The Long Arm of the Law – or how the Consumer Regulator is Reaching into B2B Relationships: a Case Study of Two Australian Supermarkets and their Suppliers

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Abstract

In May 2014 the Australian Competition and Consumer Commission ('the ACCC') commenced legal proceedings against Coles, one of Australia's largest supermarket chains. Unlike previous legal actions which had focussed on Coles' interactions with consumers, this legal action sought to regulate Coles' interactions with their small business suppliers. In December 2015, the ACCC commenced a similar action against Woolworths (Coles' largest competitor). In both of these legal actions, the ACCC argue that each supermarket chain has acted 'unconscionably' in their dealings with commercial suppliers. These legal actions are important because they focus on a manner of conducting business or a pattern of behaviour rather than any loss suffered by a vulnerable trader; regulate the way in which a larger business behaves and seeks to utilise the advantages which come with a strong market position and demonstrate the regulator can successfully bring an action (with significant penalties) to moderate business behaviour and B2B relationships. Using the case studies of Coles and Woolworths we will seek to explore the type of behaviour which attracts the attention of the regulator and assess the impact of these legal developments on B2B relationships.

Background

"The power of supermarkets – for many years the power of two in Australia – is a topic that produces considerable passion and argument at commercial, social, regulatory and political levels. It is one that has been the subject of parliamentary committees of inquiry, adds to consultants' pockets, keeps regulators, lawyers and judges busy, and provides provocative material for the media" (Round, 2005, p.63).

In the decade since Professor Round's observations, the conduct of the two dominant supermarkets in Australia has come under even greater scrutiny following a number of government inquiries into their activities (ACCC, 2008; Senate, 2011; Senate, 2012) and litigation challenging the legality of that conduct under the *Competition and Consumer Act*, 2010 (Cth) ('the CCA') and the Australian Consumer Law ('the ACL'). This legislation provides a number of ways that supermarket conduct can be scrutinised by the Australian Competition and Consumer Commission ('the ACCC'), Australia's competition law and national consumer law regulator: through the 'misuse of market power' provisions; the 'unconscionable conduct' provisions' and industry codes of conduct.

Misuse of market power

Section 46 of the CCA prohibits a corporation that has a substantial degree of power in a market from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor; preventing the entry of a person into the market; or deterring or preventing a person from engaging in competitive conduct in the market. Also described as a 'misuse of market power' this prohibition is notoriously difficult to prove as it requires evidence of intention to damage a competitor or prevent competitive conduct. Changes to this section of the CCA were recently addressed by the Competition Policy Review (Harper et al, 2015) which recommended the removal of the requirement to prove the conduct had that purpose and replacing it with a consideration of the 'effect' of the conduct. This recommendation 'has generated political heat' (Fels, 2015, p.416) but as at the time of writing has yet to be implemented by the Australian parliament. Although there can be little doubt that Coles and Woolworths have substantial market power and have been prepared to use coercive tactics in exercising that power (Sutton-Brady et al., 2015), as section 46 of the CCA has yet to be used by the ACCC to challenge supermarket conduct it will not be discussed further in this paper.

Unconscionable conduct

Traditionally, unconscionable conduct was a legal action which an injured party in a vulnerable position could bring to seek legal redress from their exploiter. This was usually in the form of a court order declaring a particular contract void and ineffective, and classically operated in a situation of significant power imbalances: an illiterate guarantor and a bank; an elderly customer exploited by aggressive in-home sales techniques. It was seen as a way of regulating the relationships between powerful businesses and their customers, but was not operative in B2B relationships. Indeed the High Court of Australia was of the view that 'inequality of bargaining power' was not relevant when considering an unconscionable conduct claim against the landlord of a shopping centre brought by the ACCC on behalf of the small business tenant: (*Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) CLR 51).

A series of legislative amendments however, beginning in 1998, sought to permit the introduction of unconscionable conduct concepts into B2B relationships. This was significant because it recognised that the same power imbalances which exist in business/consumer relationships could exist in big business/small business relationships; allowed the regulator rather than the injured person/business to bring the legal action; and provided expanded remedies – particularly significant pecuniary penalties.

While there was some use of these legislative provisions in relational settings such as franchise arrangements and retail leasing, the vulnerability of and loss suffered by individual traders still needed to be proved. Following further legislative amendments in 2012 however this restriction was eased. Section 21 of the Australian Consumer Law ('the ACL') now simply prohibits 'unconscionable conduct' in the supply and acquisition of goods and services (see Appendix A).

Moreover, these amendments saw a whole shift in focus of the unconscionable conduct provisions. The new s21(4) provided in part that:

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour;

Unconscionable conduct had always focussed on a weaker party, typically a consumer, who had suffered loss because their weakness had been exploited by a stronger party. Now, these amendments allowed the consideration of the pattern of conduct of the stronger party, whether or not it damaged a weaker party. The emphasis of the law was shifting from a protective focus, to one which regulated the conduct of stronger parties.

As well, these new amendments provided that:and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

This is significant, because it re-inforces the change of legislative focus. No longer does the law of unconscionable conduct look to whether a stronger party exploited a weaker party in the process of contract formation, but the whole ongoing conduct of the B2B relationship is able to be examined, and regulated.

The changes to the legislative provisions prohibiting unconscionable conduct ushered in the possibility of legal proceedings against two of Australia's largest businesses, critiquing the manner in which they use their superior bargaining position and deal with their commercial suppliers. The use of section 21 of the ACL will be discussed in detail below in the context of the recent litigation involving Coles and Woolworths.

Food and Grocery Industry Code of Conduct

Part IVB of the CCA allows for the establishment of mandatory and voluntary industry codes of conduct. The Food and Grocery Industry Code of Conduct ('the Code') is a voluntary code that applies only to retailers and wholesalers that have elected to be bound by it. The big two supermarkets - Coles Supermarkets Australia and Woolworths Limited – signed up to the Code on 1 July 2015 so have been bound by the Code since that date. Their obligations under the Code are obligations in addition to legal obligations under the 'misuse of market power' provisions in the CCA and the 'unconscionable conduct' provisions in the Australian Consumer Law so the Code provides additional protections to businesses that supply groceries to the major supermarkets. The protections and obligations under the Code have yet to be tested but will be outlined below as they provide the ACCC with an alternative to litigation when concerns arise about the dealings between Australia's largest supermarkets and their suppliers.

Case Study I: ACCC v Coles Supermarkets

It's an honour that people want to try and pick apart what we have been doing, but what we're doing is not that complicated. We ask suppliers to give us what we can sell to customers, and if they do that, customers will buy more of it and everybody wins. (John Durkan, Coles CEO, quoted by Malcolm Knox in https://www.themonthly.com.au/issue/2014/august/1406815200/malcolm-knox/supermarket-monsters)

Supermarket conduct

For Coles, one of the large supermarket chains which dominate the retail grocery sector in Australia, success was about becoming customer facing, and this involved asking suppliers 'to give us what we can sell to customers'. This conversation was not just about product, but also price (and supplier rebates). The regulatory issues focussed on the nature of the 'conversations' between Coles and its suppliers – were Coles asking, or were they coercing?

Late in 2011, Coles, with help from the Boston Consulting Group, developed the Active Retail Collaboration Program (ARC). This involved dividing suppliers into groups or tiers (in its final iteration there were three tiers) and seeking 'efficiency rebates' from these suppliers. Tier 3 was composed of small suppliers for whom Coles constituted a significant part of their business (at least 30%) (Knox, 2014) and the ARC program sought an across the board rebate of 1% from these suppliers- designed to raise $16 million dollars. Tier 3 was composed of businesses as disparate as cake decorating supplies and tabasco sauce importers, but they all had one thing in common – they relied heavily in a concentrated market on Coles as an outlet for their products, and consequently had limited bargaining power.

Coles' managers were trained to ask for these rebates, and every conversation with Tier 3 suppliers followed the same format in which:

- there was no negotiation. The rebate amount had been set by Coles, was standard across the Tier, and would be paid. Coles refused requests for meetings to discuss these demands. In a number of instances (eg Tru-Blu) ongoing contractual negotiations were suspended until payments were made
- there was no substantiation of alleged benefits. The basis of asking for the rebates was claimed efficiencies, but these were asserted and never substantiated. In an early, unsuccessful, example discussed by Knox, Coles executives met with Red Bull, asserted that they had cut $400,000 from the company's supply costs, and sought in return a $200,000 rebate. When Red Bull queried these figures, no substantiation was provided. Based on Red Bull's figures, it was unlikely that it could have been, as Red Bull calculated that its total costs in serving Coles did not even come to $400,000. They refused to pay

- there was no time for suppliers to think about the 'requests'. Payment was expected within days, and there were consequences for failure to comply
- the commercial consequences which were threatened – and implemented – included terminating supply contracts; recategorisation as a transactional supplier; withholding of ranging information (previously supplied); withholding forecasting data; declining to acquire new products from the supplier; and risks to ongoing promotional activities
- the consequences of these demands were severe for some suppliers. The Gourmet Food Group supplied the Rosella and Waterwheel brands to Coles – it fell into receivership, after the start of the ARC campaign. Ferrier Hodgson, their receiver, stated that the collapse stemmed from "trade spend demanded by the supermarkets and the competition from own brands." (Knox, 2014)

Regulatory response to supermarket conduct

As Rod Sims, the Chair of the regulatory body the Australian Competition and Consumer Commission (ACCC) indicated in a statement to the Senate Estimates Committee in February 2013, the regulator, responding to concern as to the harsh treatment of their suppliers by the supermarket chains, began investigating. The first major hurdle they faced was the reluctance of the suppliers to speak, for fear of the commercial consequences. This is where the amendments to s21(4)(b) discussed above are relevant. Because the legislation now permits an action to be brought based on a pattern of conduct, and does not require evidence of damage suffered by a particular trader, the ACCC was able to respond to this problem by offering to collect information on a confidential basis.

They found some 50 suppliers (Senate Estimates Committee) who were prepared to speak to them on this basis, and gathered evidence which suggested two separate breaches of the legislation:

1. *"Whether the major supermarket chains are engaging in unconscionable conduct in their dealings with their suppliers; and*
2. *Whether the major supermarket chains are misusing their market power by discriminating in favour of their own homebrand products to deter or prevent suppliers of proprietary brands from engaging in competitive conduct."*

The second action, based on s46, was not proceeded with, and will not be further discussed.

The ACCC followed up these confidential disclosures, by using its own investigative powers to obtain information from a number of other suppliers. They found concerning evidence in relation to the ARC program discussed above, but also found evidence of other behaviour they alleged was unconscionable, such as:

- discriminating against the products of suppliers, and in favour of home brand products
- pressuring suppliers to pay 'profit gaps'. For example, Oates, a manufacturer of brooms and mops, was required to pay a 'profit gap' bill of $326,500 after Coles had allegedly lost money in a failed promotion – and a promotion which had been run without consultation with Oates. Similarly, Austech, the supplier of cleaning products such as *Orange Power* to Coles, was asked to cover a 'profit gap' of $25,845 between the internal Coles target and the actual sales figures in the first five months of the 2011 financial year – and to cover this shortfall in Coles' profits within 3 days. 'Profit gap' requests ended up totalling some $200,000;
- requiring suppliers to cover the costs of any wastage caused by shoplifting or product expiry. Austech was required to fund the markdown of product lines, which Coles had decided to delete.
- levying 'fines' for late or short deliveries.
- one of the key issues identified by Sims (Senate Estimates Committee) was imbalance of bargaining power:

  Such an imbalance, when misused, can have important economic consequences. For example suppliers may find it more difficult to plan for and invest in their businesses.

Supermarket strategy

The ACCC began action against Coles in May 2014 alleging it had engaged in unconscionable conduct in breach of s21 ACL in relation to the payments it had demanded as part of the ARC program. Following the further investigations, a second action was launched in October, in relation to 'profit gap' payment demands made to five suppliers, including Oates and Austech.

Coles defended its actions vigorously – both legally and in the press. Ian McLeod, Coles' CEO at the relevant time, telling journalists from The Australian (October 20, 2014):

I'm absolutely certain that the way we approach suppliers was professional and absolutely we operate ethically and I do not believe there is anything systematically wrong in the way in which our (Coles) buyers conduct their business.

However, by the 16th December, Coles had agreed with the ACCC that it had in fact been engaged in unconscionable conduct and appeared in the Federal Court of Australia, seeking consent orders in relation to a settlement which had been reached in respect of the two cases. McLeod's successor as Managing Director, John Durkan, commenting to the press (ABC News 16/12/14):

Coles unconditionally apologises and accepts full responsibility for its actions in these supplier dealings….I believe that in these dealings with suppliers, Coles crossed the line and regrettably treated these suppliers in a manner inconsistent with acceptable business practice.

Court decision

Just in time for Christmas, on 22nd December 2014, Gordon accepted the settlement and the agreed penalties, which included:

- Admissions by Coles that it had engaged in unconscionable conduct;
- Coles pay financial penalties totalling $10 million
- Coles contributes $1 million towards the ACCC's costs
- An 87B undertaking to appoint Jeff Kennett as an independent arbiter to ensure adequate compensation for all the affected suppliers
- Gordon commented in *ACCC v Coles Supermarkets* [2014] FCA 1405 [at 102]:

  Coles' misconduct was serious. I reject Coles' submission that these contraventions are …less serious…because they did not involve vulnerable consumers. Coles' conduct did not involve vulnerable consumers. Coles' conduct did involve vulnerable suppliers – some of Coles' smaller suppliers…These vulnerable suppliers were up against Coles…Coles' conduct was also serious because the admitted unconscionable conduct was difficult for the ACCC to detect due to the reluctance of smaller suppliers to report complaints about, and assist the ACCC with investigations into, the conduct of major retailers, when they rely on these retailers for the ongoing viability of their businesses…Coles' misconduct was serious, deliberate and repeated…Its conduct was "not done in good conscience."

Consequences for supermarket and suppliers

Coles paid a significant financial penalty for its unconscionable conduct – but by agreeing to consent orders avoided a penalty, which could have been ten times higher. Its suppliers now have a mechanism in place to receive compensation – those that is, who are still in business. One of the clear issues emerging from this litigation is that s21 can be an effective – but time consuming method – to address abuses of commercial power. The unconscionable conduct in question occurred in 2011, but it was not until the dying days of 2014 that a decision was reached. If Coles had decided to contest the action, it may have taken almost another year to achieve a result. The case established a mechanism to

compensate injured suppliers, but this also was a lengthy process, stretching to months. It may be effective in achieving cultural change in the long run, but does not work well as a protective mechanism for smaller suppliers.

Case Study 2: ACCC vs Woolworths Limited

"Welcome to the world of Australia's supermarket duopoly, where the decades long turf war between Coles and Woolworths dominates. From advertising campaigns to fresh food claims, differences between the two chains are often barely discernable. Sadly, it seems that in how they treat suppliers, the two supermarket giants also share similarities. Just days after Coles issued a mea culpa over its treatment of suppliers, and agreed to pay a $10 million fine, Woolworths has been hit with strikingly similar allegations of bullying, and now faces a probe from the corporate watchdog" (Hawthorne, 2014b, p.63).

Supermarket conduct

In late 2014, while the media continued to report on the landmark decision of the Federal Court of Australia to impose significant financial penalties on Coles because it had engaged in unconscionable conduct in its dealings with certain suppliers, attention shifted to the conduct of Coles' major rival, Woolworths Limited. Suppliers had been approaching the media with their allegations of demands for extra cash payments to be made by 31 December (Hawthorne, 2014a).

"In total 17 different suppliers have contacted Fairfax Media – representing scores of household brand names from across the supermarket shelves – to tell their story of Woolworths' pre- Christmas cash grab. All tell similar stories of verbal threats" (Hawthorne, 2014b).

Examples of the suppliers' allegations include:

- *"There have been implied threats, including loss of shelf space and suggestions they [Woolworths] would just deduct the amount from our accounts."* (quoted in Hawthorne, 2014a).
- *"They dropped the retail price to match their competitor, and then want me to fund their lost profit."(*quoted in Hawthorne, 2014a).
- *"I was asked for a contribution of almost $1 million, and when I refused to pay I was told a 'range review' was under way and I would be informed of the outcome early next week...The implied threat is that some of my products will no longer be stocked if I don't pay up."* (quoted in Hawthorne, 2014c).

The practice described as 'margin filling' was allegedly directed at suppliers who had their products discounted as part of Woolworths new "Cheap Cheap" marketing campaign with the aim of recouping $70 million from those suppliers by the end of the trading quarter to help Woolworths avoid a profit downgrade (Hawthorne, 2014a).

Regulatory response to supermarket conduct

The ACCC launched an investigation as to whether Woolworths' conduct had contravened the law. Suppliers were encouraged to come forward and provide information with their anonymity and confidentiality assured by the regulator. Almost exactly one year later, the ACCC announced it had commenced legal proceedings against Woolworths seeking injunctions, an order requiring the full refund of the amounts paid by suppliers, a pecuniary penalty, a declaration and costs (ACCC, 2015, MR252/15).

According to the ACCC media release issued at the time (ACCC, 2015, MR252/15), the ACCC has made the following allegations against Woolworths in that:

- December 2014, Woolworths developed a strategy, approved by senior management, to urgently reduce its expected profit shortfall by 31 December 2014
- under a scheme referred to as 'Mind the Gap" Woolworths systematically sought to obtain payments from a group of 821 'Tier B' suppliers
- Woolworths asked those suppliers for 'Mind the Gap' payments ranging from $4,291 to $1.4 million to 'support' Woolworths
- these requests were made when Woolworths was in a substantially stronger bargaining position than the suppliers; did not have pre-existing contractual entitlement to seek the payments; and either knew it did not have or was indifferent to whether it had a legitimate basis for requesting the payments
- Woolworths sought approximately $60.2 million in 'Mind the Gap' payments and ultimately received approximately $18.1 million from these suppliers
- Woolworths conduct in requesting the 'Mind the Gap' payments was unconscionable in all the circumstances.

Supermarket strategy

Woolworths has defended its conduct saying the payments "are consistent Australian and international industry practice to engage regularly with suppliers over performance" (Mitchell & Danckert, 2015). The Chairman of the ACCC has been quoted in the media as responding in the following terms:

"If behaviour such as we are alleging is industry practice then industry practice needs to change ... If people believe that's industry practice that's extremely unfortunate and something we should deal with – suppliers can't be in a situation where they get arbitrary demands" ((Mitchell & Danckert, 2015).

The matter has yet to be heard or determined by the Federal Court (with a hearing date unlikely to be allocated before August 2016) but the similarities with the litigation involving Coles are clear. Initially Coles had denied that its demands for extra payments from small suppliers breached the law but it eventually agreed to refund millions of dollars to those suppliers and to pay a $10 million penalty. Will Woolworths do the same?

Commentators have suggested that Woolworths may choose to continue to deny the allegations and defend the proceedings when the matter gets to court in the hope that it will avoid having to refund the 'Mind the Gap' payments and avoid a substantial penalty (Temby 2016a). Temby (2016b) also reports that Woolworths' defence is based on the following arguments:

- this was 'business as usual' and Woolworths approach and methodology was reasonable and considered
- the conduct was an ordinary aspect of the trading relationship between suppliers and retailers
- Woolworths doesn't have any real power in its dealings with suppliers.
  However, in Temby's view:

  "Given the Court's earlier disapproval of the conduct of Coles supermarkets (given its size and strength), we don't expect the 'market conduct' and 'we don't have power' aspects of Woolworths defence will hold much weight. In our view, the Court is unlikely to be persuaded by an argument that its conduct was standard practice in the market, as the case law requires the judge to have regard to the much broader notion of 'community standards', rather than those that may occur in the wholesale grocery sector". (Temby, 2016b).

Ultimately, the success or otherwise of the legal proceedings will be determined by the strength of the ACCC's evidence and the ability to prove that Woolworths' buyers made express or implied threats to secure payments from suppliers for which they had no legal entitlement.

Food and Grocery Industry Code of Conduct

"There can be a significant imbalance in bargaining power between suppliers and large grocery retailers and wholesalers. The code seeks to limit some of the conduct that was brought to the ACCC's attention during our supermarket suppliers' investigation... The new code, together with the recent Court judgment that Coles acted unconscionably, makes it clear that no matter how much bargaining power a retailer holds, they must deal with their suppliers fairly." (ACCC, 2015, MR 21/15).

The Food and Grocery Code of Conduct ('the Code') is a voluntary industry code made under section 51AE of the CCA. It binds retailers and wholesalers carrying on a supermarket business in Australia who have agreed by written notice to the ACCC to be bound by the Code. The purpose of the Code is:

- to help to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain; and
- to ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between parties; and
- to provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers;
- to promote and support good faith in commercial dealings between retailers, wholesalers and suppliers: (see Code section 2).

The Code gives an indication of the types of conduct which suppliers have been subjected to by the supermarkets. The Code requires grocery supply agreements to be in writing (section 7) and to cover matters such as the following:

- delivery requirements
- the circumstances in which the retailer or wholesaler may reject the groceries
- the payment period and any circumstances in which payment may be withheld or delayed
- the term of the agreement
- any quantity and quality requirements relating to the groceries
- the circumstances in which the agreement may be terminated: (section 8).

The Code limits when retailers and wholesalers can unilaterally or retrospectively vary an agreement – such variations must be reasonable and can only occur if the agreement expressly provides for the variation and clearly sets out the changed circumstances in which the variation can be made: (sections 9 and 10).

Payments to suppliers for goods delivered and accepted in accordance with the grocery supply agreement must be made within the time frame set out in the agreement or within a reasonable time: (section 12).

Requiring payments from suppliers for matters such as shrinkage, wastage, a condition of being a supplier, for better positioning of groceries, for retailers' activities and funding for promotions – is prohibited unless the payment is set out in the grocery supply agreement and is reasonable: (sections 13 to 18).

The Code also provides suppliers with additional protections in relation to: delisting products, supplier funded promotions, fresh produce standards and quality specifications, labelling and packaging requirements, changes to supply change procedures, threatening business disruption or termination, intellectual property rights and confidential information, product ranging and shelf space allocation: (sections 19 to 27).

The Code requires retailers and wholesalers to deal with suppliers lawfully and 'in good faith' at all times (section 28). Although 'good faith' is not expressly defined in the Code it takes its meaning from the common law that requires parties to an agreement to exercise powers reasonably, honestly and without improper motive. In determining whether the retailer or wholesaler has acted in good faith in dealing with a supplier, the following may be taken into account:

- whether the retailer or wholesaler's trading relationship with the supplier has been conducted without duress;
- whether the retailer or wholesaler's trading relationship with the supplier has been conducted in recognition of the need for certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment;
- whether, in dealing with the retailer or wholesaler, the supplier has acted in good faith: (Section 28 (3)).

The Code also provides processes for suppliers to lodge complaints about matters covered by the Code (sections 33 to 37) and for complaints and disputes to be resolved by mediation or arbitration (sections 38 to 39).

The ACCC monitors compliance with the Code and can take action to enforce the Code where appropriate. Although no court action has been taken for breaches of the Code, the ACCC has reminded grocery retailers and wholesalers of their obligations under the Code and publicly expressed its concern about their approach to implementing the Code (ACCC, 2015, MR171/15; MR185/15; MR200/15; MR248/15). This public 'naming and shaming' drew a lot of media attention (Low, 2015; Mitchell, 2015; Smith, 2015). Rod Sims, the Chairman of the ACCC was quoted in late 2015 as saying the initial implementation of the code had been 'disappointing' and that the ACCC had been vetting grocery supply agreements to ensure they were compliant with the code after initial feedback from suppliers that supermarkets had not been negotiating in good faith (Mitchell, 2015). However, a few months into 2016 Rod Sims was again quoted in the media but this time saying that the supermarkets' treatment of suppliers-once a hot-button topic – was 'not as much on our radar' (Heffernan, 2016). Whether the complaints about supermarkets from their suppliers had fallen because of the Code or because supermarkets had changed their behaviour following the successful litigations against Coles and the continuing legal proceedings against Woolworths cannot be determined with any certainty. However what is certain is that there are now a number of protections in place and the ACCC has a range of enforcement options should the supermarkets act unconscionably or unfairly in their dealings with their suppliers.

Managerial implications

While previous research has looked at the power imbalance that exists in the Australian retail space (Sutton-Brady et al, 2015) this paper has attempted to show how this imbalance could be addressed through law. The implications are two-sided; firstly for supermarket retailers they are now aware of the threat of legal action and must be more mindful in their dealings with suppliers to ensure their conduct is above reproach. For suppliers especially smaller players the power balance has shifted slightly to at least give them the opportunity to take on the big players. Perhaps the biggest advantage for these small suppliers is that they no longer need to be identified in order for a case to be taken against the supermarkets. Previous research had shown that this was a big impediment to taking on the supermarkets. Although as previously mentioned how many suppliers who have survived in this competitive arena is hard to say and the worry may be that this chance in legislation has come too late for many.

Future developments

This is an area of law, which is rapidly developing – indeed the amendments discussed above were before the Parliament before the substantive legislation was enacted. A 2014 green paper on

agriculture has recommended that remedies for unconscionable conduct be extended to allow the Courts to order a large company to divest some of its holdings, if it had been found to act unconscionably. This is in addition to the existing pecuniary penalties. From a business-to-business marketing perspective it is clearly an area of law that will be followed closely. It will be interesting to investigate moving forward if these changes have impacts on buyer-supplier relationships especially with regard to power imbalance.

References

Australian Competition and Consumer Commission (2014) *ACCC takes action against Coles for alleged unconscionable conduct towards its suppliers* (5 May, NR102/14). http://www.accc.gov.au/media-release/accc-takes-action-against-coles-for-alleged-unconscionable-conduct-towards-its-suppliers

Australian Competition and Consumer Commission (2014) *ACCC takes further action against Coles for alleged unconscionable conduct towards its suppliers* (16 October, MR249/14). http://www.accc.gov.au/media-release/accc-takes-further-action-against-coles-for-alleged-unconscionable-conduct-towards-its-suppliers

Australian Competition and Consumer Commission (2014) *ACCC and Coles seek consent orders to resolve unconscionable conduct proceedings* (15 December, MR308/14). http://www.accc.gov.au/media-release/accc-and-coles-seek-consent-orders-to-resolve-unconscionable-conduct-proceedings

Australian Competition and Consumer Commission (2014) *Court finds Coles engaged in unconscionable conduct and orders Coles pay $10 million penalties* (22 December, MR320/14). http://www.accc.gov.au/media-release/court-finds-coles-engaged-in-unconscionable-conduct-and-orders-coles-pay-10-million-penalties

Australian Competition and Consumer Commission (2015) *Coles refunds over $12 million to suppliers following ACCC action* (30 June, MR112/15). http://www.accc.gov.au/media-release/coles-refunds-over-12-million-to-suppliers-following-accc-action

Australian Competition and Consumer Commission (2015) *ACCC takes action against Woolworths for alleged unconscionable conduct towards supermarket suppliers* (10 December, MR252/15). http://www.accc.gov.au/media-release/accc-takes-action-against-woolworths-for-alleged-unconscionable-conduct-towards-supermarket-suppliers

Australian Competition and Consumer Commission (2014) *Proposed grocery code goes some way to addressing unfair practices* (1 October, MR237/14). http://www.accc.gov.au/media-release/proposed-grocery-code-goes-some-way-to-addressing-unfair-practices

Australian Competition and Consumer Commission (2015) *New rights for food and grocery suppliers* (2 March, MR21/15). http://www.accc.gov.au/media-release/new-rights-for-food-and-grocery-suppliers

Australian Competition and Consumer Commission (2015) *ACCC reminds food and grocery suppliers about new protections* (10 September, MR171/15). http://www.accc.gov.au/media-release/accc-reminds-food-and-grocery-suppliers-about-new-protections

Australian Competition and Consumer Commission (2015) *ACCC concerned over implementation of the Food and Grocery code* (24 September, MR185/15). http://www.accc.gov.au/media-release/accc-concerned-over-implementation-of-the-food-and-grocery-code

Australian Competition and Consumer Commission (2015) *ACCC working to ensure a successful Food and Grocery Code* (21 October, MR200/15). http://www.accc.gov.au/media-release/accc-working-to-ensure-a-successful-food-and-grocery-code

Australian Competition and Consumer Commission (2015) *Supermarkets take steps to address ACCC concerns over implementation of the Food and Grocery code* (8 December, MR248/15). http://www.accc.gov.au/media-release/supermarkets-take-steps-to-address-accc-concerns-over-implementation-of-the-food-and-grocery-code

Australian Competition and Consumer Commission, *Food and Grocery Code of Conduct* https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct

Australian Competition and Consumer Commission, *Supplying to retailers or wholesalers* https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct/supplying-to-retailers-or-wholesalers

Australian Competition and Consumer Commission (2008). *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*. Canberra: Commonwealth of Australia, July. http://www.accc.gov.au/publications/report-of-the-accc-inquiry-into-the-competitiveness-of-retail-prices-for-standard-groceries-july-2008

Corones, Stephen (2015) 'Regulating unilateral supermarket misconduct as customer/acquirer of goods and services' *Australian Business Law Review*, vol. 43, no. 5, pp. 400-419.

Fels, Allan (2015) 'Current Issues in Competition Policy' *The Australian Economic Review* vol. 48, no. 4, pp. 410–16.

Goldblatt , Eli. (2015) 'ACCC launches legal action against Woolworths over allegations it mistreated suppliers' *The Australian* (10 December 2015).

Harper, Ian, Anderson, Peter, McCluskey, Su, and O'Bryan, Michael (2015) *Competition Policy Review Final Report*. Canberra: Commonwealth of Australia, March. http://competitionpolicyreview.gov.au/final-report/

Hawthorne, Mark (2014a) 'Woolworths accused of bullying suppliers into paying millions for Cheap Cheap campaign' *The Sydney Morning Herald* (18 December 2014).

Hawthorne, Mark (2014b) 'Woolworths: Cheap,cheap, or bully bully?' *The Age* (19 December 2014).

Hawthorne, Mark (2014c) 'Woolworths' Christmas threat to suppliers' *The Age* (18 December 2014).

Hawthorne, Mark and Heffernan, Madeleine (2014) 'ACCC examines Woolworths supplier bullying claims' *The Sydney Morning Herald* (18 December 2014).

Heffernan, Madeleine (2016) 'Supplier complaints about supermarkets down: ACCC ' *The Sydney Morning Herald* (22 May 2016).

Johnsen , Rhona E Lacoste, Sylvie (2016) 'An exploration of the 'dark side' associations of conflict, power and dependence in customer–supplier relationships' *Industrial Marketing Management* (in press).

Knox, Malcolm (2014) 'Supermarket Monsters' *The Monthly* August 2014

Mitchell, Sue. (2015) 'ACCC chairman warns retailers over grocery code' *The Australian Financial Review* (21 October 2015).

Mitchell, Sue. (2016a) 'Woolworths' unconscionable conduct case kicks off in Federal Court' *The Australian Financial Review* (31 January 2016).

Mitchell, Sue. (2016b) 'Woolworths denies demanding 'Mind the Gap' payments was unconscionable' *The Australian Financial Review* (16 February 2016).

Mitchell, Sue, Danckert, Sarah. (2015) 'Woolworths accused of unconscionable conduct' *The Australian Financial Review* (10 December 2015).

Low, Catie (2015a) 'Aldi and Woolworths accused by the ACCC of misusing grocery code' *The Australian Financial Review* (24 September 2015).

Low, Catie (2015b) 'Battle rages between supermarkets and suppliers' *The Australian Financial Review* (11 December 2015).

Round, David K. (2006) 'The power of two: squaring off with Australia's large supermarket chains' *The Australian Journal of Agricultural and Resource Economics*, vol. 50, no. 1, pp. 51–64.

Schleper, Martin C., Blome, Constantin, Wuttkel, David A. (2015) 'The Dark Side of Buyer Power: Supplier Exploitation and the Role of Ethical Climates' *Journal of Business Ethics* DOI 10.1007/s10551-015-2681-6 published online 14 May 2015

Senate Economics References Committee (2011). *The impacts of supermarket price decisions on the dairy industry*. Canberra: Commonwealth of Australia, 3 November. <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2010-13/dairyindustrysupermarket2011/report/index>

Senate Estimates Committee – Additional Budget Estimates 12 February 2013 http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/economicsctte/estimates/add1213/index

Senate Select Committee on Australia's Food Processing Sector (2012). *Inquiry into Australia's food processing sector*. Canberra: Commonwealth of Australia, 16 August. <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/foodprocessing/foodprocessing/report/index>

Smith, Michael (2015) 'ACCC takes supermarkets Woolworths, Aldi to task over grocery supplier code' *The Australian Financial Review* (24 September 2015).

Smith, Rhonda L. (2006) 'The Australian grocery industry: a competition perspective' *The Australian Journal of Agricultural and Resource Economics*, vol. 50, no. 1, pp. 33–50.

Sutton-Brady Catherine, Taylor Tom and Kamvounias Patty (2016) Forthcoming 'Private Label Brands: a Supplier Perspective', *Journal of Business & Industrial Marketing*

Sutton-Brady, Catherine, Kamvounias , Patty and Taylor, Tom (2015) 'A model of supplier–retailer power asymmetry in the Australian retail industry' *Industrial Marketing Management*, vol. 51, pp. 122-130.

Temby, Shaun (2016a) ‘Power and conscience - Woolworths and the ACCC’s claims of unconscionable conduct’ *Maddocks* (19 January 2016)

Temby, Shaun (2016b) ‘Business as usual? Woolworths denies unconscionable dealings with suppliers’ *Maddocks* (22 February 2016)

Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (2003) CLR 51.

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405 (22 December 2014).

Competition and Consumer Act 2010 (Cth)
https://www.legislation.gov.au/Details/C2016C00249

Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015
https://www.legislation.gov.au/Details/F2015L00242

APPENDIX A

The Australian Consumer Law: Part 2-2 -- Unconscionable conduct

Section 21 Unconscionable conduct in connection with goods or services

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

(2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:

(a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or

(b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

(3) For the purpose of determining whether a person has contravened subsection (1):

(a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

Section 22 Matters the court may have regard to for the purposes of section 21

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***supplier***) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the ***customer***), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the customer; and

(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and (f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and (g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the customer:

any intended conduct of the supplier that might affect the interests of the customer; and

any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and
the terms and conditions of the contract; and
the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and
any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and
(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and
(l) the extent to which the supplier and the customer acted in good faith.

APPENDIX B
The Australian Consumer Law: Part 5-2 – Remedies
Section 224 Pecuniary penalties

(1) If a court is satisfied that a person:
(a) has contravened any of the following provisions:
a provision of Part 2-2 (which is about unconscionable conduct);
……
(b) has attempted to contravene such a provision; or
(c) has aided, abetted, counselled or procured a person to contravene such a provision; or (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
(f) has conspired with others to contravene such a provision;
the court may order the person to pay to the Commonwealth, State or Territory, as the case may be, such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the court determines to be appropriate.
(2) In determining the appropriate pecuniary penalty, the court must have regard to all relevant matters including:
(a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
(b) the circumstances in which the act or omission took place; and
(c) whether the person has previously been found by a court in proceedings under Chapter 4 or this Part to have engaged in any similar conduct.
(3) The pecuniary penalty payable under subsection (1) is not to exceed the amount worked out using the following table:

Amount of pecuniary penalty		
Item	**For each act or omission to which this section applies that relates to ...**	**the pecuniary penalty is not to exceed ...**
1	a provision of Part 2-2	(a) if the person is a body corporate--$1.1 million; or (b) if the person is not a body corporate--$220,000.