

**Unconscionable Conduct Issues Paper
Competition and Consumer Policy Division
The Treasury
Langton Crescent,
PARKES ACT 2600**

16th December 2009.

Submission on Unconscionable Conduct Issues Paper.

This submission is made on behalf of newsagents in NSW/ACT and Queensland.

Newsagents are small businesses and face major suppliers such as newspaper publishers, magazine publishers/distributors, suppliers of soft gambling products and landlords.

Conduct that newsagents regularly experience includes,

- Refusal to collectively negotiate – which seriously disadvantages individual newsagents
- Take it or leave it contracts.
- 'Lock in' which prevents newsagents suffering unanticipated economic deterioration (circulation decline) from exiting
- No proper recognition of specific costs factors escalation which can obviously adversely impact on 'locked in' newsagents
- Newsagents getting less advantageous terms than big players like supermarkets
- Newsagents supplied and charged for products that they do not want.
- Unilateral variation of contracts.

Further on in this submission is information about the experience of newsagents in the Bill Express contracts.

As a general response to the Issues paper we submit,

- The law re consumers and small business need not be the same. Some of the potential issues may impact businesses more than consumers, especially those in captive situations, consumers can often change suppliers, businesses often cannot change commercial suppliers.
- A statement of principles and specific conduct is supported but that does depend what these are.
- Essential principles should be set out, but again depends on what they are.
- Rebuttable presumptions are to be welcomed.
- ASIC and ACCC should not use section 87B undertakings in non law enforcement areas. , only to resolve past or future conduct in breach of the law.
- Guidance by regulators should be more robust
- Codes of conduct to be developed for industry specific issues but problems of enforcement when it comes to business to business codes.

THE QUESTIONS IN ISSUES PAPER

Question 1.

The law and administration of unconscionable conduct law as it applies to business to business dealings has been fraught with uncertainty and frustration.

Section 51AC was supposed to overcome much of the uncertainty of the previous statutory and common law but what was hoped did not eventuate.

The factors listed in section 51AC were supposed to be a clear guide albeit not a list of possible unconscionable conduct. Many of the factors have been largely ignored or subjugated under the view that on balance the conduct is not unconscionable. This leads to uncertainty and bitter disappointment as issues such as take it or leave it contracts, unilateral variation, unilateral assignment and many more abound.

Further it is often said by regulators that there is a need to look at each issue case by case and hence certain examples of what is likely unconscionable conduct are ignored.

Indicative list.

It appears to NANA/QNF that an indicative non exhaustive list is far preferable to the current situation. That should be in addition to general provisions that may pick up conduct not in the list. Further NANA/QNF would qualify its support for a list depending on what is included in the list.

We accept that there will be situations where examples in the list may not be unconscionable and the law needs to be flexible enough to accommodate that.

As to any cost to consumers or business, subject to what is in that para above, I would see that there are no real costs and only benefits of getting rid of offensive conduct and giving certainty. The current law leads to long and often unfruitful investigations by the ACCC/ASIC and this would be truncated to some degree. This would amount to cost savings.

Furthermore it will be the Parliament, not the ACCC/ASIC and the Courts that, determines what is unacceptable and across the board with a much fairer outcome for all concerned and more accountable.

Rebuttable presumption.

The NANA/QNF is very much in favour of the concept of rebuttable presumptions and notes its use in the Unfair Conduct provisions of the ACL.

We would support its use as part of the list. It puts the onus on those who engage in what is usually unacceptable conduct but accommodate cases where there is some positive or where the conduct is not unacceptable, akin to the TPA authorisation process.

In fact we would suggest that it apply to any allegation of unconscionable conduct and not just to conduct listed.

Question 2.

Statement of principles.

The NANA/QNF supports such a statement but that will depend what is in the Statement. In the view of the MTAA the concept of a captive situation needs to be specifically added to the examples given in the Discussion Paper.

Further the issue seeking to protect the legitimate interests of the party engaged in the conduct is of concern as it provides an out for what may be unacceptable conduct. The legitimate interest concept should be qualified with that of unreasonable impact on the other party. After all the party engaged in the conduct will usually be better able to bear any loss , if there is any , by the conduct being prohibited.

We do not see any additional costs, only benefits coming out of certainty and setting out some commercial ethics.

Use of such Statement.

Unless the Statement is so general to almost be useless we see the need for different principles re consumer and business dealings. Having said that the Statements should be very similar.

The Statement, if of substance, should be mandatory for the ACCC/ASIC and Courts to build up some consistency in the administration. The issue does arise whether in that case it is no longer a Statement of principles but simply law.

Should there be defences were the Statement to be mandatory? Much will depend on the Statement but generally yes or rebuttable presumptions. In any case the onus to be on the party engaged in the conduct.

Content of the Statement.

The NANA/QNF suggests the following,

- significant difference in the bargaining power of the parties and in particular where one party is captive to the other,
- contract terms or business dealings that unduly disadvantage the weaker party;
- the presence of some factor or factors that has forced the weaker party to accept disadvantageous terms or dealings,
- evidence that the agreement would have been made on different terms had there been no significant disparity in bargaining power or a captive situation.
- unilateral changes made during the contract by the stronger party and to the disadvantage of the weaker party.

Alternatively what is currently in section 51AC factors can be used as a Statement of Principles but subject to a rebuttable presumption on a case by case basis.

Question 3.

Alternatives.

Guidelines.

We would support national guidelines but ask that they be less qualified and cautious than the current ACCC guidelines and they should be joint ACCC/ASIC and maybe others.

The regulators should be prepared to say what they consider unconscionable and not only list those issues found to be unconscionable by a Court.

Section 87B-

We are not sure what is meant by this but would have a concern if the section is used to demand undertakings and covers issues which may not be a breach of the law but are a problem to the regulators.

We note what the ACCC is doing in relation the supermarket restrictive covenants. We understand that the ACCC is demanding section 87B undertakings yet most such covenants do not breach the law.

If particular conduct is considered offensive then there should be legislative such as including it in the indicative list. However if a number of businesses are engaged or are likely to engage in conduct in the list, acceptance of a series of section 87B is appropriate.

Section 87B is a low cost tool but must not be misused.

Codes of Conduct

We would favour that for industry specific issue but suggest that serious consideration need to be given on the enforcement of such codes as regulators cannot be expected to handle more and more codes.

Also will these be mandatory codes under the TPA or voluntary and will these need authorisation?

We note that the Government's previous policy on Codes is being revised and we welcome that. It is hoped that codes will be made mandatory without the previous prerequisite of a voluntary code being tried and that voluntary approach been shown to be unsuccessful. The NANA/QNF is interested in a code for newsagents/publisher/distributor relationships.

A general postscript. to the comments.

Newsagents have, in recent times, been subject to conduct that is illustrative of unacceptable conduct. Newsagents were preparing to take their own class action in relation the **Bill Express** contracts alleging various breaches of the Trade Practices Act including unconscionable conduct.

Fortunately the ACCC took action against **Bill Express** for breaches of the TPA but not for unconscionable conduct. That appeared too difficult.

Bill Express Ltd was a public company. It offered a bill payment platform to newsagents and almost all Australian newsagents, some 4000, took up the proposal.

The initial package of contracts involved the following,

- Take it or leave it contracts, including an equipment finance contract.
- One fits all contracts.
- Unilateral variation- and that happened in relation to essential parts of the deal, parts that actually induced most newsagents to sign the contracts.
- Unilateral assignment- that occurred.
- Payments for certain aspects of the contracts to continue even if the base service that was contracted for was discontinued. - this occurred.
- Negation of any legal rights.

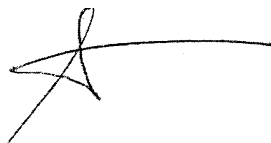
The above is a nutshell and one needs to read the Federal Court decision for the full details. However the case is illustrative of what small businesses can face.

It would appear that the above case would offend basic principles of unconscionable conduct. It offends other TPA provisions as well but the total package needs to be looked at as well and hence more extensive remedies than those which might be appropriate for misleading advertising or third line forcing.

Yours truly,



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