

Last week, the Australian Competition and Consumer Commission (ACCC) [lost](#) a Federal Court case. It was trying to prove that Woolworths had engaged in “unconscionable conduct”.

The ACCC [had alleged](#) that Woolworths sought to systematically obtain payments from various suppliers in order to reduce a profit shortfall.

At first blush, the case seemed quite similar to [a successful ACCC action against Coles](#) almost exactly a year ago.

But comparing the two cases reveals some apparent limitations in the law of unconscionability. It also raises questions about the ACCC's broader strategy for dealing with the supermarket chains.

Woolworths' conduct

The ACCC's [allegations](#) related to the design and implementation of the Woolworths scheme known as “Mind the Gap,” rather than its dealings with individual suppliers. This was a strategic decision, doubtless intended to capture a pattern of conduct, as opposed to focusing on the minutiae of individual relationships.

Fighting individual cases is incredibly time-consuming and expensive. It also tends to result in limited remedies (affecting only the specified “victims” of a case). Finally, such cases leave open the implication that a given business model is itself okay.

Nonetheless, running individual cases is the safer course. In [the Lux case](#), for example, the ACCC did not say that a business model premised on very long sales pitches targeting the elderly and frail in their own homes was itself illegal. Rather, it argued (successfully) that Lux's dealings with particular “victims” were unconscionable. A similar approach was adopted in the [Coles case](#) (which was settled – another key distinction from the Woolworths matter).

In the Mind the Gap case, however, the ACCC argued that Woolworths, being in a substantially stronger bargaining position than its suppliers, sought payments from them in order to reduce an unexpected (and significant) shortfall in its profits. Woolworths had no contractual entitlement to the payments, but the ACCC argued that, via the scheme, it pressured suppliers to comply with its requests through implicit threats to their ongoing commercial relationship.

A documentary case

The ACCC ran a paper-based case, with its evidence essentially comprising documents that Woolworths had been required by law to produce. The ACCC [did not call evidence](#) from any suppliers.

Again, this was clearly a strategic decision – perhaps one intended to demonstrate to suppliers that they did not need to put their necks on the chopping block. It has long [been claimed](#) that suppliers are scared of complaining to the ACCC for fear of damaging their relationship with the major supermarket chains.

Woolworths, on the other hand, did call evidence from key staff members who were in charge of designing and implementing Mind the Gap.

Consequently, the court was left with correspondence that clearly alluded to conversations about which there was no evidence, other than the general explanations about the scheme given by the Woolworths team.

Justice David Yates [noted](#) that the law required the court to determine whether the conduct was unconscionable “in all the circumstances”. [The judge said](#) he was unable to make such a finding on the basis of “an obviously incomplete record of the [relevant] communications”.

Some curious findings

In part because of the ACCC's overall strategy, the case took some strange turns.

For example, the ACCC argued that the Mind the Gap scheme was “unusual”, both in light of Woolworths’ prior conduct and the conduct of the business community more generally. This line of argument ultimately led to Woolworths’ (and by implication Coles’) prior conduct becoming a litmus test for whether the Mind the Gap scheme was unconscionable.

Indeed, in his decision, Justice Yates specifically used as a benchmark the commercial norms apparent in “the relationship that exists between supermarket businesses of the kind conducted by Woolworths and its key competitors” and their suppliers.

Such an approach appears inherently problematic in an industry troubled by persistent market power problems. Indeed, both major players have previously been found to have bullied their suppliers unlawfully – in Coles’ case, by engaging in [unconscionable conduct](#), and in the case of Woolworths, by a [misuse of market power](#).

With industry norms as the benchmark, however, Woolworths was able to demonstrate that it had a history of making extra-contractual demands for payments on short time frames from its suppliers. Further, such conduct was shown to be common in the supermarket industry. As a result, Mind the Gap was considered to reflect ordinary business practice.

As often occurs when a judge makes up her or his mind in a case, the ACCC lost practically every point it contended. As such, the judge was unconvinced that Woolworths had substantially more bargaining power; did not consider that suppliers would have felt their ongoing relationship with Woolworths was under threat; found it irrelevant who was to “blame” for the profit shortfall; and placed no significance on the fact that Woolworths’ requests for payments lacked a contractual basis.

Some of these findings are likely to cause consternation. But it is doubtful that they would provide a sufficient basis to overturn Justice Yates’ decision. Ultimately, that would require an appeal court to return to that question of strategy and find that the “obviously incomplete” record of evidence was sufficient to demonstrate that Woolworths’ conduct was unconscionable in all the circumstances. On initial analysis, that seems a difficult task.

What now for the ACCC?

In recent years, the ACCC has enjoyed considerable success in proving unconscionable conduct. After a series of unfortunate cases, the courts seemed to have moved to a modern interpretation of this centuries-old concept.

Nonetheless, Justice Yates' decision proves there are limitations. While the law specifically allows for prosecutions of a "system of conduct" or "pattern of behaviour", this seems hard to reconcile with parts of the legislation that require specific consideration of the parties involved.

On initial analysis, therefore, the case seems to be a significant roadblock to bringing generalised claims under the unconscionability provisions.

But the ACCC does have other weapons. In addition to the [Food and Grocery Code of Conduct](#) and [new laws](#) regarding unfair contract terms (applying only to dealings with small business), the ACCC can have recourse to old faithful – [section 46](#) of the Competition and Consumer Act (misuse of market power).

Section 46 is [currently before Parliament](#), with the long-awaited [effects tests](#) likely to soon come into law. Ironically, however, an effects test would only make harder those cases that currently lie in the overlap between misuse of market power and unconscionable conduct. It will be interesting to see, therefore, how the ACCC revises its strategy.

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