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Law

‘Unconscionability and good faith in business transactions’

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Major Recent Reforms to UC Regulation

- Heightened attention from official regulators
- Increased regulatory powers (eg pecuniary penalties, infringement notices)
- Enhanced focus upon terms and progress of contracts – not just pre-execution conduct
- Harmonisation of B2B and B2C indicators of statutory unconscionability
- Additional indicators of statutory unconscionability
- New principles of interpretation for statutory unconscionability

Three Basic Forms of Statutory Unconscionability

- **General prohibition - unconscionable conduct:**

- Old TPA s 51AA (in trade practices generally)
- New CCA ACL, section 20
- ASICA s 12CA (in financial services)
- Corporations Act s 991A (financial services licensees)

- **Unconscionable conduct in retail/personal/consumer contexts (ie B2C unconscionability):**

- Old TPA s 51AB
- New CCA ACL, sections 21 and 22
- ASICA sections 12CB and 12CC

- **Unconscionable conduct in big/small business contexts (ie B2B unconscionability):**

- Old TPA s 51AC
- New CCA ACL, sections 21 and 22
- ASICA sections 12CB and 12CC
- Some state commercial/retail leasing Acts

Competition and Consumer Act 2010 (Cth)

20 Unconscionable conduct within the meaning of the unwritten law

(1) A person must not, in trade or commerce, engage in conduct that is **unconscionable, within the meaning of the unwritten law** from time to time.

Strands of Unconscionable Dealing

- **GARCIA-Type UC**
 - Wife (or other close relationship?)
 - Guarantees husband's personal/business debts
 - Failure to understand
 - A volunteer (no benefit)
 - No or inadequate explanation
 - Relevant factors known to bank
 - Bank remedial actions inadequate
- **AMADIO-Type UC**
 - Weaker party under a special disadvantage
 - Special disadvantage can be personal (eg illiteracy)
 - Special disadvantage can also be financial, legal, or informational (ie 'situational')
 - Disadvantage affects weaker party's capacity to decide best interests
 - Stronger party knows and takes advantage of that disadvantage
 - Exploitation of that disadvantage in the circumstances is against 'good conscience' in legal terms

Meanings & Levels of Unconscionability Regulation

Under ‘the Unwritten Law’ (4 categories as described by Paul Finn):

- [1] Unconscionability as the underlying concept for Equity as a whole

- [2] Unconscionability as an element or finding that is essential for specific equitable actions (eg estoppel, relief against forfeiture, unconscionable dealings, unilateral mistake etc)
 - Coercion/exploitation/advantage-taking
 - Unconscionable exercise of rights, retention of benefits etc

- [3] Doctrines & remedies associated with unconscionable dealings & exploitation, advantage-taking, and defective understanding:
 - ‘spousal guarantees’ rules (eg *Yerkey v Jones, Garcia*)
 - ‘special disadvantage’ rule (eg *Amadio/Berbatis*)
 - Others (eg *Bridgewater v Leahy*)

- [4] Unconscionability as a direct ground of relief in its own right, unmediated by conventional doctrines (eg *Lenah Game Meats v ABC*)
 - NB Only [2] or [3] are viable possibilities – still open to argument

Spigelman CJ in *A-G (NSW) v World Best Holdings* [2005] NSWCA 261

- ‘Over recent decades legislatures have authorised courts to rearrange the legal rights of persons on the basis of vague general standards which are clearly capable of misuse unless their application is carefully confined. Unconscionability is such a standard ... Unconscionability is a concept which requires a high level of **moral obloquy**. If it were to be applied as if it were equivalent to what is “fair” or “just”, it could transform commercial relationships.’

***ACCC v Lux Distributors P/L* [2013] FCAFC 90 (15 August 2013)**

- Latest ACCC test case
- Judicial rethink on how ‘moral obloquy’ works in this field of regulation
- B2C context, not B2B
- Facts predate the latest statutory unconscionability reforms
- Old (not harmonised) list of unconscionability indicators (eg no applicable ‘good faith’ indicator)
- No need to discuss latest statutory additions (eg new principles of interpretation) in the judgment
- Not the last word on statutory unconscionability ‘test’

Full Fed Ct in *ACCC v Samton Holdings*

- Unconscientious exploitation of a party's special disadvantage (eg *Amadio*)
- Defective understanding, relationship of influence, and absence of independent explanation (eg *Garcia*)
- Unconscionable departure from previous representation (eg estoppel – *Verwayen, Waltons Stores v Maher*)
- Relief against forfeiture and penalty (eg *Legione v Hately* and *Stern v McArthur*)
- Rescind contracts for unilateral mistake (eg *Taylor v Johnson*)

Unconscionability's Interface with Corporate Law and Major Corporate Deals

- *Optus v Telstra*, *Bell Group v Westpac*, *Weston v PBL* etc litigation not the last word on raising unconscionability in corporate contexts:
 - results reinforce difficulty of dealing with unconscionability arguments at interlocutory stages
 - results influenced by available relief on other grounds
 - narrow reading of 'situational' disadvantage
 - scepticism of 'big business' claiming UC
 - conventional reading of disabling effect of disadvantage
 - heavy reliance on availability of legal advice (contrast French J in *Berbatis* litigation)
 - statutory unconscionability extends beyond special disadvantage
 - however, still a 'big ask' for corporations as victims of UC

Competition and Consumer Act 2010 (Cth)

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.

Competition and Consumer Act 2010 (Cth)

21 Unconscionable conduct in connection with goods or services

- (4) It is the intention of the Parliament that:
- (a) this section is not limited by the unwritten law relating to unconscionable conduct; and
 - (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
 - (c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
 - (i) the terms of the contract; and
 - (ii) the manner in which and the extent to which the contract is carried out; and is not limited to consideration of the circumstances relating to formation of the contract.

Competition and Consumer Act 2010 (Cth)

(Annotations in '[]')

22 Matters the court may have regard to for the purposes of section 21 [Non-Exhaustive List of 12 Statutory Indicators of B2C and B2B UC]:

- (a) **[relative bargaining positions]** the relative strengths of the bargaining positions of the supplier and the customer; and
- (b) **[beyond legitimate commercial interests]** whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
- (c) **[understanding of documents]** whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and

Competition and Consumer Act 2010 1974 No. 51 (Cth)

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

(e) [**equivalent pricing and circumstances**] the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) [**equivalent treatment**] the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and

(g) [**code compliance I**] the requirements of any applicable industry code; and

Competition and Consumer Act 2010 1974 No. 51 (Cth)

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

(i) [**non-disclosure**] the extent to which the supplier unreasonably failed to disclose to the customer:

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

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

Competition and Consumer Act 2010 1974 No. 51 (Cth)

(j) [**contractual terms, progress, and conduct**] if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) [**unilateral variation**] without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and

(l) [**good faith**] the extent to which the supplier and the customer acted in good faith.

Unconscionability and Good Faith

- Co-extension of content and limits of 'good faith' under contract law and statutory unconscionability?
- Two-stage analysis of 'good faith' issues for transactional purposes
- Problems in trying to avoid statutory unconscionability by drafting devices
- Implications for judicial revision of expansive 'reasonableness' glosses on good faith
- Implications for Abbott Government's 'root and branch' review of Competition and Consumer Act