



**MONASH**  
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# CONSUMER AND SMALL BUSINESS PROTECTION

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**Small businesses and unconscionability**

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overview

# Part 2-2 ACL: Unconscionable conduct

Section 20 - Unconscionable conduct within the meaning of the unwritten law

Section 21 - Unconscionable conduct in connection with goods or services

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

Section 22A - Presumptions relating to whether representations are misleading

# Operation of Part 2-2 ACL

## section 20

- broad application
- applies the 'unwritten law'
- applies CCL remedies to unconscionability

## section 21

- applies 'statutory unconscionability' (ie not limited to the unwritten law)
- only applies re supply/acquisition (& possible supply/acquisition) of goods/services to or from a person - but **not** if the person being supplied (or if acquiring from a person) that is a listed public co

## section 22

- sets out matters court may have regard to in applying section 21



# Unconscionability under the unwritten law

# Section 20

Section 20 –  
unwritten law  
applies

Weaker party has a 'special disability'

Stronger party takes advantage of this

in circumstances where it is not consistent with equity and good conscience (ie unconscionably takes advantage)

# What is 'unconscionable'?

- 'unconscionability' not defined in the Act, nor is it a term of art
- simply means something not done in good conscience and is irreconcilable with what is right and reasonable
  - *ASIC v National Exchange* [2005] FCAFC 226
- is conduct that attracts a sufficient level of judicial opprobrium to support the grant of relief based on principles set out in specific equitable doctrines established by courts of equity
  - *ACCC v CG Berbatis Holdings* [2003] HCA 18

# *Kakavas*

Per High Court in *Kakavas*:

- Essential to the principle stated by both Mason J and Deane J in *Amadio* is that there should be **an unconscientious taking advantage** by one party **of some disabling condition or circumstance** that **seriously affects the ability of the other party to make a rational judgment** as to his or her **own best interests**
- the abiding rationale of the principle is to **ensure that it is fair, just and reasonable for the stronger party to retain the benefit of the impugned transaction**

# *ASIC v National Exchange* [2005] FCAFC 226

- "Unconscionable conduct", on its ordinary and natural interpretation, means **doing what should not be done in good conscience**. In a case where the discrepancy in price and value is great, ...and the **conduct is systematically and directly focused on vulnerable but unnamed members**, some of whom who can be expected to accept the offers, **such conduct can reasonably be described as being against good conscience**
- The targeted offerees in this case could reasonably be expected to include persons who are unacquainted with share values, inexperienced in trading their interests, lacking in commercial experience and some of whom act inadvertently and are elderly

# Cases relating to small businesses

## Franchises

- *ACCC v Leelee* [1999] FCA 1121

## Shop lease renewal

- *ACCC v CG Berbatis Holdings* [2003] HCA 18



# Statutory unconscionability

## Section 21: Unconscionable conduct in connection with goods or services

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

# Section 20

## Section 21 – statutory unconscionability

A person in connection with supply/acquisition of goods/services to another person (not being a listed co)

engages in unconscionable conduct

# Unconscionable conduct under s.21

- "unconscionable conduct" is capable of a wider meaning than in ACL s 20
- the section is explicitly not limited by the unwritten law relating to unconscionable conduct
  - S 21(4)(a)
- The question is: how much wider
- something more than unfairness or unreasonableness is required
  - *Kakavas*

# Section 21

- section is intended to build on and not be constrained by decisions in equity - it is neither possible or desirable to define its scope
  - *Tonto Home Loans v Tavares* [2011] NSWCA 389
- the conduct must be contrary to good conscience – to be tainted with a moral obloquy – a factual question in each case based on the conduct involved
  - *Director of Consumer Affairs Victoria v Scully* [2013] VSCA 292
- Not every deliberate breach of contract necessarily involves the moral obloquy needed for unconscionable conduct
  - *Body Bronze International v Fehcorp* [2011] VSCA 196;

## Section 22(2)

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

## Section 22: matters that can be considered

- the extent supplier's conduct towards the customer was consistent with its conduct in similar transactions with other customers
- the extent to which the supplier unreasonably failed to disclose to the customer any intended supplier's conduct that might affect customer and any risks to customer
- the extent to which the supplier was willing to negotiate the terms
- the conduct of parties in complying with the contract
- whether supplier can unilaterally vary a term
- the extent to which the supplier and the customer acted in good faith

# Steps for determining unconscionability

- (a) the correct principles of law governing a decision as to whether conduct is unconscionable must be stated
- (b) the court must find the primary facts on the basis of which the court makes its determination as to whether the impugned conduct was unconscionable
- (c) the court must decide whether, on the facts as found, the conduct should be characterised as unconscionable
  - *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446

# Application of principles

- see *ACCC v South East Melbourne Cleaning* per Murphy J at [116]
- first and foremost must have regard to the language of the statute rather than judicial explanations of unconscionability: *PT Ltd v Spuds Surf Chatswood*
- “Unconscionability” is not a term of art but simply means “something not done in good conscience”: *Lux*
- should have due regard to the remedial and beneficial objects of the legislation: *Investec Bank v Naude* [2014] NSWSC 165
- must have regard to the non-exhaustive and non-prescriptive list in s 22(1) although the presence of one or more of these matters will not be determinative to an unconscionability enquiry: *Scully*

# Application of principles

- not constrained by the general equitable concept of unconscionability although equity's exploration of unconscionable conduct may assist the court: s 21(4)(a) ACL; *Investec*
- court is prevented from having regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention: s 21(3)(a) ACL
- whether or not conduct is unconscionable will depend on careful consideration of all of the conduct and involves standing back and looking at the whole episode: *Lux*
- task involves evaluating conduct by reference to a normative standard of conscience which may develop and change over time and which must be understood and applied in the context in which the circumstances arise: *Lux*

# Application of principles

- Notions of moral obloquy or moral tainting are relevant, but it must be recognised that it is conduct against conscience by reference to the norms of society that is in question: *Lux*
- As “unconscionability” in this context is predicated on “conduct”, a person’s conduct is to be distinguished from the consequences that that conduct may have on the lives of other people: *Scully*
- A determination of unconscionability involves a broadly based value judgment,
- applied to the facts on which reliance is placed, to the extent that they are proved: *Investec* and *Lux*

# Unconscionability and small business

## Franchising

*ACCC v South East Melbourne Cleaning Pty Ltd (in liq)* [2015] FCA 25

*Garry Rogers Motors v Subaru* [1999] FCA 903

## Supply of goods arrangements

*ACCC v Coles Supermarkets* [2014] FCA 1405

## Dealing with customers

*ACCC v Lux* [2013] FCAFC 90

# Conclusion

- Courts apply a test of the norms and standards of today rather than moral judgment
- "That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers.
- ...Values, norms and community expectations can develop and change over time. Customary morality develops "silently and unconsciously from one age to another", shaping law and legal values:
  - *ACCC v Lux*

# Conclusion

- Treasury discussion paper *Extending Unfair Contract Term Protections to Small Businesses* (2015):
- “In practice, statutory unconscionable conduct provisions are not used to find a contract term unfair. Consequently, it is not clear whether statutory unconscionable conduct provisions can deal with unfair contract terms in themselves. As a result, it is unlikely that these provisions provide businesses offering contracts to small businesses with sufficient disincentives to not include unfair terms in contracts.”