



# BUSINESS SNAPSHOT



It is important that businesses and consumers understand their rights and responsibilities under the law. For consumers, it helps them to ensure they are treated fairly and honestly. For businesses, it helps them to build trust with their consumers.

The Australian Consumer Law (ACL) (forming part of the *Competition and Consumer Act 2010*) sets out a number of rights and responsibilities that serve to guide businesses in their day to day dealings with consumers and other businesses. Among other things, the ACL prohibits unconscionable conduct. Unconscionable conduct provisions also exist in the *Australian Securities and Investments Commission Act 2001*, which apply to transactions involving financial products and services.

This business snapshot provides practical tips for businesses to minimise the risk of becoming a victim of unconscionable conduct or to avoid engaging in such conduct towards other businesses or consumers. It also explains unconscionable conduct using actual examples.

## Understanding what unconscionable conduct means

Unconscionable conduct can be a difficult concept to understand. Certain conduct may be unconscionable if it is particularly harsh or oppressive. It may also be unconscionable where one party knowingly exploits the special disadvantage of another. It needs to be more than just hard commercial bargaining; it must be against conscience, as judged against the norms of society. The Australian courts have found transactions or dealings to be unconscionable when they are deliberate, involve serious misconduct or something clearly unfair and unreasonable.

The ACL does not define unconscionable conduct, but it does include a number of principles to help consumers and businesses understand the type of conduct that is likely to be considered unconscionable. These principles are:

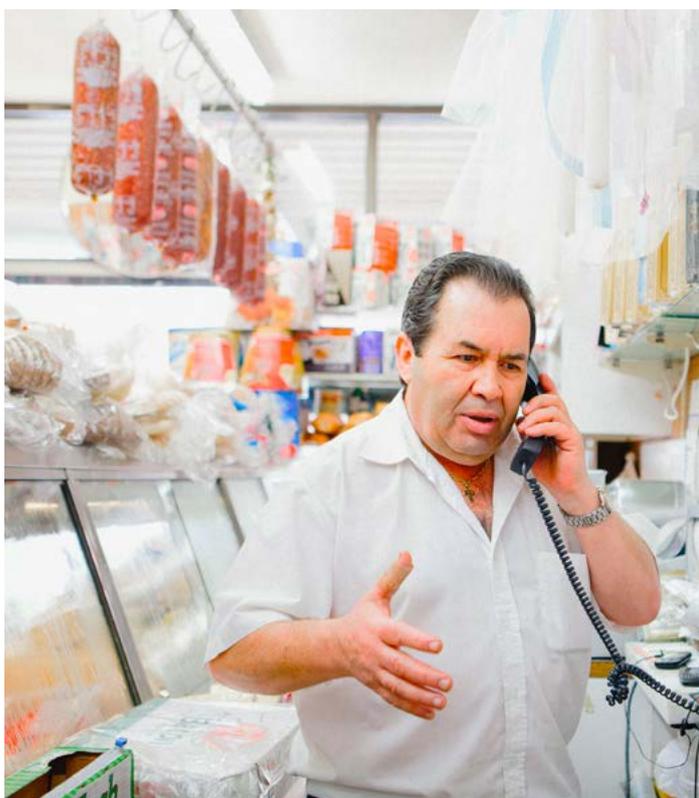
- Unconscionable conduct under the ACL is not limited by historical judge-made law. Importantly, this means that it is not necessary to show that the weaker party suffered from a special disadvantage or disability that the stronger party took advantage of.

- A system of conduct or pattern of behaviour may amount to unconscionable conduct even if the party complaining of it suffered no loss or damage or where no individual 'victim' is identified.
- Unconscionable conduct is not limited to situations where there is a contract. However, where there is a contract, the courts can consider not only how the contract was entered into (for example, whether excessive pressure was used in negotiations), but its terms and how—and to what extent—the contract was carried out.

### Things to consider

There are a number of factors to consider when assessing whether certain conduct is unconscionable. These include:

- The relative bargaining strength of the parties.
- Whether any conditions were imposed on the weaker party that were not reasonably necessary to protect the legitimate interests of the stronger party.
- Whether the weaker party could understand the documentation used.
- The use of undue influence, pressure or unfair tactics by the stronger party.
- The price, or other circumstances, under which the weaker party would be able to buy or sell equivalent goods or services.
- The requirements of applicable industry codes.
- The willingness of the stronger party to negotiate.
- Whether the stronger party has the right to unilaterally change contract terms.
- The extent to which the parties acted in good faith toward each other.
- Any other factor indicating that the stronger party acted with little or no regard to conscience.



## Practical tips to avoid becoming a victim of unconscionable conduct

- Ensure all commercial agreements are set out in writing.
- Make sure you fully understand all the terms of the transaction.
- Do not sign any agreements without reading them carefully.
- Ask for plain language explanations and obtain independent professional legal or financial advice if unsure.
- If you think you are being treated differently, find out why.
- Do not allow yourself to be talked into a deal that is wrong for you by high pressure sales tactics. Be wary if you are presented with tight deadlines.
- Look for the best deal and attempt to negotiate the outcome you want.
- Be prepared to walk away from a deal that does not 'feel' right. It could be an unreasonable or oppressive deal.

## Practical tips to avoid engaging in unconscionable conduct

- Do not exploit the other party when negotiating the terms of an agreement or contract.
- Take care to be reasonable when exercising your rights under a contract.
- Consider the characteristics and vulnerabilities of your consumers. For example, use plain English when dealing with consumers from a non-English speaking background.
- Make sure your contracts are comprehensive (without being too lengthy), easy to understand and do not include harsh, unfair or oppressive terms.
- Ensure you have clearly disclosed important or unusual terms or conditions of an agreement.
- Ensure that the consumer understands the terms of any agreement associated with the transaction and give consumers the opportunity to consider the offer properly. If the contract is long, you may decide to provide a summary of the key terms.
- Observe any cooling-off periods that may apply or consider offering a cooling-off period.
- Give consumers the opportunity to seek advice about the contract before they sign it.
- If things go wrong, be open to resolving complaints and, where appropriate, setting aside contracts or agreements.
- Do not reward your staff for unfair, pressure-based selling.

## Some recent examples of unconscionable conduct

### Dealing with other businesses

#### **Retail leasing**

A landlord sought unreasonable rent for the renewal of a shop lease (which it represented as below market value) and required a very short time frame for its tenants to respond to the proposed rental offer. The landlord's conduct involved small business owners who had little or no ability to speak or read English and the landlord was aware of this. The landlord also failed to comply on an ongoing basis with Victorian retail leasing legislation and it threatened to evict or send letters of demand to certain tenants. The landlord's conduct was unconscionable because its actions were deliberate (or at least reckless), showed no regard for conscience and were irreconcilable with what was right or reasonable.

*(ACCC v Dukemaster Pty Ltd)*

#### **Unreasonable franchise conditions**

A franchisor demanded and obtained from some of its franchisees a 50 per cent weekly fee increase for access to a national telephone number those franchisees relied upon to receive consumer inquiries and work. The franchisor disconnected some of the franchisees from the telephone number when they failed to pay the full fee increase and it also required existing franchisees to vary their franchise agreements to include the fee increase.

The court found that the franchisor abused its position of strength and engaged in conduct that involved misstatements, non-disclosure of information, threats and intimidation. The court also found that the conduct amounted to unilateral profit gouging and all the elements together, demonstrated that the franchisor's conduct was unconscionable.

*(ACCC v Seal-A-Fridge Pty Ltd)*

### Dealing with consumers

#### **Unconscionable conduct in door to door selling**

Craftmatic was found to have used misleading and unfair sales tactics to sell beds to elderly people during the course of home presentations. Craftmatic's sales and promotional methods were designed, scripted and conducted to unduly influence potential consumers and to create and take advantage of an unequal bargaining position and as a result its conduct was unconscionable.

*(ACCC v Craftmatic Pty Ltd)*

#### **Unconscionable conduct towards Indigenous consumers**

When selling educational materials to Indigenous people, the court found that based on his 'way of operating', a marketer was unconscionable in his dealings with eight consumers and in relation to Indigenous consumers in the Northern Territory generally.

The marketer's 'way of operating' included failing to offer consumers a written record of the contracts they entered into, which involved automatic and indefinite bank account deductions and other conditions which were not reasonably necessary to protect his legitimate business interests. The marketer was also aware of his consumers' relative poverty, cultural differences and differing ability to communicate in English but did not notify the consumers about the excessive payments or that he would hold onto those payments until the educational materials had been delivered. He also failed to tell consumers how to stop the automatic payments.

*(ACCC v Ramon Lal Keshow)*



## What to do next to find out more about unconscionable conduct or to sort out your problem

If you want to find out more about the unconscionable conduct provisions or you wish to make a complaint, contact the ACCC, ASIC or your local consumer protection agency (the ACL regulators—see below for details). If you are a small business, you may also choose to contact your local small business commissioner if there is one in your state or territory (see below for details).

A business or consumer may take their own private action for unconscionable conduct by seeking damages for loss suffered or seeking an injunction to prevent an offending party from breaking the law (for example, by enforcing unfair terms). You may want to seek legal advice prior to taking such action.

In some cases, the ACL regulators may investigate complaints and take action against businesses that have engaged in unconscionable conduct. The ACCC's decision to take enforcement action against a business is made in accordance with the principles set out in its *Compliance and Enforcement Policy*.

## Contact details for the ACL regulators

ACCC Infocentre: 1300 302 502

ACCC Small Business Helpline: 1300 302 021

ACCC website: [www.accc.gov.au](http://www.accc.gov.au)

ASIC Infocentre: 1300 300 630

ASIC website: [www.asic.gov.au](http://www.asic.gov.au)

### Your local consumer protection agency

#### **New South Wales Fair Trading**

13 3220 | [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)

#### **Consumer Affairs Victoria**

1300 558 181 | [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)

#### **Queensland Office of Fair Trading**

13 7468 | [www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au)

#### **Consumer and Business Services in South Australia**

13 1882 | [www.ocba.sa.gov.au](http://www.ocba.sa.gov.au)

#### **Western Australia Department of Commerce**

1300 304 054 | [www.commerce.wa.gov.au](http://www.commerce.wa.gov.au)

#### **Australian Capital Territory Office of Regulatory Services**

02 6207 3000 | [www.ors.act.gov.au](http://www.ors.act.gov.au)

#### **Northern Territory Consumer Affairs**

1800 019 319 | [www.consumeraffairs.nt.gov.au](http://www.consumeraffairs.nt.gov.au)

#### **Tasmania Consumer Affairs and Fair Trading**

1300 654 499 | [www.consumer.tas.gov.au](http://www.consumer.tas.gov.au)

### Your state or territory Small Business Commissioners

#### **Office of the Small Business Commissioner Victoria**

13 2215 | [www.sbc.vic.gov.au](http://www.sbc.vic.gov.au)

#### **Office of the Small Business Commissioner**

##### **New South Wales**

1300 795 534 | [www.smallbiz.nsw.gov.au](http://www.smallbiz.nsw.gov.au)

##### **Small Business Commissioner of Western Australia**

Small Business Development Corporation Western Australia

13 1249 | [www.smallbusiness.wa.gov.au](http://www.smallbusiness.wa.gov.au)

#### **Office of the Small Business Commissioner**

##### **South Australia**

1800 072 722 | [www.sasbc.sa.gov.au](http://www.sasbc.sa.gov.au)

### ACCC contacts

Infocentre 1300 302 502

Website [www.accc.gov.au](http://www.accc.gov.au)

For information in languages other than English, call 13 1450 and ask for 1300 302 502

TTY service for people with hearing or speech difficulties:  
1300 303 609 [www.accc.gov.au](http://www.accc.gov.au)

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