Finding a balance

Towards fair trading in Australia

Report by the House of Representatives Standing Committee on Industry, Science and Technology

May 1997
Terms of reference

1. The Committee is asked to investigate and report on:
   - the major business conduct issues arising out of commercial dealings between firms including, but not limited to, franchising and retail tenancy;
   - the economic and social implications of the major business conduct issues particularly whether certain commercial practices might lead to sub-optimal economic outcomes.

2. The Committee is asked to examine whether the impact of the business conduct issues it identifies is sufficient to justify Government action taking into account, but not limited to:
   - existing State and Commonwealth legislative protections;
   - existing common law protections;
   - overseas developments in the regulation of business conduct.

3. The Committee is asked to examine options and make recommendations on strategies to address business conduct issues arising out of dealings between firms in commercial relationships, taking into account, but not limited to:
   - the potential application of voluntary codes of conduct, industry self-regulation and dispute resolution mechanisms, including alternatives to legislation and court-based remedies, and mechanisms to support these measures;
   - legislative remedies.

4. In developing options, the Committee will seek to ensure certainty in the market place, contract dealings and other commercial transactions, minimise the regulatory burden on business, and keep litigation and costs to a minimum.

Received from the Hon. Geoff Prosser MP
Minister for Small Business and Consumer Affairs
(26 June 1996)
Membership of the Committee

38th Parliament

Chair:

The Hon Bruce Reid MP (to 12 September 1996 and from 6 February 1997)

Deputy Chair:

The Hon David Beddall MP

Other Members:

Mrs Fran Bailey MP
Mr Bob Baldwin MP
Mr Russel Broadbent MP (to 9 October 1996)
The Hon Martyn Evans MP
Mr Richard Evans MP  (Chair from 12 September 1996 to 6 February 1997)
Mr John Forrest MP
Ms Teresa Gambaro MP
Mr Harry Jenkins MP
Mrs Ricky Johnston MP (from 9 October 1996)
Mr Allan Morris MP
Mr Peter Nugent MP
Mr Gavan O’Connor MP
Mr Paul Zammit MP

Secretariat:

Mr Paul McMahon Secretary
Mr Lee Boldeman Adviser (courtesy Department of Industry, Science & Tourism)
Ms Gillian Gould Inquiry Secretary (to 30 November 1996)
Ms Susan Johnston Inquiry Secretary (from 1 December 1996)
Ms Frances Wilson Administrative Officer
Foreword

It is widely recognised that small business plays a vital role in the Australian economy. The recent statement by the Prime Minister, the Hon John Howard MP, *More Time for Business*, described small business as the engine room of the Australian economy, a vital source of enterprise, innovation and jobs. There are nearly 900,000 small businesses in Australia, employing almost 50 per cent of the workforce.

Because it plays such a vital role, small business is a top priority for the Government. In particular the Government has committed itself to listen to the concerns of small business, to address those concerns and to subject its policies to a process of continuous improvement.

Unfair conduct by big business towards small business is one such major concern. Indeed, it has been a matter of grave concern for many years. Not only has such conduct the potential to impact heavily on the economic health of the small business sector, and on the allocation of resources generally, it can also involve heavy social costs. Consequently, the Minister for Small Business, the Hon. Geoff Prosser MP, asked the House of Representatives Standing Committee on Industry, Science and Technology to investigate and report on business conduct on 26 June 1996.

After a detailed investigation the Committee has concluded that concerns about unfair business conduct towards small business are justified, and should be addressed urgently. In an endeavour to find a balance towards fair trading in Australia, the Committee has recommended a number of specific measures, including legislation, to induce behavioural change on the part of big business towards smaller business, and to provide unfairly treated small businesses with adequate means of redress. These proposals will provide small business with a fair deal.

I wish to thank the many business groups, property managers, small business operators and interested individuals who recognised there are problems and who provided written submissions and oral evidence at public hearings. For some small business witnesses, providing such evidence revived many painful memories. They are to be commended for their public spirit.

Finally, I would like to thank the Department of Industry, Science and Tourism for releasing Mr Lee Boldeman, a senior officer of the Department with particular interest and expertise in the regulation of unfair business conduct, to advise the Committee throughout this inquiry.

The Hon Bruce Reid MP
Chair
May 1997
# Table of contents

Terms of reference  iii
Membership of the committee  v
Foreword  vii
Abbreviations  xiii
Recommendations  xv

## 1 INTRODUCTION

**BUSINESS CONDUCT ISSUES**  1

**SMALL BUSINESS IN AUSTRALIA**  2

**SOCIAL AND ECONOMIC IMPLICATIONS**  3

- **SOCIAL OUTCOMES**  3
- **ECONOMIC OUTCOMES**  6
  - Economic efficiency and fairness  7

**OPTIONS AND STRATEGIES TO ADDRESS BUSINESS CONDUCT ISSUES**  11

## 2 RETAIL TENANCY

**INTRODUCTION**  15

- **OVERVIEW OF THE EVIDENCE**  15
- **TRENDS IN RETAIL TENANCY ENVIRONMENT**  17

**EXISTING LEGISLATIVE PROTECTION FOR RETAIL TENANTS**  22

- State and Territory retail tenancy legislation  22
- Gaps in State and Territory retail tenancy legislation  22
- Uniform retail tenancy legislation  24

**Remedies for retail tenants in the Trade Practices Act**  26

- Dispute resolution mechanisms  27
- Best practice dispute resolution  30

**SPECIFIC BUSINESS CONDUCT ISSUES**  32

- Committee’s approach  32

**SECURITY OF TENURE FOR RETAIL TENANTS**  33

- Issues raised  33
- Goodwill  35
- Options and recommendations  37
- Lease assignment  40

**RENT**  43

- Is retail property overvalued?  44
- Should rental information be more readily available?  47
- Why is there gross disparity in rents paid in shopping centres?  48
- Should specialty retailers pay turnover rent?  49
- Are market rent reviews fair?  52
- Are sitting tenants ‘sitting ducks’?  55

Conclusions and recommendations  56
4 MISUSE OF MARKET POWER

ABUSE OF POWER BY CUSTOMERS, SUPPLIERS AND COMPETITORS 121
PRICE DISCRIMINATION 122
PREDATORY PRICING 125
EXERCISE OF MARKET POWER 128
  FILM DISTRIBUTION 128
  ROOFTILING INDUSTRY 129
  RETAILING 130
LEGISLATIVE PROTECTION AGAINST THE MISUSE OF MARKET POWER 131
  SECTION 46 OF THE TRADE PRACTICES ACT 131
  OPTIONS FOR STRENGTHENING SECTION 46 132
  ‘Effect’ test vs the ‘purpose’ test 132
  Representative actions 132
  ACCC’s litigation profile 134
  HARSH OR UNCONSCIONABLE CONDUCT 135

5 SMALL BUSINESS FINANCE

INTRODUCTION 137
  NATURE OF COMPLAINTS TO THE FAIR TRADING INQUIRY 137
  FINANCIAL SYSTEM INQUIRY (THE WALLIS INQUIRY) 137
    Wallis findings on small business finance 138
    Wallis recommendations on client protection 139
MAJOR CATEGORIES OF DISPUTES WITH BANKS 140
  PRE-CONTRACT AND ONGOING DISCLOSURE 140
  ACCESS TO ACCOUNT INFORMATION 142
  FAILURE OF BANKS AND FINANCE COMPANIES TO FULFIL OBLIGATIONS TO CLIENTS 143
  FORECLOSURE AND MORTGAGEE SALES 144
  CLIENT CONFIDENTIALITY 148
  HANDLING OF DISPUTES 149
  SECURITY FOR SMALL BUSINESS FINANCE 149
EXISTING LEGISLATIVE PROTECTION 152
  OPTIONS FOR CHANGE 153
    Code of Banking Practice and the Australian Banking Industry Ombudsman 153

6 LEGISLATIVE PROTECTION AGAINST UNFAIR CONDUCT 157

COMMON FEATURES OF UNFAIR CONDUCT 157
THE CONCEPT OF ‘UNCONSCIONABLE CONDUCT’ 158
EXISTING UNCONSCIONABILITY PROVISIONS OF THE TRADE PRACTICES ACT 161
  MISLEADING CONDUCT 166
CONCERNS WHICH HAVE HINDRITED EARLIER ACTION 166
  FREEDOM TO CONTRACT 167
  UNCERTAINTY 168
RELEVANT AUSTRALIAN EXPERIENCE 171
RELEVANT OVERSEAS EXPERIENCE 173
OPTIONS 176
  OTHER PROPOSALS FOR AMENDMENT TO THE TRADE PRACTICES ACT 183
7 ACCESS TO JUSTICE AND EDUCATION 185

INTRODUCTION 185
ALTERNATIVE DISPUTE RESOLUTION 186
EDUCATION 188

MINORITY REPORT 193

APPENDICES

APPENDIX I  CONDUCT OF THE INQUIRY 197
APPENDIX II  LIST OF SUBMISSIONS 199
APPENDIX III  LIST OF EXHIBITS 211
APPENDIX IV  WITNESSES AT PUBLIC HEARINGS 237
APPENDIX V  PREVIOUS REPORTS DEALING WITH UNFAIR BUSINESS CONDUCT 247
APPENDIX VI  RETAIL TENANCY LEGISLATION 285
APPENDIX VII  UNCONSCIONABLE CONDUCT PROVISIONS IN THE TRADE PRACTICES ACT 1974 303
Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AADA</td>
<td>Australian Automobile Dealers Association</td>
</tr>
<tr>
<td>ABA</td>
<td>Australian Bankers’ Association</td>
</tr>
<tr>
<td>ABS</td>
<td>Australian Bureau of Statistics</td>
</tr>
<tr>
<td>ACCC</td>
<td>Australian Competition and Consumer Commission</td>
</tr>
<tr>
<td>ACCI</td>
<td>Australian Chamber of Commerce and Industry</td>
</tr>
<tr>
<td>ACT</td>
<td>Australian Capital Territory</td>
</tr>
<tr>
<td>AIP</td>
<td>Australian Institute of Petroleum</td>
</tr>
<tr>
<td>AMP</td>
<td>AMP Shopping Centres Pty Ltd</td>
</tr>
<tr>
<td>ANZ</td>
<td>Australia and New Zealand Banking Group Limited</td>
</tr>
<tr>
<td>APADA</td>
<td>Australian Petroleum Agents &amp; Distributors Association</td>
</tr>
<tr>
<td>BCA</td>
<td>Business Council of Australia</td>
</tr>
<tr>
<td>COSBOA</td>
<td>Council of Small Business Organisations of Australia</td>
</tr>
<tr>
<td>CPI</td>
<td>Consumer Price Index</td>
</tr>
<tr>
<td>EIEA</td>
<td>Entertainment Industry Employers Association</td>
</tr>
<tr>
<td>FAANZ</td>
<td>Franchise Association of Australia &amp; New Zealand</td>
</tr>
<tr>
<td>FCAI</td>
<td>Federal Chamber of Automotive Industries</td>
</tr>
<tr>
<td>GLA</td>
<td>gross lettable area</td>
</tr>
<tr>
<td>IST Committee</td>
<td>Standing Committee on Industry, Science and Technology</td>
</tr>
<tr>
<td>Lend Lease</td>
<td>Lend Lease Property Management (Australia) Pty Limited</td>
</tr>
<tr>
<td>MTAA</td>
<td>Motor Trades Association of Australia</td>
</tr>
<tr>
<td>NSW</td>
<td>New South Wales</td>
</tr>
<tr>
<td>SA</td>
<td>South Australia</td>
</tr>
<tr>
<td>SMEs</td>
<td>Small and Medium size Enterprises</td>
</tr>
<tr>
<td>UCC</td>
<td>Uniform Commercial Code</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>US</td>
<td>United States of America</td>
</tr>
<tr>
<td>VECCI</td>
<td>Victorian Employers’ Chamber of Commerce and Industry</td>
</tr>
<tr>
<td>WA</td>
<td>Western Australia/West Australian</td>
</tr>
<tr>
<td>Westfield</td>
<td>Westfield Shopping Centre Management Co. Ltd</td>
</tr>
</tbody>
</table>