
ACCC fails to ‘Mind the Gap’ in unconscionable conduct case against Woolworths

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In brief

The Federal Court has dismissed the ACCC’s unconscionable conduct case against Woolworths. Yates J was not satisfied that Woolworths had acted unconscionably in designing and implementing its ‘Mind the Gap’ scheme, through which Woolworths sought to ask, negotiate and obtain additional financial support from suppliers who it assessed to be under-performing by reference to a number of metrics or ‘lenses’.

The case provides useful guidance on the application of the unconscionable conduct provisions of the Australian Consumer Law (ACL) in business to business dealings, including confirmation that:

- Unconscionable conduct is not simply conduct which is unfair or unjust – something more is required before conduct will be unconscionable.
 - Whether or not conduct is unconscionable is to be determined having regard to all of the circumstances, and consideration as to whether the conduct is against conscience by reference to the norms of society.
 - The appropriate norms in evaluating whether unconscionable conduct arises in a business to business context are those that are relevant to commercial relationships, not those that apply as between supplier and consumer. These norms are to be determined by objective facts, not personal notions of morality.
 - Approaching a supplier to reopen a concluded transaction to seek a greater benefit than that already gained from it does not, without more, amount to conduct that is unconscionable, and it is not necessary to have a contractual right to approach a supplier to enter into a negotiation with them.
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In detail

Federal Court found that Woolworths did not engage in unconscionable conduct

On 8 December 2016, the Federal Court dismissed ACCC proceedings alleging that Woolworths had acted unconscionably in designing and implementing its ‘Mind the Gap’ scheme, through which Woolworths essentially sought to ask, negotiate and obtain additional financial support from suppliers who it assessed to be under-performing by reference to a number of metrics or ‘lenses’.

Yates J found that the ‘asks’ made by Woolworths of suppliers under the Mind the Gap scheme were typical of approaches for financial support which Woolworths had previously undertaken in the normal course of Woolworths’ closely integrated trading relationship with those suppliers, which was “always under negotiation and, depending on the circumstances, constantly changing”. The fact that conduct is typical in an industry does not necessarily mean that it cannot be unconscionable. However, it was particularly relevant in this instance because the ACCC’s case centred on the allegation that the design and implementation of the Mind the Gap initiative was unconscionable, in circumstances where suppliers had been approached with similar ‘asks’ on prior occasions.

In the face of that prior practice, the ACCC's decision not to call any evidence from any suppliers proved to be fatal to their case, particularly in the absence of any evidence of threats or reprisal action on the part of Woolworths against any supplier who refused to provide the requested financial support. The Court found that the ACCC's documentary evidence provided an ‘incomplete record’ of the dealings between Woolworths and its suppliers in implementing the Mind the Gap scheme, making it impossible for the Court to assess a number of factors to which it should have regard when determining whether conduct is unconscionable.

Yates J also found that:

- Approaching a supplier to reopen a concluded transaction to seek a greater benefit than that already gained from it does not, without more, amount to conduct that is unconscionable. Woolworths did not need a contractual right to approach its suppliers to enter into a negotiation with them (and did not assert any such right). The fact that a party to a trading relationship approaches the other party to make a request or engage in a negotiation without obtaining that party’s prior agreement to that approach being made, is not itself unconscionable.
- The fact that negotiations between Woolworths and its suppliers, in the course of the Mind the Gap scheme, might have involved ‘escalation’ (i.e. one person in the negotiation passing the negotiation up to his or her superior for further handling) does not, without more, signify unconscionability.
- The focus of the Mind the Gap scheme was to improve Woolworths’ profitability by seeking to adjust what it considered to be an imbalance between supplier and retailer of the benefits obtained from the trading relationship. However, the ACCC failed to demonstrate, in all the circumstances, that the attempt to realise this ‘opportunity’ by making ‘asks’ of suppliers based on the data Woolworths had generated, was unconscionable.

The ACCC stated in a media release following the decision that it will ‘carefully consider the judgment’, and that pursuing unconscionable conduct remains an important area for the ACCC, particularly in relation to supply chain issues.

Given the broad parallels drawn by the ACCC and some commentators during the course of the proceedings to the ACCC’s successful unconscionable conduct case against Coles in 2014, it is instructive to compare the two cases to understand the different judicial outcomes.

Comparison with ACCC v Coles case

The ACCC essentially failed in its unconscionable conduct case against Woolworths due to a lack of evidence to support the particular case it had pleaded. The ACCC sought to rely on its earlier case against Coles, where Coles admitted that it had engaged in unconscionable conduct in dealings with particular suppliers, ultimately resulting in a total pecuniary penalty of \$10 million, and refunds of over \$12 million to affected suppliers. While there are some broad parallels between the two cases, in that each involved supermarkets seeking payments from suppliers to reduce anticipated profit gaps in circumstances where there was no contractual entitlement to the payments sought, Yates J emphasised that they were ‘very different’ cases.

In the Coles case, the Court found (and Coles admitted) that Coles had acted unconscionably in the manner in which it sought payments from particular suppliers, however it was not alleged that merely asking for payment from suppliers was itself unconscionable. In contrast, the ACCC alleged that Woolworths’ design and implementation of the Mind the Gap scheme itself was unconscionable, but did

not pursue a case that Woolworths engaged in particular conduct with regard to specific suppliers that was unconscionable.

In addition to this structural difference between the two cases, the ACCC did not adduce any direct evidence from suppliers; instead seeking to rely on documentary evidence, which the Court found to be an incomplete record of Woolworths' dealings with those suppliers. The table below summarises important factual differences as established by the evidence produced by the ACCC, which are instructive in understanding the different outcomes in these two cases, and in providing guidance as to factors which will be relevant to determining whether particular conduct is likely to be unconscionable.

Factor	Coles Case	Woolworths Case
Imbalance of bargaining power / vulnerability of suppliers	Coles was held to have taken advantage of its superior bargaining power in the course of seeking payments from some suppliers for whom Coles represented 'a very significant part' of their business.	Yates J did not accept that it was self-evident that there was 'an immense disparity of bargaining power' as submitted by the ACCC, noting that the suppliers targeted were a non-homogenous group which included some very large suppliers. While Woolworths had a large market share by overall sales value, Yates J held that it was not possible to come to a firm view on Woolworths' comparative bargaining power as the ACCC's evidence 'was confined to generalities'. The ACCC's submission that Mind the Gap was "a speculative scheme designed to take advantage of vulnerable suppliers" was found to be "not supported by any evidence".
Threats / undue pressure	Coles was held to have demanded payment from suppliers to which it was not entitled, by threatening harm to suppliers that did not comply with its demands, and to have withheld money from suppliers it had no right to withhold.	The ACCC called no evidence that any supplier was threatened by Woolworths if they did not make payment, or that there were any adverse consequences for suppliers that refused to make a payment. The evidence also did not support the ACCC's contention that suppliers made payments because they believed refusal to do so might jeopardise their ability to access customers through Woolworths.
Demands / timeframes imposed	Payment demands made to suppliers were not conveyed as being optional and were held to be 'deliberate, orchestrated and relentless'.	Yates J did not accept that the 'asks' made by Woolworths were 'demands', and considered that the setting of timeframes for action, like other targets, was not unusual commercial behavior.
Legitimacy of basis for payment	Coles was aware that profit gaps could be caused by Coles' own acts or omissions or matters outside the control of suppliers. In the case of other rebates sought by Coles in relation to its 'Active Retail Collaboration' program, Coles accepted that it should not have made certain assertions regarding the value of that program to particular suppliers.	The ACCC's submission that suppliers had not contributed to Woolworths' profit shortfall for the relevant period was not established as a fact. Yates J also rejected the ACCC's submission that Woolworths' employees implementing the scheme did not consider why Woolworths' analysis, based on their chosen 'lenses', indicated a potential underperformance by a given supplier.

Guidance on application of unconscionable conduct prohibition in B2B context

The ACCC's case against Woolworths forms part of a broader recent regulatory focus on business to business conduct, including the recent extension of the unfair contract terms provisions of the ACL to small business contracts, and the proposed amendment of the misuse of market power provisions of the *Competition and Consumer Act 2010* (Cth) (CCA) to include an 'effects test'. Yates J's judgment provides some useful guidance on the application of the unconscionable conduct prohibition in a business to business context.

The relevant norms in B2B transactions are commercial norms

The ACL prohibits a person, in trade or commerce, from engaging in conduct in supplying or acquiring goods or services to a person (other than a listed public company) that is, in all the circumstances, unconscionable. The term 'unconscionable' is not defined in the ACL, however there are a list of factors to which the court 'may have regard' in determining whether conduct is unconscionable.

In *ACCC v Lux Distributors* (which involved unconscionable conduct in relation to the sale of vacuum cleaners to vulnerable consumers), the Full Federal Court held that unconscionable conduct extended to "something not done in good conscience" or "conduct against conscience by reference to the norms of the society in question".

In the context of the Woolworths case, Yates J clarified that the norms in question in a business to business context were those that are relevant to commercial relationships, not those that apply as between supplier and consumer. In particular, the relevant relationship was that which existed between supermarket businesses of the kind conducted by Woolworths and its key competitors, and suppliers to those businesses, in connection with the acquisition or possible acquisition of goods in trade or commerce.

Unconscionable means more than 'unfair' or 'unjust'

Yates J emphasised that whatever the norms may be in a particular case, the characterisation of conduct as unconscionable is not equivalent to saying the conduct is 'unfair' or 'unjust'. The ACCC sought to subordinate prior authority of Spigelman CJ in the case of *World Best Holdings* in 2005 that unconscionability involves a 'high degree of moral obloquy' on the part of the person said to have acted unconscionably, arguing that the case law on the principles of unconscionability had developed since that time. In particular, the ACCC referred to observations in subsequent cases to the effect that "explanatory phrases used to elucidate the meaning of a statutory provision cannot substitute for the statutory language" (i.e. unconscionability, rather than moral obloquy, is the relevant standard).

While acknowledging the correctness of these 'cautionary observations', Yates J emphasised that they underscore the fact that unconscionability is not conduct that is merely unfair or unjust, which Yates J considered to be the true import of Spigelman CJ's analysis in *World Best* in distinguishing unconscionable conduct from other non-proscribed forms of conduct.

Relevant norms are determined by objective facts, not personal notions of morality

Yates J observed that the characterisation of conduct as unconscionable "... is not arrived at by a process of personal intuitive assertions or idiosyncratic notions of commercial morality"; rather, it is "... plainly informed by fact-finding concerning the nature of the relationships involved, by which the relevant norms are to be identified". Yates J emphasised that Woolworths called evidence on this subject (which his Honour accepted), however the ACCC called no such evidence.

Yates J acknowledged that "it may be that some would see Woolworths' conduct... as unjustified, unfair or unjust according to their own standards or commercial propriety" (a view which his Honour did not share), but distinguished the "casual and informal judgments of others" from the role of the Court to reach an evaluative judgment "standing back and looking at the whole episode".

The takeaway

- Unconscionable conduct is not simply conduct which is unfair or unjust – something more is required before conduct will be unconscionable.

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- The appropriate norms in evaluating whether unconscionable conduct arises in a business to business context are those that are relevant to commercial relationships, not those that apply as between supplier and consumer. These norms are to be determined by objective facts, not personal notions of morality.
 - The ACCC's case against Woolworths forms part of a broader recent regulatory focus on business to business transactions, which also includes the recent expansion of the unfair contract terms provisions of the ACL to small business contracts, and the proposed amendment of the misuse of market power provisions of the CCA to include an "effects test". The fact that the ACCC was unsuccessful in this case will not deter it from continuing to pursue business to business conduct which it considers to be unconscionable or anticompetitive.
 - We expect this case to be raised by stakeholders in the current review of the ACL being undertaken by Consumer Affairs Australia and New Zealand (CAANZ). An interim report by CAANZ on the ACL provided that a case has not yet been made for amending the unconscionable conduct provisions, but CAANZ will continue to monitor the development of the law.

Let's talk

At PwC, we assist clients by giving clear guidance on the principles of unconscionability and the developing case law. For a deeper discussion of how these issues might affect your business, please contact:

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