



# Unconscionable conduct in the Indigenous art and craft sector

## Know your rights and how to protect yourself—a guide for artists and art centres assisting artists

Negotiating with commercial acquirers of art (dealers) is a part of being an artist or running an art centre. The process of negotiation is essential for a competitive art industry.

The Australian Consumer Law (contained in a schedule to the *Competition and Consumer Act 2010* (the ACL)) limits how far dealers can go in their negotiations with artists and art centres. In particular the ACL prohibits unconscionable conduct.

### What is unconscionable conduct?

Unconscionable conduct is difficult to define or describe as it varies on a case-by-case basis. Unconscionable conduct requires something substantially more than just being 'unfair' or hard commercial bargaining. As a general rule, for conduct to be considered unconscionable, it must be against conscience as judged against the norms of society.

Examples of conduct that the courts have found to be unconscionable include situations where:

- one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstance affecting their ability to conserve their own interests and the other party unconscientiously takes advantage of the opportunity
- involved an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour
- actions showed no regard for conscience or are irreconcilable with what is right or reasonable
- unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests

- one party takes advantage of an innocent party who is unable to make a worthwhile judgement as to what is in his best interest.

There are a number of factors the court may consider in determining unconscionable conduct in business transactions (for example, between a dealer and an artist):

- the relative bargaining strengths of the artist and the dealer
- whether as a result of the conduct engaged in by the dealer, the artist was required to comply with conditions that were not reasonably necessary to protect the legitimate interests of the dealer
- whether the artist was able to understand any documentation used
- whether the dealer used undue influence or pressure or unfair tactics
- the price and terms on which the artist could have sold the same or equivalent artwork elsewhere
- the extent to which the dealer's conduct was consistent with dealings with other artists
- whether the dealer met the requirements of an industry code and, for voluntary codes, the artist reasonably believed the dealer would abide by that code
- the extent to which the dealer failed to disclose any intended conduct (and any risks arising from this conduct) that might affect the artist
- where there is a contract, the terms and conditions, the extent to which the dealer was willing to negotiate the terms and conditions and extent of compliance with the terms and conditions by the dealer and the artist
- whether the dealer has contractual rights to unilaterally vary a term or condition of the contract
- the extent to which both the artist and the dealer acted in good faith.

It is important to remember that these factors are not intended to be exhaustive, and the court may have regard to any other relevant factors. The court will determine whether the conduct is unconscionable by having regard to all the circumstances, meaning each of these factors by themselves are unlikely to amount to unconscionable conduct.

### How can artists avoid being treated unconscionably?

Certain circumstances increase the risk of artists being treated unconscionably by dealers. In particular, artists should be cautious when agreeing to produce art for dealers where the artist has little or no opportunity to negotiate or does not understand the:

- terms of payment
- timeframes for finishing the artwork
- quantity of artwork required.

However, being in these positions does not necessarily mean the artist is being treated unconscionably.

To protect themselves artists should:

- get advice from a third party before agreeing to produce artwork
- know how much their art is worth
- ask the dealer about how much they will be paid
- ask the dealer when they will be paid
- ask the dealer how they will be paid
- have a written agreement with the dealer
- before accepting non-cash payments, check the value of those payments and whether they will cost them anything
- before accepting cash in hand, check how much they could get for their art if they used a dealer or an art centre selling on commission.

### More information

The ACCC and state and territory consumer protection agencies will be jointly responsible for enforcing the consumer protection laws under the ACL.

The Australian Securities and Investments Commission is responsible for enforcing the consumer protection laws that apply to the supply of financial goods and services.

If you would like to learn more about this area of the law, the ACCC's *Small Business Guide to Unconscionable Conduct* offers more detailed information. The guide is available to download from the ACCC website at [www.accc.gov.au](http://www.accc.gov.au).

### Consumer protection agencies

#### Australian Securities and Investments Commission

1300 300 630  
[www.asic.gov.au](http://www.asic.gov.au)

#### Australian Capital Territory

Office of Regulatory Services  
(02) 6207 3000  
[www.ors.act.gov.au](http://www.ors.act.gov.au)

#### Queensland

Office of Fair Trading  
13 74 68  
[www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au)

#### South Australia

Office of Consumer & Business Affairs  
(08) 8204 9777  
[www.ocba.sa.gov.au](http://www.ocba.sa.gov.au)

#### Tasmania

Office of Consumer Affairs & Fair Trading  
1300 654 499  
[www.consumer.tas.gov.au](http://www.consumer.tas.gov.au)

#### New South Wales

NSW Fair Trading  
13 32 20  
[www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)

#### Victoria

Consumer Affairs Victoria  
1300 55 81 81  
[www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)

#### Northern Territory

Office of Consumer Affairs  
1800 019 319  
[www.consumeraffairs.nt.gov.au](http://www.consumeraffairs.nt.gov.au)

#### Western Australia

Department of Commerce  
1300 30 40 54  
[www.commerce.wa.gov.au](http://www.commerce.wa.gov.au)

### ACCC contacts

ACCC Infocentre 1300 302 502

ACCC Indigenous Infoline 1300 303 143

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

For information in languages other than English, call 131 450 and ask for 1300 302 502.

For people with hearing or speech difficulties, contact the TTY service: 1300 303 609.

Voice-only (speak and listen) users, phone 1300 555 727 and ask for 1300 302 502.

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#### Important notice

This publication has been updated to refer to the *Competition and Consumer Act 2010* which replaces the *Trade Practices Act 1974* on 1 January 2011. For more information on the Australian Consumer Law changes see [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au)

The information in this brochure is for general guidance only. It does not constitute legal advice and cannot be relied on as a statement of the law relating to the *Competition and Consumer Act 2010*.

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