaining their own open-mindedness and being receptive to other points of view than those commonly expressed internally.²⁰⁰

Deciding how to choose when a regulatory agency should use negotiated settlements and when to take enforcement proceedings in court is a problem that deserves further scholarly research and discussion amongst lawyers, business people and regulators. However, we can say that it is quite possible, and desirable, for the ACCC to negotiate (before proceedings are issued), and/or participate in mediation (after proceedings are issued), with alleged offenders consistently with its public enforcement role.

The ACCC, for example, could consider negotiating or mediating with the alleged offending party without the precondition that the party first make admissions of liability. This could be done on the basis that the negotiation or mediation may not necessarily resolve all issues of liability, but it may allow the ACCC to reach some agreement with the party about facts or issues that may shorten the time and cost of the investigation or hearing. This also demonstrates to the party and larger community that the ACCC is fair in listening to the other side's point of view, and is prepared to engage in meaningful dialogue with a party. This in no way compromises the ACCC's public interest function because the process does not require the ACCC to bargain away liability under the TPA, if it considers such liability to truly exist.

Finally, although the ACCC has produced several publications on unconscionable conduct, people interviewed for this paper suggested that much of this material has not been helpful in clarifying for the community what kinds of conduct are unconscionable. For example, most of this material is based on case studies that offer little guidance. One interviewee suggested that an operational guideline in

²⁰⁰ Rod Shogren, 'Implementing an Effective Competition Policy: Skills and Synergies.' Paper presented at The 28th Trade and Development Conference 'Competition Policy in the New Millennium', Manila, 2002 at 15.

which the ACCC identify what they think unconscionable conduct is and the kind of conduct they will investigate might be more helpful.

In fact, if the ACCC did produce a very detailed operational guideline on what conduct it believes amounts to unconscionable conduct, it would probably be heavily criticized (rightly) for trying to make its own law. The lack of case law means that the unconscionable conduct provisions are so uncertain that the ACCC cannot simply impose its own view of what the law should be through ‘guidelines’ or any other means. However, there is another more legitimate mechanism available for addressing the problem of specific guidance to industry on what is and is not unconscionable conduct.²⁰¹ That is the use of voluntary codes of conduct developed jointly by industry with consumer groups and regulatory oversight. If necessary in particular problem areas, as in the case of the Franchising Code of Conduct, there is also the possibility for mandatory codes under the TPA which can be developed using transparent, accountable processes very similar to delegated legislation. With codes, the ACCC could play a role in facilitating voluntary compliance without illegitimately imposing its view of unconscionable conduct. As we have seen, these codes also generally make provision for mediation and resolution of complaints and disputes between businesses, or between business and consumers. But the ACCC also plays a role in overseeing and reviewing the way they work and in being available to take enforcement action in relation to disputes that raise real issue of potentially illegal conduct.

²⁰¹ Of course more case law would also be helpful.