Submission – Competition Policy Review

June 2014

IPA INSTITUTE OF PUBLIC ACCOUNTANTS

Partnership beyond numbers

Forward

The Institute of Public Accountants (IPA) welcomes the opportunity to present our submission to the Competition Policy Review.

The IPA is one of the three professional accounting bodies in Australia, representing over 26,000 accountants, business advisers, academics and students throughout Australia and in 57 countries worldwide. The IPA prides itself in not only representing the interests of accountants but small business and their advisers.

The IPA takes an active role in the promotion of policies to assist the small business and SME sectors, reflecting the fact that two-thirds of our members work in these sectors or are trusted advisers to small business and SMEs. The IPA also pursues fundamental reforms which will result in easing the disproportionate regulatory and compliance burden placed on small businesses.

In developing this submission we acknowledge the contribution made by IPA members and the IPA Deakin University SME Research Partnership.

We welcome the opportunity to discuss our submission in more detail if required and we look forward to ongoing participation in the Review. Please address all further enquires to Vicki Stylianou, Executive General Manager, Public Affairs at either vicki.stylianou@publicaccountants.org.au or on 0419 942 733.

Yours faithfully

Andrew Conway FIPA

Chief Executive Officer

Institute of Public Accountants

Introduction

The IPA has considered two main parts of the competition laws and policy, which are of particular concern to small and medium sized businesses. The main concerns are with the existing unconscionable conduct and unfair contract terms provisions of the Australian Consumer Law (ACL), which do not adequately protect small or medium sized businesses from being the victims of price gouging or price squeezes. That is, when dealing with suppliers (or customers) who have superior bargaining power, being forced to pay (or accept) an unfair price in situations such as the following:

1. when goods or services are in short supply as a result of supplies being disrupted by a natural disaster or strike[1]

2. when alternative supplies of goods or services are not available to a particular business, at all or within a reasonable time,[2] and advantage is taken of a business's urgent need for them

3. when a supplier has only one significant customer who uses its monopsony power to force that business to accept an unfair selling price, or contribute to the (dominant) customer's retail marketing efforts[3]

4. when advantage is taken of a business's inability to obtain supply elsewhere to extract an additional payment in respect of past supplies[4]

5. when advantage is taken of an existing tenant's investment in good will or fit-out when negotiating a renewal of the tenant's lease.

The IPA accepts that the best form of protection against conduct of the kind described above is for small and medium size businesses to face competitive markets when they enter into acquisition or supply transactions, or for them to seek to establish countervailing market power through authorised collective bargaining. Unfortunately, when markets are not competitive, or collective bargaining is not possible or sufficiently expeditious, small or medium size businesses facing suppliers, or customers, with substantial market power, remain vulnerable to being charged (or paid) an 'unfair price'.

To enable the law to respond to this situation and protect the victims of unfair pricing, the IPA believes that the ACL should be amended to make it clear that it is unconscionable conduct

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[1] This situation has prompted the enactment of price gouging laws in many states in the United States of America. Some of these are limited to price rises following natural disasters, others are general in nature.

[2] In the case of marine salvage, 19th and early 20th century courts would set aside salvage contracts if the amount charged by the towing vessel was 'inequitable, extortionate and unreasonable': see *The Port Caledonia and the Anna* [1903] P 184. There, the amount was five times what the court thought was reasonable and the vessel being rescued had agreed only because she was in danger of fouling another vessel and was in no position to bargain for more reasonable terms. A more prosaic example might be where equipment upon which the business depends is broken and an essential spare part needed for its repair is available from one supplier only.

[3] This appears to lie at the heart of the action taken recently by the ACCC against Coles alleging that Coles has engaged in unconscionable conduct, and which received extensive media attention. However, it is noted that, perhaps because of the deficiency in the law about which the IPA is concerned, this action alleges in support of its unconscionability claim that Coles has engaged in misleading conduct.

[4] This is the situation that faced the milling business in *Smith v William Charlick Ltd* (1924) 38 CLR38.

for a firm to use its superior bargaining power to force a customer (or supplier) to accept an unfair price and to make void a contractual term specifying an unfair price. In particular, the IPA contends the following.

Unconscionable conduct

Section 22 of the ACL should be amended to include 'price' within the list of matters to which a court may have regard when determining whether conduct is 'in all the circumstances, unconscionable' under section 21. Corresponding changes should also be made to the equivalent provisions of the *Australian Securities and Investments Commission Act 2001* (section 12CC). This could be achieved, for example, by:

1. adding a new paragraph (m) to sub-sections 22(1) and (2) such as 'the price[5] the customer was required to pay' and 'the price the supplier was required to accept', respectively; or

2. amending the existing sub-paragraphs 22(1)(j)(ii) and (2)(j)(ii) to read 'the terms and conditions of the contract*, including the price to be paid for the goods or services;* and'

Unfair contract terms

Part 2-3 of the ACL dealing with unfair contract terms should be amended by deleting:

1. the references therein to 'consumer'

2. section 23(3) which defines 'consumer contract'

3. section 26(1)(b)

This would expand the reach of Part 2-3 so that it can apply to business-to-business contracts, not merely consumer contracts, and by making it possible for a term that 'sets the upfront price payable' to be found to be unfair.

Deficiency in the existing law

Situations such as those listed in paragraph 2, above, are unfair and capable of threatening the business's participation in the markets in which they operate to their detriment and the eventual detriment of consumers. As the Review *Issues Paper* notes, this is contrary to the intent of the unconscionable conduct provisions of the ACL which is to provide both a 'more *efficient* and *equitable* basis' for competition (emphasis added).

Unconscionable conduct provisions of the ACL

Section 20 of the ACL prohibits a person, in trade or commerce, from engaging in conduct that is unconscionable within the meaning of the unwritten law from time to time. Although this prohibition is broad; in particular, it is not restricted to consumer transactions and can be used on behalf of any business, it does not extend the forms of conduct that are to be regarded as unconscionable as it is specifically made coterminous with what equity, currently

[5] 'Price' includes a charge of any description: see s. 4(1) of the *Competition and Consumer Act 2010*.

and in the future, regards as unconscionable.[6] As a result, present authority suggests that it will not protect a person or business from being charged an unfair price unless this is accompanied by some other form of misconduct such as duress, undue influence, non-disclosure or sharp practice.[7]

Section 21 of the ACL creates a new, statutory prohibition of unconscionable conduct occurring in trade or commerce. Although it applies only to conduct in connection with the supply or acquisition of goods or services, 'goods' and 'services' –

1. are defined broadly in section 4(1) of the *Competition and Consumer Act 2010* (CCA); importantly, the definition of services including rights and interests in real or personal property); and

2. are not restricted to consumer goods or services so that the prohibition can be invoked in relation to goods or services that are being acquired or supplied for any business purpose.

Section 21 is also not restricted to conduct directed towards consumers. As a result, it can be invoked by individuals, or corporations engaged in business. The only persons not protected are listed public companies. As a result, it can be invoked by small to medium businesses that are not listed public companies.

Section 22 then lists a large number of matters to which a court may have regard for the purpose of determining whether the conduct of a 'supplier' or 'acquirer' was unconscionable under section 21.

It is acknowledged that the precise scope of these provisions is unclear. It is also acknowledged that because a court can consider 'the terms of the contract'[8] and because the factors listed in section 22 do not limit the matters to which a court may have regard, it may be possible for charging or paying an unfair price to alone amount to unconscionable conduct. However, as the only reference to price in section 22 is to the 'amount' for which the customer (or supplier) could have acquired or supplied elsewhere and as the weight of previous authority is to the contrary, the IPA is concerned that 'mere inadequacy of price is not likely to constitute unconscionability'.[9]

Unfair contract terms provisions of the ACL

These provisions apply only to a 'consumer contract', the definition of which in section 23(3) restricts them to the 'acquisition of … goods or services … wholly or predominantly for personal, domestic or household use or consumption.' As a result, they cannot be invoked by small or medium sized business in respect of their contracts with dominant suppliers or customers, no matter how egregious those contracts may be.

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[6] The only difference is that equity is not restricted to conduct occurring in trade or commerce. The advantage of prohibition is that it gives victims access to the ACL's superior remedies and allows the ACCC to invoke it in the public interest.

[7] See, for example, *Smith v William Charlick Ltd* (1924) 34 CLR 38, *Eric Gnapp Ltd v Petroleum Board* [1949] 1 All ER 980, *Burmah Oil Co v Bank of England* The Times 4/7/1981 and *Australian Competition and Consumer Law Reporter*, para 27-320.

[8] See ACL s. 21(4)(c)(i).

[9] See *Australian Competition and Consumer Law Reporter*, para 27-320.

In addition, the exclusion, via section 26(1)(b), of 'the upfront price payable under the contract' from the terms that can be made void under section 23 means that these provisions cannot assist a consumer whose only complaint is that they were charged an unfair contract price.

Reform

Unconscionable conduct provisions of the ACL

'Price' should be included in the list of matters in section 22 to which a court may have regard when determining whether conduct is unconscionable, in a manner that addresses the deficiency in the existing law outlined above in sub-paragraph 2.1-2.5. To be clear, it is not suggested that merely charging an 'unfair' price should make a transaction unconscionable. However, it should do so when this is combined with and results from '[T]he absence of a reasonable equality of bargaining power by reason of the special disability of one party to a transaction'[10] so that a finding of unconscionability is necessary to 'prevent victimisation of the weaker party by the stronger'[11].

Although it may not always be easy to determine whether the price extracted by a dominant firm was so 'unfair' as to make its conduct unconscionable, the law is not unfamiliar with addressing problems of this nature. In various jurisdictions it has, for example, been achieved in:

1. price gouging legislation designed to protect consumers[12]
2. price gouging being made a competition law offence[13]
3. adapting the unwritten law to respond to particular instances of exploitation such as happened in the salvage cases, and cases involving expectant heirs[14]
4. empowering courts to reopen unjust credit contracts where the injustice results from excessive interest charges.[15]

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[10] *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and KeaneJJ at para 117.
[11] *Ibid.*
[12] For an Australian example, see the (now repealed) provisions in Part VB of the *Trade Practices Act 1974* which prohibited 'price exploitation' in the wake of the introduction of the GST. This involved the concept of an 'unreasonably high' price and the matters that could be taken into account in determining whether a price was unreasonably high. As noted above, in the USA general and specific price gouging legislation exists in a majority of states and the District of Columbia.
[13] European Community competition law makes charging excessive prices an offence: see *General Motors v Commission* [1976] 1 CMLR 95 and *United Brands Continental BV v Commission* [1978] 1 CMLR 429. Under the UK Competition Act 1998 charging an excessive price was found to be an offence in *Napp Pharmaceuticals Holdings Ltd v Director General of Fair Trading* [2002] CAT 1. In Australia, however, it would be a competition law offence only if it amounted to a contravention of s. 46 of the CCA.
[14] See, for example, *Earl of Aylesford v Morris* [1962-73] ALL ER Rep 300 (borrowing money at an interest rate of 60%). This situation is now regulated by Consumer Credit legislation: see, for example, *Consumer Credit (Victoria) Act 1995,* s. 39. For US examples under the Uniform Commercial Code s. 2-302(1) *, see Kugler v Romain* 279 A 2d 640 (1971) (charging a consumer of limited education and economic means 2.5 times a reasonable market price) and *Jones v Star Credit Corp* 198 NYS 2d 264 (1969) (charging a consumer over $1,234.80 for goods worth less than $300).

Unfair contract terms provisions of the ACL

The IPA submits that small and medium sized businesses, as well as consumers, can be the subject of unfair contract terms and they are no less deserving of protection. This is especially so in the kinds of situations identified in sub-paragraphs 2.1-2.5, above. As noted earlier, as well as being unfair in the sense of preventing them from receiving an equitable share of the wealth that may be generated by the markets or supply chains in which they operate, it may threaten their ability to operate in their markets at all. For these reasons, the protection created by Part 2-3 of the ACL should be extended to them.

However, they will be protected from the kinds of exploitation described above only if the price they are obliged to pay, or accept, can also be deemed 'unfair'. This would require the deletion of section 26(1)(b).

[15] See the *National Credit Code*, s. 76(2)(o) (Schedule 1 to the *National Consumer Protection Act 2009)*.