



**Australian
Competition &
Consumer
Commission**

Guide to unconscionable conduct



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Important notice

Please note that this guideline is a summary giving you basic information. It does not cover the whole of the Trade Practices Act and is not a substitute for professional advice. Other laws, either federal or state-based, may impose additional requirements or responsibilities on your businesses when dealing with other businesses or consumers, beyond the requirements of the Trade Practices Act.

Moreover, because it avoids legal language wherever possible there may be some generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the conduct need to be taken into account when determining how the Act applies to that conduct.

Foreword

The Australian Competition and Consumer Commission is committed to ensuring that all businesses understand their rights and obligations under the Trade Practices Act. The Act applies to nearly all aspects of your business—the way you set prices, advertise and compete.

Small businesses make an important contribution to the Australian economy, and the ACCC is keen to ensure they are not the target of anti-competitive, misleading, harsh or oppressive conduct.

All businesses can benefit by having transparent and equitable relationships with their trading partners. A productive business relationship with suppliers and customers is essential to your profitability and long-term viability.

Treating consumers and other businesses fairly is not just about staying out of court. Resolving a problem before it gets out of hand, effective complaint handling and dispute resolution procedures saves the time, expense and stress associated with litigation or other formal procedures.

A business' reputation is among its greatest assets. An effective trade practices compliance program can go a long way towards establishing a reputation as a business that deals with consumers and other businesses properly.

All businesses, large and small, need to understand what unconscionable conduct is, and how owners, managers and employees can avoid engaging in such conduct.

The Act encourages vigorous competition between firms and a robust approach to business dealings. The unconscionable conduct provisions do not seek to inhibit businesses from advancing their own legitimate commercial interests, particularly when negotiating with other businesses. The law will not apply in situations where one party has merely 'driven a hard bargain', nor does it require one business to put the interests of another party ahead of its own.

There are, however, limits on how far businesses can go. The courts have long recognised the need to intervene to set aside transactions where one party has acted unconscionably.

Unconscionable conduct is not a static concept; it has developed in recent years, and continues to be refined as it is interpreted by the courts. In addition to incorporating the equitable notion of unconscionability under section 51AA, subsequent amendments have seen the adoption of a set of broader statutory criteria to which the courts may have regard when determining whether a business has acted unconscionably.

The introduction of the statutory unconscionability provisions under sections 51AB and 51AC has strengthened the protection afforded to consumers and small businesses under the Act.

Since the insertion of these statutory provisions the ACCC and private parties have initiated a number of court actions with successful outcomes. These outcomes have clarified how the courts will interpret and apply the statutory tests.

While some of these cases have been contested at trial, in many cases the court has made orders after the parties have agreed to resolve the proceedings without a contested trial. The fact that businesses are willing to recognise their failure to comply with the law and agree to steps to remedy such breaches further demonstrates the effectiveness of the unconscionability regime.

This guide contains summaries of a number of these recent outcomes. Businesses should keep up to date with their legal responsibilities and tailor compliance systems accordingly.

This publication provides guidance on how the unconscionable conduct provisions of the Act apply in your dealings with other businesses and consumers.

It is not legal advice, and does not advocate just a bare minimum standard of business conduct required to avoid liability under the unconscionable conduct provisions. Rather, it promotes good commercial practices that will lead to productive and sustainable business relationships.

John Martin

ACCC Small Business Commissioner

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Introduction

The Trade Practices Act encourages vigorous competition and a fair approach to commercial transactions. A key aspect of modern commerce is the negotiating process that accompanies business transactions—generally, businesses and consumers are free to organise their affairs as they see fit, formalising their arrangements through contracts or agreements.

There are, however, limits on how far businesses can go in their dealings with other businesses and consumers.

What is unconscionable conduct?

Three sections in Part IVA of the Trade Practices Act address unconscionable conduct. They are:

- s. 51AA, which is a broad prohibition on unconscionable conduct within the meaning of the judge made law—that is, the law as it has evolved through the decisions of the courts
- s. 51AB, which applies to transactions between businesses and consumers, for goods ordinarily bought for household use—it includes a statutory test which sets out a range of matters for the courts to consider in determining whether a business has acted unconscionably towards its consumers
- s. 51AC, which also identifies a range of matters that the court may take into account when determining if conduct is unconscionable—however, it applies to dealings between businesses in relation to the supply of goods or services where the value of the transaction does not exceed \$3 million. Section 51AC does not apply in protection of listed public companies.

Section 51AA is a statutory prohibition on conduct which is unconscionable according to established legal principles. In contrast to s. 51AA, it is the dictionary or ordinary meaning of unconscionable which is relevant to s. 51AB and s. 51AC. The courts have described unconscionable conduct as:

- serious misconduct or something clearly unfair or unreasonable
- conduct which shows no regard for conscience
- conduct which is irreconcilable with what is right or reasonable.

Section 51AA does not apply to conduct that is prohibited by ss. 51AB or 51AC.

In determining which provision will apply to a given set of circumstances, it is therefore necessary to first examine whether the conduct falls within ss. 51AC or 51AB. If not, it may then be assessed under s. 51AA. This publication therefore deals with the provisions in this order.

Aims of the guideline

This guideline is targeted mainly at businesses which deal directly with other businesses or consumers. Its main aims are to:

- promote awareness of the law
- help businesses avoid possible breaches of the law
- encourage businesses to implement effective compliance programs which will reduce the risk of the ACCC or private parties taking court action for breaches of the unconscionable conduct provisions.

The guide contains numerous examples of court actions—resolved either by fully contested hearings or by agreement between the parties—that have been taken by the ACCC or others.

The ACCC is unable to investigate every allegation of unconscionable conduct it receives. This publication is not intended to give guidance on when the ACCC may take action, administrative or otherwise, in relation to a complaint. Rather, it explains the ACCC's view of the law, provides examples on how the law has been applied in particular cases, and gives guidance on steps that businesses can take to reduce their risk of engaging in unconscionable conduct.

Structure of this guideline

The guide is divided into five chapters:

- chapter 1 outlines business' obligations to other businesses under s. 51AC
- chapter 2 relates to business' obligations to consumers under s. 51AB
- chapter 3 relates to business' obligations not to engage in unconscionable conduct within the meaning of s. 51AA
- chapter 4 briefly explains the role of the Australian Securities and Investment Commission (ASIC) in unconscionable conduct cases in the financial services industry
- chapter 5 sets out the remedies available for breaches of the unconscionable conduct provisions.

The guideline tries to help business understand this complex area of the law.

If any specific issues arise, you should seek professional advice about how the principles outlined in this guideline might apply to your particular circumstances. The relevance of particular principles may vary with those circumstances.

I. Dealing with other businesses

Unconscionable conduct in business transactions—s. 51AC

Section 51AC of the Trade Practices Act prohibits unconscionable conduct by corporations and individuals in the course of a business transaction. Specifically, it includes the following requirements:

1. A **corporation** 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. A **person** must not, in trade or commerce, in connection with
 - (a) the supply or possible supply of goods or services to a **corporation** (other than a listed public company) or
 - (b) the acquisition or possible acquisition of goods or services from a **corporation** (other than a listed public company)engage in conduct that is, in all the circumstances, unconscionable.

Corporation—the prohibition on unconscionable conduct applies to the conduct of corporations and to conduct engaged in by people directed at corporations. The prohibition also applies if:

- the conduct was engaged in by a person and involved the use of postal, telegraphic or telephone services or took place in a radio or television broadcast
- the conduct was undertaken in a territory of Australia, in the course of the promotional activities of a professional person.

In trade or commerce—this term limits the application of the unconscionable conduct provisions to conduct of a trading and commercial character.

In connection with—this suggests that the unconscionable conduct should ‘accompany’, ‘go with’ or ‘be involved in’ the supply or acquisition, or possible supply or acquisition, of goods or services.

Possible—the reference to ‘possible supply’ and ‘possible acquisition’ ensures that the provision covers unconscionable conduct generally in dealings between businesses. Those words may include promotional activities and pre-contractual negotiations.

Other than a listed public company—relief under this section would be available only to unlisted public companies, private companies and individuals—not companies whose shares are traded on the stock market.

Goods and services—section 51AC only applies to the supply or acquisition or possible supply or acquisition of goods or services:

- acquired for the purpose of trade or commerce and
- priced at or below \$3 million (or whatever amount is prescribed by the regulations).

The ACCC considers that schemes contrived to avoid this threshold are unlikely to persuade a court that the conduct does not fall within the price limit if they would do so in the absence of the ‘scheme’.

Engage in conduct—the term is defined in s. 4(2) of the Trade Practices Act and includes refusing to do an act (other than inadvertently) as well as doing an act.

Factors to be considered

Section 51AC includes a non-exhaustive list of factors which a court may take into account in determining whether unconscionable conduct has occurred. These are:

- the relative bargaining strengths of the parties
- whether, as a result of the stronger party’s conduct, the other was required to meet conditions not reasonably necessary to protect the stronger party’s legitimate interests
- whether the weaker business could understand any documentation used
- the use of any undue influence, pressure or unfair tactics by the stronger party
- how much the weaker business would have had to pay/charge, and under what circumstances, to buy/sell identical or equivalent goods or services from/to another supplier
- the extent to which the stronger party’s conduct was consistent with its conduct in similar transactions with other similar businesses
- the requirements of any applicable industry code (or of any other industry code if the weaker business acted in the reasonable belief that the stronger party would comply with it)
- the extent to which the stronger party unreasonably failed to disclose:
 - any intended conduct that might affect the interests of the weaker business and
 - any risks to the weaker business arising from that conduct which the stronger party should have foreseen would not be apparent to the weaker business.
- the extent to which the stronger business was willing to negotiate the terms of any supply contract with the weaker business

- the extent to which each party acted in good faith.

The court may also consider any other relevant matter it sees fit to take into account.

‘in all the circumstances’

It is important to note that the court will determine whether a business has engaged in unconscionable conduct by considering all the circumstances. Each of these factors in isolation may not amount to unconscionable conduct, but may do so when considered cumulatively and evaluated in light of all the circumstances.

For example, the circumstances might include not only the way in which the legal rights were exercised, but also how the relevant contract was negotiated, or how the legal rights were acquired in the first place.

Section 51AC(6) provides that the court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the conduct.

‘the relative bargaining strengths of the parties’

The courts have observed that many, perhaps even most, contracts are made between parties of unequal bargaining power. This inequality may arise for a number of reasons—for example, one business may rely on another business for essential business supplies in circumstances where it cannot buy those products elsewhere.

Businesses sometimes seek to use their position of power to impose unreasonable conditions on another business.

It is important to note that an inequality of bargaining power may arise in other situations too, not just those where there is a disparity of size between the parties. For example, a party may be in a superior bargaining position because of its financial resources, or some other aspect of its relationship to the other business.

When a business uses its superior bargaining power to secure a benefit from another business that it would not have been able to secure except for the inequality of bargaining power, it is more susceptible to an allegation that it has acted unconscionably.

‘legitimate interests’

Businesses should only include terms in their contracts that are reasonably necessary to protect their legitimate interests. By imposing or attempting to enforce contractual terms that are not reasonably necessary to protect legitimate interests they may risk engaging in unconscionable conduct.

Some examples of terms or conditions that may not be reasonably necessary to protect the legitimate interests of the business imposing them are those that:

- appear to exclude the legal rights or remedies of the weaker party

- are so harsh or oppressive that they make a breach of the contract by the weaker party inevitable
- allow termination of contracts, forfeiture or penalties in favour of the stronger party for mere technical breaches and on terms oppressive to the weaker party
- require the weaker party to comply with onerous or unrealistic conditions
- attempt to contract out of what is the main purpose of the contract
- involve penalty provisions that require the weaker party to pay an amount out of proportion to the loss which might be experienced by the stronger party—for example, for early termination of a finance contract.

‘whether the weaker business could understand any documentation used’

This factor may be considered when determining whether a business has engaged in unconscionable conduct in breach of s. 51AC.

Businesses would therefore be prudent to actively prevent a situation arising where the other party might not understand the documentation. Specifically, businesses would be prudent to exercise particular care if:

- the stronger party realises that the weaker party is under a serious misapprehension about either the terms or the subject matter of the transaction, or
- the weaker party:
 - has difficulty with the language
 - is inexperienced or lacks business acumen
 - has no access to independent assistance or advice.

The risk of the weaker party not understanding the documentation is greater if the documentation:

- is very lengthy
- is worded in technical or legal language
- contains fine print, and/or
- incorporates key terms or conditions by referring to other documents, and those documents are not provided with the main document.

‘the use of any undue influence, pressure or unfair tactics by the stronger party’

Undue influence generally refers to situations where a person with influence uses their position of influence over another party in such a way that the other party carries out an act for the benefit of influential party which, due to the influence exerted, was not an act of free will.

Courts may consider all tactics used by businesses which may be ‘unfair’ or involve the exertion of pressure. For example, if the stronger party, such as a franchisor, threatens to withhold supplies in order to force the weaker business to do something, this may be considered to involve the exertion of pressure and the use of unfair tactics.

If a business uses undue influence or pressure or unfair tactics over another to obtain some kind of commercial advantage that it would not otherwise have been able to obtain, it risks engaging in unconscionable conduct.

‘how much the weaker business would have had to pay/charge, and under what circumstances, to buy/sell identical or equivalent goods or services from/to another supplier’

In some circumstances, businesses may be contractually obliged to buy goods or services from a specific provider, for example in certain franchising arrangements. There may be legitimate reasons for such contractual terms, for example, to ensure consistency and quality across stores carrying a common brand. However, the business should not exploit such contractual terms by charging commercially unrealistic prices for goods and services.

‘the extent to which the stronger party’s conduct was consistent with its conduct in similar transactions with other similar businesses’

A business will often have legitimate commercial reasons for treating its trading partners differently—for example, a large wholesaler may be able to give a cheaper price per unit for a business that orders bulk quantities of stock compared to the price it offers a business that places smaller orders.

In other circumstances, one business may simply have been able to negotiate a better deal than another similar business. The existence of such an inequality will not, of itself, give rise to unconscionable conduct.

In general, however, businesses should seek to treat all their trading partners as consistently as possible. Businesses should not allow personal disputes to get in the way of their business dealings, or use other commercially irrelevant matters as the basis for discriminating between other businesses in similar situations.

‘the requirements of any applicable industry code (or of any other code if the weaker business acted in the reasonable belief that the stronger party would comply with it)’

In some situations, whether a business has adhered to an industry code will be relevant to whether they have engaged in unconscionable conduct.

This may be because the code is mandatory under the Act. It may also be because a small business had a reasonable belief that the other party would adhere to that code, for example, where the other party has publicly stated that it would do so.

The Franchising Code of Conduct is a declared industry code under the Trade Practices Act, and as such has the force of law. It applies to all franchise agreements. It provides for dispute resolution, disclosure, and governs the circumstances and the manner in which a franchise agreement may be terminated. In a number of cases, the courts have held that a failure to comply with the franchising code was relevant to a finding that conduct was unconscionable in all the circumstances.

‘unreasonable failure to disclose any intended conduct that might affect the interests of the weaker business, and any associated risks which the stronger party should have foreseen were not apparent to the weaker business’

Larger businesses will sometimes be in a better position to know about possible risks to another business than that business itself. This is particularly the case when those risks arise from intended conduct of the larger business.

It is important that parties to a contract enter into the agreement on the basis of all the available facts that affect the interests of the parties. Disclosing intended future conduct can not only give the weaker business a better basis on which to make its decisions, but can also enable planning to minimise the risk.

If a business unreasonably fails to disclose intended conduct which might affect the interests of the weaker party, and any risks to the weaker party as a result of that conduct which the stronger party should have foreseen would not be apparent to the weaker party, the stronger party runs the risk of engaging in unconscionable conduct.

‘willingness to negotiate’

Standard form contracts generally minimise the time spent negotiating commercial transactions. They can also help ensure that one business treats other businesses alike, where those other businesses are similar. In most cases, standard form contracts can be a useful tool for businesses contracting with large numbers of consumers or businesses.

While the use of such contracts is unlikely, of itself, to expose a business to risk of unconscionability, standard form contracts may provide little or no scope to negotiate important matters.

Using ‘take it or leave it’ contracts—whether standard form or not—may expose your business to risk of breaching the unconscionable conduct provisions if:

- the offer is made in circumstances where the weaker business has no real choice but to accept the offer
- the weaker party is asked to sign the form without being given an opportunity to consider or to object to the terms, or is given a summary explanation which does not mention important terms or
- the stronger party refuses to negotiate any terms.

‘acting in good faith’

Under ss. 51AC (3)(k) and (4)(k), one of the factors that the courts may consider in determining whether a party has acted unconscionably is the extent to which that party acted in good faith.

What does good faith require?

Australian law has implied obligations to treat the other party fairly and act with good faith in various commercial relationships. The courts have held that contractual clauses expressly requiring the parties to act in good faith were both valid and enforceable.

In *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903 (at para 37), the judge stated, in relation to acting in good faith:

In my view, a term of a contract that requires a party to act in good faith and fairly, imposes an obligation upon that party not to act capriciously. It would not operate so as to restrict actions designed to promote the legitimate interests of that party. That is to say, provided the party exercising the power acts reasonably in all the circumstances, the duty to act fairly and in good faith will ordinarily be satisfied.

In *Burger King Corp v Hungry Jacks Pty Ltd* [2001] NSWCA 187 it was observed that Australian cases make little distinction between the implied term of ‘reasonableness’ and that of ‘good faith’.

In *Overlook v Foxtel* [2002] NSWSC 17 it was noted that while the party who was obliged to show good faith was not required to subordinate its interests to those of the other party, it did have to consider the interests of the other party.

Kinds of conduct declared to have been unconscionable

Both the ACCC and private parties have obtained declarations from the courts, either after a contested hearing or after the parties have agreed to resolve the proceedings without a contested trial, in a wide range of commercial situations.

In isolation, each of these kinds of conduct may not have breached s. 51AC. However, combined with other factors each of these actions has been taken into account in arriving at a decision that a party acted unconscionably:

- blatant disregard of industry codes of conduct or other law
- placing conditions on supply of essential franchising goods to franchisees, where those conditions were not reasonably necessary to protect the franchisor’s legitimate business interests
- conduct that is inconsistent with the nature of the relationship of the parties, particularly in a franchising context
- threatening to withhold essential franchising supplies
- attempting to terminate a commercial agreement for contrived reasons

- conduct calculated to harm the weaker business, such as a franchisor competing with its franchisees
- failing to honour important terms of a retail lease
- failing to adequately disclose key changes to a lease, despite claiming that the lease is unchanged, in circumstances where the changes cause significant detriment to the lessee
- granting an 'exclusive' dealership to one business, while at the same time negotiating with another business for a dealership that would impinge on that of the first business
- unreasonably refusing to supply a business with whom a dealership has been entered into
- conduct that is unfair, unreasonable, harsh or oppressive, intimidating, bullying or thuggish, or wanting in good faith
- terminating a contract in a capricious and unreasonable manner when there was not a sufficient basis to terminate it
- making a call on a letter of credit for amounts which were not actually due and had been disputed by the other party
- failing to honour a contractual obligation to act in good faith.

When considering the potential application of the law to your own circumstances, you should examine the conduct as a whole and form a view as to whether the totality of the conduct is likely to be considered unconscionable.

States and territories adopt s. 51AC

A number of states and territories have included provisions that mirror s. 51AC in their legislative regimes. In certain instances they have adapted the provisions to suit the particular industries in which they are to be applied, such as retail tenancy.

By including these provisions in state law, disputes can often be heard in forums other than the courts, for example specialist tribunals. As well as allowing greater access to justice, this can reduce the costs of resolving matters, especially given the expense of litigation, and may offer more flexible methods of resolving the issue.

While effective compliance regimes and dispute resolution procedures can prevent problems escalating to the point where formal intervention is required, businesses should be aware of the different commercial contexts in which s. 51AC, or its state legislative equivalent, may apply, and of the associated procedures under state regimes for resolving matters.

Examples

Unreasonable franchise conditions

One case under s. 51AC involved disputes that developed between a franchisor and some of its small business franchisees.

The franchisor refused to consider requests to meet franchisees to discuss their complaints unless the request was received by mail, and would not agree to joint meetings with the franchisees. The franchisor also placed unreasonable conditions on the meetings, and threatened to withhold, and subsequently withheld, essential business supplies unless the franchisees complied with certain conditions, including:

- requiring franchisees to buy full boxes of a product, which may have taken several years to sell, despite previously telling the franchisees they could buy half boxes
- demanding the surrender of diaries containing details of customers
- requiring franchisees to pay for brochures and other advertising that did not include their stores' details.

The franchisor also competed directly with the franchisees, contrary to the terms of the franchise agreement, harming their businesses.

For these reasons, the court declared that the franchisor had breached s. 51AC of the Trade Practices Act. The court also declared that the franchisor had contravened the Franchising Code of Conduct (in breach of s. 51AD) by withholding disclosure documents from each franchisee unless they gave their written consent to renew the agreement, which the court also found contributed to the unconscionable conduct. It also declared that the managing director of the franchise was involved in the contraventions of ss. 51AC and 51AD by the franchise itself.

ACCC v Simply No Knead (Franchising) Pty Ltd [2000] FCA 1365

Pressure in a retail tenancy agreement

This case concerned a franchisor which leased premises to a franchisee who operated its franchise from the premises. Part of the leased premises was a separate shop that the franchisee had been permitted to sublet on previous occasions.

Following disputes between the parties over franchising matters, the franchisor unreasonably refused to allow the franchisee to sublet the shop again, despite being aware that the franchisee relied on the rental income to maintain a viable franchise.

When the franchisee sought mediation under the Franchising Code of Conduct, the franchisor refused to attend.

The court declared, after the parties agreed to resolve the proceedings without a contested trial, that the franchisor and its director had acted unconscionably toward its tenant and that the company had breached the Franchising Code of Conduct by refusing to attend mediation.

The court ordered, by consent, that the franchisor be required to compensate the franchisee, pay the ACCC's costs and implement a trade practices compliance training program.

ACCC v Suffolk Parke and Gregory George Bradshaw, Federal Court of Australia (SA) proceeding no. s159 of 2001 (unreported)

Failing to disclose intended future conduct

A machinery manufacturer entered into an agreement with one company, Porter Crane, after representing to it that it would be the exclusive dealer in Queensland for certain heavy machinery for the term of the agreement. Porter Crane was also led to believe that the agreement included an option to renew, and that it would be ongoing and long-term. The manufacturer did not, however, intend to appoint Porter Crane as its exclusive Queensland dealer but in fact intended to appoint a national dealer whose territory could include Queensland. The manufacturer did not inform Porter Crane of this before contracting.

The manufacturer subsequently appointed Construction Equipment Australia (CEA) as a national dealer and gave effect to this agreement, to the detriment of Porter Crane, by:

- refusing to supply Porter Crane with machines when it was able to do so, and instead supplying CEA
- supplying machines to CEA at lower prices than it supplied Porter Crane
- referring sales leads to CEA instead of Porter Crane
- relying on the strict effect and wording of the agreement with Porter Crane to refuse to extend or renew its agreement.

The court declared, after the parties agreed to resolve the proceedings without a contested trial, that the manufacturer had engaged in unconscionable and misleading and deceptive conduct, and granted injunctions, by consent, preventing similar conduct in the future. The court ordered, by consent, the manufacturer and its director to undergo trade practices compliance training if they resumed trading in Australia.

ACCC v Daewoo Australia Pty Ltd and Daewoo Heavy industries and Machinery Ltd and Mr EH Kang, Federal Court of Australia (Sydney) proceeding no. 1627 of 2001 (unreported)

Retail tenancy

This case concerned a retail landlord operating a food court.

The landlord granted exclusivity rights to one tenant, and then allowed another tenant to compete against it in breach of those rights. The landlord also specified the prices at which the tenant could sell its goods and services, inhibiting the tenant's ability to compete with a third tenant.

The court declared, after the parties agreed to resolve the proceedings without a contested trial, that the landlord had acted unconscionably, and granted injunctions restraining both the landlord and its director from engaging in similar behaviour in the future.

ACCC v Leelee Pty Ltd Federal Court of Australia (SA) proceeding no. s7 of 1999 (unreported)

Primary industries

This case concerned a lessor that leased land to farmers in South Australia. The original lease agreements had no limitation on the water available from a bore on the land. However, subsequent agreements limited the allocation of water available, despite the lessor claiming that the agreements were unchanged.

The lessor told the farmers that it was entitled to terminate the lease agreement and that unless they signed the new leases they would have to vacate the land immediately.

The lessor transferred a large proportion of the water allocated to the bore elsewhere, exposing the farmers to excess water charges, without telling the farmers. Many of the farmers lacked formal education, English language skills or commercial experience.

The Federal Court declared, after the parties agreed to resolve the proceedings without a contested trial, that the lessor engaged in unconscionable conduct under s. 51AC.

The court granted injunctions, by consent, restraining the lessor from demanding payment for excess water, and requiring the lessor to indemnify the farmers for any excess water charges until their leases expired. The lessor and its then director were also required to pay the ACCC's costs.

ACCC v Avanti Investments Pty Ltd and Giuseppe Rocco Barbaro, Federal Court of Australia (SA) proceeding no. s51 of 2001 (unreported)

Failing to observe a good faith requirement

This case concerned disputes that developed in an automotive servicing franchise system. The franchisor alleged that the franchisee had breached the franchise agreement, and obtained a temporary injunction preventing the franchisee from using the business name and trademarks.

When the franchisor sought a permanent injunction and damages for breach of contract, the franchisee filed a counter claim alleging that the franchisor had breached the good faith provision in the agreement and engaged in unconscionable conduct.

The court found that the franchisor:

- terminated the franchise agreement on the basis of information it was not sufficiently certain of
- proceeded to terminate the franchise immediately in spite of an independent quality assessment recommending otherwise
- withheld details of an independent quality assessment report that were favourable to the franchisee
- failed to comply with a term of the agreement requiring the franchisor to act in good faith
- was motivated by irrelevant matters in seeking to terminate the franchise
- purported to terminate the franchise over an amount of money that 'could not be said to impact on the (franchisor's) legitimate commercial interests'
- failed to attend mediation, in breach of the Franchising Code of Conduct.

The court found that the franchisor was determined to find fault in the way the franchisee's business was being managed. It found that the franchisor was 'not really interested in explanations and attempts to sort out matters ... but was looking for an opportunity to bring the Franchise Agreement to an end.'

The court found that the franchisor had engaged in conduct that was 'serious, unfair and oppressive and showed no regard for conscience'. The court declared that the franchisor had engaged in unconscionable conduct in breach of s. 51AC of the Trade Practices Act, and had breached the Franchising Code of Conduct. The court declared that the franchise was not terminated and awarded damages to the franchisee.

Automasters Australia Pty Ltd v Bruness Pty Ltd & Anor [2002] WASC 286

Checklist to assess whether conduct has breached s. 51AC

To establish a breach of s. 51AC, the conduct must have been unconscionable ‘in all the circumstances’. The courts may take into account a range of factors and circumstances, however the list below will indicate whether conduct may be considered under s. 51AC. If you have specific concerns relating to unconscionable conduct, it is recommended that you seek professional advice, or contact the ACCC.

If you can answer ‘Yes’ to either one of questions 1, 2 or 3, as well as question 4, the Act may apply to the conduct in question.

1. Was the conduct engaged in by a corporation, or directed towards a corporation? YES NO
2. Did the conduct engaged in by a person involve the use of postal, telegraphic or telephonic services or take place in a radio or television broadcast? YES NO
3. Did the conduct occur in a territory of Australia in the course of promotional activities of a professional person? YES NO
4. Did the conduct occur in trade or commerce? YES NO

You must be able to answer ‘Yes’ to questions 5–7 for the conduct to be caught by s. 51AC.

5. Did the transaction involve goods or services priced under \$3 million? YES NO
6. Was the conduct aimed at a private company, unlisted public company or person (as distinct from a listed public company)? YES NO
7. Were the circumstances of the alleged unconscionable conduct reasonably foreseeable? That is, would a reasonable person acting in the same situation have been likely to foresee the circumstances that gave rise to the alleged unconscionability? YES NO

Questions 8–11, which cover the discretionary criteria to guide the court, will help determine whether particular conduct may be unconscionable under s. 51AC(3) or (4).

If the answer is ‘Yes’ to one or more of these questions then the risk of unconscionable conduct is increased.

8. Does the size or strength of the company put it in a substantially stronger bargaining position than the other business? YES NO
9. Is the weaker business, as a result of the company’s conduct, required to comply with conditions that are not reasonably necessary to protect the legitimate commercial interests of the company? YES NO
10. Was undue influence or pressure, or unfair tactics used against the weaker business or its representative? If so, was such conduct engaged in by the stronger party or person acting on behalf of the stronger party? YES NO
11. Was the amount paid for the goods or services higher or were the circumstances and/or terms under which they could be acquired more onerous than generally apply elsewhere? YES NO

Questions 12–17 also relate to discretionary factors. If the answer to these questions is ‘No’, the risk of unconscionable conduct is increased.

12. Was the weaker business able to understand the documents used? YES NO
13. Has the stronger party demonstrated compliance with an industry code? YES NO
14. Has the stronger party disclosed intended conduct, where it is reasonable to do so, that could affect the weaker business’ commercial viability? YES NO
15. Was the weaker party given any opportunity to negotiate the terms and conditions of the contract? YES NO
16. Has the stronger party treated the weaker party in a manner consistent with the stronger party’s dealings with other similar parties? YES NO
17. Has the stronger business acted in good faith in its dealings with the weaker business? YES NO

2. Dealing with consumers

Section 51AB

Section 51AB prohibits unconscionable conduct in consumer transactions—that is, it relates to the supply of goods or services which are ordinarily acquired for personal, domestic or household use or consumption. It does not apply, for example, to goods acquired for resupply or to be used in a business capacity.

Section 51AB provides that a corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

Refer to pages 3–4 for discussion of the terms:

- corporation
- in trade or commerce
- in connection with
- possible
- engage in conduct.

Section 51AB also sets out a non-exhaustive list of factors that the court may take into account when determining whether a business has engaged in unconscionable conduct in all the circumstances. These are:

- the relative bargaining strengths of the business and the consumer
- whether the business required the consumer to comply with conditions that were not reasonably necessary to protect the legitimate interests of the business
- whether the consumer understood any documentation that may have been used
- whether the business used undue influence or pressure, or unfair tactics
- the price and terms on which the consumer could have acquired the same or equivalent goods elsewhere.

However, the court can take into account any other matter it considers relevant.

Examples

Finance company repossesses vehicle

A finance company advanced about \$15 000 to a consumer, with the amount secured by a chattel mortgage over a motor vehicle.

From time to time the customer defaulted on the repayments, and by April 2000 the arrears exceeded \$1800. The finance company issued a notice requiring the customer to pay the outstanding amount.

On 20 June 2000 the finance company repossessed the vehicle. By then the outstanding amount was \$2180. Before this, the finance company had instructed its agents to seize the vehicle on the condition that they would not be paid unless they successfully took possession of the vehicle, or secured full payment of the arrears.

While repossessing the vehicle the agents

- made repeated visits to the customer's home, and
- made it known to the customer that he was under surveillance.

Following this, six people went to the customer's home to seize the vehicle, entering the property without permission. One of them jumped a gate to unlock a garage where the vehicle was parked.

The agents had been instructed that the customer may try to stop them seizing the car and that if he did, they may have to restrain him. After threatening to use force to protect his property, the customer was pinned to the ground while the vehicle was towed away.

The court declared, after the parties agreed to resolve the proceedings without a contested trial, that the finance company had engaged in unconscionable conduct by:

- serving a notice of demand on a consumer that conveyed that it could not lawfully repossess a vehicle without a court order, and then repossessing the vehicle without obtaining the order
- failing to withdraw its instructions to its agents to repossess the vehicle when they had reasonable cause to believe a physical confrontation may occur if the instructions were carried out.

The court also declared that the finance company had engaged in unconscionable conduct when its agents:

- entered the customer's property and jumped the gate to gain access to the garage
- failed to discontinue the repossession when they had reasonable cause to expect that a physical confrontation may occur if the seizure continued.

The court ordered, by consent, that the company be restrained from engaging in any similar conduct in future, that it be required to change some of its debt recovery procedures, and that it be required to compensate the customer. The court also reduced the amount of the loan by \$1892.73, and ordered the company to pay the ACCC's costs in the matter.

ACCC v Esanda Finance Corporation Ltd [2003] FCA 1225

(Note: financial services reform has affected the enforcement of the Trade Practices Act for financial services. More information on these changes is on p. 38 of this guide.)

False claims about a teaching course

This case concerned a college that advertised various courses in childcare.

The college told many prospective students that the most they would lose by cancelling their enrolment was \$100. However, the enrolment form stated that the student must pay the full tuition fee regardless of whether they started the course, unless the college received written notification 60 days before the course began.

On at least five occasions, students subsequently sought to cancel their enrolment. The college refused to accept the cancellation or refund the deposit. The college then demanded payment for the full tuition fees, which in some cases was more than \$9000, and instituted proceedings against students to recover the fees.

The court declared that the terms of contract for the payment of the fees and provision of refunds for cancelled enrolments were not reasonably necessary to protect the legitimate interests of the college. It also declared that the college's conduct was unconscionable.

The college also told other students, who subsequently enrolled on this basis, that it intended to introduce a deferred payment plan similar to the HECS system. The college subsequently failed to do so, requiring the students to pay the outstanding balance of their fees, and engaging solicitors to send a letter of demand for the balance of the fees. The court declared that this conduct was unconscionable, breaching s. 51AB.

The court ordered the college and certain associated people to compensate those students who had suffered loss or damage because of the conduct. The damages awarded varied for each student, but included amounts for such things as:

- deposits paid for the courses
- tuition fees
- accommodation fees.

ACCC v Black on White Pty Ltd & Ors [2001] FCA 372

ACCC v Black on White [2002] FCA 739

Internet company tricks customers

An internet company made various claims about its service, including that connecting to the service would be at the cost of a local call. However, some of its customers incurred long-distance telephone charges by connecting to the service.

The court declared, after the parties agreed to resolve the proceedings without a contested trial, that when supplying internet access services to certain regional areas, the company had engaged in unconscionable conduct by:

- failing to immediately check that dial-in numbers it had supplied were available for local call costs when it was aware that it had provided long distance dial-in numbers as local call cost numbers—this led to some customers unknowingly incurring long-distance charges
- failing to fairly and properly investigate consumer complaints about the long-distance charges
- refusing to deal with or negotiate with customers about their complaints

- relying on terms of agreements which operated against the interests of its customers after telling them they did not have contracts
- relying on clauses which unlawfully excluded consumer rights and remedies
- excluding liability for any long-distance call charges incurred in accessing its service
- relying on terms and conditions that had not been properly brought to the attention of its customers or agreed to before entering the agreement with the company
- denying any liability for the long-distance telephone charges incurred
- acting in reckless disregard of the interests of its customers

with the knowledge that some of its customers in those areas had incurred long-distance telephone call charges because they relied on its false and misleading claims.

The court ordered, by consent, that the company be restrained from engaging in any similar conduct in the future, and ordered it to:

- compensate any customers who had incurred long-distance telephone charges or other liabilities because of the company's conduct
- place a notice of the court's findings on its website
- implement a trade practices compliance training program.

ACCC v Dodo Internet Pty Ltd & Ors, Federal Court of Australia (SA) proceeding no. s216 of 2002 (unreported)

Unreasonable term in a contract

A real estate agent signed up a property vendor to an agency agreement using a standard form sole agency agreement of the Real Estate and Stock Institute of Victoria (RESI). The agreement created a general or open agency once the sole agency period expired, unless the vendor notified the agent in writing to the contrary. (A sole agency appoints a single person as the agent to sell the property, whereas under a general or open agency more than one agent may be able to act as agent for the property).

However, in the fine print of the contract several conditions obliged the vendor to pay commission after the sole agency period expired. The real estate agent failed to find a suitable buyer for the property within the sole agency period, but relied on the fine print clause to sue the vendor for the unpaid commission after the agent located a buyer for the property and the vendor refused to sell.

The vendor argued that the sole agency agreement was in fact an agreement that created a general agency of unspecified duration.

The court held in this case that the relevant clause was unconscionable because it meant that the vendor could potentially be liable to pay commission for an indeterminate period after the sole agency term had expired. The court also held that it was unconscionable to include a term in a contract that transforms an exclusive agency into a general agency of unspecified duration in circumstances where:

- the agent had falsely represented that the contract contained no onerous clauses
- the clause was submerged in the fine print of the contract
- the clause was inconsistent with the purpose of the agreement.

The court noted that the clause was not necessary to protect the legitimate interests of the agent.

It also found that even if an unconscionable clause finds its way into a contract accidentally it does not lose its unconscionable characteristic because of it.

(Note: this case was taken under the unconscionable conduct provision under s. 52A of the Act, later renamed s. 51AB).

George T Collings (Aust) Pty Ltd v HF Stevenson (Aust) Pty Ltd 1991 ATPR41–104

Similar laws by states and territories

All states and territories have incorporated some form of prohibition on unconscionable conduct in their fair trading laws, many of them expressed in the same terms as s. 51AB. Businesses should be aware that the statutory protection against unconscionable conduct in consumer transactions is available in a range of venues in addition to the Federal Court—for example state fair trading tribunals or state courts.

Your customers, your procedures

When thinking about your compliance obligations in this area, it may help you to think about it in terms of substantive and procedural unconscionability.

Substantive unconscionability relates to the substance of the transaction itself, in particular the content of the agreement reached. Some contracts with characteristics that might give rise to a situation of substantive unconscionability include those:

- which allow for the business to vary key terms of the agreement without notice
- with terms that impose onerous obligations on the consumer.

Procedural unconscionability concerns the way in which a transaction was conducted and how the consent of the other party was obtained. It considers the characteristics of the consumer involved in the transaction—that is, whether the consumer has any characteristics that may prevent them from making a meaningful choice about whether it is in their own best interest to enter into a given contract.

You can seek to prevent procedural unconscionability by doing such things as making sure consumers can easily get explanations of any documents used, and training staff not to use any high pressure sales tactics.

High risk situations when dealing with consumers

Some characteristics that may give rise to a situation of unconscionability include the following:

- A business may **fail to disclose** key contractual terms.
- Consumers on **low incomes** may be particularly attracted by claims about savings or lower prices. They may have fewer options in choosing the best product for their needs, and may suffer the most if representations about price turn out to be misleading or they are locked into contracts they cannot afford.
- Consumers from a **non-English speaking background** may not understand what you say or may have difficulty understanding documents or contracts, especially if they are lengthy or complex.
- There are many kinds of **disabilities**, including intellectual, psychiatric, psychological, physical or sensory. Consumers with certain kinds of psychological disability may be more willing to buy things they don't need. Consumers with an intellectual disability may find it difficult to understand complex documents quickly or at all.
- **A lack of education, or poor reading, writing and numerical skills** may make it difficult or impossible for a consumer to understand complex or lengthy sales presentations and documents.
- A consumer who suffers **serious or chronic illness** may be more willing to believe the health claims on products or services, or to accept inappropriate or expensive services in an emergency.
- **Young consumers** may be more susceptible to promotions concerning popularity or body image. They may not understand complex contractual arrangements.
- **Older consumers** may have fears about health and safety.
- Consumers in **remote areas** may have limited choices and feel they have to put up with poor conduct to access goods or services.

Of course, not all consumers who have one or more of these characteristics are susceptible to poor business practices, but they are more likely to be disproportionately affected if exposed to such practices.

Compliance tips for dealing with consumers

Making sure your business steers clear of any unconscionable conduct is not just about complying with the law—it makes good business sense. If some kind of unconscionability is present when agreements are formed, a court may set them aside, so it makes sense to get it right the first time.

The following are examples of how you can minimise the risk of your business engaging in unconscionable conduct before, during and after you deal with your customers. This list is not exhaustive, and your particular business will need to assess its own compliance risks and implement procedures to address them.

Before you contact your customers

Consider your customers—you should consider the impact of your marketing message on its intended audience, particularly if you are dealing with a sector of the community that may be more susceptible to poor practices. It may help to try and consider your message, and how it will be received, from the point of view of your consumers.

Use plain English—use as much plain English as possible to make sure consumers understand the agreement they are entering into.

Do not use any harsh or oppressive terms in any agreements or contracts—in particular, are there any terms which:

- are not reasonably necessary to protect the legitimate interests of your business
- could give rise to an unfair situation between your business and the customer
- try to give your business the right to change key aspects of the agreement without telling the customer or gaining their agreement
- attempt to exclude rights that the customer normally enjoys under the law
- impose obligations or liabilities that are not usually found in comparable agreements offered by other businesses?

Simply having these terms in your contract may indicate that some element of unconscionability is present. If a dispute arises, you may not be able to rely on such a term. Any attempts to enforce such terms may constitute unconscionable conduct.

Clearly set out all key terms of the agreement—if a key term of an agreement is buried at the back of a lengthy contract or is in fine print, it may not be enforceable, especially if the term is considered harsh or oppressive, or if it operates against the interests of the consumer and is unusual for that particular type of agreement.

You must also take care when incorporating terms of the agreement by referring to some other document. If possible, include the document that the contract refers to.

During your contact with the consumer

Make full and frank disclosure—this means bringing to the customer’s attention the key terms of the agreement, and ensuring they understand any possible consequences. Customers should be informed of any unusual terms, or ones that could potentially operate against their interest. It may help to put yourself in the shoes of the customer and consider what terms you would expect to be told about.

Make sure the customer understands any agreement and any documentation used—whether the agreement is oral or in writing, make sure the customer understands what they are getting into, especially if the agreement is in a language that is not the customer’s first language or if they do not speak that language at all. If you are concerned the consumer does not understand the implications of an agreement suggest they seek independent advice.

Do not use any high pressure sales tactics—the Trade Practices Act encourages vigorous competition, but there are limits on how far you can go to make a sale, especially with certain marketing practices. You may be dealing with many sections of the public, and conduct that may be appropriate for some consumers may threaten or intimidate others. Make sure your staff are adequately trained to avoid such situations, particularly if they are working on a commission or incentive basis; after all, your business is responsible for the actions of its agents.

After your contact with the consumer

Have procedures in place to deal with complaints—how does your business deal with customer complaints? You should have a system that enables customers to easily raise disputes and have them attended to promptly by a person within your organisation qualified to resolve the matter. You should make sure the customers know where and how to raise the complaint, and that they are responded to quickly.

Be prepared to set aside the contract if required—if it appears that you or your employee may have engaged in any form of unconscionable conduct, be prepared to release the consumer from the agreement. If key terms of the agreement change, and the consumer no longer wishes to be part of the agreement, be prepared to negotiate or set the agreement aside if appropriate.

3. Unconscionable conduct within the meaning of the unwritten law

Section 51AA

Section 51 AA provides that ‘a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law’ of the Australian states and territories—i.e. the law as it has evolved through the decisions of the courts.

When will s. 51AA apply? Section 51AA applies to unconscionable conduct that is not covered by either ss. 51AC or 51AB of the Act. This means that although ss. 51AB or 51AC may not apply to conduct engaged in by you or your business, because, for example, the price threshold in s. 51AC has been exceeded, it is possible that a court will consider the conduct to be unconscionable under s. 51AA.

Section 51AA incorporates the unwritten law on unconscionable conduct into statute. This role is important because it:

- opens unconscionable conduct in commercial transactions to the scrutiny of the ACCC
- provides for the ACCC to take representative action in such circumstances
- gives rise to the application of a more flexible range of remedies under ss. 80, 82 and 87 of the Act, for example, injunctions, damages, variation of contracts and compensation orders
- allows the ACCC to accept legally enforceable undertakings, under s. 87B of the Act.

So far, s. 51AA has been applied to situations involving ‘unconscionable dealing’—that is, where one party knowingly exploits the special disadvantage of another. There are, however, other situations where the court will grant relief to a party as a result of the unconscionable behaviour of another. The courts have recently suggested that s. 51AA may apply to those other situations in addition to unconscionable dealing.

In applying s. 51AA, the courts have distinguished between taking an opportunistic approach to striking a hard bargain, and unconscionable conduct. Acting in good conscience does not require businesses to forfeit their advantages, or neglect their own interests. It has also been observed that the courts will not intervene to remake a contract simply because one party has made a bad bargain.

The courts may, however, intervene in situations where one party has unconscientiously obtained legal rights, or seeks to enforce its strict legal rights in a manner that is harsh or oppressive. This section examines the doctrine of unconscionable dealing, as well as some of the other situations where one party may seek to exercise its legal rights against another party in a way that is unconscionable.

In *ACCC v Samton Holdings Pty Ltd* [2002] FCA 62 (at 48), the Full Federal Court noted that in certain circumstances equity will intervene ‘under the rubric of unconscionable conduct’. Broadly stated, the circumstances referred to include those where:

1. the stronger party knowingly exploits the weaker party’s special disadvantage
2. one party does not understand the bargain it has entered into, there has been some influence exerted on that party by a third party and there has been no explanation to the complaining party
3. one party unconscionably departs from a representation it made to a second party, in circumstances where the second party relied on that representation to its detriment
4. the agreement between the parties contains a penalty clause or in some circumstances a forfeiture clause, or
5. one party has entered into the contract on the basis of a unilateral mistake.

The three judges of the full court noted that this list may not be exhaustive, which indicates that s. 51AA may apply to other areas of law which involve unconscionable conduct.

For example, one further situation where s. 51AA may apply is where one party has been subjected to undue influence.

1. The stronger party knowingly exploits the weaker party’s disadvantage

Unconscionable dealing describes situations where one party to a transaction has a special disability, and the other party to the transaction knows, or should have known, of this disability and takes unfair advantage of it.

This form of unconscionable conduct involves a three part test:

- the existence of a ‘special disadvantage’ on the part of the weaker party
- the existence of circumstances in which the stronger party knew, or ought to have known, of the disadvantage
- the stronger party takes unfair advantage of the special disadvantage.

Special disadvantage

The term ‘special disadvantage’ has traditionally referred to inherent personal or ‘constitutional’ disadvantages, resulting from factors such as:

- an ignorance of the material facts known to the other party
- illiteracy or lack of education
- poverty or need of any kind
- age
- infirmity of body or mind
- drunkenness or
- lack of assistance or explanation where such guidance is necessary.

A special disadvantage requires that there be a disabling condition or circumstance of the innocent party which seriously affects or results in a lack of capacity or ability to judge what is in their best interests.

The factors listed above are examples of conditions which contributed to or caused a person’s special disadvantage. These categories are not closed—other circumstances could result in a special disadvantage and the inclusion of s. 51AA into the Trade Practices Act recognises that unconscionable conduct can occur in commercial transactions.

2. Dealings where a person does not understand the transaction and there has been influence by a third party

An agreement may not be enforceable in circumstances where it is clear that a party to a transaction does not fully appreciate the nature or consequences of the agreement and a third party has exerted some influence with no independent advice or explanation having been given.

Garcia v National Australia Bank [1998] HCA 48 dealt with a guarantee that a woman executed in favour of a bank. The purpose of the guarantee was to secure a loan made to her (then) husband, which was done by a mortgage over her home. The woman sought to have the agreement set aside. She claimed that she signed the guarantee after her husband asked her to do so, and that he had assured her that the loan was ‘risk proof’. She also claimed that she was not aware that the guarantee was secured by the mortgage over her home and that as a result her home was at risk in the event that the debtor (her husband) defaulted.

The court held that the guarantee was not enforceable. In particular, it noted that the enforcement of the guarantee was unconscionable in the following circumstances:

- the woman did not understand the content or effect of the guarantee
- the woman was a 'volunteer', that is, she did not benefit from providing the guarantee
- the bank was assumed to have understood that, as a partner, the woman may have had trust and confidence in her husband in matters of business and therefore to have understood that the husband may not have fully and accurately explained the transaction to his wife, and
- the bank did not itself explain the transaction to the wife or find out whether a third party had explained it to her.

3. Departure from a representation relied on by another party

When party A makes a representation to party B, and B, relying on that representation, changes their position, takes particular action or refrains from acting, A may be prevented from departing from that representation if B would suffer detriment as a result and it would be unconscionable to do so.

In *Waltons Stores (Interstate) Pty Ltd v Maher* [1988] HCA 7, a land owner negotiated with a prospective lessee for the lease of a particular site. The parties contemplated the owner destroying an existing building, and constructing a new building to be leased by the prospective lessee.

The parties exchanged draft documents and negotiated amendments to those documents. While the prospective lessee did not sign the documents, its solicitor:

- said to the lessor that its client had given verbal instructions that the amendments were satisfactory
- provided the lessor with an amended document with a covering letter indicating that the solicitor believed approval would be forthcoming.

Subsequently, due to the urgency that attended the negotiations, the owner destroyed the existing building and started work on the new one before the documents were signed by the prospective lessee.

Meanwhile, after becoming aware that the owner had demolished the old building, the prospective lessee instructed their advisers to delay finalising the lease. The prospective lessee subsequently told the landlord that they did not intend to sign the lease. The landlord sought to prevent the prospective lessee from departing from its implied promises that it would enter into a lease.

The court held that relying on a representation by another party will not, of itself, be enough to prevent the first party departing from its representation. However, the court stated that it was unconscionable for the prospective lessee to remain silent when it was aware that the lessor was exposing itself to detriment on the basis of the owner's false assumption which was encouraged by the prospective lessee.

4. Agreements containing forfeiture or penalty clauses

In general, parties to an agreement will be required to carry out the terms of that agreement. In *Legione v Hateley* (1983) 152 CLR 406, the court noted that equity will not remake the parties' contract 'simply because it transpires that as things have happened one party has made a bad bargain'.

However, parties may not be allowed to rely on their strict legal rights if those rights involve a penalty provision or require forfeiture of an interest.

A contract which requires that a party pay a 'penalty' for breach of contract may not be enforceable. A penalty provision is one which punishes a party to a contract for not complying with a term of a contract—for example, requiring that the party in breach of contract pay a sum of money much greater than the actual damage suffered by the other party to the contract.

Further, if a contract contains clauses or terms that require one party to forfeit an interest in property, such as a lease, due to a breach of contractual obligations by that party, such requirements may not be enforceable. In particular, they may not be enforceable if the purpose of the forfeiture provision is to secure a result, such as the payment of money, which could be obtained by a court order, and if they produce an outcome that is inconsistent with equitable principle.

Stern v McArthur [1988] HCA 51 involved a contract for the sale of land.

The contract required that the balance of the purchase price was to be paid in instalments and that in the event of default by the buyers, the vendor was entitled to rescind the contract and the buyers' deposit would be forfeited.

The buyers took possession of the land and built a house there. They defaulted on the instalments, but subsequently resumed them. The vendors sought to rely on their contractual right to terminate the contract as a result of the buyers' default. The buyers sought to prevent the contract from being rescinded.

The court found that in the circumstances, the actions of the vendors in seeking to enforce the forfeiture provision was unconscionable. The court considered that the buyers' default justified payment to the vendors of the amount owed under the contract, if any, interest on any amount outstanding, and any consequential damages suffered by the vendor, but that it did not justify an order to allow the vendor to resume possession. Therefore the court intervened to require that the vendor complete the sale.

5. One party has entered into the contract on the basis of a mistake

If one party mistakenly believes a set of facts, and the other party is aware of the mistake, that party may be prevented from enforcing any agreement made on the basis of such a mistake.

Taylor v Johnson (1983) 151 CLR 422 involved a contract for the sale of 10 acres of land. The contract provided that the **total** sale price was \$15 000, however, when the vendor executed the contract, she mistakenly believed that the price was \$15 000 **per acre**. The court found that the buyer deliberately set out to ensure that the vendor did not become aware of the mistake. The court observed that:

- when a party has entered into a contract and
- that party is acting on the basis of a serious mistake about a fundamental term of that contract

then the mistaken party will be entitled to an order to rescind the contract if:

- the other party is aware of the mistake and
- the other party deliberately sets out to ensure the first party does not become aware of the mistake.

6. Undue influence

Undue influence generally refers to one party unconscientiously using their position of influence over another party to obtain a benefit. The doctrine is usually applied when one party has conferred a benefit to another party without receiving anything in return.

Situations of undue influence arise if one party has, by some means, acquired a position of influence over another party and uses that influence in such a way that the other party carries out an act for the benefit of the influential party which, due to the influence exerted, was not an act of free will.

The courts will presume that one party has exercised undue influence over another in such relationships as between:

- trustee and beneficiary
- lawyer and client
- doctor and patient.

Once a relationship of influence has been established, the onus lies on the person accepting the benefit under the transaction to establish that the other party exercised their own free and voluntary will in entering into the transaction.

In *Johnson v Buttress* [1936] HCA 41, the court noted that evidence that the party presumed to be subject to the influence received independent advice 'is one means, and the most obvious means, of helping to establish that the gift was the result of the free exercise of independent will'.

If the parties are not in a recognised relationship, the affected party would have to prove that they were actually influenced by another party to such an extent that their act was not of their free or voluntary will.

Examples

The following examples demonstrate how some of the principles outlined in this part have been applied in practice.

Unconscionably obtaining a guarantee

This case involved a woman mortgaging land and acting as guarantor for the benefit of a man with whom she had a personal relationship. While not overly familiar with contracts for the conveyance of land, the woman was significantly more experienced in commercial matters than the average person.

The man, for his part, had substantial financial problems, despite his outwardly prosperous appearance. In particular, his main business was operating well in excess of its overdraft with the bank.

The man devised a plan which involved developing the woman's land. However, the plan was a deception designed to make the woman's assets available for him and his businesses to use. At the request of the man, the woman signed a number of documents, including a mortgage over her land and a guarantee. The woman believed that the documents related to the plan to develop her land and was not aware that the man intended to use the money for his own purposes.

The bank had concerns about its risk exposure to the business, and was keen to obtain additional security for amounts owing to it. The bank had procedures to ensure that third parties giving security to the bank understood the obligations they assumed, and its usual practice was to advise such parties to seek independent advice.

However in this case, the manager of the bank failed to ensure that these conditions had been fulfilled, and in fact he had good reason to believe that the man may have taken unfair advantage of the woman in obtaining her property as security.

The court found that the woman was under a disadvantage compared to the bank—specifically, that there was a great disparity in knowledge between the bank and her. The bank was aware of the purpose for which the security would be used and that the woman would not receive significant benefit, if any, from providing the security. The woman was not aware of this, and it was this disparity in knowledge which prevented the woman from making a judgment in her own best interests when providing the security. The court found that this constituted a special disadvantage.

As the bank was aware of the woman's special disadvantage, it was unconscionable for it to accept the security.

Note: The plaintiff also sought relief under s. 52A of the Trade Practices Act (later renumbered s. 51AB), however, the court held that the nature of the transaction and the purpose of the loans meant that the service was not of a kind ordinarily acquired for personal, domestic or household use, and therefore the provision did not apply.

Begbie v State Bank of New South Wales Ltd (1994) ATPR 41-288

Taking advantage of commercial inexperience

A foreign exchange trader constructed an elaborate plan to convince its clients that it was engaging in genuine foreign exchange margin trading.

As part of the plan, the trader promoted itself as being willing and able to act as an agent for foreign exchange trading, and that it was affiliated with a major international bank.

The trader also hired 'brokers' who recruited clients for the traders, and required clients to lodge a \$20 000 deposit. The trader also charged its clients expenses, described as interest and other charges incurred on behalf of the clients, when in fact no such expenses had been incurred. Some clients also had to pay additional amounts said to be 'margin calls'.

The court found that as far as the trader knew, none of its clients had any proper understanding of foreign exchange margin dealing.

The court held that the clients were at a special disadvantage because they did not understand the nature of the transactions they had instructed the trader to enter into on their behalf, and because they had no access to accurate information about how the trader purported to carry out the transactions.

By taking advantage of his superior understanding and knowledge in circumstances where the clients were unable to judge what was in their best interest, the court found the trader had engaged in unconscionable conduct in breach of s. 51AA of the Trade Practices Act.

The court granted an injunction restraining the trader from engaging in foreign exchange margin trading. The court also ordered that damages of \$822 803.84 be paid to compensate persons who had suffered loss or damage as a result of the conduct.

ACCC v Chats House Investments Pty Ltd [1996] 1119 FCA 1

High risk situations when dealing with other businesses

Businesses should be mindful of both ss. 51AC and 51AA when they deal with other businesses. As noted above, if a transaction is not caught under s. 51AC (either because it exceeds \$3 million or the business seeking relief is a publicly listed company) it might be considered under s. 51AA.

The ACCC considers that the following situations involve a high risk of encouraging or condoning commercial unconscionable conduct in breach of either ss. 51AC or 51AA. Note that these situations may not of themselves give rise to a breach of the law; rather, the ACCC considers that businesses in these situations should take extra care to ensure they do not engage in unconscionable conduct.

1. Where the stronger party knew, or ought to have known, that the consumer/weaker party did not fully understand the transaction

Such situations may arise:

- if the supplier realises that the weaker party is under a serious misapprehension about either the terms or the subject matter of the transaction
- if the weaker party:
 - has difficulty with the language
 - suffers from some mental or physical infirmity
 - is incapacitated by drugs or alcohol
 - is inexperienced or lacks business acumen
 - has no access to independent assistance or advice.

2. Where there is no real opportunity for the weaker party to bargain

Standard form contracts generally minimise the time spent in negotiating commercial transactions. On the other hand they may provide little or no scope for negotiation on important matters.

Using ‘take it or leave it’ contracts—whether standard form or not—may lead to conduct in breach of the unconscionable conduct provisions if in the particular circumstances:

- pressure is brought to bear or unfair advantage is taken
- the terms of the contract are onerous and their onerous nature is disguised by using fine print, unnecessarily difficult language, or deceptive layout
- the weaker party is asked to sign the form without being given an opportunity to consider or to object to such terms, or is given a summary explanation which does not mention them or
- there is a lack of willingness to negotiate any terms.

3. Where a contract is one-sided

In some circumstances the substance of an agreement may suggest that one party has engaged in unconscionable conduct.

Terms and conditions that might be considered one-sided include those that:

- appear to exclude the legal rights or remedies of the weaker party
- state the weaker party has agreed to, read, or understood terms, when this is not so

- are so harsh or oppressive that they are designed to make a breach of the contract by the weaker party inevitable
- claim that no misrepresentations have been made by the other party, or representations that the goods have been fully inspected when they have not
- allow termination of contracts, forfeiture or penalties in favour of the stronger party for mere technical breaches and on terms oppressive to the weaker party
- imply a smaller than actual liability
- require the weaker party to comply with onerous or unrealistic conditions
- attempt to contract out of what is the main purpose of the contract
- involve penalty provisions that require payment of an amount out of proportion to the loss which might be experienced by the stronger party—for example for early termination of a finance contract.

When the conduct discussed above involves people who are disadvantaged, for example by poor language or literacy skills, by inexperience or by some mental impairment, the court is more likely to infer that the conduct was unconscionable.

4. Excessive terms and prices

The fact that some traders can negotiate better deals than others does not necessarily indicate unconscionable conduct. In the vast majority of cases there will be valid commercial reasons for the differences in price and terms. If there are not, or there are other factors e.g. an unreasonable escalating price formula which results in the weaker party paying substantially more than others are paying, and if other terms are excessive—this is a factor that a court may take into account in considering whether conduct is unconscionable in all the circumstances.

5. Using a position of power to impose unreasonable conditions

Many complaints to the ACCC from small businesses involve circumstances where the larger party uses its power to extract commercially unfavourable terms from the weaker party particularly when that party is vulnerable—such as when the agreement between the parties is due for renewal.

Compliance tips for dealing with other businesses

This section outlines some positive steps businesses can take to reduce their risk of engaging in unconscionable conduct when dealing with other businesses.

Using a neutral third party facilitator

Involving a neutral third party in the negotiation and renewal stages of contracts may:

- improve communications and the development or adoption of terms based on mutual interests which clearly set out each party's rights and obligations
- help parties work collaboratively to resolve problems.

Format and language of documents

Using contracts that clearly communicate each party's rights and obligations can help avoid disputes. However, this can occur only if the main purpose of the contract is not to help win a law suit but to promote a balanced working relationship. Businesses would be prudent to produce their contracts and promotional material in plain language and in a readable format. This may reduce the risk of breaching the unconscionable conduct provisions.

Harsh or unfair contractual terms

It may be worthwhile getting advice on whether any clauses used in your contracts are one-sided or excessively harsh, or could be used in such a manner against another business.

Pricing policy

One of the criteria which a court may take into account is the amount for which the business consumer could have acquired identical or equivalent goods or services from someone other than the supplier.

This provision appears to allow differentiation in price to reflect different commercial considerations (e.g. the size of a store and the floor space it occupies). However, if there is a substantial disparity between the price and terms on which the stronger business deals with other businesses, (see s. 51 AC(3)(f)) it would be wise for the stronger business to have a reasonable commercial explanation.

Another issue which larger businesses may need to review and perhaps seek legal advice on, is how much they are charging the weaker party in special fees (e.g. listing fees) and whether these fees can be commercially justified in terms

of cost recovery and a reasonable margin. The larger party would be prudent not to use its stronger bargaining position to extract a price higher than what is commercially reasonable.

Disclosure/transparency

Many disputes arise where one business has not fully understood its rights or obligations in an agreement. This can be made worse if contracts contain incomplete or misleading information. Good disclosure can go a long way towards clarifying commercial relationships and preventing disputes.

Providing full and frank disclosure will reduce the risk of breaching the Act so that the other party goes into the transaction ‘with both eyes open’. Contract negotiations should be transparent so that the weaker party is totally aware of its nature and content. Any disparity in information may give rise to an imbalance of bargaining power.

If the weaker party has limited or no previous business experience then it is especially important to explain clearly from the outset the effect of any clauses that allow for prices/fees/charges to be raised, or any other term that could affect the commercial viability of the business (e.g. activities by the stronger party that affect consumer traffic flow).

Some steps you can take to encourage disclosure and transparency are:

- ensure that staff or agents understand what they are trying to sell and not gloss over any restrictive or harsh terms that would affect the commercial viability of the business—for example by suggesting that they are of little importance or would never be used
- explain clearly the effect of the transaction and important terms and conditions in contracts, especially those that increase fees, charges or prices
- ensure that staff or agents give material that accurately explains the transaction to the other party. If the transaction is complex the party should be advised to seek independent expert advice.

Compliance with an industry code

One of the matters that courts can take into account in determining unconscionability in s. 51AC is whether the requirements of industry codes (both applicable codes and otherwise) are observed.

An industry code may be considered relevant under s. 51AC if the weaker party acted in the reasonable belief that the stronger party would comply with that code, even if it is not mandated under the Trade Practices Act.

Alternative dispute resolution

If a matter goes to court, it can result in great expense to both parties. An inexpensive and timely dispute resolution procedure can be an important component of a compliance program before a complaint gets out of hand.

Acting in good faith

Your business may be subject to an obligation of good faith in its dealings with other businesses, whether that obligation is implied or part of a contract. Whether or not your business has acted in good faith is also relevant to whether you have acted unconscionably. Any such requirement to act in good faith may include:

- cooperating with the other party to achieve the objects of a contract
- acting reasonably
- being willing to negotiate
- being willing to mediate where necessary
- exploring all available options to resolve the dispute.

The things your business shouldn't do include:

- don't act capriciously—only take into account commercially relevant matters when attempting to resolve disputes
- don't attempt to avoid contractual obligations on the basis of trivial matters.

Note, however, that an obligation to act in good faith does not require you to put another business' interests ahead of your own.

4. Unconscionable conduct in financial services

Financial services reform

Financial services reforms introduced a new regime on 1 July 1998 for the financial services sector.

Under these changes, the Australian Securities and Investments Commission (ASIC) assumed primary responsibility for consumer and small business protection issues in this sector, although in some circumstances the ACCC will share responsibility with ASIC.

Section 51AAB of the Act excludes financial services from the operation of ss. 51AA and 51AB, however, s. 51AC does apply to conduct related to financial services. However, there may be situations in which the financial service is provided in conjunction with non-financial goods or services, in which case the conduct might be caught by ss. 51AA or 51AB.

Financial services and products are defined in the *Australian Securities and Investments Commission Act 2001*.

The unconscionable conduct provisions under the ASIC Act mirror those of the Trade Practices Act, and therefore businesses have equivalent compliance obligations when dealing in financial services.

For further inquiries about consumer protection issues in financial services, contact ASIC.

ASIC Infoline: 1300 300 630

ASIC website: www.asic.gov.au

5. Remedies

General

Sections 51AA, 51AB and 51AC—the sections of the Trade Practices Act covering unconscionable conduct—do not affect an individual’s right to seek redress under the unwritten law.

Rights of private parties under the Trade Practices Act

Parties who choose to take private action under the Trade Practices Act may seek redress in the form of an injunction (s. 80) and/or certain other orders (s. 87). These other orders, which a person must seek within six years of the cause of action relating to the conduct arising, may include:

- compensating a person for loss or damage
- declaring a contract void in whole or in part
- varying a contract or arrangement
- requiring a refund of money or return of property
- requiring that specified services be performed.

Damages (s. 82) may be awarded if a person suffers loss or damage by the actions of another in breach of Part IVA. Damages may also be recovered against a person involved in a contravention. An action for damages must start within six years of the cause of action relating to the conduct arising.

Pecuniary penalties (i.e. fines) are not available for breaches of Part IVA.

Remedies available to the ACCC

The ACCC itself may take either administrative or court action against a business or individual that has engaged in unconscionable conduct in contravention of ss. 51AA, 51AB or 51AC. The action taken will depend on both the ACCC’s priorities and the nature of the particular conduct.

Administrative action may take several forms. For example, in the first instance, the ACCC may request that someone stop certain conduct or change particular trading practices. In more serious instances it might accept an enforceable undertaking from the company concerned and make these public. The court can enforce written undertakings upon application by the ACCC (s. 87B).

If a matter cannot be resolved administratively, the ACCC may take court action. The ACCC can seek injunctions (s. 80) or other orders (s. 87). It may also take representative action on behalf of people who have suffered, or are likely to suffer, loss or damage as a result of conduct by a person in contravention of Part IVA (s. 87(1A)(b)).

The ACCC can also seek a community service order (s. 86C(2)(a)), probation orders (s. 86C(2)(b)), orders for disclosure of certain information (s. 86C(2)(c)) and corrective advertising (s. 86C(2)(d)).

Except for injunctions, applications seeking orders from the court must be made within six years of the cause of action that relates to the conduct arising (s. 87(1CA)).

After it has begun proceedings the ACCC may seek orders to prevent the dissipation of property or money (s. 87A).

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