

UNCONSCIONABLE CONDUCT

INTRODUCTION

Pursuant to S20, a person must not, in trade or commerce, engage in conduct that **unconscionable** within the **meaning of the unwritten law**

Similarly, pursuant to S21, a person must not, in trade or commerce, engage in conduct that is in **all circumstances unconscionable**

(Start with S21 as it is the easier threshold to prove)

IN TRADE OR COMMERCE

As per S2 ACL, (conduct) must be in trade or commerce

Trade or commerce is defined by S2 ACL as

- a) **Within Australia**
- b) **Between Australia and other places**

S2 also includes **“business or professional” activity regardless of whether it is for profit**

CONNECTION WITH GOODS/SERVICES

Under S21 ACL, a person must not engage in unconscionable conduct with relation to

- a) **Supply or possible supply** of goods or services
- b) **Acquisition or possible acquisition** of goods or services

SPECIAL DISABILITY (S20 CONTRAVENTION)

Is X under some kind of **special disadvantage or disability**

Examples

- **“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” – BLOMLEY
- **Inability to speak English** – AMADIO
- **Emotional dependence** built in a relationship – LOUTH V DIPROSE
- **Situational disadvantage** – i.e. where a party is at a specific disadvantage or vulnerability because of a short-term situation – BERBATHIS
- **Actual knowledge in unnecessary** – enough for the **reasonable person to be aware that the victim is under a special disability** – AMADIO

TAKING ADVANTAGE (S21 CONTRAVENTION)

S22 sets out a list of factors to have regard to when considering whether a party has unequal bargaining power

- a) Relative strengths of the parties
- b) Whether the consumer was required to comply with conditions not necessary for protection of legitimate interests
- c) Whether consumer was able to understand any documents
- d) Whether there was any undue influence or pressure
- e) Amount for which the consumer could have acquired identical goods
- f) Extent to which the conduct towards the consumer was consistent with the supplier's conduct in other transactions
- g) Requirements of any industry code
- h) Requirements of any industry code and if the consumer acted on the reasonable belief that the supplier would comply with the code
- i) Extent to which the supplier failed to disclose
 - i. Any intended conduct which may have affected consumer
 - ii. Any risks to consumer arising from supplier's intended conduct
- j) If there is a contract between supplier and consumer for supply of goods
 - i. Extent to which supplier is willing to negotiate
 - ii. Terms and conditions
 - iii. Conduct of the supplier and consumer in complying with the terms
 - iv. Any conduct that the supplier or consumer engaged in after entering contract
- k) Whether supplier has contractual right to vary terms unilaterally
- l) Extent to which supplier and consumer acted in good faith

REMEDIES

Where X can show that unconscionable conduct has occurred at the hands of (party), the X may seek the following remedies

- Pecuniary penalties for contravention of S20
 - Up to \$1.1M for corporations
 - Up to \$220,000 for natural persons
- If X suffers loss or damage resulting from (party's) unconscionable conduct, X may seek damages under S236 or remedial compensation under S237
- If X is ACCC, it may seek compensation for non-parties under S239
- Injunction against (party) under S232

Limitation of action for breach of S20

- Proceedings must be brought within 6 years when X has suffered or is likely to suffer, loss or damage – S236 (2) and S237 (3)
- If claim for damages from death/personal injury – proceedings must be brought within 12 years from the date when the act/omission alleged to have caused death or injury occurred – S87H CCA

CONCLUSION

Assuming the above analysis is correct, X will be able to prove that (party) has engaged in unconscionable conduct pursuant to S20/21