

Productivity Commission

Review of Australia's Consumer Policy Framework

An important plank in Australia's consumer policy framework has been the enactment of section 51AB, in Part IVA, of the *Trade Practices Act 1974* (Cth) ("TPA") and the enforcement of this provision by the Australian Competition and Consumer Commission ("ACCC"). In November 2006, as part of the *ACCC Enforcement and Compliance Project*,¹ a working paper was delivered to the ACCC assessing the impact of the ACCC's enforcement of Part IVA of the TPA ("the Working Paper").² A copy of the Working Paper is attached. A brief outline of the scope of section 51AB and the findings of the Working Paper in relation to the enforcement of section 51AB is provided below.³

Section 51AB

The provision was first inserted in the TPA in 1984 and was numbered section 52A.⁴ The provision was later renumbered 51AB in 1992.⁵ Section 51AB prohibits corporations from engaging in conduct "that is, in all the circumstances, unconscionable" in the supply or possible supply of goods or services to a consumer. The provision provides a non-exhaustive list of four matters which a court may have regard to in determining whether a corporation's conduct is unconscionable. These matters include;

- the relative strengths of the bargaining positions of the corporation and the consumer;
- whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
- whether, the consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer in relation to the supply or possible supply of the goods or services.

¹ Further information about the project can be obtained at <http://www.cccp.anu.edu.au/projects/project1.html> (10 August 2006.)

² Sharpe and Parker, *The ACCC Compliance and Enforcement Project: Assessment of the Impact of ACCC Regulatory Enforcement Action in Unconscionable Conduct Cases*, November 2006.

³ For a more comprehensive examination of the enforcement of section 51AB see the Working Paper from pages 38 to 54.

⁴ *Trade Practices Revision Act 1986* (Cth).

⁵ *Trade Practices Legislation Amendment Act 1992* (Cth).

The scope of section 51AB remains unclear. The courts have held that section 51AB is broader in scope than its sister provision, section 51AA, but the outer limits of section 51AB are still as yet undefined.⁶

Enforcement of section 51AB

Section 51AB can be enforced by consumers against unscrupulous corporations through the institution of legal proceedings.⁷ However, the provision is of little assistance if the consumer is ignorant of the existence of section 51AB and/or lacks the resources to engage in litigation. It is, therefore, the role of the ACCC to administer the TPA by educating the public about their rights and obligations under the TPA and taking enforcement actions.⁸

Successful ACCC enforcement of section 51AB

The Working Paper found that the ACCC has to some extent been successful in enforcing section 51AB in two main ways.

First, the ACCC has been highly effective in attracting and using media attention to educate the public about the existence of section 51AB and about some of the kinds of conduct that may breach the provision.

Second the ACCC, when dealing with some corporations, have been effective in not only stopping conduct in breach of section 51AB but also in prompting the corporation to take action to better educate itself, and in some instances the market generally, of its obligations under the TPA. For example in settlement of legal proceedings against McDonalds for its conduct in running its “McMatch and Win” competition McDonalds agreed to draft and distribute best practice guidelines for the running of national competitions.⁹

Unsuccessful ACCC enforcement of section 51AB

The Working Paper noted that the ACCC has been unsuccessful in enforcing section 51AB in two main ways.

First, ACCC strategy in dealing with corporations in breach of the provisions of the TPA was largely ineffective when dealing with a corporation that was deliberately and consciously in breach. While the ACCC was initially effective in stopping these kinds of corporations from engaging in the offending conduct the corporation did not benefit from programs or schemes designed to improve the corporation’s future compliance with the TPA. Instead, such corporations would frequently be subsumed by new a corporation and

⁶ Section 51AA provides that a corporation must not engage in “conduct that is unconscionable within the meaning of the unwritten law”. The courts have held that section 51AA merely imports into the TPA the equitable doctrine of unconscionable conduct and that sections 51AB and 51AC are potentially broader in scope than section 51AA; see for example *ACCC v CG Berbatis Holdings Pty Ltd* [2003] HCA 18, *ACCC v Samton Holdings Pty Ltd & Ors* [2002] FCA 62 and *Hurley v McDonald’s Australia Ltd* [1999] FCA 1728.

⁷ Under the TPA consumers may obtain an injunction or damages or any other order the court considers appropriate to enforce the TPA under sections 80, 82 and 87.

⁸ TPA, Part II.

⁹ See further Working Paper at pages 48 to 49.

would relocate its activities to a different Australian address or, more often, a New Zealand one.

Second, the ACCC have been unsuccessful in bringing cases before the courts to clarify the scope of section 51AB. In the cases surveyed by the Working Paper the ACCC were often found to have failed to adopt a coherent case theory which frequently resulted in the ACCC being ultimately unsuccessful in the proceedings and, most importantly, did not provide an opportunity for the law to be further clarified by the courts. Somewhat related to this issue is the issue frequently raised by businesses, in particular small businesses, that the ACCC have failed to produce publications which offer real guidance as to the kinds of conduct that may fall foul of section 51AB.

A third issue which may adversely affect the ACCC's enforcement of section 51AB is the issue of whether, or to what extent, the ACCC should mediate or negotiate with those corporations or individuals against whom it has commenced proceedings. This is a difficult, complex issue and, depending on the circumstances of the particular case, the ACCC may or may not be seen to have failed in enforcing the TPA by failing to mediate. The ACCC has argued that its public role in administering the TPA prevents it from 'bargaining away' liability under the TPA.¹⁰ It has been argued, however, that such a role can still be safely accommodated in mediation and that mediation could potentially allow for a more efficient enforcement of the TPA through resolution of issues in dispute.¹¹

Recommendations

In conclusion the Working Paper suggested that ACCC enforcement of section 51AB, and consequently the protection of consumers, could improved by:

- adopting a different, harder approach when dealing with corporations who are deliberately breaching the TPA and that this may mean parliament may have to empower the ACCC with a greater range of civil and criminal penalties for such conduct;
- adopting a clear coherent case theory when commencing proceedings against a corporation and that this might involve seeking the advice or assistance of lawyers or counsel external to the ACCC;
- developing best practice guidelines or codes of conduct which offer greater clarity to businesses as to the type of conduct expected of them;
- development of some kind of policy with the ACCC as to when, and to what extent, it may be appropriate to negotiate or mediate with corporations alleged to have contravened the TPA.

¹⁰ See for example *ACCC v Lux Pty Ltd* [2004] FCA 1344 and the Working Paper at page 50.

¹¹ *Ibid.*