AUSTRALIAN COMPETITION & CONSUMER COMMISSION AND AUTO MASTERS, MIDLAND
OPINION

1. My opinion is sought on behalf of the Australian Competition & Consumer Commission ("the Commission") as to whether Auto Masters Australia Pty Ltd ("Auto Masters") has contravened either of sections 51AA or 51AC of the *Trade Practices Act* 1974 (Cwth) ("the Act"). Advice is also sought in relation to additional evidence to prove the contravention if such contravention is thought to exist.

The Entities

2. Mr. David Coombes is a director of the company, Bruness Pty Ltd, which previously traded as Auto Masters Midland under a franchise agreement. Auto Masters Midland alleges it has been treated unfairly by Auto Masters as franchisor. The nature of the allegations include claims that breach notices which issued against the franchisee were unjustified and inconsistent with the way other franchisees were treated. Further, it is asserted that the franchisor was unwilling to negotiate with the franchisee, refused to provide relevant information regarding the franchise to the franchisee and threatened and subsequently carried out the threat to terminate the franchise.

The Dispute

3. Historically disputes have arisen concerning a number of issues relating to the operation of the franchise and specifically concerning allegations that -

    1. computing hardware and software required to be used under the franchise agreement on an ongoing basis was unreliable and an invoice for repairs by a preferred supplier, On-line Business Solutions, was inappropriate;
    2. the franchisor "poached" the franchisee's business manager, Mr. Steven Holland, to operate an alternative outlet which the franchisee had orally agreed to purchase in or about August 1998; and
    3. the franchisee discovered that Mr. Holland, while operating the new outlet, had made fraudulent invoices and/or conducted repair work *inappropriately*.

4. There was a substantial amount of correspondence in relation to the allegations and ultimately a Notice of Remedy was issued on the franchisee. That notice alleged breaches including -

    1. non-payment of the account to On-line Business Solutions, the only contractor authorised to service and repair the data system;
    2. outstanding extraordinary audit fee for auditing of invoices conducted by the franchisor;
    3. non-completion of outstanding data entry;

4. non-completion of data entry on the day work commenced;

5. non-completion of invoices on the computer printer to avoid any illegibility problems;

6. operation of the franchise outside the policies, procedures, standards and specifications of the Franchise Operations and Procedures Manual.

History

5. On 3 September 1992 Auto Masters entered into a franchise agreement with Graham Clive Hinks and Janice Ann Hinks of Bassendean under which the Hinks would operate a franchise using the trademark Auto Master, the localised business name being Auto Masters Midland. The financial year ran from 30 June to 30 June with a minimum gross revenue specified under the agreement of $385,000 for each financial year adjusted in accordance with C.P.I. The agreement provided for an initial term of ten years with a renewal term of a further ten years. It was a term of the agreement that it was limited to certain specific territory. A franchise fee of $40,000 was paid to acquire the franchise and an account service fee of 7% of gross revenue as well as an advertising levy of 6% of gross revenue were conditions of the agreement. There was a further assignment fee of $1,000 payable in the event of assignment.

6. The recitals to the agreement acknowledge that the franchisor had expended considerable time, effort, skill and money in developing a system of business for the delivery of professional and comprehensive automotive service including tune ups, lubrication, brake repair and maintenance service and other related services and had established a reputation and goodwill for those goods and services. The agreement was reasonably exhaustive in its terms, running to approximately fifty pages and being in standard form and generally speaking, as with many such agreements, predominantly favouring the franchisor.

7. By mid-1998 at the latest, difficulties were being encountered and demands were being made by On-line Business Solutions as indicated above for payments of outstanding invoices accompanied by threats of referral of the matter to the solicitors for debt collection. One of the reasons On-line Business Solutions was imposed upon franchisees was apparently because a computer network common to all franchisees was established under the auspices of Auto Masters apparently in order to achieve uniformity of dealings.

8. This was about the time when Steven Holland had left the employ of the Midland franchise.

9. By 7 October 1998 Mr. Coombes had forwarded to Auto Masters a draft of a letter in response to the threats from On-line Business Solutions, making the point that the firm had been unable to rectify computer problems as and when they arose and that in his opinion the services and/or goods were not of a merchantable quality and he regarded the threats of debt collection and other threats by which his "standing within the organisation" would be affected, as being misplaced and inappropriate. He was also concerned, as indicated in a letter of that date (7 October 1998), with an "extraordinary audit fee" pertaining to "twenty missing invoices" and as he described it, the constant computer down time attributable to both the hard and software inefficiencies.

10. In response to his complaints, Auto Masters wrote to Mr. Coombes on 12 October 1998. In the Auto Masters' response on 12 October, it clarified that the special audit fee was not only for twenty missing invoices but also because invoices that were not entered and completed on the computer had to be audited and reconciled manually in consequence of which there was computer down time but the point being stressed in the letter was that the down time was only slightly more for Auto Masters Midland than for other Auto Masters centres and all other stores were "up to date within days of coming back on line".

11. In relation to allegations concerning Steven Holland it was said -

> "The allegations you are levelling against past staff members are between yourself and the accused. Although you employed this person it does concern me that not only him but any Auto Masters employee would be dishonest. As you know, the accused is now an Auto Masters franchisee. I understand your concerns but until a third party proves beyond reasonable doubt that the accused is guilty of allegations, I cannot pursue this matter further. However, we would be willing to have an open forum on this matter with all parties present."

12. Although no reference at all was made to it in the 12 October letter, at the same time and to precisely the same person a Notice to Remedy was issued in relation to breaches of the Franchise Agreement requiring remedies within fourteen days to be followed by an internal audit. Amongst other things, this required the payment of the extraordinary audit fee of $200.00 to Auto Masters.

13. This met with a response on the same day marked "Without Prejudice" dealing with each of those items and essentially rejecting the underlying assertions. If it was not abundantly clear prior to this time it was certainly clear at this stage that relationships between the franchisor and franchisee had well and truly broken down. In this letter Mr. Coombes said -

> "As you seem hellbent on pushing issues and threatening to terminate my franchise agreement, I would welcome an offer to buy the franchise based on recent values put on the Welshpool, Balcatta and Perth stores. Welshpool with a turnover of $40K per month was sold for $235K, Balcatta with a turnover of $40K per month, sold for $240K and Perth, with a turnover of approximately $60K per month, sold for $360K.

Based on these figures and with Midland now averaging $50K per month, your formula would value my store at $300K. An offer close to this figure would be acceptable and welcome, given you unwillingness to support or compromise on contentious issues."

14. Two days later there was also a response to the substantive 12 October letter signed by Nigel Warr, Managing Director, enclosing a copy of the letter sent to Doug Canham, in response to his Notice to Remedy but addressing each of Mr. Warr's points in his letter and essentially reiterating the point that the software and hardware support was grossly inadequate and the cause of the problems.

15. The problems continued with Monica Lane of Auto Masters sending on 22 October an extensive list of alleged non-compliance with completion of invoices per the "quality procedures".

16. By this time Mr. Coombes was of the view and possibly quite reasonably that Auto Masters was simply attempting to find breaches to justify a termination. Apparently that sentiment was expressed in a meeting at Auto Masters Midland according to the content of his letter of 27 October 1998 to Doug Canham copied to Nigel Warr. He also recorded an "inference" that once the quality assurance for the store was terminated, he would take it back at cost. There was a rather confused response to this saying that a "specific performance action" would be

launched in response. The offer to sell was repeated. The relevant response to this was -

> "My terminology was if you lose your quality assurance listing, this is then under yours and any other franchisee's agreement that you will automatically loose (sic lose) your franchise and the rest will follow because we are your lessor and no-one will buy a franchise and goodwill if you haven't got a franchise."

17. The paper war continued with a substantial number of self-serving statements, accusations and threats. Nevertheless, towards the end of October there was some conciliation towards a process of purchase of the store. Regrettably these negotiations were peppered with further heated exchanges in relation to the computer facility. There were difficulties in the meantime concerning pressure on Auto Masters Midland in relation to car parking bays at the leased premises.

18. Mr. Canham then brought the matter to the Commission who wrote to Auto Masters on 17 December 1998 in relation to an allegation of applying considerable pressure including the issue of breach notices without basis and then threatening to terminate Mr. Coombes' franchise agreement without just cause when Mr. Coombes raised concerns over the handling by Auto Masters of complaints of fraudulent invoices being issued by the franchisee at Maddington. It was the understanding of the Commission at that stage that Auto Masters had withdrawn

threats of breach notices or the termination of the franchise. At that stage the view was expressed that there had not been a breach of the unconscionability provisions under Part IVA of the Act.

19. Unperturbed, a week later on 24 December a Notice of Default was served by solicitors for Auto Masters accompanied by a covering letter saying that Auto Masters had gone to great lengths to accommodate concerns expressed in recent correspondence and to provide Auto Masters Midland with adequate opportunity to remedy defaults. It had done so mindful that several months ago Auto Masters Midland had experienced some difficulty in properly completing data input procedures consequent to a break down in the computer system and for a variety of reasons Auto Masters had refrained from taking action to enforce the obligations of the franchise agreement but the continued failure to comply with the important aspects of the obbligatos of the agreement undermined the ability of Auto Masters generally to deliver a consistently high level of quality across its branches, met its obligations to other franchisees and other franchisees in turn to meet their own responsibilities to their customers under the franchise agreement.

20. On 13 January Mr. Coombes was notified of an impending internal audit. On 18 January Mr. Coombes wrote to the Commission in the following terms -

"Thank you for your letter dated 18 December 1998 and the attached copy of the correspondence sent to Doug Canham Auto Masters Australia Pty Ltd. I now forward to you copies of correspondence to date and also bring to your attention to (sic) a sequence of events.

- Steven Holland attended court on 14 December 1998 and pleaded not guilty to charges made against him. Steven Holland will return to court 26 March 1999.

- Auto Masters Australia Pty Ltd have engaged their lawyers Deacons, Graham & James to issue a "Notice of Default" refer attached letter dated 24 December 1998. I believe this was in response to the letter from A.C.C.C. to Auto Masters Australia.

The statement in your letter dated 18 December 1998 in paragraph three "I understand Auto Masters have recently withdrawn any threats of breach notices or the termination of Mr. Coombes' franchise" is to the contrary of your understanding.

- I have enclosed documentation regarding their latest "Breach" refer "Notice of Default" regarding car parking. The lawyers have been guided to believe as stated in the Notice of Default "The franchisor has been informed by the Property Manager of the Premises, that you have breached by the by laws of the Strata Company in relation to premises by virtue of your use/misuse of car parking bays at the premises, such have been communicated to you by a letter from John Angus and Co (Property Manager) refer letter dated 26 November 1998."

Unfortunately they appear to have neglected to inform their lawyers refer memo dated 2 December 1998 from John Angus and Co Property Manager stating "Because his business has expanded in his customers can number up to thirty per day, any overflow would be permitted for the time being, or until such time as the Strata Company said otherwise, on the grassed verge".

John Angus continued that "he would need to take every care with the reticulation system and that he should endeavour to park these vehicles approximately in front of his own complex".

Confirmation of the memo is validated in writing from my landlord HG and LM Barnard refer letter dated 6 January 1999.

Auto Masters total disinterest and lack of support in this matter is evident by virtue of the fact that they apparently did not pursue the issue or endeavour to ascertain the result of the Strata Title meeting, yet they appear to have been very willing to present only some of the relevant correspondence to their solicitors.

Under your direction, I have now contacted the Australian Securities Commission case manager being Mr. Adrian Reading due to the fact that Mr. John Newman was on leave at the time and Mr. Reading was taking his calls. I forwarded all correspondence to him with a covering letter refer 7 January 1999 to Mr. Adrian Reading.

I was led to believe that I would have a Quality Assurance Audit in mid January which has now changed to 10 February 1999 refer correspondence dated 24 November 1998 from Doug Canham stating "The Notice to Remedy issued on 12 October 1998 is currently being reviewed by the Franchisor with the intention of resolving the problems the parties have, shortly after the Quality Assurance Services audit in January". Refer letter dated 13 January 1999 from Doug Canham states that "Notice of Default" will expire on Thursday 21 January 1999". "On Friday 22 January an internal audit will be conducted at Auto Masters Midland at 9.00 a.m. to determine whether you have complied with the Notice of Default. A report of that audit will be forwarded to the Franchisor and Deacons Graham & James for their appropriate response. If you have failed to comply, the Franchisor reserves the right to commence cancellation of your Franchise. However, you will also receive a Quality Assurance Audit on 10 February 1999 and this will be confirmed seven (7) days prior to that date.

Under these dire circumstances of my family, staff and my livelihood, delaying such a crucial audit should never have been postponed and it was only at my enquiry that I was informed of Auto Masters change of strategy.

An internal memo refer dated 7 January 1999 from Doug Canham requesting revision of invoices that are either not received or not entered on the data base. In response I forwarded a fax refer dated 10 January 1999 listing the whereabouts of the invoices with the majority already forwarded to the franchisor and only the store copy on file. To complete requirements asked of me in relation to the invoices I then requested they forward lists of missing/incompleted

invoices for the months July, August, September and October. No response has been made to this request to date, keeping in mind part of the breach involves missing or incomplete invoices and the Notice of Default expires on 21 January 1999 so I believe this is not an unreasonable request.

As stated in my letter to Doug dated 18 January 1999 AI am undertaking steps to rectify the "breach" in regards to $200.00 extraordinary audit fee which is now placed into a bank trust account and the money may be released to Auto Masters Australia only after an independent arbitrator assesses and states his recommendation".

I now refer you to a copy of Auto Masters Australia Pty Ltd Disclosure Document "Code of Conduct" - September 1998. Refer point 15.4 Information - *The Franchisor will prepare and make available to the Franchisee such oral and written information, as the Franchisee reasonably requires in respect to all matters relating directly to the Franchise Business.*"

My continued requests dated 22 September 1998, 5 October 1998, 14 October 1998 and 27 October 1998 requesting notes or minutes pertaining to a meeting between the Franchisor, General Manager and Steven Holland would fall under this code.

With my interest in the Code of Conduct and my belief that they have reneged on their Code, I continued perusing this documentation. I now refer you to **17 17.1 Summary of Other Conditions of Agreement (f)** "If the **Franchisee** is in substantial compliance with this Agreement and the **Franchisor** breaches a material term of this Agreement and fails to correct such breach within 14 days after service upon written notice of such a breach, the **Franchisee** may terminate this Agreement with such termination taking effect one month after service upon the **Franchisor** of notice of such termination. Any termination of this Agreement by the **Franchisee** that is not in accordance with the procedures set out in the sub-clause may be deemed to be a termination without proper cause and will constitute a material breach of the Agreement by the **Franchisee**."

I seek confirmation from the ACCC if this paragraph is correct (the Franchisee and Franchisor seem to be placed the wrong way around)

as this document is a lawful requirement and is regulation under the Trade Practices Act 1974 and is monitored by the ACCC. My understanding upon reading this paragraph is that the **Franchisee** can breach the **Franchisor** for a material term of this Agreement, of which I refer you back to **point 15.4 Information** in which they neglected to supply after numerous requests by me for oral and written information relating to my Franchise Business.

I thank you in advance and I look forward to your earliest response."

21. A detailed memorandum recording findings following the audit was forwarded to Mr. Coombes on or about 22 January 1999, perhaps predictably finding problems. On 4 February 1999 a lengthy letter from the solicitors for Auto Masters was forwarded to Mr. Coombes indicating that Auto Masters at that stage did not intend to immediately terminate the franchise agreement but reserved its right to do so. Further correspondence and meetings ensued over the issues of whether or not Auto Masters Midland were conducting a business "riddled with areas of non-compliance with Auto Masters mandatory procedures".

22. On 26 February 1999 Auto Masters also issued a notice of default in relation to the sub-lease of the premises occupied by Auto Masters Midland and on 12 March offered through its solicitors $100,000 for the business.

23. The offer made was $100,000 as distinct from the $300,000 requested by Auto Masters Midland. At the same time a notice of demand informing Auto Masters

Midland it was no longer entitled to trade that name was forwarded together with notice of termination of franchise agreement and a writ issued out of the Supreme Court. All of these steps were taken on the same day.

24. Mr. Coombes then forwarded a handwritten letter to Ms. Nicky Ferguson, Office of the Mediation Adviser, Franchising Code of Conduct, in relation to the notice of dispute and requesting the appointment of a mediator and resolution of the matter. In substance the complaint was that Auto Masters, as franchisor, had failed to support Auto Masters Midland as franchisee and had continued to issue notices of default of sub lease relating to the occupied premises, every endeavour has been made to comply with the terms of the franchise agreement notwithstanding the inability of the computer software to operate efficiently and effectively. The information contained in the notice of default of sub-lease is incorrect. The desired outcome was for Auto Masters to refrain from this activity and comply with the terms of the franchise agreement and in particular sections 15.1 and 15.4.

25. A further writ was issued out of the Supreme Court of Western Australia on 24 March 1999, on this occasion joining Mr. Coombes as a second defendant with Bruness Pty Ltd as first defendant.

26. A mediation conference was indeed held and a solicitor appointed to act on behalf of Mr. Coombes, Mr. David Taylor from Midland, who reported to Mr. Coombes on 19 April 1999 that the essential terms of the proposed settlement by the franchisor were -

1. A manager acceptable to both parties to be appointed. The franchisor anticipated payment of $1,000 per week to the manager.

2. An independent book keeper to be appointed.

3. The business to be sold on the open market and two valuations to be made prior to setting the sale price (and any offer within 10% of the average of the valuations to be accepted).

4. You will be permitted to attend at the premises, however, the manager will take instructions from the franchisor.

5. You will be required to pay costs -

   (a) legal costs of the franchisor - $30,000; and
   (b) administration costs of the franchisor - $6,000.

6. All usual transfer costs will be paid by you.

7. Back royalties/levies to be paid by you.

The offer is open until the close of business today."

27. The solicitor had suggested that Mr. Coombes should give serious consideration to the offer.

The Law

28. Although there are only a few reported decisions on Section 51AC of the Act (and I refer to these decisions below), it can be seen when reading those decisions that regardless of the specific legislative indicia of matters which may be taken into account (a non-exhaustive list), the courts approach the issue of unconscionability much the same way (at least on the present cases) as they have done in the past.

29. I have also been asked to advise on the effect of section 51AA on the alleged contraventions. Before doing so I should mention that the constitutional validity of that section at this moment is under challenge and anything I have to say regarding section 51AA should be read subject to the determination of the High Court in relation to the validity of that section.

30. Section 51AA of the *Trade Practices Act* 1974 (Commonwealth) "the Act") provides -

> "(1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
>
> (2) This section does not apply to conduct that is prohibited by section 51AB."

31. In the second reading speech on 3 November 1992 when the Bill was introduced to the Commonwealth Parliament, the following was said of it: -

> "A new provision is to be inserted which will prohibit unconscionable conduct not already covered by current section 52A. Section 52A is confined to unconscionable conduct involving goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, and is thus generally concerned with consumer transactions. The new provision will prohibit unconscionable conduct by corporations in trade and commerce and thus will extend, but in modified form, the prohibition now in section 52A.
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> Unconscionability is a well understood equitable doctrine, the meaning of which has been discussed by the High Court in recent times. **It involves a party who suffers from some special disability or is placed in some special situation of disadvantage and an "unconscionable" taking advantage of that disability or disadvantage by another.** The doctrine does not apply simply because one party has made a poor bargain. In the vast majority of commercial transactions neither party would be likely to be in a position of special disability or special disadvantage, and no question of unconscionable conduct would arise. Nevertheless, unconscionable conduct can occur in commercial transactions and there is no reason why the *Trade Practices Act* should not recognise this.
>
> Both the new provisions, which will be numbered as sections 51AA, and existing section 52A, which will be renumbered, are placed in a new part IVA. The new provision will not extend the equitable principles of unconscionability beyond their current limits. The new provision refers to "conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories". All transactions covered by the new provision are already covered by the equitable doctrine.
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> **The advantages of prohibiting in the Act what is already addressed by equity lie in the availability of remedies under the Act, the potential involvement of the Commission, including the possibility of representative actions being brought by the Commission in cases where it seeks an injunction, and the educative and deterrent effect of a legislative prohibition."**

32. Thus it will be seen from the foregoing that the legislative purpose was a purpose directed not so much to changing the existing law but rather to linking the remedies available under the Act to the existing law of equity. Those remedies, in particular, contemplated the involvement of the Commission as an applicant including the possibility of representative actions. On one view of the matter (see Lee J. infra), the true purpose and effect was procedural rather than substantive.

33. In an article by Professor Paul Finn in (1994) 8 Journal of Contract Law "Unconscionable Conduct", Professor Finn expressed the view at page 39 that the notion of unconscionability was pervasive in Australian equity today but what was unanswered was how much of equity in consequence has been swept into the *Trade Practices Act* regime by the new section 51AA. He expressed the view that in some instances, unconscionable conduct could best be seen as an expanded form of "contractual" wrongdoing - the word "contractual" being used in an expanded, non-technical sense because while there may be a consensual dealing between the parties, there may in fact be no actual agreement which satisfies the formal requirements of the law of contract though many of the underlying features of a contractual relationship were there (e.g. *Waltons* and *Baumgartner*). Some instances, however, were best aligned with tort such as *Amadio, Verwayen* and *Taylor v. Johnson* - the latter being a case dealing with unilateral mistake in contract.

34. The legal *effect* of the use of unconscionable conduct was to extend and soften the rigidities of the law of contract and law of tort.

35. Equity provides a remedy where a binding contract has not eventuated as expected if the parties have conducted themselves to create the reasonable assumption that it would be consummated and have justifiably relied on that premise. It also acts in a circumstance where a contract is completed but in the course of reaching its concluded terms, there has been exploitation of a position of vulnerability of one of the contracting parties. Where that power has been exploited in a positively manipulative way, equity will readily intervene. Examples are misrepresentation, undue influence and duress. However, there are also the cases where the exploitation of power is not accompanied by conduct which could so readily be classed in a pejorative way. The circumstance in which equity will intervene in this category of case is where the use of the power distorts unfairly the bargaining conditions on which the contract is based.

36. Finn suggests that the singular feature of unconscionable conduct of this variety is that it involves in essence a species of intentional wrongdoing. He observes that to counter balance the exploitation of the seriously disadvantaged, equity imposes duties of affirmative action on the superior party if, A... and I emphasise this, that party knows or has reason to know of the other's position of special disadvantage: he mistake must be corrected; assistance and explanation given or else independent advice recommended; etc."

Intent

37. If a party considers that its course of action is entirely acceptable commercial behaviour, yet others may objectively view it as being unconscionable, will there be a contravention? It would appear so. In *Begbie v. State Bank of New South Wales Ltd* (1994) A.T.P.R. 41-288 the following passage appears:

> "The relevant principles that govern Mrs. Begbie's claim to relief on equitable grounds are stated in *Commercial Bank of Australia Ltd. v Amadio* (1983) 151 CLR 447. They have been repeatedly applied since: see *Louth v Diprose* (1993) 67 ALJR 95; *National Australia Bank v Nobile* (1988) 100 ALR 227; *Nolan v Westpac Banking Corporation* (1989) 11 ATPR 50,727; *Broadlands International Finance Ltd. v Sly* (1987) 4 BPR (97280); *Borg-Warner Acceptance Corp. (Australia) Ltd. v Diprose* (1987) 4 BPR (97279); *Westwill Ltd. v Heath* (1988) 52 SASR 461.

According to Mason J, in Amadio at p 462, the equitable doctrine which entitles a party to seek relief against unconscionable conduct "may be invoked whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created". His Honour went on to explain that he considered that a party would suffer from a "special disadvantage" only where "the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party". So mere difference in bargaining power between the parties is not by itself enough to put the weaker party at a "special disadvantage".

Deane J, with whom Wilson J agreed, said at 474:

> "The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that the disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable".

It is apparent from the way both Mason J and Deane J formulated the principle that, for it to apply in a given case, it is not necessary that the party who has benefited from the impugned transaction should itself have created the special disadvantage from which the party claiming relief suffers.

See also *Louth v Diprose*, supra, at 99. It is enough that the first-mentioned party knows (or ought to know) of the other's handicapped situation and takes unfair advantage of the opportunity so presented. Amadio itself was just such a case, at least in the view of Mason J who, at p 464, identified the situation of special disadvantage in which the claimants were there placed as being "the outcome of this reliance on and confidence in their son, who in order to serve his own interests, urged them to provide" the bank with the impugned security. So was *Louth v Diprose*: see p 99. It is also clear from the statements in Amadio that if one person has either actual knowledge that another occupies a position of special disadvantage in relation to an intended transaction or, without actual knowledge, is aware of the possibility that that situation of special disadvantage may exist or is aware of facts that would raise that possibility in the mind of a reasonable person, then that person's conduct in entering into the transaction from which he benefits against such a background of knowledge or awareness on his part will be unconscionable. See per Mason J at pp 462 and 467 and per Deane J at p 479.

Whether Mrs. Begbie was in a position of "special disability" in relation to the transaction which involved the bank taking the mortgage and the guarantee from her in late July is to be determined by an objective comparison of the relative positions of the respective parties and of their ability to protect their own interests. See per Deane J in *Amadio* at pp 475-477.

Such a comparison in this case shows that Mrs. Begbie was under a relevant disadvantage vis-a-vis the bank. The bank by Henshaw knew that Cheers intended that Anivor would use the loan that it was prepared to make to Anivor only because of the security provided by Mrs. Begbie to reduce the debts then owed to the bank by Cheers and by Snowlake and to buy a bakery business, even if it also had some expectation that part of the loan funds might be used at some future time for the redevelopment of Mrs. Begbie's land. Mrs. Begbie on the other hand, was unaware that the loan moneys might be used for any purpose other than redevelopment of the land (purposes, moreover, from which she would obtain no benefit or no significant benefit). It was this disparity in knowledge as to Cheers' intentions for the Anivor loan funds as between Mrs. Begbie and the bank that operated to prevent Mrs. Begbie making a judgment as to her own best interests concerning the provision of the security that put her in a position of special disadvantage with respect to the transaction in question: Amadio at p 462 and pp 476-7. It is unlikely in the extreme that, if Mrs. Begbie did know of the full range of Cheers' intentions for the Anivor loan moneys, she would have proceeded with the transaction and handed over her title deeds to enable Anivor to raise the loan funds in question, notwithstanding her feelings for Cheers at the time.

The next question is whether the bank knew enough of Mrs. Begbie's position of special disability to make it unfair for the bank to take from her the mortgage of her Eight Mile Plains land and her promise of guarantee as security for the repayment of Anivor's indebtedness to the bank. The answer to this question is clear, given the conclusions I have reached as to the circumstances in which Henshaw took these securities.

> Counsel for the bank submitted that this is a case in which the applicant really relies on a failure by the bank to disclose information known to it about the borrower's position, under the guise of an unconscionability claim. But the applicant does not in any way rely on a failure by the bank to make disclosure. A bank may not be in breach of its limited duty of disclosure, but may still be guilty of unconscionable conduct in taking the benefit of a security from a person. Amadio at 463. The applicant's case is that there is unconscionable conduct on the part of the bank in taking security from her because the bank went ahead and took that security knowing that the applicant believed the funds to be borrowed against her security would be used for one purpose which might ultimately benefit her and also knowing that the applicant was unaware that the funds would be used for other purposes that would be of no benefit to her but which would benefit the bank itself as well as Cheers and Snowlake.
>
> Mrs. Begbie is entitled to the relief she seeks with respect to the mortgage and the guarantee on the ground of the bank's unconscionable conduct associated with its taking of these securities from her."

38. Such considerations also arose in *Louth v. Diprose* (1992) 175 C.L.R. 621. On other occasions courts have concluded that if the party benefiting from the unconscionable behaviour has no reason to know of it and that the person responsible for the behaviour is not his or her agent, then no claim can be made by the person who benefited (*Lisciandro v. Official Trustee* (1995) A.T.P.R. 41-436).

39. The concept of the superior/inferior bargaining position and the serious disadvantage is not precise. Some guidelines appear in the cases and even in the Act under s.51AB (2) but these in turn reflect the unwritten law and it is to this law that one must turn for present purposes. The decided cases touching on the section itself do not greatly assist. For example *Swift et al v. Westpac Banking Corporation et al* (1995) A.T.P.R. 41-401, was a first instance decision importing only general statements of principle in refusing injunctive relief. In *Leitch et al v. Natwest Australia Bank Limited et al* (1995) A.T.P.R. Digest 46-153, the case was disposed of promptly because the section did not have retrospective effect. *Cameron v. Qantas Airways Limited* (1995) A.T.P.R. 41-417, was perhaps predictably dismissive of the unconscionable claim in that although it was held the airline was negligent in some respects, it was not shown that its conduct was unfair or unreasonable nor that it had "in any unscrupulous way" taken advantage of the situation and that no victimisation had been demonstrated. The court took into account in that decision external objective factors such as the fact that smoking remains a lawful activity, that the Government had ample constitutional power to prohibit smoking on international flights to and from Australia but had elected not to exercise it, that some international carriers permitted smoking on certain or all flights, that it was legitimate for Qantas to take into account its competitive position, that Qantas had responded to the evolving community attitudes in the area.

40. In *Tri-Global (Aust) Pty Ltd et al v. Colonial Mutual Life Assurance Society Limited* (1992) A.T.P.R. 41-174, the court took the view that the broader equitable basis of unconscionability for the purpose of section 52A as it then stood, would not assist a party complaining about the circumstances of termination of a bargain so much as the formulation of a bargain. The termination, while it may have been peremptory in that case, had not been predatory.

41. *Vital Finance Corporation Pty Ltd v. Taylor et al* (1991) A.T.P.R. Digest 46-080 is a decision in which the defendants were held to be in a position of special disadvantage by reason of their financial needs. They had no cash and had pressing commitments which were to be honoured. However, in that case there was also a special disadvantage by virtue of their general commercial inexperience and limited understanding. The unfair or unconscientious advantage which was taken was an absence of belief that the defendants could afford the repayments for the particular advance. The corporation, through its officer, was satisfied that the home and truck owned by the defendants provided sufficient security. They were given legal advice as to the effect of the transaction at law but no one gave them advice as to the commercial wisdom of entering into the arrangements. It was not suggested that such advice should be given in all commercial circumstances but only in a circumstance of special disadvantage. As to the issue of advice, reliance was placed upon *Bester v. Perpetual Trustee Co Ltd* [1970] 3 N.S.W.R. 30 per Street J. as he then was at pp. 35-36.

42. *Douglas Wilshire-Smith v. Votino Bros Pty Ltd et al* dealt with a tenancy situation in which at the time the applicant executed a deed of assignment of lease, he was aware that substantial renovation and re-development of a shopping centre was contemplated and likely to occur during the term of the lease. Lee J. said:

"If it is accepted, without deciding the point, (see contra: *Radley Investment Co. Pty. Ltd. v. Amque Clothing Pty. Ltd.* (1994) Aust. Contract Reports, 90-036)) that a norm of commercial conduct in the circumstances described would have required Votino Bros. to bring to the attention of a prospective assignee Votino Bros.' intention to commence substantial works likely to impinge upon the assignee's uninterrupted use of the demised premises, and if it is further accepted, again without deciding, that a managing agent of the landlord, aware of the proposed work, would be expected to convey that advice on behalf of the landlord to a proposed assignee, I am satisfied on the facts of this case that J.L.W. had sufficient grounds to believe that the proposed assignee would be, or had been, informed by the assignor of the imminent upgrading of the Centre or, alternatively, that the failure of J.L.W. to so inform Willshire-Smith had no effect on Willshire-Smith's actions. (See: *Tomlinex Pty. Ltd. v. Candoura Pty. Ltd.* (1994) ATPR 41-302.)

J.L.W. distributed a notice to tenants in or about February 1990 advising that substantial renovation of the Centre had commenced and would be continuing. Distribution of that notice entitled J.L.W. to assume that the information it had provided would be passed on by an assignor to a subsequent assignee.

In any event the evidence shows that, in fact, Willshire-Smith was aware that substantial construction work was to be undertaken at the Centre and that when he was informed that Votino Bros. would not vary the lease, he decided to take the chance of an increase in the financial burden imposed by the lease.

.....

I turn now to the claims against Votino Bros.

Willshire-Smith claimed that in exercising the right under the lease to increase the rental payable by the lessee, Votino Bros. had engaged in unconscionable conduct in contravention of s.51AA of the Act by exercising that right when the work of renovation or enlargement of the Centre undertaken by Votino Bros. had been, and would be, the cause of loss to the lessee.

In October 1990 Votino Bros. gave notice of an increased assessment of the rental payable under the lease. Votino Bros. sought to increase the rental from $23,083 per annum to $28,000 per annum. Willshire-Smith disputed the assessment and pursuant to the terms of the lease an independent valuer was appointed to determine the rental and to make that determination as an expert.

The independent valuer determined that the appropriate rent was $26,340. Willshire-Smith did not accept that determination and appointed his own valuer who assessed the appropriate rent to be $23,083. The dispute about the assessment of rent was one of the issues decided by the Tribunal. The Tribunal held that the terms of the lease in respect of the review of rent had been followed and that the rent payable was $26,340.

It is apparent from the facts recited above that although the approach by Votino Bros. to its tenant may have displayed a hard edge, its conduct did not involve participation in sharp practice, concealment, or underhand dealing calculated to put Willshire-Smith at such a disadvantage that it would nullify the exercise of an independent and voluntary will. It was necessary for Willshire-Smith to show, at least, that Votino Bros. engaged in conduct of that character if he were to be able to submit that the conduct was unconscionable "within the meaning of the unwritten law" and, therefore, in contravention of s.51AA of the Act and the subject of remedy under s.87 of the Act. (See: Commercial Bank of Australia Limited v. Amadio (1983) 151 CLR 447 per Mason J at 461-462; Zumbo, F., "Unconscionability and Commercial Transactions: Exploring the Need for Further Reform Under the Trade Practices Act", Australian Business Law Reform 22 (1994) at 323-344.)

Furthermore, the conduct relied upon occurred before s.51AA was inserted in the Act by the Trade Practices Legislation Amendment Act 1992, commencing on 21 January 1993, and it was submitted that s.87 of the Act provided no remedy in respect of such conduct.

Having determined that the evidence did not establish that Votino Bros. engaged in unconscionable conduct, it is unnecessary to decide how s.87 should be construed, although it may be noted that s.51AA directed corporations not to breach the existing unwritten law of States and Territories and, therefore, remedies were already provided in respect of such breaches. By augmenting remedies available under the Court's accrued jurisdiction, with the remedies provided in s.87, it may be argued that the amending Act had consequences that were merely procedural rather than substantive. (See: *Wheeler, Grace and Pierucci Pty. Ltd. v. Wright* (1989) ATPR 40-940 at 50,254-50,255.) However, as I have said, it is unnecessary to decide the point.

> Willshire-Smith also claimed that Votino Bros. engaged in conduct that was unconscionable and in contravention of s.51AA of the Act between July 1991 and March 1993 by withholding its consent to the assignment of the lease from Willshire-Smith to a prospective purchaser of the newsagency business. Willshire-Smith also claimed that the withholding of consent by Votino Bros. was unreasonable and in breach of a term of the lease.
>
> The evidence adduced by Willshire-Smith failed to establish the case pleaded."

43. In *Pritchard v. Racecage et al* 142 A.L.R. 527, a decision of the Full Federal Court on a preliminary question, Branson J. with whom Spender and Olney JJ. concurred in determining whether a cause of action under section 51AA could exist for a widow of a deceased who had died after being struck by a motor vehicle being driven in the "Cannonball Run", held that it may be debatable whether the expression "conduct that is unconscionable" in section 51AA of the TPA extended beyond the meaning ordinarily attributed to expressions such as unconscionable conduct and unconscionable dealings. His Honour said -

> "The factual allegation pleaded in support of the claim of unconscionable conduct may be summarised as follows:-
>
> (a) the first respondent knew that the executive government of the Territory, its officers and the Police had no experience in conducting events like the Rally;

(b) the first respondent knew that the public, the executive government of the territory, its officers, the Police and Rally officials trusted and relied upon the first respondent to advise them in order to ensure that the Rally was safely conducted in accordance with the law and without exposing the public or the Rally officials to an unreasonable risk of injury;

(c) in breach of a duty owed by the first respondent to the public, the executive government of the Territory, its officers, the Police and Rally officials, and acting in its own interests, the first respondent determined to conduct the Rally in a manner that was unsafe with respect to the public and Rally officials and thereby acted unconscionably within the meaning of s.51AA of the TP Act;

(d) The second respondents knew that the executive government of the Territory, its officers, the Police, members of the Darwin Motor Sports Club Inc. and Rally officials relied upon the permit issued by the second respondents to the first respondent, and upon representations made by the second respondents to them that it would act in their best interests, and that it was qualified to control the Rally and had satisfied itself, and had put in place necessary controls to ensure, that the Rally would be conducted safely;

(e) in breach of a duty to act in the interests of the public, the executive government of the Territory, its officers, the Police, the members of the Darwin Motor Sports Club Inc. and the Rally officials, the second respondents issued a permit for the Rally when it should have known that the Rally would not be conducted safely;

(f) had the respondents respectively not acted unconscionably, the Rally would not have been permitted to occur, or alternatively would only have been permitted to occur on terms that it be conducted safely, or in the further alternative the deceased would not have acted as a Rally official.

(g) the deceased's death was caused by the respective breaches by the first and second respondents of s51AA of the TP Act and by reason of such breaches the applicant, the estate and the children have suffered loss and damage.

As the learned primary judge pointed out, s51AA of the TP Act extends the remedies available under the TP Act to unconscionable conduct to the extent that such concept is already part of the general law. The section does not expand equitable concepts of unconscionable conduct.

Senior counsel for the applicants based his argument on s. 51AA of the TP Act principally upon the allegations in the statement of claim designed to support findings that the first and second respondents respectively owed fiduciary duties to the deceased. He contended that, to the extent that the learned trial judge acted on the basis that s. 51AA was limited in its operation to "unconscionable dealing", in the sense that that expression was used by Deane J and Dawson J in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, he was in error. It was contended on behalf of the applicant that the words "conduct that is unconscionable" appearing in s51AA of the TP Act comprehend all of the categories of conduct which have traditionally been regarded as fraudulent in equity. He drew attention to the six categories of equitable fraud identified by the learned authors of Equity: Doctrines and Remedies, Meagher, Gummow and Lehane, 3rd ed at par 1210.

I note that in *Commercial Bank of Australia Ltd v Amadio* at 461, Mason J considered the usual meaning of the expression "unconscionable conduct" in the following passage:

> "Historically, courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience. But relief on the ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, e.g., a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating liquor. Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two."

In the same case, Deane J, with whom Wilson J agreed, at 474, stated as follows:-

> "The equitable principles relating to relief against unconscionable dealing and the principles relating to undue influence are closely related. The two doctrines are, however, distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party. ... Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible of being comprehensively catalogues [sic]."

It seems to me likely that the expression "conduct that is unconscionable" appearing in s51AA of the TP Act is intended to have the same meaning as the more frequently used expressions "unconscionable conduct" and "unconscionable dealings". It may therefore be debatable whether s51AA has a sphere of operation quite as wide as that for which Mr Maurice QC, senior counsel for the applicants, contended. It cannot, however, in my view, be said that the argument in favour of a wide construction of s51AA is untenable or doomed to failure (Murex Diagnostics Australia Pty Ltd v Chiron Corporation (1995) 128 ALR 525; General Steel Industries Ltd v Commissioner for Railways (1964) 112 CLR 125; Walton v Gardiner (1993) 177 CLR 378).

Although Mr Maurice disclaimed any reliance on "the unconscionable bargain type of situation", he did assert an abuse by the respondents respectively of the relationships between them and the deceased. He emphasised the vulnerability of the deceased, who was recruited as a volunteer to act in the interests of the respondents, to exploitation by the respondents if they did not fulfil their undertakings to him and others. The statement of claim pleads that each of the respondents knew that persons in the class to which the deceased belonged trusted and relied upon them as to important matters, and that they acted in disregard of such trust and reliance.

It has been said on a number of occasions that it is impossible to describe all of the situations in which relief will be granted on the ground of unconscionable conduct (see Blomley v Ryan (1956) 99 CLR 362 per Fullagar J at 405; Commercial Bank of Australia Ltd v Amadio per Mason J at 461-462 and Deane J at 474). Moreover, the categories of fiduciary relationships are not closed (Hospital Products Limited v United States Surgical Corporation & Ors (1984) 156 CLR 41 esp. per Gibbs CJ at 68, Mason J at 96 and Dawson J at 141-142). In Breen v Williams (1994) 35 NSWLR 522 at 543-544, Kirby P stated certain propositions and cited authority in support of them. Such propositions include the following:-

> "1. The fiduciary principle is in a state of development whose impetus has not been spent to the present day ...;
>
> 2. As society becomes more complex, it is both necessary and appropriate for courts of equity to recognise new fiduciary allegations and to protect incidents of new or changing relationships ...;
>
> 3. What began with the trustee-beneficiary relationship ... has extended, by analogical reasoning, to other relationships including trust and confidence ...;
>
> ...
>
> 6. A person may be in a fiduciary position in some parts of his or her activities and not other parts."

In my view, it cannot be said that the pleading on behalf of the applicants of a cause of action based upon s51AA of the TP Act is so plainly doomed to failure that it ought to be struck out at this stage of the proceedings. Conclusions as to whether particular conduct should be characterised in equity as unconscionable are based upon careful examination of the facts of each particular case. Such consideration involves, amongst other things, an examination of the precise relationship between the relevant parties, and consideration of their respective capacities and vulnerabilities (if any) in the circumstances in which they were involved the one with the other (Jenyns v Public Curator (Q) (1952) 90 CLR 113 at 118-119 and 132-133).

As Spender J pointed out in Capro Group Pty Ltd v Janbrett Consultants Pty Ltd (1994) ATPR 41-298 at 41,978, in respect of an application for summary dismissal:-

> "It is plain that it is only in a clear case that a proceeding should be summarily dismissed. Further, it seems to me that it is not appropriate to adopt that course where the matter involves serious and difficult questions of law and which questions moreover may be dependent on what is in truth the facts as established by the evidence."

Representative Action

44. Under section 87(1A) of the Act, the Commission may seek an order directing the respondent to pay to third parties the loss or damage suffered by them due to the respondent's conduct contravening various provisions of Part IVA or Part V of the Act.

45. The representative proceedings are authorised under Section 75AQ of the *Trade Practices Act.*

46. Some caution is required before committing to representative proceedings because of the difficulties which arose in *TPC v. Manfal Pty Ltd et al* (1991) 33 F.C.R. 382.

Procedure

47. It is clear (*inter alia* from *ACCC v. Shell* 142 A.L.R. 569) that the ACCC can bring an application under section 87(1A) in the same proceedings in which it seeks conventional relief under either section 79 or section 80. Although the language of section 87(1B) emphasises that the finding of contravening conduct must be made before the applicant can make a separate application under section 76(1A), there is no requirement for separate proceedings to be instituted in order to make that application. It was held in *Shell* that the jurisdiction of the court under sections 22 and 23 of the FCA is wide enough to enable the applicant in the suit to resolve all issues in the controversy between the parties, both those central to the controversy and those ancillary to it. Final judgment is unnecessary. All that is required before the applicant can pursue an application under section 87(1A) or (1B) is that there be a finding in either a section 79 or a section 80 proceeding of contravening conduct. As established in *Landsal Pty Ltd (In Liquidation) v. REI Building Society* (1993) 41 F.C.R. 421, the court has wide power to make findings without determining the litigation in which they are made.

48. Nevertheless, for reasons which are not particularly clear, the formal step envisaged by section 87(1B) of asking the court to make an order under section 87(1A) is a condition precedent which cannot be taken in the originating application but must be made either by motion in the course of those proceedings or by the commencement of a separate originating proceeding after the requisite finding. I have assumed it is the former course that the Commission would wish to adopt.

Section 51AC

49. Section 51AC provides as follows -

> **Unconscionable conduct in business transactions**
>
> (1) A corporation must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
>
> (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);
>
> engage in conduct that is, in all the circumstances, unconscionable.
>
> (2) A person must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of goods or services to a corporation (other than a listed public company); or
>
> (b) the acquisition or possible acquisition of goods or services from a corporation (other than a listed public company);
>
> engage in conduct that is, in all the circumstances, unconscionable.
>
> (3) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person

(the "supplier") has contravened subsection (1) or (2) in connection with the supply or possible supply of goods or services to a person or a corporation (the "business consumer"), the Court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the business consumer; and

(b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and

(g)the requirements of any applicable industry code; and

(h)the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the business consumer:

(i) any intended conduct of the supplier that might affect the interests of the business consumer; and

(ii)any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and

(j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and

(k) the extent to which the supplier and the business consumer acted in good faith.

(4) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the "acquirer") has contravened subsection (1) or (2) in connection with the acquisition or possible acquisition of goods or services from a person or corporation (the "small business supplier"), the Court may have regard to:

(a) the relative strengths of the bargaining positions of the acquirer and the small business supplier; and

(b) whether, as a result of conduct engaged in by the acquirer, the small business supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and

(c) whether the small business supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the small business supplier or a person acting on behalf of the small business supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and

(e) the amount for which, and the circumstances in which, the small business supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and

(f) the extent to which the acquirer's conduct towards the small business supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like small business suppliers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the small business supplier acted on the reasonable belief that the acquirer would comply with that code; and

(i) the extent to which the acquirer unreasonably failed to disclose to the small business supplier:

(i) any intended conduct of the acquirer that might affect the interests of the small business supplier; and

(ii) any risks to the small business supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the small business supplier); and

(j) the extent to which the acquirer was willing to negotiate the terms and conditions of any contract for the acquisition of the goods and services with the small business supplier; and

(k) the extent to which the acquirer and the small business supplier acted in good faith.

(5) A person is not to be taken for the purposes of this section to engage in unconscionable conduct in connection with:

(a) the supply or possible supply of goods or services to another person; or

(b) the acquisition or possible acquisition of goods or services from another person;

by reason only that the first-mentioned person institutes legal proceedings in relation to that supply, possible supply, acquisition or possible acquisition or refers to arbitration a dispute or claim in relation to that supply, possible supply, acquisition or possible acquisition.

(6) For the purpose of determining whether a corporation has contravened subsection (1) or whether a person has contravened subsection (2):

(a) the Court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the Court may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.

(7) A reference in this section to the supply or possible supply of goods or services is a reference to the supply or possible supply of goods or services to a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.

(8) A reference in this section to the acquisition or possible acquisition of goods or services is a reference to the acquisition or possible acquisition of goods or services by a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.

(9) A reference in this section to the supply or possible supply of goods or services does not include a reference to the supply or possible supply of goods or services at a price in excess of $1,000,000, or such higher amount as is prescribed.

(10) A reference in this section to the acquisition or possible acquisition of goods or services does not include a reference to the acquisition or possible acquisition of goods or services at a price in excess of $1,000,000, or such higher amount as is prescribed.

(11) For the purposes of subsections (9) and (10):

(a) subject to paragraphs (b), (c), (d) and (e), the price for:

(i) the supply or possible supply of goods or services to a person; or

(ii)the acquisition or possible acquisition of goods or services by a person;

is taken to be the amount paid or payable by the person for the goods or services; and

(b) paragraph 4B(2)(c) applies as if references in that paragraph to the purchase of goods or services by a person were references to:

(i) the supply of goods or services to a person pursuant to a purchase; or

(ii) the acquisition of goods or services by a person by way of purchase;

as the case requires; and

(c) paragraph 4B(2)(d) applies as if:

(i) the reference in that paragraph to a person acquiring goods or services otherwise than by way of purchase included a reference to a person being supplied with goods or services otherwise than pursuant to a purchase; and

(ii)a reference in that paragraph to acquisition included a reference to supply; and

(d) paragraph 4B(2)(e) applies as if references in that paragraph to the acquisition of goods or services by a person, or to the acquisition of services by a person, included references to the supply of goods or services to a person, or the supply of services, to a person, as the case may be; and

(e) the price for the supply or possible supply, or the acquisition or possible acquisition, of services comprising or including a loan or loan facility is taken to include the capital value of the loan or loan facility.

(12) Section 51A applies for the purposes of this section in the same way as it applies for the purposes of Division 1 of Part V.

(13) Expressions used in this section that are defined for the purpose of Part IVB have the same meaning in this section as they do in Part IVB.

(14) In this section, "listed public company" has the same meaning as it has in the "Income Tax Assessment Act 1997".

50. There are at present only a handful of Australian decisions concerning the new section 51AC of the Act. What is already evident, however, is that the courts are considering traditional equity notions as well as the Act itself.

51. In the decision of *ACCC v. Leelee Pty Ltd* [1999] F.C.A. 1121, delivered on 20 August 1999, Mansfield J. struck out a statement of claim but granted leave to file and serve an amended version. After describing the section and the relevant parts of it for the particular case, his Honour outlined the relevant facts as being that since 1987 Leelee had been the lessee of premises at the Adelaide International Food Plaza from which it conducted business as landlord. The business included leasing food stalls to food stall proprietors with twelve food

stalls leased to stall holders. The premises also included a central area seating 450 people and a liquor and drink vending bar conducted by Leelee. Mr. Ong was the managing director of Leelee and conducted its operations. The Choongs held stall no. 8 from Leelee operating it under the name of "Blessing Noodle Bar". The sub-lease or under-lease was for an initial term of three years and the Choongs exercised their right of renewal for the further period of five years. The term granted by the sub-lease expired in January 1999. There were four general groups of complaints, the first three of which related to the conduct of the respondents under the sub-lease and the last of which related to their conduct in relation to prospective new under-lessees when the under-lease was about to expire. The statement of claim generally related to -

1. their conduct in relation to rental charge from time to time under the under-lease;

2. conduct in permitting other stall holders to sell food of the same kind as that exclusively reserved for the Choongs;

3. their conduct in permitting other stall holders to sell food at prices lower than their respective under-leases permitted whilst insisting that the Choongs adhere to the prices as fixed in accordance with the under-lease;

4. their conduct in failing to consider the grant of a fresh under-lease of the stall to prospective tenants introduced by the Choongs so that the Choongs

might have the opportunity to sell to a prospective tenant the goodwill and the plant and equipment attaching to the Blessing Noodle Bar business.

52. A rental increase was sought to be imposed by the respondents but the respondents failed to provide details and information to enable the Choongs to verify the amount of the rental increase in accordance with the under-lease and that was contended to be conduct engaged in contravention of section 51AC(1) of the Act.

53. Another contravention which was alleged was that the under-lease provided that the Choongs were permitted to sell Chinese foods only, Leelee covenanting that no other stall holder would be permitted to sell those dishes without the Choongs' prior consent but Leelee failed to honour that condition. Despite request, the respondents refused to honour this provision which was said to be a contravention of section 51AC(1) of the Act.

54. There was also an alleged contravention of the food price, namely a competitor being permitted to sell at prices less than the minimum prices applicable to them. Finally, there was a complaint about the refusal to re-lease or provide a further term to the Choongs.

55. By Gazette No GN 35, 2 September 1998, the Minister for Customs and Consumer Affairs by notice dated 25 August 1998, issued Consumer Protection Notice No 5 of 1998. That Notice also referred to the provision to the applicant of $480,000 annually for the next four years to initiate precedent setting cases under the Act in areas of specific relevance to small business, and to the desire of the Minister to protect small business from unconscionable conduct. It directed the applicant pursuant to s 29(1) of the Act, inter alia, to -

> *"initiate, as soon as practicable after 1 July 1998, legal proceedings in an action or actions based upon alleged contraventions of the* Trade Practices Act *1974 for the purpose, among others, of establishing legal precedent under new section 51AC of the Trade Practices Act on matters of specific relevance to small business."*

56. These proceedings reflect that direction given by the Minister under s 29(1) of the Act. It is a matter for the applicant's judgment, at this stage, whether those proceedings may serve that direction. There is no assertion that the applicant is acting outside the proper boundaries of the Act.

57. The respondents submitted, nevertheless, that the maintenance of the proceedings is so unfair and unjustifiably oppressive as to amount to an abuse of the process of the Court. I have set out above the circumstances relied upon to demonstrate that unfairness and oppression.

58. I am not persuaded that, in civil proceedings instituted without any improper purpose, the mere balancing of the types of considerations to which the respondents referred may itself result in the proceedings being stayed as an abuse of the process of the Court. ...

65. Even if I accept the respondents' contention as to the nature of the balancing exercise which should be undertaken, that is adopting a colloquial sense of unfairness or oppression, I would not exercise my discretion to permanently stay the proceedings. The applicant is properly exercising its power in bringing them. The proceedings appear to raise certain issues of potential general importance. The respondents claim that, whatever their motives, their conduct in insisting upon the vacation of the stall at the end of the term granted by the underlease cannot constitute them engaging in conduct which is unconscionable in contravention of

55. There was a preliminary application to stay the proceedings as an abuse of process which unsurprisingly was not upheld.

56. In an important passage dealing with these submissions the court said -

> "52. It was appropriate not to contend that the applicant had an improper purpose in instituting and maintaining the proceedings. The applicant is expressly empowered to institute proceedings under the Act: s 80, including in appropriate circumstances the claim for compensation on behalf of the Choongs: s 87(1B). The express seeking of findings under s 83 does not indicate any improper purpose on its part: *Trade Practices Commission v Friendship Aloe Vera Pty Ltd* (1988) 82 ALR 557 at 559-560 and *Australian Competition and Consumer Commission v The Shell Company of Australia Ltd* (1997) 72 FCR 386 at 387. The fact that the applicant regards the proceedings as a potential test case about the operation of s 51AC of the Act also does not involve any element of improper purpose on its part.
>
> 53. It is clear that the applicant is of that view. Following service of the proceedings, on 4 February 1999, the applicant issued a media release concerning them. It includes a quote attributed to the Chairman of the applicant that -
>
> > *"A successful outcome in this case will show how the new law protects small business and that landlords must treat their tenants fairly."*
>
> 54. The background material provided with that press release, included information that the Government has specifically provided the applicant with funds to initiate legal proceedings in actions based on alleged contraventions of s 51AC for the purpose of establishing legal precedent on matters of specific relevance to small business.

s 51AC(1) of the Act. They claim that they are acting within their contractual rights. It may be significant to determine whether, in those circumstances, s_51AC(1) has any scope for its operation. The proceeding may also raise for consideration whether their conduct is in relation to the supply of services and the nature of the connection between the conduct and the supply of services necessary to make out a contravention of s_51AC(1). Those matters are properly matters for the consideration of the applicant in invoking the jurisdiction of the Court.

66. It may be accepted that there is a disparity of resources available to the respondents compared to those available to the applicant. In this instance, the evidence shows dedicated Government funding for cases such as the present. I am not satisfied, however, that the respondents do not have the resources to instruct solicitors properly to defend the proceedings. Mr Ong's income tax return for the 1997/98 year shows he earned $20,499 as manager of Leelee, and interest on money in the bank of $4,053. The unsigned financial accounts of Leelee show that it is a trustee for the Market Plaza Unit Trust. Leelee's only asset is its right of indemnity from the trust assets to the extent of its liabilities. The Market Plaza Unit Trust had a net profit for that year of $76,302.99 as a landlord, but after its trading income and expenses were allowed for, it had only a net income distributed to its beneficiaries of $27,733.10. It paid $208,094.50 to Strategic Alliance Holdings Co Pty Ltd, the lessor to Leelee, presumably for rental. Mr Ong is also a director of sixteen other registered companies and he is a shareholder in most of them. There is no evidence as to his personal assets and liabilities, or as to any resources available to him through those companies. I do not consider that it has been shown, in those circumstances, that the respondents would be unable to afford legal representation, or that they are indigent.

67. I have considered the submissions concerning the scope of the allegations in the statement of claim, and therefore the complexity of the facts to be inquired into. That complaint is said to be the more significant because those facts appear to extend beyond that which s 51AC(6)(b) contemplates. Later in these reasons, I rule that the statement of claim should be struck out, and that conduct of the respondents prior to 1 July 1998 may not be alleged or proved against them. Accordingly, the proceedings will ultimately address a much shorter time span and (judging from the present particulars) involve a much more confined set of facts than the respondents presently anticipate. Their concerns about the proceedings

dictating an inquiry into many instances of alleged conduct from 1991 are, in the light of that ruling, not warranted.

68. Given the nature and evident purpose of s 51AC, the fact that at least to some extent the claims now to be made under s 51AC (in so far as they relate to conduct after 1 July 1998) might in part be brought by the Choongs in separate proceedings under the underlease does not lead to the conclusion that the proceedings are vexatious or an abuse of process. The re-leasing claim is not one which is said to arise under the underlease. The applicant also contends that the relief based on unconscionable conduct concerning the rental issue, the food range issue, and the food price issue, is at least partly beyond mere enforcement of the terms of the underlease. For example, the applicant wishes to contend that it was unconscionable not to provide information concerning the rental issue, even though there may have been no provision in the lease that such information be provided. I do not think that the respondents have shown any grounds why the applicant should not be entitled to pursue such matters. Nor does the relatively small amount of loss which the Choongs might have sustained by that conduct give rise to such a conclusion. It is likely to be the case in many actions under s 51AC and under s 51AB that the individual losses of the small business or businesses, or of the consumers, will be relatively small. Indeed, often the fact that individual losses are small leads to the individual trader or consumer not pursuing a claim. The Legislature has enacted provisions such as s 51AC to enable unconscionable conduct (if established) to be penalised notwithstanding such considerations."

57. The court then went on to deal with a submission concerning section 51AC(6)(b) which permits the court to have regard to circumstances existing before 1 July 1998 but not to have regard to conduct engaged in before that date for the purpose of determining whether a contravention had occurred.

58. The view was taken by the court that the applicant's submission that section 51AC(6)(b) only prevented the court from applying section 51AC remedies to

conduct occurring before 1 July 1998 was incorrect. The court concluded th would have been easier for the legislature to express the sub-paragraph in a to achieve that result if it was what it had intended to do. On this point Honour said -

"85 Those considerations lead me to the conclusion that, in determining whether an alleged contravention of s 51AC(1) of the Act has occurred, the Court cannot take into account conduct on the part of the alleged contravenor, using the term "conduct" in the wide sense in which it is defined in s 4(2) of the Act. It follows, in my judgment, that the applicant ought not be permitted to make allegations of conduct on the part of the respondents prior to 1 July 1998 in the statement of claim.

86 That does not indicate where the borderline between "circumstances" and "conduct" lies. Yet, borderline there must be. There may clearly be matters relevant to an alleged contravention of s 51AC(1) of the Act which do not involve any conduct on the part of the alleged contravenor, and which arose before 1 July 1998. Where they provide the context in which an alleged contravention is sought to be proved, there is nothing to indicate that those matters might not be alleged and proved. There may also be matters which involve some act done or transaction entered into by an alleged contravenor prior to 1 July 1998 which provide the content in which the alleged contravention occurred. Such matters may well be "circumstances" under s 51AC(6)(b). An illustration in the present claim may be Leelee's lease of the premises, and its underlease of the stall to the Choongs. Another illustration may be the fact of Mr Ong's directorship of Leelee. Although, in a sense, each of those matters involves conduct because Leelee had to act to accept the lease and grant the underlease, and Mr Ong had to give his consent to be a director of Leelee, I do not think that is the sort of conduct to which s 51AC(6)(b) refers. That is because the definition of conduct, and of engaging in conduct, in s 4(2) of the Act, although widely expressed, serves the purpose of identifying behaviour which may relate in some way to a potential contravention of a provision of the Act. In the present matter, the fact of the underlease (for example) is not related in that way to the alleged infringement but provides the setting in which the alleged infringement occurred.

87 It is not appropriate to endeavour to provide some formula always applicable to draw the distinction between "circumstances" and "conduct" for the purposes of s 51AC(6)(b). The answer may depend upon the purpose for which the particular fact is alleged. In relation to the allegations of conduct identified by the applicant in par 101 (it is not clear that the reference to par 100A conduct is correct), in my view the allegations specifically transgress the direction in s 51AC(6)(b). They should be confined to any conduct after 1 July 1998. Even if those allegations have the more limited purpose of informing the respondents' state of mind in respect of the alleged contravention after 1 July 1998, I consider that they transgress that statutory direction. They require the Court to have regard to conduct of the respondents prior to 1 July 1998 for the purpose of determining whether the respondents, after 1 July 1998, contravened s 51AC(1).

88 There is also a difficult question as to whether the alleged conduct of the Choongs referred to in par 99 of the statement of claim should be allowed to be pleaded and proved. In practical terms, the question is whether the Court should be permitted to have regard to requests by the Choongs in the terms referred to, but made prior to 1 July 1998, for the purposes of determining whether, after 1 July 1998, the respondents contravened s 51AC(1). It is hypothetically possible that the Choongs may have made the same request on 30 June 1998 and on 1 July 1998. Should evidence be permitted only about the request on 1 July 1998, and not about that of the day before? If the request were made only on 30 June 1998 and the response alleged to be unconscionable conduct was made on 1 July 1998, should evidence be permitted of the conduct of the Choongs on 30 June 1998?

89 In my judgment, the allegations about the Choongs' conduct in par 99 of the statement of claim should not be permitted. The allegation does relate to conduct, as that term is defined in s 4(2), as it alleges the doing of an act. Section 51AC(6) is introduced by describing when subs (6)(b) will apply. It applies where the purpose of the proposed evidence is to determine whether a corporation has contravened s 51AC(1). The purpose of the allegations about the Choongs' conduct is explicitly to determine whether Leelee has contravened s 51AC(1). It is an allegation which is part of the transaction which gives rise to the alleged contravention. It is a piece of conduct to which the Court must have regard, in the sense described above, to determine if there has been a contravention of s 51AC(1). It is not a fact which merely sets the scene, or a "circumstance", in which the impugned conduct takes place. The impugned conduct only takes its colour and significance from the conduct alleged.

90 A consideration of what might occur in this matter if such allegations are treated as "circumstances" and not "conduct" supports that conclusion. There may be many oral requests alleged to have been made by the Choongs in the period September 1997 to 30 June 1998. The respondents may wish to dispute the terms of those requests, or even that they were made at all. They may wish to lead evidence of their conduct in response to those requests up to 30 June 1998. Those sorts of issues may need to be resolved to ascertain whether there were any requests still active, or as to their ongoing significance, at 1 July 1998. The respondents may wish to show that they refused the requests prior to 30 June 1998, and that the requests were not further pursued, or that they were pursued in terms which differ from the present allegations. In my view, it is those sorts of inquiries which s 51AC(6)(b) was intended to exclude from the Court's consideration. Indeed, on its terms s 51AC(1)(b) would clearly preclude the Court from having regard to conduct of the respondents which might throw a significantly different light on the alleged requests. It could not have been the legislative intention that that opportunity would be denied to the alleged contravenor of s 51AC(1).

91 Accordingly, I have concluded that the allegations of conduct on the part of the respondents and the allegations of conduct on the part of the Choongs which are part of the transaction giving rise to the alleged contravention, and not merely allegations which set the scene in which the alleged contravention occurred, should be disallowed."

59. On the remaining issues, the court said -

"(b) Is there conduct in connection with the supply of services?

93 For the purpose of considering this issue, I shall treat the existence of the underlease as a circumstance capable of being proved and will assume that it is alleged that there was a request by the Choongs after 1 July 1998 to the respondents to consider the entry into a fresh underlease with a third party so that the Choongs, as existing tenants of the stall, and as persons who had substantial plant and equipment at the stall, had the opportunity of selling that plant and equipment in situ to any new tenant of the stall, and that the respondents refused that request.

94 The respondents submit that such conduct is not relevantly in connection with the supply or possible supply of services to a person. They point out that the term granted by the underlease was to, and did, expire on 6 January 1999. There is no allegation that the Choongs had any right to any extension of the term. They rely upon certain observations of Hill J in *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445 at 463, in the content of s_52A(1) of the Act, as follows:

> *"There must, for s 52A(1) to be satisfied, be some connection between the provision of the services and the unconscionable conduct. No doubt any connection, except perhaps one that is very remote, will suffice but it is hard to see here any relevant connection at all save the obvious fact that a loan has to be first made before, it being in default, it is called up (even if the provision of loans can be the relevant service)."*

95 The applicant in submissions identified the relevant services being supplied by the respondents as the underlease and the provisions to the Choongs of their entitlements under the covenants in the underlease. It was a term of the underlease that, upon the expiration of the occupancy rights which it granted, the Choongs would vacate the stall and remove their plant and equipment. The applicant claims that, to insist on the performance of that covenant where the Choongs might otherwise have the opportunity to sell that plant and equipment in situ to a new tenant is unconscionable, in circumstances where (as is here alleged) that insistence is both capricious and directed solely towards causing loss to the Choongs. The determination of whether there is unconscionable conduct may be assessed having regard to the factors identified in s 51AC(3). The applicant asserts that subpars (b) and (k) are of particular relevance. They provide:

> *"(b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and*
>
> ...
>
> *(k) the extent to which the supplier and the business consumer acted in good faith."*

The applicant submits that the factors referred to above are relevant, in the light of those provisions.

96 For the purposes of this application, it is not appropriate to make findings of fact. I take the pleadings as containing the relevant facts. On the assumption that the allegations are confined to conduct after 1 July 1998, I do not think that the applicant's claims are so untenable that the claim should be struck out. In expressing my conclusion in that way, I am simply

applying the test laid down for resolving such an application as the present: *General Steel Industries* (above). I have no view as to whether or not the applicant will be able to prove all or any of the facts it alleges. However, accepting that the allegations will be established at the hearing, including as to the respondents' state of mind, I consider that it is arguable by the applicant that the respondents' conduct was in connection with the supply or possible supply of services to the Choongs. In the course of submissions, counsel for the applicant indicated that the applicant may wish to add to the statement of claim to indicate an alternative way in which it is said that the respondents' conduct is in connection with the supply or possible supply of services. I have not had regard to that prospect in ruling upon this particular contention, but the leave to amend the statement of claim will enable any such additional facts or matters to be pleaded.

(c) Can the conduct alleged be unconscionable?

97 The respondents finally contend, in relation to these paragraphs of the statement of claim, that the refusal of the respondents to deal with the Choongs in relation to any potential new tenants, or the refusal "to consider" an underlease to a prospective tenant of the stall so that the Choongs might have the opportunity to sell to that tenant their plant and equipment, cannot amount to unconscionable conduct in connection with the supply of services in any event. In effect, it is contended that the respondents cannot contravene s 51AC(1) simply by insisting on their right of vacant possession at the expiration of the term granted by the underlease.

98 Counsel for the respondents referred to *Coal Cliff Collieries Pty Ltd v Sijehama Pty_Ltd* (1991) 24_NSWLR 1 for the proposition that heads of agreement to negotiate in good faith may be enforceable. It was put that, inferentially from that decision, in the absence of any such agreement there can be no obligation to negotiate. Counsel also referred to *Official_Trustee in Bankruptcy v Tooheys Ltd* (1993) 29_NSWLR 641 as providing an illustration of circumstances where it would be unconscionable for a landlord simply to allow a tenancy to expire without the tenant having an opportunity to transfer its business and assets to a new tenant. In that case, the conduct relied upon included specific representations by the landlord as to the transferability of the tenant's business and assets at the expiration of the term.

99 That general submission may be correct. However, in my view, those submissions are more appropriately considered when the admissible evidence has been received, and in the light of the facts as found. I do not think those authorities so conclusively establish the outer boundaries of the concept of unconscionable conduct for the purposes of s 51AC of the Act

as to lead to the view that the applicant presently has no real prospect of success on its application as expressed in the statement of claim. The views expressed about the breadth of the concept encompassed within the expression "unconscionable conduct" by Beaumont_J in *Cameron v Qantas Airways Ltd* (1995) 55 FCR 147 at 179-181 and by Branson J (with whom Spender J agreed on this point, and Olney J agreed) in *Pritchard v Racecage Pty Ltd* (1997) 142 ALR 527 at 543-546 are, in my view, sufficient reason not to accede to the proposition of the respondents at this stage of the proceedings. The fact that the respondents may be exercising contractual rights is not necessarily a circumstance which precludes a finding of unconscionable conduct in the present circumstances. It may do so, but in my view that proposition of the respondents is not so clearly right that the applicants should be deprived of the opportunity of taking the matter to trial if it is not otherwise resolved. There may also be other facts proved at trial which might be relevant to whether the respondents' conduct is unconscionable in any event, including (if it be the case) that the respondents have some sound commercial reason for not releasing the stall. It is preferable that the respondents' arguments be addressed in the light of the facts as they are found to be.

Should the statement of claim be struck out?

100 I have referred in some detail to the allegations concerning the rental issue, the food range issue, and the food price issue. In the light of my decision about the way in which s_51AC(6)(b) operates, it is clear that many of the facts alleged should not be allowed to stand. In respect of each of those issues, allegations are made of conduct prior to 1 July 1998 which is said to be unconscionable. Allegations are also made of conduct prior to 1 July 1998 which is said to be part of the transaction involving the conduct after 1 July 1998 said to be unconscionable.

101 Again, I do not think it is sensible or feasible simply to strike out parts of the statement of claim. The applicant, and the respondents, may be left with a confusing document and one which is difficult to follow. In the light of those reasons, the applicant may wish to review the way in which the matters alleged are pleaded, or to omit parts of its allegation. Unless some oral direction was given after 1 July 1998 on the topic, it may limit the allegations it makes concerning the food price issue to some degree. It may wish to indicate the relevant "circumstances", as that term is used in s 51AC(6)(b), in some different way. I am not to be taken as indicating that the applicant should do any of those things, or as indicating how the applicant should plead its case. Subject to the statement of claim reflecting

the particular rulings contained in these reasons for judgment, that is a matter for the applicant. However, the opportunity given to the applicant to consider such matters in the light of the submissions put by the respondents is a further reason why I consider that the appropriate order is to strike out the statement of claim."

60. In another decision this year, ***Spalla v. St. George Wholesale Finance Pty Ltd*** **[1999] F.C.A. 513**, the mortgagors alleged that the appointment of a receiver by virtue of a failure to pay sales tax was unconscionable and thus a contravention of the Act. The facts were extremely complex in relation to the financial affairs of the applicant. The relevant part of the judgment in that case reads as follows -

"141 The position thus far reached is that, for the reasons stated above, the charge created by each debenture had, at the option of St George Wholesale and St George Finance, become enforceable thereby permitting the appointment of receivers to the property of Irlmond and APS. The issue that now arises is whether there is some basis for contending that St George Wholesale and St George Finance were not entitled to exercise their power to appoint receivers. Two arguments were put forward in support of the proposition that St George Wholesale and St George Finance were precluded from so doing. First, it is said that they are estopped from relying upon any of the events that gave rise to the enforceability of the charge. The second argument is that the appointment of the receivers was contrary to s. 51AC(1) of the *Trade Practices Act* thereby justifying the grant of relief under s. 80 or s. 87 restraining the continuation of the receivership.

142 Once it was thought that there were many types of estoppel. Jordan CJ in *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR(NSW) 598 at 602 - 603 identified them as estoppel by deed, common law estoppel, estoppel by representation and estoppel by acquiescence. To this list his Honour may have added estoppel by judgment, issue estoppel, an estoppel of the *Henderson v Henderson* (1843) 67 ER 313 variety, and estoppel by convention.

143 In the trilogy of cases *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, *Foran v Wight* (1989) 168 CLR 385 and *Commonwealth v Verwayen* (1990) 170 CLR 394, an attempt was made to unify these categories of estoppel. For most purposes, in particular for what is commonly known as promissory estoppel, the elements that must be satisfied for an estoppel to arise have been summarised by Brennan J in *Waltons Stores*, supra, at 428 -429:

"In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise."
See also *Verwayen*, supra, at 444 - 446 per Deane J.

...

148 If Irlmond and APS, through Mr Spalla, did believe that the strict contractual rights that governed the relationship between the parties would not be enforced, they cannot show that that belief was induced by the conduct of the St George companies. In that regard I do not accept that conduct that amounts to no more than mere acts of indulgence can constitute a promise or assurance that late payment would forever be indulged or would be indulged until notice to the contrary was given so as to found an estoppel: *Tool Metal Manufacturing Co Ltd v Tungston Electric Co Ltd* [1955] 1 WLR 761; *John Burrows Ltd v Subsurface Surveys* (1968) 68 DLR (2d) 354. Here the conduct relied upon amounts to nothing more than mere acts of indulgence. In any event, Mr Spalla did not say that the St George companies had promised or assured Irlmond or APS that they would always overlook late payments. Indeed, Mr Spalla said that when he was served with the notices of default in November 1998, he understood that the St George companies were seeking immediate payment of all the money that was due to them and that Irlmond and APS were obligated to make those payments. This is not consistent with a belief that late payments would be tolerated or, at the least, that they would be tolerated after the service of the notices.

149 Leaving aside the issue of late payments, there is no basis in the evidence for concluding that St George Wholesale was estopped from appointing receivers if sales tax was not paid. It is true that in 1994 there had been a significant default in the payment of sales tax followed by an agreement with the ATO that the tax could be paid by instalments. It is also true that the St George companies were aware that there were other occasions when sales tax was not paid on time. But it does not follow from this that if sales tax was not paid on the due date for payment, on some other occasion the St George companies had represented that they would take no action. Moreover, I do not believe that Mr Spalla was of that opinion.

150 Finally there is the insolvency of the two companies. There is no suggestion that Mr Spalla believed that the St George companies would not act on that insolvency if they were minded to do so. If he was of that belief, it was not brought about by any conduct on the part of the St George companies.

151 The suggested promise that the St George companies would continue to support Irlmond and APS until they were able to dispose of the dealership or obtain refinance is also not made out on the evidence. It is clear that in the latter part of 1998 and the first few weeks of 1999, Mr Spalla was encouraged to make the dealership as attractive as possible to entice another financier to take over the account or to encourage a prospective purchaser to acquire the business. As Mr Hiller said, that was the reason why St George Wholesale contemplated writing off a substantial portion of its debt. Of course it was in the interests of not only Mr Spalla and his companies but also of the St George companies that the business to be sold or refinanced. However, Mr Spalla had been told in October 1998 that the St George companies wished to terminate the facilities. In many of the important discussions that took place thereafter the possible appointment of receivers was raised. Thus Mr Spalla knew that if the dealership was not sold or refinanced, the St George companies might well appoint receivers if an event occurred that justified their appointment. Indeed, nowhere in the evidence is it suggested that Mr Spalla was promised or given an assurance that this would not occur.

152 **Much of what I have said in relation to the estoppel claim is also directly relevant to the claim that the appointment of the receivers was unconscionable conduct in contravention** of s 51AC"(1) of the *Trade Practices Act*. In my view the true position was that the St George companies had given Mr Spalla every reasonable opportunity to make arrangements to avoid the appointment of receivers. He had been told in September 1998 to obtain another financier or sell the dealership. When the notices of demand were served Mr Spalla was told that they would not be

acted upon because the parties were hopeful that Capital would take over the finance. St George Wholesale offered to release some of the debt due to it to assist in that regard. It continued to accept late payment without real complaint. It allowed Irlmond and APS to exceed the limits of their facilities. It did all of these things with the risk that its own financial position may suffer. **In the end the St George companies appointed receivers to protect their position. They were entitled to do so and were not acting unconscionably in making that appointment.**

61. The other Federal Court decision is a decision of *Gary Rogers Motors (Aust) Pty Ltd v. Subaru (Aust) Pty Ltd* [1999] F.C.A. 903, 2 July 1999. This was a case in which there had been a termination of a dealership and an allegation that the termination was unconscionable conduct contrary to section 51AC. This matter was also heard before Finklestein J. and dealt with relief at an interlocutory level as distinct from a trial level.

62. This case is important in relation to termination of a franchise as in the present instance. His Honour did not accede to the application by which an interlocutory injunction was sought and expressed his reasons in relation to the legal principles in the following way -

> 34 The first of the two substantive arguments that the applicant has put forward in support of an interlocutory injunction is based on the alleged implied term of good faith and fair dealing. The first respondent was prepared to accept the implication of such a term in the dealership agreement for the purposes of the interlocutory application. It could hardly

do otherwise. Recent cases make it clear that in appropriate contracts, perhaps even in all commercial contracts, such a term will ordinarily be implied; not as an ad hoc term (based on the presumed intention of the parties) but as a legal incident of the relationship: see eg *Renard Constructions (ME) Pty Ltd v Minister for Public Works* [1992] 26 NSWLR 234; *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *Alcatel Australia Ltd v Scarcella* [1998] 44 NSWLR 349.

35 If such term is implied it will require a contracting party to act in good faith and fairly, not only in relation to the performance of a contractual obligation, but also in the exercise of a power conferred by the contract. There is no reason to think, prima facie at least, that the obligation of good faith and fair dealing would not act as a restriction on a power to terminate a contract, especially if that power is in general terms.

36 It remains for me to decide whether the implication of that duty results in the conclusion that the first respondent has acted in breach of it.

37 In my view, a term of a contract that requires a party to act in good faith and fairly, imposes an obligation upon that party not to act capriciously. It would not operate so as to restrict actions designed to promote the legitimate interests of that party. That is to say, provided the party exercising the power acts reasonably in all the circumstances, the duty to act fairly and in good faith will ordinarily be satisfied.

38 However, whatever the precise content of the restriction on the exercise of a contractual power to terminate a contract is, it has not been exceeded in this case. I say this for two reasons. First, the first respondent did have good reason to terminate the dealership when it served its notice in June 1998. It had decided that its Six-Point Program was an appropriate means of improving the position of its dealers in the marketplace. It had requested the applicant to adopt the program in full and the applicant had refused to do so. The first respondent was entitled to treat this conduct as being contrary to its own business interests and to act accordingly. The second reason is that thirteen months' notice of termination was given. So far as the evidence discloses, this was a sufficient period of notice to enable the applicant to reorganise its affairs to accommodate the loss of the dealership, to the extent that it was able to do so. At least, it has not been suggested that the period of notice was unreasonable.

39 I should mention in passing that the applicant did contend, in reliance upon cases such as *Chan v Zacharia* (1984) 154 CLR 178, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 and *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, that the relationship between the parties was such that the first respondent owed

duties of a fiduciary character to the applicant. However, it was not suggested that the content of any such duty would be different than that imposed upon the first respondent by reason of the implication of a term requiring it to act in good faith and fairly. It follows that if there were fiduciary duties governing the conduct of the first respondent, they were not breached when it gave the notice of termination.

40 The second substantive point argued by the applicant was that in giving the notice of termination and, more importantly, in failing to withdraw that notice after the applicant had indicated its willingness to abide by the Six-Star Program, the first respondent had acted unconscionably, in contravention of s 51AC" of the *Trade Practices Act.*

41 I will assume, as the first respondent suggested I might, that s 51AC has application to the facts of this case. Section 51AC(1) is in the following terms:

"A corporation must not, in trade or commerce, in connection with: (a) the supply or possible supply of goods or services to a person (other than a listed public company);or (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable."

42 Section 51AC(9) provides that a reference in the section to the supply or possible supply of goods or services does not include a reference to the supply or possible supply of goods or services at a price in excess of $1,000,000. Section 51AC"(10) imposes the same restriction in respect of the acquisition or possible acquisition of goods or services.

43 Section 51AC sets out the matters to which regard may be had in determining whether there has been unconscionable conduct in relation to the supply of goods or services. One of the matters mentioned is the "requirements of any applicable industry code": see s 51AC"(3)(g). There is an applicable industry code: the "Franchising Code of Conduct". That code came into operation on 1 July 1998. However, by clause 5 most of its provisions did not take effect until 1 October 1998. The code is applicable to the facts of this case, because clause 4(2) provides that a motor vehicle dealership agreement is to be taken as a franchise agreement for the purposes of the code.

44 Relevant for present purposes is clause 22. It provides:

"(1) This clause applies if a franchisor terminates a franchise agreement: (a) before it expires; and (b) without the consent of the franchisee; and (c) if the franchisee has not breached the franchise agreement; and (d) clause 23 does not apply.

(2) For paragraph (1)(b), a condition of a franchise agreement that a franchisor can terminate the franchise agreement without the consent of the franchisee is not taken to be consent. **(3) Before terminating the franchise agreement, the franchisor must give reasonable written notice of the proposed termination, and reasons for it, to the franchisee.** (4) Part 4 (resolving disputes) applies in relation to a dispute arising from termination under this clause."

45 It will be noticed that this clause permits the termination of a franchise agreement before the expiry of the term of that agreement even if the franchisee has not breached the agreement. However, before terminating the agreement, the franchisor must (a) give reasonable written notice of the proposed termination and (b) provide written reasons for the termination. The first requirement has been satisfied. Thirteen months' notice was given. The second requirement has not been complied with. The first respondent did not provide written reasons for the termination. However, in the circumstances I do not regard this failure as constituting unconscionable conduct. The reason is that the applicant was aware that one factor, if not the principal factor, motivating the termination was its failure to adopt the Six-Star Program. It is true that the first respondent contends that there were other reasons why the notice of termination was given. Mr Cassar has said that he orally informed Mr Rogers of those reasons and this is one of the matters that are in dispute. Nevertheless it seems clear enough, in my opinion, that even if there were no other reasons for the termination, the dealership would have been terminated in consequence of the failure by the applicant to adopt the Six-Star Program. **A failure to state in writing what the applicant knew to be the case could not constitute unconscionable conduct in my opinion.**

46 Further, I do not regard the refusal by the first respondent to withdraw its notice of termination as unconscionable conduct. I take as the measure of unconscionability, conduct that might be described as unfair. In the present circumstances I do not believe that the first respondent has acted unfairly in not wishing to reinstate the applicant as a dealer. The applicant had been a dealer for seven or eight years. Whilst it was not obliged to adopt the Six-Star Program, that is, it was not contractually obliged to do so, its failure to adopt the program and its criticism of certain aspects of the program, could reasonably be regarded by the first respondent as an indication that the applicant was not willing to act in the best interests of the first respondent and of the dealership group as a whole. No doubt this led to a loss of confidence in the applicant. That loss of confidence would not necessarily be overcome by a change in attitude on the part of the applicant. Many relationships can only operate satisfactorily if there is mutual confidence and trust. Once that confidence and trust has

broken down the position is not easily restored. It is not unconscionable to terminate a relationship where that trust and confidence has been undermined.

47 For the foregoing reasons, I would dismiss the application for interlocutory relief with costs."

63. In another brief recent State court decision of ***Eddy Lau Constructions Pty Ltd v. Transdevelopment Enterprise Pty Ltd & Anor.*** **[1999] N.S.W.S.C. 455**, an injunction was sought in circumstances where the plaintiff had entered into a contract with the first defendant under which the plaintiff carried out building work for the first defendant. This was residential building work and the provisions of legislation prohibited the plaintiff from contracting to do that work unless a contract of insurance in compliance with the legislation was in force. The judgment was very brief but injunctive relief was granted on the basis that on the plaintiff's case there was a representation made to the plaintiff to the effect that the plaintiff only needed a contract of insurance before starting the work rather than before making the building contract. The plaintiff relied on the representation that the plaintiff would be disadvantaged if the first defendant was permitted to retreat from it.

64. Also in the Supreme Court of New South Wales on 11 June 1999 was a case of ***Tanzone v. Westpac*** **[1999] N.S.W.S.C. 478**. In a claim for rent the main question for determination was whether Westpac as a lessee of premises was liable to pay

rent to Tanzone, the owner of the premises, on terms of the lease or whether Westpac was entitled to relief by way of rectification on the ground that Tanzone had engaged in unconscionable conduct under section 51AA of the Act. The claim of unconscionable conduct failed. The decision is lengthy but as to the unconscionable conduct aspect, the court said, perhaps unsurprisingly, that it was not argued that if there were conduct to which the section otherwise applied, it was not in trade or commerce.

65. The court observed -

> "In essence what is claimed is that Tanzone, in taking title with notice of the mistake, engaged in unconscionable conduct by taking advantage of the mistake. It is very difficult to conceive how a major financial institution could be in a position of special disadvantage of the sort generally required to bring entitlement to relief for unconscionable conduct. When ignorance is referred to in *Bromley v. Ryan* (1956) 99 C.L.R. 362 at 415, it is as part of the general incapacity of a party to a transaction. In this case ignorance arose, if it arose at all, through an extraordinary blindness to revealed facts. And usually unconscionable conduct requires the party under disability to have been in direct relationship with the oppressor so that there is some inequality of position or power between them. Thus unconscionable conduct often involves the insistence upon legal rights "to take the benefit of another's vulnerability in a way that is unreasonable and oppressive to an extent that offends ordinary minimum standards of fair dealing" (*Commonwealth v. Verwayen* (1990) 170 C.L.R. 394 at 441); or in circumstances such as those which arose in *Bahr v. Nicolay* refusing to acknowledge a right having been found to have been agreed to be bound by that right. The facts of the case do not bring it within either of these principles. In addition section 51AA cannot, in my view, be used as a means to defeat indefeasible title by an attack from flank. That is because

s. 51AA must be directed to conduct which would, under State law, give rise to a right of relief. In some respects it may do little more than extend the range of remedies available under State law. Thus this claim fails." (para 55)

Auto Masters in the Supreme Court

66. Finally, I should mention the *Auto Masters Case* itself as decided in the Supreme Court of Western Australia in ***Auto Masters Australia Pty Ltd v. Bruness Pty Ltd et al* [1999] W.A.S.C. 39**. This was a decision of McKechnie J. in Chambers on 21 May 1999. I am not sure whether my instructing solicitor is familiar with this decision as it is not mentioned in my brief.

67. The question which I have not been asked to advise upon but will necessarily be required to consider is the appropriateness of issuing proceedings in the Federal Court in relation to section 51AC when proceedings have already been issued in the State court dealing with that provision. Although the Commission was, of course, not a party to the proceedings in the State court, otherwise the parties in the State court are the same as those under consideration in this opinion. I will briefly refer to this aspect below.

68. I repeat the relevant parts of the judgment below -

1 This is an application by a franchisor seeking to restrain a franchisee from trading under the franchisor's name, goodwill and logo until trial. It is therefore in the nature of an interlocutory injunction of a mandatory kind, the granting of which will obviously have a significant effect upon the franchisee.

2 The franchisor says it is justified in so acting because the contract between the parties has been brought to an end.

3 The application has been strongly opposed. Each party has filed a series of affidavits which dispute facts asserted in the opposing side's affidavits. No application was made by either party for leave to cross-examine the deponents.

4 I have noted some of the issues in dispute but have not attempted the difficult, well nigh impossible, task of resolving them in this judgment. Rather I have proceeded on what I find to be either common or uncontested facts or inferences to be drawn from such facts.

The parties

5 The plaintiff whom I shall now refer to as Automasters is the franchisor of automotive service centres throughout Western Australia. It is the largest group in WA and operates in 19 locations including Midland. Mr Douglas Canham is the General Manager. Automasters is the registered proprietor of Australian trade mark No 477432 and is the registered proprietor of the name "Automasters".

6 The two defendants are interlinked. Bruness Pty Ltd has been a franchisee of Automasters since 3 September 1992. It was granted an exclusive licence to use the Automasters system for a term from 1 July 1997 to 3 September 2002. On the 30 June 1997 the interest in Bruness passed to Mr Coombes who guaranteed its performance. Mr Coombes is a director of Bruness and the manager of Automasters Midland. When referring to the defendants in this judgment I shall generally refer to Mr Coombes as encompassing both defendants.

The franchise agreement

7 The original franchise agreement was expressed to be a standard franchise agreement between Automasters and a Mr and Mrs P Hinks. It is dated 3 September 1992.

8 The agreement was assigned to Mr Coombes by a deed of assignment dated 30 June 1997. I will outline the salient points of the agreement. The preamble asserts that Automasters have developed an automotive system and have established a reputation demand and goodwill for the business.

9 The franchisee wishes to obtain the benefit and advantages of associating with the business. The guarantors guarantee the due and punctual performance of all obligations of the franchisee.

10 Clause 4(1) deals with intellectual property then provides that immediately on termination the franchisee will cease to trade as Automasters and, in effect, transfer all names back to Automasters.

11 Clause 10 deals with payments to be made by the franchisee, including a franchise fee and an account service fee.

12 Clause 14 deals with standards. The franchisee must obtain accreditation in respect of the standards and use the QAM system to ensure the accreditation of the franchisor is protected.

13 Clause 15 deals with Automasters' obligations. This includes provision of technical, managerial and administrative advice:

14 Clause 15:3 provides that Automasters will provide a manual. The clause states:

"15.3 **Operations & Procedures Manual**

(a) The Franchisor has developed and will provide to the Franchisee during the Term with an Operations and Procedures Manual containing the confidential and mandatory specifications, standards and procedures prescribed from time to time by the Franchisor for the operation of the Franchise Business and the maintenance of the System and Image.

(b) The Franchisor may from time to time amend these mandatory specifications, standards and procedures at its absolute discretion and such amendments will form part of the Operations and Procedures Manual."

15 Clause 16.8 provides:

"Conduct of Business

The Franchisee and its employees will at all times give prompt, courteous, efficient services to all customers of the Franchisee's Business. The Franchisee and it employees will in all dealings with all customers, suppliers and the public adhere to the high standard of honesty and integrity, fair dealing and ethical conduct. The Franchisee agrees not to deviate from the specification standards procedures said by the Franchisor in the Operations and Procedures Manual or else where and in particular to ensure that:

(a) the Premises are open for business at all times during normal commercial trading hours as reasonably specified by the Franchisors;

(b) the Premises are adequately stocked with a well-balanced selection of the franchise products or permitted alternative franchise products, to regularly replace old stock and to otherwise comply with directions relating to products or alternative products given to the Franchisee by the Franchisor;

(c) the Premises and the Equipment at all times clean, tidy, orderly, painted, equipped and maintained to a standard and in a manner approved by the Franchisor or specified in the Operations and Procedures Manual and, subject to lease obligations, the interior and the exterior of the Premises shall be repainted at least every five years;

(d) the Franchisee and all staff employed in the Franchisee's Business are at all times suitably presented and comply with the dress requirements, if any, specified in the Operations and Procedures Manual.

If at any time the Franchisor is reasonably of the opinion that the Franchisee is not complying with the provisions of this sub-clause the Franchisor may, without prejudice to any of the other remedies available to the Franchisor including termination of this Agreement, give to the Franchisee a written notice of the steps required by the Franchisor to be taken to ensure compliance with these provisions and the Franchisee shall at its own expense comply with such requirements within the period specified in such notice."

16 Clause 29 deals with termination. Relevantly cl_29.4 provides:

"29.4 **Termination after Notice to Remedy**

The Franchisor may terminate this Agreement where the Franchisee or the Guarantors has failed to remedy the breach specified within a period of 14 days of receipt of the notice in writing from the Franchisor requiring the Franchisee to do so where the Franchisee:

(a) fails to pay to the Franchisor any sum due to the Franchisor under the terms of this Agreement;

(b) fails to submit the accurate monthly returns specified in clause 18;

(c) sells or offers for sale any unauthorised franchise services or products/services;

(d) has encumbered the Franchisee's Business or any part thereof other than in compliance with this Agreement;

(e) fails to operate the Franchisee's Business in accordance with the policies, procedure, standards and specifications set forth in the Operations and Procedures Manual;

(f) fails to rectify any breach of the Standards as assessed during the internal compliance audits conducted by the Quality Representative;

(g) operates the Franchisee's Business in a manner that presents a hazard to its employees or the public and fails to take reasonable steps to correct such breach;

(h) breaches any other term of this Agreement or breaches any term of its lease or sub-lease of the Premises."

The operation and procedures manual

17 The manual forms an important part of Automasters' business. By cl 36.7 the agreement includes the manual.

18 The manual provides requirements for transmission of data to Automasters' head office. Franchisees are linked to the head office by computer.

19 Mr Canham in his affidavit of 25 March 1999 deposes in par 37 that performance of the obligation by a franchisee is important because

"Auto Masters insists on the performance of the above obligations as:

(1) it enables Auto Masters to determine whether or not a particular franchisee is following the procedures;

(2) it enables Auto Masters to calculate what royalties, licence fees and other fees are payable under the Agreement by the franchisee to Auto Masters;

(3) it enables Auto Masters to reconcile the computer-entered data against the manual copy of the invoice."

Termination of the agreement

20 On 27 February 1999 Automasters served on Mr Coombes a "Notice of Default of Franchise Agreement". As this notice forms the basis for the subsequent action I shall set out the operative parts in full:

21 "B (1) By:

(a) clause 14.1 of the Franchise Agreement, Bruness agreed to obtain and maintain accreditation in respect of ISO 9002 of 1987 and AS3902 ("Quality Standards") and use the QAM System developed by the Franchisor to ensure continued compliance with the Quality Standards; and

(b) clause 14.4 Bruness agreed to pay all reasonable costs of the Franchisor incurred in remedying breaches in compliance by Bruness of the Quality Standards including costs of additional audits necessary to monitor subsequent compliance.

(2) By clause 16.8 of the Franchise Agreement, Bruness agreed to operate the Business in accordance with and not to deviate from the policies,

procedures, standards and specifications set out in the Operations & Procedures Manual ("Manual").

(3) the Manual provides:

(a) in a section of the Manual titled "*Branch Operations*" that the original and copies of any invoices raised by Bruness are to be distributed in the following manner:

Original - Administration Centre (Franchisor)

1st Copy - Customer

2nd Copy - Branch File

(b) in a section of the manual titled "*Document Control*" that Bruness shall be responsible to maintain the branch filing system and indexes. Bruness is responsible for the receipt and despatch of documents between its branch and the Administration Centre and between its branch and other branches which shall be via the Administration Centre. Paperwork, Computer Data Entry and Banking are to be done on a daily basis;

(c) in a section of the Manual titled "*Control of Quality Records*" that Bruness is to ensure that all customer records and financial data are entered on the Computer Management System on a daily basis.

(4) By clause 16.11 of the Franchise Agreement Bruness agreed to observe all covenants and conditions of Bruness's sub-lease of the Premises.

C. By clause 33.1 of the Franchise Agreement the Guarantor guaranteed to the Franchisor the due and punctual performance, compliance and discharge by Bruness of each and all of its covenants, undertakings and warranties in the Franchise Agreement.

D. (1) In breach of Clause 14.4 of the Franchise Agreement Bruness has failed to pay to the Franchisor an audit fee of $200.00;

(2) In breach of clause 16.8 of the Franchise Agreement and the Manual Bruness has failed to:

(a) submit invoices to the Franchisor ("the Invoices");

(b) carry out Computer Data Entry on a daily basis; and

(c) ensure that all customer records and financial data are entered on the Computer Management System on a daily basis.

Particulars of the matters referred to in subparagraphs (a), (b) and (c) are contained in a schedule annexed to this notice.

(3) In breach of clause 16.11 of the Franchise Agreement, Bruness has breached its sub-lease of the Premises by virtue of Bruness's having interfered with the use and enjoyment by occupiers of adjoining business premises of their common property."

22 Automasters asserts that the breaches were not remedied, that it was entitled to terminate the agreement, and on the 15_March 1999 it terminated the agreement.

23 Mr Coombes continues to trade as Automasters Midland.

The issues about default

24 Clause D of the notice specified three matters whereby Automasters alleged that Mr Coombes was in default.

(1) The $200 fee

25 This matter is quickly disposed of. The fee was eventually paid albeit without admission of liability. As I indicated to counsel at the hearing I would not be minded to make a mandatory injunction in respect of $200 fee that was paid even if late.

(2) Breach of the agreement and the manual

26 This is the matter upon which issues were joined.

(3) The breach of the sublease

27 The plaintiff did not advance the sublease breach as a basis for relief in this application.

The relevant portion of the manual

28 The revised manual provides as follows:

"Agreement with Customer and Booking in

Prior to a customer being advised of the cost and time required for completion Branch Manager shall ensure that the customers requirements have been clearly determined and assessed as being within Auto Masters capabilities.

When the cost and time required are advised to the customer it may be necessary for some further negotiation to reach agreement on the scope of work its cost and time required. During these negotiations, personnel shall at all times be aware of Auto Masters performance capabilities.

Once agreement has been reached and all of the customers requirements have been reviewed, the vehicle should be booked in on the Booking In Sheet (AMB 006-G). As per Appendix 1 & Sample Appendix 2.

When the vehicle is delivered to the Branch, an invoice shall be raised accordingly i.e. Tune, Service, Brakes or Mechanical. The following Data is to be entered in the computer and the invoice printed with the customer details, name, address, vehicle details, model and year. The method of payment must be confirmed and authorisation must obtained before any work is carried out however, if the customer is not avalible (*sic*) a notation

on the invoice i.e. (by phone, as previous arranged, etc.) must be completed.

NB: When the computer system is down the information shall be hand written. (My emphasis)

APPENDICES

AMB 006-G Booking In Sheet.

AMB 006-G Booking In Sheet. Completed Example

Distribution of Invoices

The original and copies of the Invoice are to be distributed as follows:

Original - Administration Centre

1st Copy - Customer

2nd copy - Branch File.

...

Monitoring

All processes are to be progressively monitored and the results legibly recorded on the Invoice.

...

2. The Branch Outlets

The Branch Manager shall be responsible to maintain the branch filing system and indexes. The Branch Manager is responsible for the receipt and despatch of documents between his branch and the Administration Centre and between his branch and other branches which shall be via the Administration Centre. Paperwork, Computer Data Entry and Banking is to be done on a daily basis. No document shall be removed from branch office files without the consent of the Branch Manager.

...

APPENDICES

APPENDIX 1

SCHEDULE FOR TRANSMISSION OF QUALITY RECORDS FROM BRANCHES TO THE ADMINISTRATION CENTRE

Items marked "CORP" are not required to be submitted by Branch Managers of Franchised Stores.

Weekly

Computer Transfer Discs (or effect modem download when requested)

Inspection & Test Status Invoice (Administration Centre Copy) in numerical order and secured.

FORTNIGHTLY

Internal Mail."

Problems with the computer

29 It is obvious that the nature of this franchise requires that Automasters be constantly advised as to the business being generated through its franchisees. Part of its profit is derived from the turnover. The businesses need to be constantly monitored and decisions made. Mr Canham put it this way:

"This enables the plaintiff to ensure that no franchisees are attempting to evade payment of royalties and also allows the plaintiff to determine how busy the various franchisees are. Levels of work among the franchisees may effect (*sic*) the plaintiff's marketing and promoting strategy. Because of these matters, the plaintiff insists, through the obligations imposed on the franchisees by the Manual, that invoices be entered into the database daily and hard copies of invoices be provided to the plaintiff weekly (even handwritten when the computer is down)."

30 On behalf of Mr Coombes it is asserted that there were constant problems with the computer system. He complained many times about it with little success.

31 Mrs Coombes filed an affidavit. She is an experienced data processor and had the main responsibility of data entry of the invoices. She asserted constant problems with the computer including run time errors, synchronising errors, hanging including inability to use the mouse, and crashing and losing data.

32 Her assertions are challenged by Automasters and its computer consultant Mr Lapins.

33 She explains there are many reasons why an invoice cannot be completed the same day and that sometimes it may take weeks or even months to complete a job.

34 What is clear is that the parties have been in constant dispute over the entry of data into the computer. It is impossible to resolve that dispute on the affidavits. However it is possible to make some conclusions.

35 Firstly, the manual clearly states that in the event that the computer is down, the entries shall be made manually. The Coombes do not depose that they ever complied with this requirement when the computer was off line.

36 Secondly, Mr Canham deposed that between the notice of breach and the notice of termination, the breach was not remedied. No invoices were received. Thirty two invoices had still not been received by Automasters.

37 In her affidavit, Mrs Coombes details various invoices which she said were completed. However, significantly, she did not say when those invoices had been completed by her. In par_19 of her affidavit she asserts that all invoices have been entered and all completed invoices lodged with Automasters. She does not say when this was done.

38 The conclusion I reach is that during the notice period the breach was not remedied.

39 I add as an aside the fact that subsequent to these proceedings being instituted Mrs Coombes was able to complete much of the details is indicative that there was no insuperable hurdle to compliance.

40 Furthermore, I found the explanation in respect of some invoices, namely that they were still awaiting costing, implausible. It does not seem to accord with the business system generally outlined in the affidavits, that customers and the Coombes would still be wanting costings on parts months later.

41 Clause_8 of the agreement specifically deals with purchase of products, the primary obligation on a franchisee being to purchase from Automasters or its nominated suppliers.

42 The manual covers the procedure in respect to ordering supplies. If that procedure is followed, lengthy delays are unlikely. Finally, the delay in costings was never raised by Mr Coombes during the notice period. I would have expected this supposed difficulty to have been raised in a timely manner.

The defendants' contentions

43 Because of the urgency of the matter the defendants did not file a defence or counterclaim. However, counsel for Mr Coombes attacked the plaintiff's case in several areas.

Statement of claim - no cause of action

44 This submission was made during the early part of the defendants' response without leave. Because it was in time, the plaintiff filed an amended statement of claim.

45 I consider the amended statement of claim clearly discloses a cause of action.

The defendants' submissions: implied term of reasonableness

46 Counsel for Mr Coombes asserted that there must be a requirement of reasonableness. The contract might be technically breached but the consequences should not be visited upon a franchisee if the result is unreasonable.

47 I am not sure that is so. Where parties enter into a contract of mutual obligation and notice to remedy a breach is given, if the breach remains unremedied there may not be much scope for the operation an implied term of reasonableness.

48 Accepting however for present purposes that the concept of reasonableness is to be implied, having regard to all the circumstances, I do not regard the actions of Automasters in relation to the breach of the requirement to forward the information to Automasters as unreasonable. These notices were the culmination of a long history of default during which no evidence has been given that there was compliance by handwriting the information.

49 The actual notice of default which triggered the action to terminate the contract must be seen against a lengthy background of non-compliance.

50 Mr Coombes received a new computer on 26_November 1998. However despite requests for invoices on 4, 8, 9, 18 and 21_December 1998 there was no compliance and there was no reason advanced as to why there was no compliance.

51 As a result a notice of default was delivered on 24_December 1998. No action was taken on that notice.

52 Mr and Mrs Coombes attempt to deal with this notice in their affidavit. From 26_November the problems with the computer asserted by Mr and Mrs Coombes, though denied by Automasters, were intermittent, related to the software and in particular run time errors and synchronising errors. It was not explained how these prevented compliance with the manual.

53 It is easy to see that the information is vital to Automasters' business even if the service fee in respect of the invoices under consideration might be small in the period under review.

Unconscionable contract (*sic conduct*)

54 Counsel for the defendants also submitted that Automasters had engaged in unconscionable contract: *Trade Practices Act 1974* s 51AC".

55 The onus would be on the defendants at trial to establish that there was unconscionability by Automasters to such a degree as to warrant interference with the franchise agreement.

56 **It is sufficient for present purposes to say that I do not regard the defendants' arguments of sufficient persuasion on this point to convince me that I should decline to grant an injunction.**

57 **Some of the argument will have to be supported by findings of fact which can only be made after a trial. While the need for a trial to resolve these issues is clearly not decisive of the question, in my opinion the present state of the evidence strongly suggests that Automasters**

were entitled to terminate the agreement and, even if there were other motives, the dominant reasons was for non compliance with the manual in respect to invoices.

58 There is no evidence from which I am able to draw an inference that Automasters is really proceeding against Mr Coombes to force him to sell back his franchise agreement at a figure much below its true market value.

59 As a related submission counsel for the defendant submitted that the notice of default was invalid because Automasters was in breach of contract. Its breach was said to be failing to deal with the franchisee in utmost good faith. I am not presently persuaded that there is undisputed evidence from which I can draw such a conclusion. There is some evidence to the contrary. **Automasters did not proceed on its first notice of default. It tried to work through the problems with Mr Coombes. In the letter from Automasters' solicitors of 16 February 1999, Mr Coombes was requested to attend a meeting to discuss the breaches of the franchise agreement and the options Automasters were willing to make available to rectify the situation. The solicitors strongly recommended that Mr Coombes attend with his legal adviser "as the issues to be discussed are of great significance to your continued interests in your franchise business and immediate future in the Auto Masters systems".**

60 Mr Coombes responded to that letter declining a meeting on the basis in part that:

"... I don't make enough money out of the business to afford me the luxury of taking my legal advisors to a meeting where it would appear that you have already decided what options Auto Masters Australia Pty Ltd are willing to make available to me to rectify the situation."

61 To some extent Mr Coombes had a point. The internal audit report was not made available to him. No convincing reason was advanced at the hearing as to why it was not given to him, even if in a form which blanked out reference to other franchisees.

62 However, notwithstanding this matter, there is in fact little, if any, evidence of lack of good faith by Automasters.

Internal audit report

63 As part of its system, Automasters requires that the franchisee undergo a quality assessment audit from time to time. Such an audit was conducted in October 1998.

64 On 22 January 1999 Mr Warr and Mr Canham conducted an internal audit. They reported their findings to Mr Coombes in a minute dated

22 January 1999. Various matters of default were there identified. Some of those matters relate to incomplete documentation which does not appear to depend upon computer entry. The affidavit filed by the defendant disputed this report. I have put aside matters where there is a material dispute in the affidavits. Consequently, I make no findings in this regard.

General conclusions

65 There is a level of dispute about customer complaints and the vagaries or otherwise of the computer system. I accept that the defendants experienced a level of problems with the computer system. I am unable to determine the extent of these problems.

66 **However, in the circumstances I do not consider it was of such a level as to prevent general compliance with the manual. Further, the defendants did not, as required, hand write the entries when the computer was, for whatever reason, down.**

67 I am satisfied that the defendants were in default when the notice to rectify the default was issued. I am also satisfied that they did not remedy the default within the time specified under the notice.

68 I do not regard as relevant the allegation that Mr Canham was acting out of some form of malice against Mr Coombes because of the ACCC's complaint, complaints about the computer system or the prosecution of a Mr Holland. Those matters are in dispute and cannot be resolved on affidavit evidence alone. However, even if true they do no more than provide a motive for Mr Canham to determine the franchise agreement.

69 **The motive does not affect the result if there has been a breach of the contractual arrangements by failing to comply with the notice of demand.**

70 For the purposes of determining this application I find that there was such a breach. The breach was not trivial and the action taken by Automasters in terminating the contract was reasonable.

71 It follows from this finding that not only is there a serious question to be tried, but that I consider it highly likely the plaintiff will succeed at trial.

Principles as to interlocutory mandatory injunction

72 A good exposition of the principles is to be found in ***Cash Converters Pty ltd v Hila Pty Ltd*** (1993) 9 WAR 471 per Kennedy J at 483.

73 The reason for the courts reluctance to grant a mandatory injection is often because as Kennedy J says:

"Such an injunction is usually more wasteful of time and money if it turns out in the end to have been wrongly granted."

74 For this reason, among others, a court granting a mandatory interlocutory injunction must feel a high degree of assurance that the plaintiff will ultimately succeed and that the injunction will, after a full trial, be shown to have been rightly granted: see ***Shepherd Homes Ltd v Sandham*** [1971] 1 Ch 340 per Megarry J at 351.

75 Where the practical effect of such an injunction is to bring to an end the court action the court should be especially cautious:

"Where a plaintiff brings an action for an injunction, I think that it is, in general, an injustice to grant one at an interlocutory stage if this effectively precludes a defendant from the opportunity of having his rights determined in a full trial ... where a plaintiff brings an action and in it seeks an interlocutory injunction on the basis that the defendant has breached the former's rights then justice requires that the defendant should be entitled to dispute the plaintiff's claims at trial, and if the grant of the injunction would preclude this then it should not be granted on an interlocutory basis: per May_LJ; *Cayne v Global Natural Resources PLC* [1984] 1 All ER 225 at 238.

76 I have borne these admonitions carefully in mind. In the end however, the grant of an interlocutory injunction - whether mandatory or prohibitory - is an exercise in discretion either to do justice or to avoid injustice to either party.

77 The following factors are relevant to the decision in this case.

1) There is a serious question to be tried.

2) I am satisfied to a high degree that the plaintiff will succeed at trial for the reasons already set out.

3) **The balance of convenience**

(i) *Breakdown of relationship*

The words of Woodward J in ***Miniskips Ltd v Shelton Pty Ltd*** (1987) 11 IPR 459 at 466 are apposite:

"A franchise arrangement which requires for its success, co-operation between the parties cannot conveniently be cobbled together by the court after one party has purported to terminate it and has since acted on that basis, particularly when the other party is suing for misrepresentation."

In the present case it is obvious that goodwill between the parties has broken down.

(ii) *The agreement: consequences of termination*

The agreement by cl_30 provides what will happen once the agreement is terminated. The injunction sought by Automasters is in accordance with the

agreement, providing as it does for the prevention of holding out the name Automasters, the return of property and the removal of signage.

(iii) *Damage to Automasters*

I am satisfied that Automasters' business will be seriously affected if Mr Coombes continues to trade as Automasters Midland. The continued provision of invoices and other information is important to the plaintiff's business and I have little confidence that the defendants' problems in compliance have been overcome.

(iv) *Damage to Mr Coombes' business*

I am also satisfied that Mr Coombes' business will be adversely affected by not trading under the Automasters' banner. After all, the advantages of so trading are no doubt why he entered into the franchise in the first place. He will not of course be put out of business entirely in the sense that he will be able to trade as an automobile servicer and utilise the personal goodwill he has built up. Yet the effect of an injunction is likely to be substantial. For this reason I have been especially careful to assure myself of the high likelihood of the plaintiff's ultimate success.

(v) *Mediation*

Upon receipt of the notice terminating the agreement, Mr Coombes appeared before me late on a Friday afternoon seeking some form of relief. His application was incompetent. However I did suggest mediation. Subsequently, it appears that Mr Coombes attempted to have Automasters participate in mediation but was unsuccessful.

The *Trade Practices Act* s 51AE gives power to make regulations. The *Trade Practices (Industry Codes - Franchising) Regulations* came into operation on 1 July 1998. The code is prescribed and is a mandatory industry code. The code affected the Automasters' Franchise Agreement with respect to mediation from 1 October 1998. Part 4 sets out a procedure for resolving disputes.

The Code relevantly provides:

"27. **Code complaint handling procedure**

A party to a franchise agreement who has a dispute with another party to the franchise agreement may start the procedure under clause 29.

28. **Choice of procedure**

A party to a franchise agreement who has a dispute with another party to the franchise agreement may, at any time, choose to use the procedure under clause 26 or 27.

29. **Procedure**

(1) the complainant must tell the respondent in writing:

(a) the nature of the dispute; and

(b) what outcome the complainant want; and

(c) what action the complainant thinks will settle the dispute.

(2) The parties should then try to agree about how to resolve the dispute.

(3) For mediation under a franchise agreement:

(a) if the parties cannot agree under subclause (2) within 3 weeks, either party may refer the matter to a mediator; and

(b) if the parties cannot agree about who should be the mediator, either party may ask the mediation adviser to appoint a mediator.

(4) For mediation under this code, either party may ask the mediation adviser to appoint a mediator.

(5) The mediator may decide the time and place for mediation.

(6) The parties must attend the mediation and try to resolve the dispute.

30. **Mediation under the code**

(1) The mediation adviser must, within 14 days after referral under paragraph 29(3)(b) or subclause 29(4), appoint a mediator for the dispute.

(2) After mediation under this code has started, the mediator must tell the mediation adviser, within 28 days, that mediation has started."

I do not know whether Mr Coombes entirely followed the procedure. However, I am prepared to accept in general terms that he wished to have the dispute mediated and that Automasters refused. This refusal is a significant factor against the granting of an injunction and may in some cases be decisive.

However, in this case **I do not regard the initial refusal of Automasters to participate in mediation as decisive.**

At the conclusion of the hearing on 12 April 1999 I addressed the parties as follows:

" ... I am going to rise for a brief time because I want the parties to clearly - and this is addressed to the parties rather than their lawyers - to clearly understand that I will take this away and I will make a ruling on the mandatory injunction, not by tomorrow and as soon as I am able to do so. One or other party is going to lose on that ruling and the results to either party are going to be very serious.

Now, I can order mediation at this stage but I would not order mediation unless the parties consented to it. However, it seems to me that there are two ways that this action can proceed. Whether or not an injunction is granted it can proceed very expensively for both parties to have the ultimate issues thrashed out, or you can all honestly sit down and try and

see if there is a way of resolving your difficulties. There may not be, and I'm inclined to think, looking at the papers, notwithstanding what Mr Lauri has said, that there is an element of truth in what is said, that the second defendant has certainly pushed to the very limit in relation to the plaintiff. At the same time, I think the plaintiff has acted - and maybe should have gone to mediation even if called on.

So what I'm going to do is rise shortly. I do propose to reserve my decision and I do propose to deliver a decision unless mediation were successful, but everybody should understand clearly each party is at risk and regardless of the outcome of this there are going to be very few winners out of a long, drawn-out litigation. I will rise shortly so the parties can consider that."

As a result the parties did attend before an accredited mediator who had apparently been available earlier. The results of the mediation are, quite properly unknown by me. In the particular circumstances of this case therefore I do not consider that Automasters initial refusal to mediate is decisive because subsequently mediation was attempted.

(vi) *Damages*

If the plaintiff ultimately succeeds in its actions without a mandatory injunction, its damages are to some extent incalculable. The continued wrongful use of the name and property and the holding out of a franchise by Mr Coombes cannot be fully measured but will be significant. I note in this regard the advertising done by Automasters to promote the group.

If the defendant ultimately succeeds the damages will also be significant. However they are more measurable as the difference (if any) between average turnover while a franchisee and turnover while restrained from holding out as a franchisee.

Conclusion

78 There is a serious question still to be tried. At this early stage of proceedings a Judge must necessarily be predictive as to the success of that question. My prediction is that it is highly likely the plaintiff will succeed at trial. The plaintiff will only fail if the defendants discharge the onus of establishing an implied condition of reasonableness or unconscionable action or lack of good faith. I assess the chances as low. The balance of convenience strongly favours the plaintiff.

79 The conclusion is that justice is best served by granting an injunction in terms sought by Automasters."

69. I do not know what has happened to the substantive Supreme Court action. Enquiries should be made in that regard if this matter is to be taken further but the commission may well form a view that it is inappropriate to do so, having read my opinion.

Observations

70. My brief refers to the fact that the franchisor acknowledged on or about 28 October 1998 that Mr. Holland had admitted to an action he regretted and he was subsequently charged with fraud and found guilty which Mr Coombes believes vindicates his persistence in pursuing the matter with the franchisor. Be that as it may, it seems to me that the essential undetermined question is whether the franchisee was in fact failing in his performance under the franchise agreement to an extent which was either significant or at least substantially significant as suggested by the franchisor and/or its solicitors. I note, for example, that there were proceedings issued in the Supreme Court of Western Australia and it may well be that findings are to be reached in that regard in those proceedings.

71. While I recognise that issues under the Act in terms of unconscionability will, by definition, examine concepts which are not confined to legal rights, nevertheless,

it is clear from the cases I have cited that if there was a significant departure from the requirements of the agreement that is most certainly one aspect to be taken into account in determining whether or not the actions of the franchisor were unconscionable or otherwise. It seems to me that the issues concerning Mr. Holland and his conviction are not particularly relevant although one can see that this is one of the matters which gave rise to considerable disharmony between the parties.

72. The conduct which receives perhaps the most examination in my brief is the debate between the franchisor and the franchisee as to whether or not the problems in respect of which notices were issued and complaints made were surmountable. It would be most inadvisable for the Commission to proceed with this matter in the absence of cogent evidence that the complaints were either incapable of being sustained in significant measure or were exaggerated and/or fabricated. There is no doubt that the franchisor has acted strongly but if all or a substantial number of the breaches occurred, it would be very difficult to convince a court that the strong action by the franchisor was unconscionable.

73. I agree with the approach suggested in my instructions that if the issuing of the breach notices were not warranted then matters falling for consideration are -

1. whether the franchisor issued the notices in good faith, albeit mistakenly; or

2. whether the issuing of the notices was an attempt to pay back the franchisee or to remove the franchisee from the group because of a previous personal disagreement.

74. Clearly wilfully false notices motivated by either of (a) or (b) would be unconscionable. The difficulty is there is insufficient information at present to form a view on that issue.

More Information Needed on Alleged Breaches

75. It would be necessary to take a detailed statement from the franchisee in relation to each of the alleged possible contraventions and then to consider some independent examination of the franchisee's comments in relation to those contraventions.

Specific Allegations in Brief Chronological Sequence As Outlined in My Instructions

<u>Poor quality computer hardware and software</u>

Mr. Coombes alleges that he had ongoing problems with the computer equipment supplied by the franchisor's preferred supplier, On-line Business Solutions. These problems resulted in the franchisee not being able to electronically process invoices on the day work commenced as required under the franchise agreement. The franchisor requires complete invoices to be provided to enable accurate allocation of franchise and advertising fees which are calculated on store turnover. An extraordinary audit (for which the franchisee was provided an account) of the franchisee's business was conducted because complete invoices were not provided to the franchisor. Mr. Coombes disputes the legitimacy of the audit fee, claiming the incomplete invoices were a result of the failure of the computer system and also disputes an account from the supplier of the computer equipment which caused further difficulties with the franchisor.

Incomplete invoice processing

Bruness Pty Ltd was placed in breach of the franchise agreement with the notice to remedy being issued on 12 October 1998 and providing fourteen days to remedy the breaches. Mr. Coombes disputes the notice to remedy stating in writing on the same day that the problems were caused by the computer and therefore beyond his control. Mr. Coombes was advised on 22 October 1998 that a number of invoices were outstanding or incomplete. Following an internal audit on 27 October 1998 Mr. Coombes was advised that a number of items of the notice to

remedy remained outstanding, however, an extension of time was granted due to further computer difficulties.

General store layout and operational processes

The further internal audit was conducted on 17 November 1998 which appears to have established that the general appearance of the store was in compliance with the franchise requirements and that recording of work carried out, both through invoices and on the computer was appropriate. However, some deficiencies in the recording process were identified. Mr. Coombes was later advised, on 24 November 1998, that the notice to remedy previously issued was being reviewed and that a quality assurance services audit would be conducted in January 1999. Mr. Coombes raised concerns over this as he had previously expressed his desire to sell the franchise but was not able to do so while the notice to remedy remained. This second audit may well have been over-zealous on the part of the franchisor but more precise analysis of the outcome of the previous notice is necessary.

Lease defaults and Notice to Remedy

In late December 1998 the notice of default issued to Bruness Pty Ltd alleged ongoing defaults by Bruness Pty Ltd and numerous disputes with the franchisor leaving the franchisor with "no alternative but to enforce the obligations of the franchise agreement". The ongoing default included, in addition to the matters raised in the notice to remedy, failure to pay all account service fees and advertising levies as required under the franchise and a default in relation to the lease over premises.

Mr. Coombes claims that the issue regarding the lease was resolved and Bruness Pty Ltd was never penalised due to breach of the lease conditions - but this does not mean it was not in breach nevertheless. Mr. Coombes also paid $200 into a trust account to cover the extraordinary audit fee. Mr. Coombes accepted an obligation to pay to avoid further difficulties but refused to pay the amount direct to the franchisor until the amount sought was justified. Mr. Coombes advised the franchisor of the steps he had taken to resolve this issue. These issues are outlined in the letter from Mr. Coombes to the ACCC in January 1999 to which I have referred.

The internal audit was conducted on Auto Masters Midland on 22 January 1999 at which time it was determined that Bruness Pty Ltd was not complying fully with

the procedures set out in the operations manual and therefore was in breach of the franchise agreement. Subsequently, a further notice of default was issued to Bruness Pty Ltd on 4 February 1999 and notification was served that the franchisor was entitled to terminate the franchise but did not intend to do so at this time. By the beginning of 1999 it would seem to be reasonable to infer that the franchisor was searching for ways to justify termination of the franchise.

Quality Accreditation Requirements

The further quality standards audit conducted on Auto Masters Midland on 10 February 1999 resulted in a similar outcome to the internal audit conducted on 22 January 1999, namely that Bruness Pty Ltd was not complying with the quality accreditation requirements. Mr. Coombes was notified of this on 16 February 1999. A copy of the report was not provided to Mr. Coombes and he disputes the findings as he contends he was advised by the assessor at the conclusion of the report that Bruness Pty Ltd would not be in breach as a result of the report. A detailed statement from Mr. Coombes on this point, cross-referenced to court and other documents, would be necessary.

Offer to purchase business

The 12 March 1999 offer by Auto Masters at the sum of $100,000 to purchase the business may, in light of the background described, reveal an ulterior motive although McKechnie J. rejected this suggestion. When advising Mr. Coombes that if not accepted, in light of the previously issued default notices, the franchisor would take steps to protect its interests, it seems to me that there are grounds for suspicion. This offer was not accepted by Mr. Coombes and his franchise was subsequently terminated on 15 March 1999. Legal proceedings regarding this were instituted by the franchisor in March 1999.

76. In support of the argument that there may be a contravention by the franchisor of section 51AC of the Act, particularly in the steps taken early this year, the following matters are raised by way of examination in my brief -

Section 51AC(3)(a) Relative Bargaining Strengths

> "There is an apparent disparity in bargaining position between Auto Masters Australia Pty Ltd and Bruness Pty Ltd. Auto Masters is the master franchisor for a number of franchises and has an estimated annual turnover of over $1 million (this estimate provided by Mr Coombes). Bruness Pty Ltd is a small business operation, consisting of (at the time) one franchise outlet with limited financial

resources. Auto Masters, as franchisor, would also be considered to be in a much stronger bargaining position due t the nature of the franchise agreement and the obligations on the respective parties."

I agree that this disparity is likely to be established.

Section 51AC(3)(b) Requirement to comply with conditions not reasonably necessary

"From the information available there does not appear to have been any requirement by the franchisor outside the terms and conditions of the franchise agreement. Mr. Coombes had alleged that it was rumoured if any franchisee took legal action against the franchisor then they would shut their business down. However, there is no evidence to substantiate the allegations and therefore it is considered that this element does not apply."

I would repeat the observation that more information is needed to evaluate this limb. The essence of unconscionability embraces the notion of strict adherence to legal rights (here contractual rights) in a variety of inappropriate circumstances.

Section 51AC(3)(c) Ability of business consumer to understand any relevant documents

"It is understood that Mr. Coombes has extensive business experience and was in a position to understand all relevant documentation provided to him. However, Mr. Coombes claims that certain information or documentation requested, which he considered important to the operation of the franchise, was refused, making it difficult for Mr. Coombes to make an informed decision. This is not considered sufficient for this element to be applied."

I agree that this limb could not be sustained but the withholding of information may be unconscionable.

Section 51AC(3)(d) Use of undue influence or pressure or unfair tactics

"Mr. Coombes alleges that the lucrative offer to his former business manager, Mr. Holland, was unfair as it removed the opportunity for Bruness Pty Ltd to expand which was an expressed desire of Mr. Coombes. This may have affected the longer term plans of Mr. Coombes but had no influence on the initial decision to enter the franchise and is therefore unlikely to apply. Further, the issuing of breach notices without notice, the conducting of internal audits and threats of termination of the franchise agreement are claimed by Mr. Coombes to amount to

undue pressure to stop him pursuing the matter relating to Mr. Holland and to force him out of the franchise. The legitimacy of the breach notices may be questionable but whether this can be construed as unfair pressure or unfair tactics is debatable."

I agree that the conduct at the beginning of this year may be an unfair tactic subject again to more information about the breaches.

Section 51AC(3)(e) Amount for which identical goods or services could have been obtained

"Not applicable."

I agree.

Section 51AC(3)(f) Consistency of conduct

"There is no evidence to suggest that the actions of the franchisor towards Mr. Coombes was inconsistent with the way in which Auto Masters dealt with all other franchisees in similar situations."

I agree.

Section 51AC(3)(g) Requirements of any applicable industry code

"The alleged conduct of Auto Masters does not appear to be in conflict with any applicable industry code, including the Franchising Code of Conduct."

I agree.

Section 51AC(3)(h) Requirement of any other industry code

"Not applicable."

I agree.

Section 51AC(3)(i) Failure to disclose intended conduct or risks from the intended conduct

"It would appear that the franchisor failed to advise Mr. Coombes of its intention to set Mr. Holland up in the franchise outlet which Mr. Coombes had a verbal agreement to purchase. This outcome affected the ability of Mr. Coombes to continue his plan of expansion. However, this would have had no impact on the decision by Mr. Coombes to enter the franchise. There are no apparent risks to Bruness Pty Ltd from this conduct as it did not affect their standing within the franchise. It is considered this element applies only to a limited extent."

I agree. This does not ground a valid complaint.

Section 51AC(3)(j)Willingness to negotiate terms and conditions of any contract

"There does not appear to be any contracts subsequent to the initial franchise agreement between Auto Masters and Bruness Pty Ltd. Accordingly, this element does not apply. Mr. Coombes does argue, however, that the franchisor refused to provide documents which he considered relevant to the franchise and that the franchisor would not negotiate on the issue. Staff consider that conduct of this nature is not likely to be included within the interpretation of this element and therefore does not apply."

I agree. This does not ground a valid complaint.

Section 51AC(3)(k) Extent to which parties acted in good faith

"It could be argued that the decision or intention of the franchisor to have Mr. Holland take over the new franchise outlet while negotiating with Mr. Coombes for the purchase of that same outlet was not acting in good faith. The dispute which resulted is crucial to the subsequent events and therefore must be taken into consideration. There is no evidence of any other actions by the franchisor or any conduct by Mr. Coombes which would be considered as not acting in good faith."

I do not consider there is sufficient evidence to ground a complaint under this limb on the Holland issue. However, subject to further information, it is possible that the 1990 actions were not in good faith.

Conclusion

77. It seems clear that the conduct under consideration is "... in connection with supply ..." albeit that it is more accurately in connection with the termination of that supply. *(Zoneff (supra))*

78. For reasons stated, I consider that further evidence is required to examine in precise detail the alleged breaches so that a view can be formed in relation to each of the default notices as to whether the franchisor was not merely nit-picking but in fact trying to search for technical breaches to justify a reason to terminate the franchise. Taken in conjunction with the other conduct and, in particular, the loss sustained in consequence of the termination and the inevitability of that loss, there is an arguable case for contravention of section 51AC of the Act although, on present indications, I do not consider it to be particularly strong. The strength of the case may possibly increase on provision of the additional information.

79. The other issue which concerns me is the current state of the proceedings in the Supreme Court of Western Australia where the same parties (with the exception of the Commission) are litigating, amongst other things, the same or very similar dispute. In that dispute the Hon. Justice McKechnie rejected (although with the most cursory of examinations of the section and the arguments) the notion of unconscionability. Needless to say, the evidence in support of that contention and the arguments may well have been substantially less than could be raised in Federal Court litigation by the Commission. At least two difficulties spring to mind, however, and they are the possible reluctance on the part of the Federal Court to explore issues which are in the domain, at present, of the Supreme Court. This issue was considered in the High Court decision of *Re Wakim* 163 A.L.R.

270, which found that the Federal cross vesting scheme was constitutionally invalid. In the course of that decision, in the context of entirely different facts and circumstances, the High Court stressed that the identity of parties is a necessary element for the application of both issue estoppel and *res judicata*. Accordingly, it would follow that both by virtue of the statutory right which the Commission has, as outlined above, and as it was not a party to the proceedings commenced in the Supreme Court, it would not be necessarily precluded as a strict matter of law from raising any issue decided or to be decided in that case. (In any event, as is well established, the doctrine of *res judicata* and issue estoppel depend on there having been a judgment that is final (*Blair v. Curran; Curran and Perpetual Trustee Co Ltd v. Blair* (1959) 62 C.L.R. 464).) However, the second consideration is that although issue estoppel or *res judicata* may not apply, an application to stay the proceedings could be anticipated if the Supreme Court proceedings were on foot, having been commenced substantially before the present proceedings and dealing *inter alia* with the same issue. That topic necessarily invites detailed consideration of a range of matters on which I have not been presently instructed but if required to do so, I will be happy to offer views on that topic.

80. Finally, I hold the same view as to the prospects of success under section 51AA of the Act but in light of a theoretically adverse determination by the High Court

as to its constitutional validity arising *inter alia* out of the *Farrington Fayre* matter, I have focussed principally on section 51AC.

Neil McKerracher QC
Francis Burt Chambers,
Perth
26 October 1999