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Protecting consumers from unconscionable dealing

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Protecting Consumers from Unconscionable Dealing

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As the cornerstone of Australia's competition and consumer protection regimes, the *Trade Practices Act* 1974 (Cth) (the TPA) is necessarily concerned with the welfare of all Australians, particularly those who are disadvantaged or vulnerable.

In its 2005 publication, *Don't take advantage of disadvantage*, the Australian Competition and Consumer Commission (the ACCC) identified the following characteristics of disadvantage/vulnerability:[1]

- baving a low income;
- having a non-English speaking background;
- having a disability – including intellectual, psychiatric, physical, sensory, neurological or learning;
- having a serious or chronic illness;
- having poor reading, writing and numerical skills;
- being homeless;
- being very young;
- being elderly;
- coming from a remote area; and
- having an indigenous background.

Concern about disadvantaged and vulnerable parties underpins the three unconscionable conduct provisions in Part IVA of the TPA.

The first section, s 51AA, provides: 'A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.'[2]

This section's reference to 'the unwritten law, from time to time, of the States and Territories' is a reference to 'the common law of Australia'.[3] In this way, s 51AA brings 'common law' notions of unconscionability within the TPA (assuming the threshold requirements of 'corporation' and 'trade or commerce' are satisfied), thereby providing access to the Act's broad remedies – particularly the range of 'ancillary orders' available under s 87 (such as an order declaring a contract resulting from unconscionable conduct to be void).

The second section, s 51AB – selected as the main focus of this article – prohibits unconscionable conduct in consumer-type transactions. Section 51AB(1) provides: 'A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.'

As the ACCC has explained, s 51AB is relevant in situations where 'it is apparent that a potential customer may not have the capacity to make a voluntary or informed decision about the implications and/or benefits of their purchasing or contractual decisions.'[4] In these circumstances, businesses 'need to act responsibly and take extra care in their dealings to ensure that no unfair advantage is taken.'[5]

The third and final section, s 51AC, prohibits unconscionable conduct in business-type transactions. Section 51AC(1) provides: 'A corporation 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 of 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.'[6]

Despite its repeated use in Part IVA, the Act contains no statutory definition of the term 'unconscionable conduct'. Hence, the equitable doctrine of unconscionability is a useful starting point in understanding the scope of unconscionability under the TPA.

Equitable doctrine of unconscionability

Since the High Court's decision in *Commercial Bank of Australia Ltd v Amadio*,[7] it has been settled law in Australia that the equitable doctrine of unconscionability extends generally to circumstances in which 'a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them ... [and] ... that disability was sufficiently evident to the stronger party to make it *prima facie* unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it.'[8]

Thus, 'unconscionable conduct' is usually taken to refer to 'the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from a special disability or is placed in some special situation of disadvantage.'[9]

In the *Amadio* case, Mr and Mrs Amadio, an elderly Italian couple, were persuaded by their son to give a mortgage guarantee in favour of his business. The couple believed that the guarantee was limited to a sum of $50,000 for six months. In fact, it was unlimited in amount and duration. Following the failure of the son's business, the High Court held that it would be unconscionable for the bank to retain the benefit of the guarantee when it had reason to believe that the Amadios were in a position of special disability (they were elderly, had little formal education and limited business experience, and had a poor command of the English language), yet failed to provide or recommend that they obtain clearly necessary advice and assistance.

The High Court's decision in *Amadio* establishes that in order for a transaction to be set aside under the equitable doctrine of unconscionability, three requirements must be satisfied: (i) the weaker party was under a special disability vis-à-vis the stronger party; (ii) the stronger party knew or ought reasonably to have been aware of the weaker party's special disability; and (iii) the stronger party took unfair advantage of the weaker party's special disability in order to procure the weaker party's consent to the agreement.

In the earlier case of *Blomley v Ryan*,[10] it was held that a special disability may be constituted by 'poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.'[11] However, the *Amadio* decision indicates that the categories of special disability are not closed; rather, it will be relevant to examine any circumstances affecting a party's ability 'to make a judgment as to his own best interests'.[12]

Section 51AB of the TPA

As noted previously, s 51AB(1) prohibits corporations from engaging in unconscionable conduct in consumer-type transactions.

The necessity for a consumer-type transaction derives from ss 51AB(5) and (6). Section 51AB(5) requires the goods or services supplied by the corporation to be 'goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption', and s 51AB(6) specifies that the goods cannot be acquired for the purpose of resupply.

In the absence of a definition of 'unconscionable conduct' within the TPA, the s 51AB decisions to date suggest that the scope of the term flows from its ordinary meaning of 'showing no regard for conscience, irreconcilable with what is right or reasonable'.[13] What is required is 'serious misconduct or something clearly unfair or unreasonable'.[14] It will also be relevant 'whether advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his or her best interests.'[15]

Section 51AB(2) provides some statutory guidance by setting out a non-exhaustive list of matters to which a court may have regard in determining whether a corporation has acted unconscionably in contravention of s 51AB(1).

Although circumstances giving rise to unconscionability will usually fall within several of the paragraphs in s 51AB(2), unconscionability may still be established if the circumstances fall within one paragraph only or do not fall within any.

The matters identified in s 51AB(2) are as follows:

- The relative strengths of the bargaining positions of the corporation and the consumer: s 51AB(2)(a).
  – Disparity may arise if the consumer suffers from a physical, intellectual or emotional disability, lack of education or financial hardship. Information asymmetry between the parties may also be relevant.
- Whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation: s 51AB(2)(b).
  – This paragraph will be relevant where the contract contains harsh terms.
- Whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services: s 51AB(2)(c).
  – Language problems and poor educational background are implied by this paragraph.
- Whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services: s 51AB(2)(d).

– This paragraph takes account of high pressure sales techniques and situations where a party enters into a transaction as the result of the influence of a close relative.

- The amounts for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation: s 51AC(2)(e).

– This paragraph allows consideration of whether the consumer has made a bad bargain.

Pursuant to s 51AB(4), however, a court is not permitted to have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention of s 51AB(1).

To illustrate the application of s 51AB, compare and contrast the decisions in *ACCC v Keshow*[16] and *ACCC v Radio Rentals Ltd*.[17]

ACCC v Keshow was a case involving unconscionable conduct in the sale of educational materials to indigenous consumers. Mr Keshow, a Perth resident, visited remote indigenous communities in the Northern Territory to solicit customers for the educational materials supplied by his business. He targeted indigenous women, encouraging them to purchase materials that were not always age-appropriate for their children. Payment for the goods was secured by having the women sign periodic payment forms which permitted automatic deductions from their bank accounts into accounts he controlled. In several instances, payments were made beyond the value of the goods supplied, or for goods that had not been supplied at all. The court found that Mr Keshow had engaged in unconscionable conduct in breach of s 51AB(1) by taking advantage of the lack of education and commercial experience of the indigenous consumers with whom he dealt. He was ordered to pay $26,000 in compensation and was banned from entering indigenous communities in the Northern Territory to conduct his business.

The ACCC's success in *Keshow* was not repeated in *ACCC v Radio Rentals Ltd*. In the latter case, the ACCC alleged that Radio Rentals had acted unconscionably when it entered several rental agreements with a customer who had an intellectual disability and a schizophrenic illness. However, although the court expressed sympathy for the unfortunate circumstances of the customer in this case, it found that Radio Rentals had not contravened s 51AB. The same contracts were used for this particular customer as for every other customer, and no pressure or unfair tactics had been applied to him. Moreover, it had not been evident to the company's representatives that the customer had the kinds of problems he did.

Conclusion

The ACCC has issued this warning:

'Businesses generally have more information about the goods or services they sell and/or more bargaining power than their consumers. This imbalance may be greater for disadvantaged or vulnerable consumers than for other consumers. Disadvantaged or vulnerable consumers may also have less understanding of the consequences of a particular action or transaction or may believe that the trader is acting in their best interests in situations where they are not.'[18]

In other words, businesses need to take extra care when dealing with disadvantaged or vulnerable consumers to avoid accusations that they treated those consumers unconscionably.

References

1 ACCC, *Don't take advantage of disadvantage* (2005) 1-2.
2 See s 51AA(1) of the TPA. Section 51AA(2) provides that s 51AA(1) does not apply to conduct which is prohibited by ss 51AB or 51AC.
3 *ACCC v Samton Holdings Pty Ltd* (2002) FCR 301.
4 Above n 1, 1.
5 Ibid.
6 Section 51AC(3) sets out a non-exhaustive list of matters in paragraphs (a)-(k) to which the courts may have regard in determining whether there has been a contravention of s 51AC(1).
7 (1983) 151 CLR 447.
8 Ibid 474 (Deane J).
9 Ibid 461 (Mason J).
10 (1956) 99 CLR 362.
11 Ibid 405 (Fullagar J).
12 Above n 7, 462 (Mason J).
13 See, eg, *ACCC v Keshow* [2005] FCA 558, [97].
14 Ibid.
15 Ibid.
16 [2005] FCA 558.
17 [2005] FCA 1133.
18 Above n 1, 2.

You be the judge:

In ACCC v Lux Pty Ltd [2004] FCA 926, a door-to-door salesman employed by Lux Pty Ltd sold a $945 Lux vacuum cleaner to an illiterate and allegedly vulnerable woman who was alone in her house at the time. Was s 51AB contravened in this case? Think about the relative bargaining positions of the parties, the consumer's ability to understand the contract, and the fact that there were complaints about the salesman's tactics. Refer to the case to find the answer.