

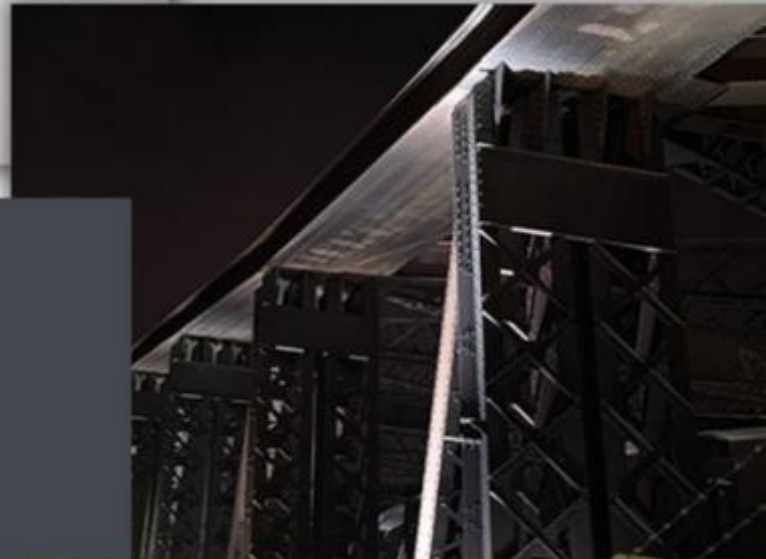
# NSW: Proving Unconscionable Conduct



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## Newsletter

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In this Newsletter, we discuss statutory unconscionable conduct under section 21 of Schedule 2 of the Australian Consumer Law. We will focus on how to prove unconscionable conduct, with reference to the cases of *FMT Aircraft Gate Support Systems v Sydney Ports Corporation* [2010] NSWSC 1108 and *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* [2002] FCAFC 4.

## Introduction

The Australian Consumer Law (ACL)<sup>1</sup> provides a statutory provision under section 21 prohibiting unconscionable conduct in connection with goods and services. Section 21 provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person or the acquisition or possible acquisition of goods or services from a person engage in conduct that is in all the circumstances unconscionable.<sup>2</sup>

While the ACL does not define the term unconscionable conduct, it is not limited to the ordinary meaning under common law. In recent times, the approach that has been followed is that unconscionable conduct refers to 'conduct that is so far outside the norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience'.<sup>3</sup> The finding of unconscionable conduct will be dependent on the facts of the case.

This newsletter will explain section 21 of the ACL, with emphasis on how to prove unconscionable conduct.

## Importance and Relevance of this Newsletter

The ACL and the concept of unconscionable conduct are important and could have significant implications for businesses in the supply of goods and services. Businesses need to be aware of these provisions as they are designed to provide legal protections for all consumers involved.

By understanding the applicability of unconscionable conduct and the test of how it is established, businesses will be enabled with the necessary mindset to be cautious when engaging in business activity. In conducting business that falls under section 21, the common law test as set out in *Commercial Bank of Australia Ltd v Amadio* requiring an obvious special disadvantage is not necessary.<sup>4</sup> This means that businesses may find themselves contravening the statutory provision under the act without the requisite knowledge.

## Section 21 of Schedule 2 of the ACL

Under section 21 of the ACL, a party can be entitled to statutory relief if they have suffered a loss due to another party's unconscionable conduct.

A person will have been found to contravene section 21 by engaging in trade and commerce in connection with the supply or possible supply of goods or services to a person or by

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<sup>1</sup> *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law').

<sup>2</sup> *Ibid* s21(1).

<sup>3</sup> *ASIC v Kobelt* [2019] HCA 18, [92] (Gageler J).

<sup>4</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

acquiring or possibly acquiring goods or services from a person who has engaged in conduct which in all the circumstances is unconscionable.

However, the provision will not apply in circumstances where conduct is engaged due to the institution of legal proceedings or engagement in arbitration regarding the supply, possible supply, acquisition, or possible acquisition of goods and services. It also does not apply to financial services.

In determining if a person has contravened section 21(1), the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention. They may, however, have regard to conduct engaged in or circumstances existing before the section commenced under the ACL.

The section is not limited to unwritten law and can apply to a system of conduct or pattern of behaviour, including if the person affected has or has not been disadvantaged by the conduct. In considering if conduct is unconscionable under a contract, the court may consider its terms and the manner and extent to which the conduct is carried out.<sup>5</sup>

In determining whether a contravention of section 21 exists, the court can also have regard to the non-exhaustive list of factors set out in section 22, including:

- The strength of the bargaining positions between suppliers and customers; and
- Whether the customer was required to comply with conditions that were not necessary for the protection of the legitimate interests of suppliers; and
- If the customer was able to understand the documents; and
- If any undue influence or pressure was exerted on the customer; and
- The amount which a customer could have acquired the good or service from another supplier; and
- The meeting of applicable industry codes; and
- The extent of unreasonably failing to disclose any intended conduct or risks; and
- If a contract was present between the acquirer and the supplier; and
- Whether the supplier had a contractual right to vary a term; and
- The extent to which the supplier and customer acted in good faith.<sup>6</sup>

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<sup>5</sup> Australian Consumer Law (n 1) s 21.

<sup>6</sup> Ibid s 22.

## Case Law

### Principle of Unconscionability

Unconscionable conduct under section 21 has been described by judges in a variety of case law to mean 'serious misconduct, something clearly unfair or unreasonable',<sup>7</sup> which reveals a 'high level of moral obloquy'.<sup>8</sup>

This is important as an absence of morality is required, and as such mere 'unreasonableness or unfairness is unlikely to be sufficient'.<sup>9</sup>

A contravention of the section rather requires something more than a mere breach or mere reliance on a contract to be proved to constitute unconscionable conduct.<sup>10</sup>

### ***FMT Aircraft Gate Support Systems v Sydney Ports Corp* [2010] NSWSC 1108**

This is arguably an important case in analysing the applicability of unconscionable conduct within commercial circumstances and how it may arise. It concerned a contract to design, manufacture and supervise the construction of a gangway at Circular Quay's Overseas Passenger Terminal. Clause 5.2 regulated the entitlement of the defendant to have resources to security where it has "any claim or entitlement to the payment of damages" under the contract.

FMT had argued that the behaviour of the defendant and its superintendent were unconscionable in all the circumstances due to a failure to advert the fact that they had liquidated damages accruing in a letter which prevented them from exercising their contractual right to recourse to security.

In discussing unconscionable conduct, the court noted that:

[35] Caution is required when equitable principles are sought to be imposed on well-resourced and well-advised commercial parties. In any given case, there might possibly be a proper basis to put submissions based on the equitable doctrine of unconscionability or its statutory equivalent in Section 51AA of the Trade Practices Act. However, the opportunities will be limited. That is because the state of affairs on which the application of equitable doctrines is usually predicated – vulnerability, dependence, mistaken assumption or inducement – will rarely exist in such circumstances.<sup>11</sup>

The court acknowledged the sentiments from *Summer Hill Business Estate v Equititrust* [2010] NSWSC 776, which provided that where two substantial commercial enterprises are dealing in a commercial transaction of great value, this requires carefully scrutinising the

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<sup>7</sup> *Cameron v Qantas Airways Ltd* (1995) 55 FCR 147 at 179.

<sup>8</sup> *Australian Competition and Consumer Commission (ACCC) v Woolworths Ltd* [2016] FCA 1472.

<sup>9</sup> *Australian Competition and Consumer Commission v 4WD Systems Pty Ltd* (2003) 200 ALR 491.

<sup>10</sup> *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 at [94] per Nicholson J.

<sup>11</sup> *FMT Aircraft Gate Support Systems v Sydney Ports Corporation* [2010] NSWSC 1108, [35].

circumstances that give rise to a conclusion that the conduct was so unconscionable that the court would provide relief.

[36] 'Courts should be careful to conserve relief so that they do not, in commercial matters, substitute lawyerly conscience for the hardheaded decisions of businesspeople'.<sup>12</sup>

Regarding this issue, Pembroke J stated that given the nature of the contract, the detailed terms, the sophistication of the parties, the policy and purpose behind unconditional undertakings and performance guarantees, there was no justification to restrain the exercise by the defendant of a legal right to which it is legitimately entitled.

This case has been cited in *Flsmidth Pty Ltd v Duro Felguera Australia Pty Ltd* acknowledging Pembroke J's judgement in discussing that sophisticated commercial entities have always been well advised and can be taken to be aware of numerous decisions in the circumstances and have contracted against that background.<sup>13</sup>

### Vulnerability

The High Court in the case of *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* defines the notion of a 'pre-existing' vulnerability or disadvantage as one where the 'victim of the conduct brings to the relationship an attribute of vulnerability in some factor or to some degree'. This leads to exploitation by the stronger party of a special disadvantage on the part of the weaker party.<sup>14</sup>

Examples of vulnerability are found in the case of *Australian Securities and Investment Commission v Kobelt*, where vulnerability occurred due to the customers remoteness to the community, limited education, limited financial literacy, and impoverishment. This was found to create a power imbalance between the parties.<sup>15</sup>

### Dependence

A finding of unconscionability based on dependence occurs when one party is being taken advantage of because of a dependence on another party.<sup>16</sup>

Dependence can include emotional dependence, attachment, and physical disability as occurred in the case of *Gregg v Tasmanian Trustees Ltd* where a mortgage was set aside based on unconscionable conduct.<sup>17</sup>

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<sup>12</sup> Ibid [36].

<sup>13</sup> *Flsmidth Pty Ltd v Duro Felguera Australia Pty Ltd* [2016] WASC 191.

<sup>14</sup> *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40, [79] ('Quantum Housing Group').

<sup>15</sup> *Australian Securities and Investments Commission (ASIC) v Kobelt* (2019) 368 ALR 1.

<sup>16</sup> *Bridgewater v Leahy* (1998) 194 CLR 457.

<sup>17</sup> *Gregg v Tasmanian Trustees Ltd* (1997) 73 FCR 91.

### Mistaken Assumption

The case of *Walton Shores (Interstate) Ltd v Maher* deals with mistaken assumptions. It provides that a mistaken assumption can be found 'where the party estopped has knowingly and silently stood by and watched the other party act to his detriment'. This requires knowledge by one party of the other party's detrimental action and adoption of their mistaken assumption.<sup>18</sup>

However, estoppel by silence will not arise without knowledge of the mistaken assumption by the representor.<sup>19</sup>

### Inducement

Inducement refers to where a party 'has made false statements intending thereby to induce them to enter into a contract and those statements are of such a nature as would be likely to provide such inducement'.<sup>20</sup> A causal link is required between where the representor intends to induce and the inducement occurring.<sup>21</sup>

The case of *Marvon Pty Ltd v Yulara Development Co Ltd* further provided that even where an active inducement is not found, the defendant can be held to have induced the assumption if he knew of the plaintiff's detrimental reliance and was silent on the issue.<sup>22</sup>

### ***Australian Competition and Consumer Commissioner v Samton Holdings Pty Ltd [2002] FCAFC 4***

The case concerned the lesser of a lunch bar and associated company, Samton Holdings alleging that the landlords had engaged in unconscionable conduct contrary to section 51AA of the Trade Practices Act 1974 (prior to the enactment of the ACL). This occurred after the failure of the tenant to exercise an option for the extension of the lease. As the tenant was then required to pay \$70,000.00 for a seven-year lease, the ACCC claimed that the tenant was at a special disadvantage due to financial dependence on the extended tenure of the premises.

At trial, the court found that the respondents fell short of the standard of being unconscionable. This decision was appealed by the ACCC. The court of appeal went on to decide that the tenant was not under a special disadvantage for legal purposes at all.

In discussing unconscionable conduct, the court found five categories that would constitute unconscionable conduct and come within the scope of the act.

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<sup>18</sup> *Walton Stores (Interstate) Limited v Maher* (1988) 164 CLR 287 ('Walton Shores').

<sup>19</sup> *KMA Corporation Pty Ltd v G & F Productions Pty Ltd* (1997) 38 IPR 243.

<sup>20</sup> *Gould v Vaggelas* (1985) 157 CLR 215.

<sup>21</sup> *Addenbrooke Pty Ltd v Duncan (No 2)* (2017) 348 ALR 1, [129].

<sup>22</sup> *Marvon Pty Ltd v Yulara Development Co Ltd* (1989) 98 FLR 348, 351.

These included:

[48] Under the rubric of unconscionable conduct, equity will:<sup>23</sup>

- i. Set aside a contract or disposition resulting from the knowing exploitation by one party of the special disadvantage of another. The special disadvantage may be constitutional, deriving from age, illness, poverty, inexperience or lack of education - *Commercial Bank of Australia Ltd v Amadio*. Or it may be situational, deriving from particular features of a relationship between actors in the transaction such as the emotional dependence of one on the other - *Louth v Diprose*; *Bridgewater v Leahy* (1998) 194 CLR 457.
- ii. Set aside as against third parties a transaction entered into as the result of the defective comprehension by a party to the transaction, the influence of another and the want of any independent explanation to the complaining party - *Garcia v National Australia Bank Ltd* (1988) 194 CLR 395.
- iii. Prevent a party from exercising a legal right in a way that involves an unconscionable departure from a representation relied upon by another to his or her detriment - *Waltons Stores (Interstate) Limited v Maher*; *The Commonwealth v Verwayen*.
- iv. Relieve against forfeiture and penalty - *Legione v Hateley* (1983) 152 CLR 406; *Stern v McArthur*.
- v. Rescind contracts entered into under the influence of unilateral mistake - *Taylor v Johnson*.

While the list was not exhaustive, it identifies conduct that can be characterized as unconscionable in a sense known to the unwritten law.

This case is significant to the topic of unconscionable conduct as it provided an extension to the nature of unconscionability where to prove unconscionable conduct situational and constitutional disadvantages can be factored in which have the potential to interrupt corporate and commercial dealings.

### Additional Cases Exploring an Unconscionable Departure from a Representation

The case of *Walton Shores (Interstate) Limited v Maher* was a key case dealing with unconscionability in the High Court. The case elaborates on the importance of circumstances and provides that a representor's departure from an assumption could be considered unconscionable when the surrounding circumstances are such that the representee's reliance on that assumption is reasonable.<sup>24</sup>

<sup>23</sup> *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* [2002] FCAFC 4, [48].

<sup>24</sup> *Walton Shores* (n 18).

The following year in the case of *The Commonwealth v Verwayen*, Deane J stated that:

At 445 'The question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all of the circumstances of the case'.<sup>25</sup>

Similarly, in the case of *Newbon v City Mutual Life Assurance Society Ltd*, the court observed:

At 734 'The injustice of allowing the representor to disregard the assumption must arise from the circumstances attending its adoption by the other party'.<sup>26</sup>

Evatt JJ, Dixon, and Rich further discussed that it is also necessary to have a material detriment resulting from reliance to make it unjust to permit the departure from the assumption.

### **Recent Decision of *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40**

In addition to the cases discussed above, it must be noted that in 2021, the Federal Court of Australia handed down an important decision in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* which found that to establish that a party has engaged in statutory unconscionable conduct, exploitation of some disadvantage or vulnerability is not necessary.<sup>27</sup>

The ACCC alleged that Quantum Housing had made false and misleading claims which were in breach of the ACL and had engaged in systematic unconscionable conduct as they pressured investors to terminate agreements with their property managers to engage one approved by Quantum without informing them of their commercial links with the recommended property managers.

In 2020, the court declared that the conduct was not within the notion of unconscionable conduct as the investors were not at a disadvantage or had a vulnerability that could be exploited. The ACCC had appealed the decision to determine if a special disadvantage was needed to determine unconscionable conduct under the ACL.

Having reviewed the decision in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, the stated:

[78] 'we reject the proposition that ratio or seriously considered obiter dicta of a majority of the High Court, indeed, of any justice of the Court in *Kobelt* ... requires in any case that for conduct to be unconscionable by reference to ss 12CB and 12CC of

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<sup>25</sup> *Commonwealth v Verwayen* (1990) 170 CLR 394.

<sup>26</sup> *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723.

<sup>27</sup> *Quantum Housing Group* (n 14).



the ASIC Act (or sections 21 and 22 of the ACL) there must be found some form of pre-existing disability, vulnerability or disadvantage of which advantage was taken.<sup>28</sup>

Rather, the court confirmed that it was not bound by earlier precedents to refrain from establishing unconscionable conduct in absence of the above factors. Importantly, the court noted:

[96] 'Conduct by a commercial entity which, as here, systematically misuses its superior bargaining position by dishonestly misleading its counterparties and pressuring them by unjustified and unnecessary commercial requirements in a way that reflects a dishonest lack of good faith in undermining bargains previously reached in order to extract surreptitious and undisclosed financial benefits is against and offends an Australian business conscience. None of this is idiosyncratic or personal. It is an offence to honesty (upon which the ACL, the common law and equity are based) and is preferable to considerations in paras 22(1)(a), (b), (d), and (l).<sup>29</sup>

Overall, the court found that Quantum Housing had breached section 21 of the ACL by engaging in unconscionable conduct.

## Conclusion and Implications

In summary, it is evident from the case law discussed that section 21 of the ACL applies a different standard relevant to sophisticated and commercial-minded people and businesses. As such, businesses need to be aware of the differences in establishing statutory unconscionability as the approach differs from common law and means that unconscionable conduct can be proved for sophisticated commercial operators who are not subject to any special disadvantage or vulnerability.

However, should a claim under section 21 of the ACL fail, a claim can still be brought under section 20 of the ACL considering the common law equitable doctrine of unconscionable conduct.

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<sup>28</sup> Ibid [78].

<sup>29</sup> Ibid [96].