



Motor Trades Association of Australia

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

By email: unconscionableconduct@treasury.gov.au

Dear Sir/Madam

Thank you for the opportunity to comment on the matters raised in the Issues Paper on unconscionable conduct regulation.

MTAA has been involved in the policy debates over unfair and unacceptable conduct in business to business dealings for many years. I note that included in the Issues Paper there is an extract from MTAA's submission to the Senate Economics Committee inquiry into a statutory definition of unconscionable conduct and the Association remains committed to the views expressed to that Committee.

Before answering the specific questions in the Issues Paper I would make the following general comments:

- the law in relation to consumers and small business need not be the same. Some of the potential issues relating to 'unconscionable conduct' may impact upon businesses more than consumers; especially those in captive situations. Consumers can often change suppliers, businesses often cannot change commercial suppliers;
- a list of specific unacceptable conduct being included in the Act, is supported, in general terms, but the detail would need to be considered. That could be reinforced by a general statement of principles;
- rebuttable presumptions are to be welcomed;
- ASIC and ACCC should not use section 87B undertakings in non-law enforcement areas. They should only be used to resolve past or future conduct that is in breach of the law;
- guidance issued by regulators should be more robust; and
- codes of conduct should be developed for industry specific issues but it needs to be acknowledged that there can be problems with enforcement when it comes to business-to-business codes.

Question 1 – List of Behaviours

The law and administration of unconscionable conduct law as it applies to business-to-business dealings has been fraught with uncertainty and frustration. The introduction of section 51AC was supposed to overcome much of the uncertainty of the previous statutory and common law regime but in MTAA's view that has not eventuated.

The list of factors in section 51AC was supposed to be a clear guide for the courts as to what was unacceptable behaviour; albeit it was not to be a list of potential unconscionable conduct (a fact that was not and is not widely understood). 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 conduct such as the presentation of 'take it or leave it' contracts, unilateral variation, unilateral assignment and much more, continues to be experienced in the marketplace.

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

Indicative list

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

MTAA accepts that there may be situations where engaging in conduct which is included in the list may not be unconscionable and the law needs to be flexible enough to accommodate that.

In general terms, MTAA would consider that there are no real costs of such regulation and would argue that there can only be benefits in getting rid of offensive conduct and giving certainty to the less powerful party to any contract. The current law leads to long and often unfruitful investigations by the ACCC/ASIC and a list of unacceptable behaviour in the Act would hopefully truncate that process to some degree. That would obviously amount to cost savings for the regulators.

Furthermore it will be the Parliament, not the ACCC/ASIC and the courts that, determine, by way of what is included in a list, what is unacceptable behaviour across the board. MTAA believes that will be a much fairer outcome for all concerned.

Rebuttable presumption

MTAA is very much in favour of the concept of rebuttable presumptions and notes its use in the unfair conduct provisions of the Australian Consumer Law.

MTAA would support the use of the rebuttable presumption in conjunction with a list of unacceptable behaviour. It puts the onus on those who engage in what is usually unacceptable conduct to show why their conduct is necessary, but also allows for the accommodation of cases where there is some positive outcome from the conduct or where the conduct is not unacceptable. This could be seen as somewhat akin to the TPA Authorisation process.

In fact MTAA would suggest that it apply to any allegation of unconscionable conduct and not just related to conduct that might be listed in the Act.

Question 2 - Statement of principles

MTAA could support the inclusion of such a statement in the Act; subject to its content. However the Association's clear preference is for a list of unacceptable conduct to be included in the Act. It is MTAA's view that the concept of a 'captive' situation needs to be specifically added to the examples given in the Issues Paper.

The issue of 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 an 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.

MTAA does not believe there will be any additional costs, only benefits for business arising from certainty and the setting of some commercial ethics.

Use of such Statement

MTAA believes that there should be different statements of principles with respect to consumer and business dealings. Having said that the statements should be very similar and based on concepts which recognise unequal bargaining positions, the need to consider the impact of conduct on the other party and so on.

The Statement, if of substance, should be mandatory for the ACCC/ASIC and Courts to take into consideration so as to build up some consistency in the administration and enforcement of the law relating to unconscionable conduct.

MTAA believes that if consideration by the regulators and courts of any statement is to be mandatory then generally there should be defences or rebuttable presumptions. In any case the onus of 'proving' a defence is to be on the party engaging in the conduct.

Content of the Statement

MTAA suggests the following matters be considered for inclusion in a statement:

- significant difference in the bargaining power of the parties and in particular where one party is captive to the other (this is particularly important, though not confined to, those in the franchising sector);
- 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; and
- unilateral changes made during the contract by the stronger party and to the disadvantage of the weaker party.

Alternatively the matters currently set out in section 51AC in the list of factors could be used as a statement of principles, but subject to a rebuttable presumption on a case by case basis.

Question 3 - Alternatives

Guidelines

MTAA could support, as an addition to a list and statement, national guidelines but would ask that they be less qualified and less cautious than the current ACCC guidelines on unconscionable conduct. Any new national guidelines should be jointly issued by the ACCC and ASIC.

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

MTAA does not support the issuing of national guidelines as an alternative to a list (irrespective of whether or not that list is supported by a statement of principles).

Section 87B

MTAA is not sure what is meant by an increased use of s87B undertakings, but would have a concern if the section is used to demand undertakings and/or to cover issues which may not be a breach of the law, but are thought to be a problem for the regulators.

MTAA notes what the ACCC is doing in relation to the supermarket restrictive covenants where, I understand, the ACCC is demanding section 87B undertakings; yet most such covenants do not breach the law.

If particular conduct is considered offensive then it should be legislated against and proscribed. That could be achieved by including it in the indicative list discussed above. 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 undertakings could be appropriate in order to prevent such behaviour occurring.

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

Codes of Conduct

MTAA supports industry specific codes but suggest that serious consideration needs to be given to the enforcement of such codes. Without effective and timely enforcement, even mandated codes can fail to achieve their desired outcomes.

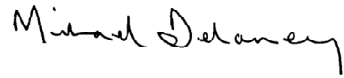
It is unclear to MTAA whether any proposed codes would be mandatory codes under the TPA or voluntary codes and thus possibly needing Authorisation. The Authorisation process can be a long, expensive and difficult one, particularly for small businesses.

MTAA notes that the Government's policy position on codes is being revised and that is welcomed by the Association. It is hoped that following that review, codes could be made mandatory without the pre-requisite of a voluntary code being tried and that voluntary approach been shown to be unsuccessful.

MTAA would welcome a mandated code in respect of body repairer and insurance company relations and also a specific code of conduct dealing with relations between franchised new vehicle dealers and their suppliers.

Should you require any further information please do not hesitate to contact Sue Scanlan of this Office.

Yours sincerely

A handwritten signature in black ink that reads "Michael Delaney". The signature is written in a cursive style with a long, sweeping tail on the letter 'y'.

MICHAEL DELANEY
Executive Director

18 December 2009