

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates 3-5 June 2008

Question: bet 2

Topic: Australian Competition and Consumer Commission

Hansard Page: Written

Senator Siewert asked:

1. Have the Australian Competition and Consumer Commission (ACCC) taken any administrative or court actions (under Section 51AC of the Trade Practices Act (TPA)) against a party that has engaged in unconscionable conduct since 1998?
2. If so, can the Minister provide the details of such actions?
3. Can the Minister provide details of any successful actions taken by private parties under section 51AC of the TPA?
4. Does the ACCC currently have a full time commissioner with special responsibilities for small business and if so, who are they?
5. I refer to a statement by the ACCC in their 1998 submission to the Joint Select Committee on Retailing Sector:

“...the likelihood of establishing a breach of s.46 (of the TPA) critically rests, in terms of relevant facts and evidence. However, establishing anti-competitive purpose has proved to be very difficult in practice. For instance, to prove that the predatory nature of acquisitions breaches section 46, it would need to be demonstrated that prices paid in acquiring the independents were only rational in light of some longer term strategy to capture market share and then harm competitors by reducing competition in the expectation of future profits in excess of current opportunity cost/losses.” (p118 Volume 6)

Have the ACCC ever gone back to check what the longer term outcomes were some time after decisions have been made to permit “chequebook competition” to enable better judgement for such future cases? If not, why not?

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Answers:

1. Have the Australian Competition and Consumer Commission (ACCC) taken any administrative or court actions (under Section 51AC of the Trade Practices Act (TPA)) against a party that has engaged in unconscionable conduct since 1998?

Since 1998, the ACCC has instituted seventeen proceedings before the court under section 51AC. In addition to these, a further two matters have been resolved by traders providing enforceable undertakings to the ACCC.

Four were decided by the courts after contested hearings:

- ACCC v Simply No Knead (1999-2000)
- ACCC v Oceana Commercial Pty Ltd & Ors (including the Commonwealth Bank of Australia) (2001-2004)
- ACCC v 4WD Systems Australia Pty Ltd (2001-2003)
- ACCC v Dataline & Ors (2002-2006)

Eleven were settled by orders of the court by consent of the parties

- ACCC v Leelee Pty Ltd (1998-2000)
- ACCC v Cheap as Chips Pty Ltd (1998-2003)
- ACCC v Daewoo Heavy Industries (1999-2003)
- ACCC v Moore Talk Communications Pty Ltd (1999-2004)
- ACCC v Avanti Investments (2000-2003)
- ACCC v Arnold's Ribs and Pizza (Australia) Pty Ltd (2000-2004)
- ACCC v Australian Industries Group Pty Ltd trading as Half Price Shutters (2000-2005)
- ACCC v Suffolke Parke Pty Ltd (Cheesecake Shop) (2001-2002)
- ACCC v Kwik Fix International (2001-2004)
- ACCC v Solutions Software International Pty Ltd and others ACEPARK (1999-2002)
- ACCC v BIS Cleanaway Pty Ltd (2002-2006)

One was settled administratively:

- ACCC v Westfield Shopping Centre Management Co (QLD) Indooroopilly (2001-2004)

One is still before the court:

- ACCC v Allphones Retail Pty Ltd (2008)

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Two were resolved by enforceable undertakings, accepted pursuant to s87B of the *Trade Practices Act*:

- Scotty's Premium Pet Foods Franchising Pty Ltd (2006)
- Medibank Private Limited (2001)

2. If so, can the Minister provide the details of such actions?

ACCC v Leelee Pty Ltd

The Court declared that Leelee, the landlord of the Adelaide International Food Plaza, engaged in unconscionable conduct towards a tenant by giving approval for another tenant to infringe on the exclusive menu entitlements conferred by Leelee on the tenant; and specifying the price at which the tenant sold their food dishes in a manner which unfairly discriminated against, or inhibited, the tenant's ability to determine the prices at which its dishes were sold in competition with another tenant.

ACCC v Simply No Knead

The ACCC alleged that Simply No Knead (SNK), the franchisor, acted unconscionably towards franchisees by refusing to deliver products to several franchises; deleting franchisees' phone numbers from Telstra's Directory Assistance; refusing to negotiate matters in dispute; omitting the names of the franchisees and their businesses from advertising and promotional material; selling its products in the territories of the franchisees and refusing to provide current disclosure documents to several franchisees in response to written requests.

The ACCC also alleged that the conduct caused the franchisees to terminate, or not renew their franchise agreements. The court concluded that the conduct by SNK disclosed 'an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour' against five franchisees that amounted to unconscionable conduct for the purposes of s.51AC.

ACCC v Cheap as Chips Pty Ltd

The Court declared that Cheap As Chips Franchising Pty Ltd (CAC) and its director engaged in unconscionable conduct by terminating a franchise over a dispute about a payment; threatening to terminate franchisees rather than negotiating disputes about issues such as monies owed, attending seminars unrelated to carpet cleaning and associating with other franchisees; refusing to allocate cleaning jobs to franchisees; ("suspending") franchisees rather than negotiating disputes about issues such as the distribution of promotional leaflets and the quantities of chemicals and equipment to

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be carried in franchisees' vans and unreasonably refusing franchisees access to records in order to verify that all payments to which the franchisees were entitled had been paid to them

The court granted declarations by consent against CAC and its director, that it engaged in unconscionable conduct in its dealings with three of its franchisees and ordered that they pay \$82,000 in compensation to the franchisees.

ACCC v Daewoo Heavy Industries

The court found, by consent, that Daewoo Australia entered into an agreement with Porter Crane Imports having caused them to falsely believe they would be the only Queensland dealer for the term of the agreement, that they would have an option to renew and that it would be ongoing and long term. Daewoo then appointed another company to be its distributor in Queensland, supplied the second company with machines at lower cost, and refused to supply Porter Crane with machinery.

The court declared that Daewoo Australia, by entering into the agreement with Porter Crane having failed to disclose its actual intentions, engaged in misleading and unconscionable conduct. The court separately declared that Daewoo Australia also engaged in misleading and unconscionable conduct by appointing (and giving effect to its agreement with) the second company.

ACCC v Avanti Investments

The ACCC alleged that Avanti entered into agreements with two farmers to lease land with no limitation on the bore water and were to run for eight years. This land was later sub-let to five other farmers with unlimited use of the water available. These market gardeners invested considerable resources into working the land.

Avanti then unlawfully claimed a right to break and vary the leases, and made the farmers sign new leases which each time reduced the amount of water available, telling the farmers the leases were the same as the original lease except for the rent and the terms. Avanti sold a significant proportion of the water allocated to the bore with the result that the farmers would incur excess water charges. The lease variation also meant that the farmers had to pay increased taxes.

The court declared that Avanti had engaged in unconscionable conduct, engaged in misleading or deceptive conduct and made false or misleading representations about the land leased by the farmers.

ACCC v Arnold's Ribs and Pizza (Australia) Pty Ltd

The ACCC alleged that the franchisor of Arnolds Ribs and Pizza engaged in misleading, deceptive or unconscionable conduct in promotion of its franchised fast

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food business, especially in regards to the profitability of the business, the support provided, the costs and the experience needed to run the business.

The Court declared, by consent, that the Arnolds franchisor and the individual owners of the franchise had engaged in unconscionable conduct, and ordered Arnolds to pay \$200,000 to the affected franchisees.

ACCC v Oceana Commercial Pty Ltd & Ors (including the Commonwealth Bank of Australia)

The ACCC alleged misleading or deceptive conduct against a number of respondents involved in property marketing. It was alleged that marketers induced people to buy residential properties at inflated prices, comprising substantial and hidden marketing fees as well as additional profit for the developer. It was also alleged the purchasers were induced to believe that the price was the fair market value.

The purchasers sought finance for the unit from the Commonwealth Bank which in turn sought its own valuation for the property. The Bank's valuation was considerably less than the purchase price. The ACCC alleged that the Bank acted unconscionably in providing the loan despite having reason to believe that their customers had been misled.

The court did not find that the conduct was unconscionable.

ACCC v Moore Talk Communications

Moore Talk Communications operated a telemarketing campaign, asking potential customers to take part in a survey. At the completion of the survey, consumers were advised they could win a complimentary mobile phone. The consumer was then advised they were a winner and faxed through details of the phone specifications and two mobile phone access plans.

Receipt of the phone was conditional upon the consumer signing up to an access plan with a telecommunications service provider. If the consumer agreed to this, an application for mobile services was faxed through to the consumer for signature. However, the terms and conditions attaching to the supply of such a service were not provided to the consumer before signing. The court issued consent orders and Moore Talk provided a court enforceable undertaking.

ACCC v Australian Industries Group Pty Ltd trading as Half Price Shutters

The ACCC alleged that Australian Industries Group, trading as Half Price Shutters, had breached the Franchising Code of Conduct, made false representations to prospective licensees about the potential profitability of the installation businesses and acted in an unconscionable manner towards its licensees.

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The court declared that AIG engaged in unconscionable conduct, breached the Franchising Code of Conduct and made false representations about the profitability of the businesses in breach of the Act.

ACCC v Suffolk Parke Pty Ltd (Cheesecake Shop)

Suffolke Parke leased out premises to Shannon, a Cheesecake Shop franchisee. Part of the leased premises was a separate shop, which Shannon had been permitted to sublet on previous occasions. After disputes between the two, Suffolke Park refused to allow Shannon to sublet the shop, allegedly in reprisal for complaints arising from actions taken by Shannon and other franchisees concerning the conduct of the director of the master franchisee for SA.

The court issued consent orders that the franchisor, Suffolke Parke and its director had acted unconscionably toward its tenant.

ACCC v Kwik Fix International

The ACCC alleged that Kwik Fix engaged in unconscionable conduct by threatening to terminate the franchise agreement in response to queries by the franchisee; demanding the return of the van that the franchisee was using on a day's notice; refusing to supply goods to the franchisee; terminating the franchise agreement and demanding the franchisee return all goods within two business days and within five business days, pay all monies claimed to be owing. The ACCC also alleged misleading and deceptive conduct and breaches of the Franchising Code of Conduct.

To resolve the matter Kwik Fix and its directors agreed, without admissions, to repurchase the franchise and consented to court orders restraining them from engaging in conduct similar to that alleged.

ACCC v Westfield Shopping Centre Management Co (QLD) Indooroopilly

The ACCC alleged that Westfield acted unconscionably by making it a condition of the settlement of a private litigation that former tenants would sign a deed of release containing a certain clause releasing liability. Amongst other things, the clause required that the former tenants not commence, recommence or continue any action in connection with the subject matter of their private litigation, including any administrative or governmental investigation against Westfield.

The matter was settled with Westfield agreeing, without admissions, to pay an amount to the former retail tenants of a shop and providing an undertaking to the Federal Court that, in future, it will use a specific release of liability clause when entering into settlement agreements with retail tenants, thereby addressing the ACCC's concerns that the condition sought from the former tenants may have contravened section 51AC.

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ACCC v 4WD Systems Australia Pty Ltd

The ACCC alleged that 4WD Systems engaged in unconscionable conduct and misleading and deceptive conduct by refusing to deliver stock ordered by its franchisees; supplying stock which was regularly of poor quality or damaged and unable to be fitted to customer's vehicles which then required franchisees to provide refunds to their customers; refusing to provide refunds to franchisees for faulty goods; selling its products directly into the franchisee's areas and exerting undue influence, pressure and/or unfair tactics on franchisees.

The court found the franchisor had misled franchisees and contravened the Franchising Code of Conduct. The court was not satisfied that the conduct constituted unconscionable conduct under section 51AC. An ACCC application for refund of the franchise fees to franchisees was refused.

ACCC v Dataline & Ors

The court held that Dataline had engaged in unconscionable conduct in not permitting small Internet Service Providers to obtain legal advice before signing their contracts with Dataline, and threatening the ISPs with disconnection if they did not agree to sign further agreements with Dataline.

ACCC v Solutions Software International Pty Ltd and others ACEPARK

The Federal Court found, by admission, that a Gold Coast businessman, Mr Price (and a number of associated companies, including Solutions Software International Pty Ltd, Acepark Pty Ltd and Offtrack Investments Pty Ltd), misled consumers and acted unconscionably in connection with the marketing and sale of horse race betting software. The software falsely claimed to be able to predict horse-race place-getters with high accuracy. Purchasers paid up to \$12,500 for a copy of the program, having been told they could use it to earn up to \$8,000 per month.

The Court also found that Acepark Pty Ltd, through Mr Price, acted unconscionably by requiring one consumer to sign a waiver as a condition of being given a refund, following a court-enforceable undertaking given to the ACCC. The waiver purported to make the payment a full and final settlement, whereas the undertaking required the company to also compensate the consumer for amounts lost while attempting to operate the program.

ACCC v BIS Cleanaway Pty Ltd

The ACCC alleged that Cleanaway engaged in misleading, deceptive and unconscionable conduct when it visited customers and stated that the purpose of the visit was to gauge customer satisfaction, then requested the customer sign a Service Agreement form to acknowledge the visit of the agent and did not disclose that the Service Agreement would comprise a contract between the customer and Cleanaway. Cleanaway did not give the customer an opportunity to determine independently the

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nature of the Service Agreement form, and did not inquire whether the representative of the customer had authority to sign a contract on behalf of the customer.

The court declared that Cleanaway engaged in unconscionable conduct in that the conduct occurred in circumstances where unfair tactics were used, and where Cleanaway did not act in good faith. In relation to two customers, the court declared that Cleanaway's agent engaged in unconscionable conduct in insisting on the performance of the Service Agreement, informing the customer that they were not entitled to terminate the Service Agreement, and threatening legal action if they did not act in accordance with the Service Agreement.

ACCC v Allphones

The ACCC has commenced proceedings against Allphones Retail Pty Limited, alleging that the company failed to comply with *Franchising Code of Conduct* and engaged in misleading and deceptive conduct and unconscionable conduct towards its franchisees.

The ACCC alleges that Allphones implemented policies targeting classes of franchisees, forced franchisees to acquiesce to Allphones' will by threatening or engaging in a pattern of harsh conduct and failed to disclose or pay certain income to franchisees which in all the circumstances was unconscionable within the meaning of s51AC.

The ACCC is seeking a range of orders, including declarations, injunctions and costs.

Scotty's Premium Pet Foods Franchising Pty Ltd

The ACCC was concerned with Scotty's behaviour in issuing notices of breach to franchisees and threatening franchisees with the termination of franchises. The ACCC believed this behaviour may fall under the factors found in s51AC (3)(a), (b) and (g).

Scotty's offered an undertaking to withdraw any purported notices of breach and termination against its franchisees; not issue any termination notices unless the Code is complied with; nominate a contact for internal dispute resolution; and not compete with franchisees.

Medibank Private Limited

The ACCC was concerned with Medibank's behaviour in imposing a unilateral variation clause into a Hospital Purchaser Provider Agreement. The ACCC was also concerned with Medibank's behaviour in delaying negotiations. The ACCC was concerned the behaviour may fall under several of the factors found in s51AC.

Medibank offered an undertaking to remove the offending clause; refrain from using similar clauses; and implement new procedures to ensure that correspondence from

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hospitals are dealt with in a timely manner and representations made on behalf of Medibank are properly authorised.

3. Can the Minister provide details of any successful actions taken by private parties under section 51AC of the TPA?

Ninety private actions pleading section 51AC have been brought before various courts since 1998. In only three of these cases was unconscionability successfully argued, these being

- *Coggin v Telstar Finance Company (Q) Pty Ltd* [2006] FCA 191,
- *Boral Formwork v Action Makers* [2003] NSWSC 713, and
- *Automasters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286.

In *Coggin v Telstar Finance Company*, Mr Coggin used his boat worth \$210,000 as security for an advance by Telstar, a company his son-in-law was associated with, to facilitate the purchase of a franchise.

The son-in-law and his associate told Mr Coggin the franchise had been trialled successfully and showed him projections indicating a gross annual profit of \$248,200. Mr Coggin had told his son-in-law the use of the boat as collateral was conditional upon his ensuring the money was repaid and getting the boat back. The son-in-law then sold the boat for \$65,000. Mr Coggin signed two documents for the purchase of the franchise, on the understanding that the boat was being put up as collateral, however was confused by the paperwork and did not seek independent legal or business advice, in part because it was Christmas Eve.

When Mr Coggin realised what had happened, he instituted proceedings in the Federal Court, arguing Telstar had engaged in unconscionably. The Court held that Telstar had acted unconscionably within the meaning of s 51AC and that its director was directly and knowingly concerned in Telstar's contravention.

Boral Formwork v Action Makers involved a supply agreement, under which Action Makers Ltd was to manufacture and supply to Boral Formwork & Scaffolding Pty Ltd a quantity of scaffolding equipment. The supply agreement also required that Boral provide an irrevocable standby letter of credit to the value of each order and a number of conditions governing processes for warranty claims, return of the equipment and other payment processes. Some time after entering into the agreement, joint administrative receivers were appointed to Action Makers Ltd.

Boral considered 18 containers of equipment it received from Action were defective and so wrote to Action's administrative receivers, setting out the particulars of the defects and proposing that Boral would rectify them, then deduct the cost of rectification from the price Boral would pay. Two weeks later, Boral advised the administrative receivers of the extent and cost of the rectification work. The administrative receivers did not respond to these communications for almost two

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months then made a demand for payment of the full amount of the invoices rendered from Action Makers to Boral and made a demand for payment upon the bank that was drawee on the letter of credit. One of the administrative receivers provided a certificate that stated that the amount claimed represented funds due to be paid by Boral and that a demand for those funds remained unsatisfied.

Boral then sought an undertaking that rights under the letter of credit would not be exercised and proposed settlement amounts of the matter, but both proposals were rejected. At this point, Boral sought interlocutory and then final relief to prevent the bank acting on the administrative receivers' demand on the letter of credit. Boral contended that in calling for payment of the invoice amount and supplying the certificate in accordance with the letter of credit, Action Makers (by its administrative receivers) engaged in unconscionable conduct contrary to sections 51AA or 51AC.

The Court found that "Boral is entitled to declaratory orders under s 51AC that, in calling on payment under the letter of credit in a sum greater than the Undisputed Amount, Action Makers by the administrative receivers is engaging in conduct that is in all the circumstances unconscionable. It has also established its entitlement to final orders requiring Action Makers by the administrative receivers to countermand the demand for payment of the Disputed Amount under the letter of credit, and restraining it from making any further demands under the instrument."

In *Auto Masters Australia Pty Ltd v Bruness Pty Ltd*, Auto Masters (franchisor) instituted proceedings against Bruness (franchisee) for breach of their franchising agreement. Bruness counterclaims that Auto Masters had engaged in unconscionable conduct in their dealings with Bruness (as well as a breach of the Franchising Code of Conduct).

The court held that in seeking to terminate the franchise, Auto Masters was not acting in a way that was reasonably necessary to protect their own business, and that would result in severe detriment to Bruness. Furthermore, it was found that Auto Masters did not comply with the Franchising Code of Conduct in refusing to attend mediation, that Auto Masters did not act in good faith and that Bruness acted on a reasonable belief that Auto Masters would comply with the Franchising Code of Conduct.

The decision in relation to good faith was a major part of the judgment as there was an express term in the franchise agreement that both parties would act in good faith.

4. Does the ACCC currently have a full time commissioner with special responsibilities for small business and if so, who are they?

Commissioner John Martin was appointed as commissioner of the ACCC in June 1999 with special responsibilities for small business related matters. Michael Schaper has also been appointed as the Deputy Chair of the ACCC with special responsibilities for small business related matters in July 2008.

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5. I refer to a statement by the ACCC in their 1998 submission to the Joint Select Committee on Retailing Sector:

“...the likelihood of establishing a breach of s.46 (of the TPA) critically rests, in terms of relevant facts and evidence. However, establishing anti-competitive purpose has proved to be very difficult in practice. For instance, to prove that the predatory nature of acquisitions breaches section 46, it would need to be demonstrated that prices paid in acquiring the independents were only rational in light of some longer term strategy to capture market share and then harm competitors by reducing competition in the expectation of future profits in excess of current opportunity cost/losses.” (p118 Volume 6)

Have the ACCC ever gone back to check what the longer term outcomes were some time after decisions have been made to permit “chequebook competition” to enable better judgement for such future cases? If not, why not?

The ACCC is not entirely clear what is meant by the reference to "chequebook competition". Nor does the ACCC accept the proposition in this question that there is a need for "better judgment for future cases". The quote from the ACCC's 1998 submission does not conclude that a predatory acquisition of an independent retailer has in fact occurred, but merely outlines the matters that would be needed to be proved to demonstrate a breach of section 46 of the Trade Practices Act 1974 (TPA).

The ACCC has considered various aspects of the Australian retailing sector, including the state of competition in particular retail markets, on numerous occasions since 1998. These inquiries have been undertaken in the context of mergers, applications for authorisation and investigations of possible breaches of the TPA. The ACCC is currently conducting an inquiry into the competitiveness of retail prices for standard groceries, which is due to report on 31 July 2008.