

Appendix 7 House of Representatives Standing Committee on Industry, Science and Technology - Report: *Finding a balance towards fair trading in Australia, May 1997 – Recommendations*

RECOMMENDATIONS

1 Introduction

The Committee was asked to report to Parliament on business conduct issues arising out of commercial dealings between firms. Evidence given to the Fair Trading inquiry indicated that small businesses were vulnerable to exploitation and abuse in the following areas:

- retail tenancy;
- franchising;
- misuse of market power by larger competitors;
- and small business finance.

The Committee makes recommendations on specific policy measures to address the problems arising in each of these areas.

The Committee also recommends action to improve small business access to justice and to provide small businesses with better education and training to forestall problems arising.

The Committee also considered the need for general legislative protection for small businesses against unfair conduct and recommends a strengthening of Part IVA of the *Trade Practices Act*. The Committee considers that the success of new legislative protection against unfair conduct will require vigorous enforcement by the Australian Competition and Consumer Commission.

Recommendation 1.1 (para 1.50)

The Committee recommends that the Australian Competition and Consumer Commission be proactive in promoting compliance with the proposed new unfair conduct provisions of the *Trade Practices Act 1974*.

Due to the ineffectiveness of the Australian Competition and Consumer Commission in small business matters in the past, the Committee believes there is an urgent need to establish a body of precedents under the new provisions as quickly as practicable.

2 Recommendations on retail tenancy

Recommendation 2.1 (para 2.35)

Uniform retail tenancy legislation

The Committee recommends the drafting of a Uniform Retail Tenancy Code by the Australian Competition and Consumer Commission in consultation with industry participants including:

- (a) the Property Council of Australia;
- (b) the Australian Retailers Association;
- (c) the Australian Chamber of Commerce and Industry;
- (d) the Council of Small Business Organisations of Australia and its constituent retail bodies, including Independent Retailers of Australia;
- (e) other retail associations, including the United Retailers Association Inc;
- (f) the Australian Institute of Valuers and Land Economists; and
- (g) the Australian Institute of Business Brokers.

The Committee recommends that the Uniform Retail Tenancy Code be submitted to the Council of Australian Governments with a view to the adoption of uniform retail tenancy legislation around Australia.

Recommendation 2.2 (para 2.40)

Underpinning the Uniform Retail Tenancy Code in the *Trade Practices Act*

The Committee recommends that the Minister request the Australian Competition and Consumer Commission to approve the Uniform Retail Tenancy Code for underpinning in the *Trade Practices Act 1974*, thus providing for the courts to take into account provisions of the Uniform Retail Tenancy Code in determining whether or not business conduct in the area of retail tenancy has been ‘unfair’ and thus unlawful.

Recommendation 2.3 (para 2.60)

Dispute resolution

The Committee recommends that the Uniform Retail Tenancy Code provide for:

- (a) low cost mediation and conciliation of retail tenancy disputes; and
- (b) retail lease tribunals around Australia with jurisdiction to make binding decisions on retail tenancy disputes and affording limited rights of appeal to the courts.

The Committee further recommends that the Code explicitly exclude the option of legal representation for parties to a retail tenancy dispute, short of any eventual appeal to the courts.

Recommendation 2.4 (para 2.93)

Security of tenure

The Committee recommends that the Uniform Retail Tenancy Code provide for:

- (a) minimum lease terms of five years;
- (b) sitting tenants to have the option of lease renewal for a further five year term;
- (c) sitting tenants to have a right of first refusal of the lease for subsequent five year periods; and
- (d) the option of casual leasing in clearly defined circumstances but only at the request of the lessee.

The Committee further recommends that parts (b), (c) and (d) of this recommendation extend to tenants under existing leases.

Recommendation 2.5 (para 2.106)

Lease assignment

The Committee recommends that the Uniform Retail Tenancy Code:

- (a) require lessees assigning their leases to provide a disclosure statement to prospective purchasers, showing all relevant information on the financial position of the business and the rights and obligations of the business as a tenant, including information on rental rebates, rental holidays, and any other financial incentives applying at the time of assignment or in the previous five years;
- (b) specify the grounds on which a lessor can withhold consent to the assignment of a retail lease; and
- (c) provide that:
 - (i) purchasers of a trading retail outlet be given a new lease by the property management, when all parties agree; or
 - (ii) (as a fallback option) all rights and responsibilities pursuant to a retail lease pass to the new tenant on assignment of a lease, unless otherwise agreed in writing between the assignor and assignee.

Recommendation 2.6 (para 2.130)

Disclosure of rents paid

The Committee recommends that the Uniform Retail Tenancy Code provide for accredited retail property valuers to have access - on a non-disclosable basis - to relevant Tenancy Schedules of shopping centres, showing the total occupancy costs for each tenant in the centre and the value of any concessions or rebates given, for the purposes of valuing retail property or providing advice on market rent review.

Recommendation 2.7 (para 2.173)

Rents and rent review

Recognising rent will always be a matter for negotiation between landlord and tenant, the Committee recommends the Uniform Retail Tenancy Code provide that:

- (a) the disclosure statement set out clearly the method by which rent is to be calculated for the term of the lease without provision for review or for unpredictable increases;
- (b) market rent review only be permitted on renewal of a lease; and
- (c) the level of market rent on lease renewal be determined by an independent accredited valuer, with costs shared between the parties.

Recommendation 2.8 (para 2.197)

Outgoings and promotions

The Committee recommends that the Uniform Retail Tenancy Code provide:

- (a) for the establishment of merchants' associations in shopping centres;
- (b) that all tenants in a shopping centre belong to the merchants' association in that centre;
- (c) for Articles of Association of merchants' associations to be appended to the standard retail lease;
- (d) for the merchants' association to approve the annual budget of variable outgoings and promotions levies at an annual general meeting; and
- (e) for each tenant to be provided with detailed quarterly statements of expenditure on outgoings and promotions and audited annual statements of expenditure on outgoings and promotions.

Recommendation 2.9 (para 2.214)

Leases and disclosure statements

The Committee recommends that the Uniform Retail Tenancy Code provide for:

- (a) a standard form 'plain English' retail lease; also published in community languages; and
- (b) mandatory pre-contract disclosure of all factors likely to affect the viability of lessees - including all items currently required to be included in a statutory disclosure statement under the NSW *Retail Leases Act 1994*.

Recommendation 2.10 (para 2.228)

Tenancy mix

The Committee recommends that the Uniform Retail Tenancy Code provide:

- (a) for the merchants' association in a shopping centre to be consulted in relation to changes in tenancy mix; and
- (b) for lessors to include in disclosure statements provided prior to the signing of a retail lease the tenancy mix of the shopping centre and whether or not there are any provisions for rent reduction to apply if the turnover of the lessee falls owing to the introduction of a new competitor, or new competitors.

Recommendation 2.11 (para 2.256)

Redevelopment and relocation

The Committee recommends that the Uniform Retail Tenancy Code provide for retail tenants to be compensated according to pre-determined formulae specified in the lease or disclosure statement for:

- (a) disturbance to trading caused by redevelopments carried out at the direction of the lessor; and
- (b) any costs incurred as a result of a compulsory relocation, including pickup costs, any new fitout requirements, and compensation for disruption to trading.

The Committee further recommends that the Uniform Retail Tenancy Code require a relocated tenant to be granted a lease over new premises comparable to those vacated on like terms and conditions to the surrendered lease.

Recommendation 2.12 (para 2.261)

Economic and social impact statements

The Committee is concerned about the proliferation of retail shopping space in Australia and recommends that the Commonwealth raise through the Council of Australian Governments the possibility of local planning authorities requiring 'social and economic impact statements' to be lodged with development applications for shopping centre developments, for consideration with a view to restricting oversupply of retail floorspace.

3 Recommendations on franchising

Recommendation 3.1 (para 3.30)

The Committee recommends that the Franchising Code of Practice and any other relevant codes should provide for full disclosure of information relating to rental, outgoings, promotion expenses, tenancy mix and redevelopment proposals to franchisees who sub-let their premises from the franchisor. The code should also provide for adequate representation of franchisees in merchants' associations.

Recommendation 3.2 (para 3.79)

The Committee recommends that the Petroleum Retail Marketing Sites Act and the Petroleum Retail Marketing Franchise Act remain in force until new generic franchising legislation is enacted.

Recommendation 3.3 (para 3.112)

The Committee recommends that the Commonwealth enact specific franchising legislation providing for compulsory registration of franchisors and compliance with codes of practice. The definition of franchising under that legislation should include motor vehicle and farm machinery distribution arrangements and the oil industry.

The legislation should provide for adequate disclosure documentation, the establishment of appropriate independent code administration bodies, and dispute resolution procedures funded through compulsory registration fees.

4 Recommendations on misuse of market power

Recommendation 4.1 (para 4.59)

The Committee recommends that the *Trade Practices Act 1974* be amended to give the Australian Competition and Consumer Commission the power to take representative actions under Part IV of the Trade Practices Act which deals with various forms of restrictive trade practices, including the misuse of market power.

Recommendation 4.2 (para 4.66)

The Committee recommends that the Australian Competition and Consumer Commission make investigation of complaints, and enforcement of the law, in relation to the misuse of market power in the retail sector a top priority in light of the high degree of concentration in that sector and the disturbing evidence submitted to the Fair Trading inquiry.

5 Recommendations on small business finance

Recommendation 5.1 (para 5.16)

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The Committee recommends that small businesses be included in any client protection/dispute resolution programs established by the Treasurer pursuant to the recommendations in the report of the Financial System Inquiry (the Wallis report).

Recommendation 5.2 (para 5.48)

The Committee recommends that, in the light of the business conduct issues raised in the Fair Trading inquiry, the Commonwealth, in conjunction with State and Territory governments, examine the laws dealing with repossession and mortgagee sales with a view to providing that:

- (a) property owners have a reasonable opportunity to retire their debts by refinancing, before properties can be sold;
- (b) properties sold by mortgagee sale cannot be sold to the mortgagee or any company in which the mortgagee has an interest; and
- (c) there is a formal dispute resolution mechanism to guard the rights of unsecured creditors and shareholders against the actions of receivers/liquidators.

Recommendation 5.3 (para 5.52)

The Committee recommends that the concerns about client confidentiality raised in the Fair Trading inquiry be taken into account by any Taskforce established to review credit reporting and/or privacy of financial records.

Recommendation 5.4 (para 5.67)

The Committee recommends that the Treasury, in light of the concerns expressed in the Fair Trading inquiry, examine:

- (a) the practice of banks and other financial institutions securing business finance against real property rather than against the commercial viability of the business;
- (b) the implications of this practice for the efficient operation and survival of small businesses in Australia;
- (c) whether or not banks and financial institutions are charging excessive risk premiums for business finance given that business loans are secured against assets; and
- (d) options for promoting or ensuring small business access to finance secured against the potential commercial viability of the business.

Recommendation 5.5 (para 5.85)

The Committee recommends that:

- (a) the Code of Banking Practice be extended to cover all small business transactions instead of just applying to banking services 'for private or domestic use';
- (b) the Australian Banking Ombudsman Scheme be extended to all small businesses, not just those which are unincorporated;
- (c) the monetary limit for disputes under the Australian Banking Ombudsman Scheme be extended to 5500 000 to encompass the loan requirements of small businesses in Australia; and
- (d) if the banks are not prepared to implement part (a) of this recommendation by 30 June 1998, the Commonwealth introduce a code of conduct for the financial sector underpinned in legislation.

6 Legislative protection against unfair conduct

Recommendation 6.1 (para 6.73)

The Committee recommends that Part IVA of the *Trade Practices Act 1974* be amended by repealing the existing section 51AA and incorporating a new provision proscribing unfair conduct in commercial transactions. The section should read as follows:

Unfair conduct

New Section 51AA

- (1) *A corporation shall not, in trade or commerce, engage in conduct that is, in all the circumstances, unfair.*
- (2) *Without in any way limiting the matters to which the Court may have regard for the purposes of determining whether a corporation has contravened subsection(1) the Court may have regard to:*
 - (a) *the harshness of the result;*
 - (b) *any influence or pressure exerted on, or any tactic used against a person by the corporation or a person acting on behalf the corporation;*
 - (c) *whether or not a person suffered from any disability;*
 - (d) *whether or not there was a disparity in bargaining power between the parties;*
 - (e) *whether or not, as a result of conduct engaged in by the corporation, a person was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;*
 - (f) *whether or not the other person was able to understand any documents;*
 - (g) *the amount for which, and the circumstances under which, a party could have acquired identical or equivalent goods or services from a person other than the corporation;*

- (h) *the extent to which the conduct of the corporation is consistent with its conduct towards other persons who have entered into transactions or commercial relationships with the corporation that are the same as, or substantially similar to, the transaction or the commercial relationship between the corporation and the other person;*
- (i) *the requirements of any code of practice applying to participants in the area of trade or commerce in which the corporation is involved and which have been approved by the Australian Competition and Consumer Commission in accordance with section 51AAA;*
- (j) *the extent to which the corporation has made prior disclosure of any of its intentions affecting the interests of the other party and of the risks involved to that party;*
- (k) *in relation to a contract, the extent to which the corporation was prepared to negotiate with the other person in relation to the terms and conditions of the contract; and*
- (l) *the good faith of the parties.*
- (3) *A corporation shall not be taken for the purposes of this section to engage in unfair conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.*
- (4) *For the purposes of determining whether a corporation has contravened subsection (1):*
 - (a) *the court shall 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 conduct engaged in, or circumstances existing, before the commencement of this section.*

Recommendation 6.2 (para 6.78)

The Committee recommends that Part IVA of the *Trade Practices Act 1974* be amended to incorporate a new provision (section 51AAA) providing for the Australian Competition and Consumer Commission to approve codes of practice - the section to read as follows:

Power of the Commission to approve codes of practice

New Section 51AAA

Where the Commission is satisfied that associated corporations in a field of trade or commerce have, in consultation with organisations representing other interested persons, agreed to abide by a particular code of practice for fair dealing with those interested persons, the Commission may approve that code of practice.

Recommendation 6.3 (para 6.81)

The Committee recommends that the *Trade Practices Act 1974* be amended:

- (a) to allow in section 82 the recovery of damages under Part IVA giving parties similar rights and access to remedies as are currently available under section 52; and
- (b) to make available civil penalties in Division 1 and 1A of Part V and for the proposed unfair conduct provision, as well as for section 51AB if that is retained.

7 Recommendations on access to justice and education

Recommendation 7.1 (para 7.13)

The Committee recommends that the *Trade Practices Act 1974* be amended:

- (a) to provide for mandatory pre-trial mediation of actions under the new section 51AA, prohibiting unfair conduct in commercial transactions; and
- (b) to provide that, in assessing costs for litigation under the new section 51AA, the courts should take into account the good faith in which parties have participated in any pre-trial mediation.

Recommendation 7.2 (para 7.16)

The Committee recommends the Attorney-General explore with the States and Territories low cost options for improving small business access to legal tribunals for commercial disputes.

Recommendation 7.3 (para 7.24)

The Committee recommends that the Minister for Industry, Science and Tourism develop education strategies for existing and prospective small business operators which would include targeting:

- (a) chambers of commerce;
- (b) trade associations;
- (c) local government development units;
- (d) public and private sector enterprises that may be facing restructure their activities, necessitating employee lump sum payouts for retirement or redundancy; and
- (e) financial institutions.

Recommendation 7.4 *(para 7.25)*

The Committee recommends that:

- (a) a national campaign be undertaken to raise awareness by potential small business entrants of the need to undertake adequate business education prior to committing themselves to such entry; and
- (b) the campaign be coordinated by the Commonwealth Government and delivered by State and Territory Governments.