

ASIC Act: Unconscionable Conduct

- Unconscionable conduct & consumer transaction: section 12CB

(1) A person must not, in trade or commerce, in connection with: (a) the supply or possible supply of financial services to a person (other than a listed public company); or (b) the acquisition or possible acquisition of financial services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

- *ASIC v Skeers*: Skeers prepared Biega's loan application knowing he didn't have enough income to meet all repayments for the loan which was required to complete the purchase of a private residence.
 - Section 12CB(1)—unconscionable: not limited by the unwritten law.
 - Section 12DA(1)—misleading or deceptive or is likely to mislead or deceive both Pepper Homeloans & Biega.
- *Goodridge v Macquarie Bank*: loan & security agreement (LSA), if at anytime loan balance exceeded or was likely to exceed the market value the Bank could at its discretion require the borrower to pay a further sum to be paid at 2pm the day after the margin call + Bank could assign/transfer/novate the agreement to any person without consent (sold to Leveraged Equities). Was a consumer contract—long term personal objective. Financial services for personal, domestic or household use is covered by section 12CB(5), but he said it would be wholly or predominantly for business or investment purposes. Nothing unconscionable in a margin lender enforcing its legal rights to protect itself against a fall in the value of its security—*Bacnet v Capital Partners* [2010] FCAFC.
- Unconscionable conduct & business transactions: section 12CC
 - *ASIC v National Exchange*: \$.35 when the fair value was \$1.29, making offers to members of demutualized companies. Section 12CC not limited to the unwritten law (such as in section 12CA)—not to be read down by limiting its operation only to circumstances where the common law would grant relief in respect of unconscionable conduct [*ACCC v CG Berbatis Holdings*]. 'Unconscionable' should be given its ordinary meaning, which is what should not be done in good conscience. Great price discrepancy, conduct is systematically & directly focused on vulnerable but unnamed members, such conduct can reasonably be described as being against good conscience. National Exchange is an experienced share investor & its head Tweed knew that Aevum was unlisted with 6,255 shareholders & there was no current market price for shares in Aevum. No more than 7 business days to consider the offer, obtain advice & post the acceptance to National Exchange for receipt. They had evidence that having not paid for their shares, were more likely to sell them for less than their market value than were shareholders who had paid for their shares. Advantage to make offers without the necessity of disclosing any prevailing market price for the shares? BAM! Fair estimate of the value of the shares was not contained on the front page in close proximity to the consideration for the offer & nor was it linked to the consideration. Printed on the reverse page. No communication between National Exchange nor a fiduciary relationship so it was not misleading & contained a recommendation that the shareholders consult an adviser & read the entire document. The first is that there must be some doubt as to whether the recipients who accepted the offers were able to understand the offer document since, on its face, it is difficult to see why or how a recipient would be persuaded to part with shares without any bargaining. There may be special factors such as the urgent need for money or the possible inability of recipients to obtain cash from any other source. No evidence to warrant that. Not negotiation. No good faith. Systematically implement a strategy to take advantage of the group of inexperienced persons who would act irrationally, ripe for exploitation. Predatory & against good conscience. Not intended to protect the reckless or the unreasonable. Unconscionability requires a high level of moral obloquy. Section 12CC—only unconscionable conduct. National Exchange engaged in unconscionable conduct for section 12CC purposes leads to the question of whether acceptance by the members can be characterized as being "for the purpose of trade or commerce".

Electronic commerce

Consumer protection for electronic commerce

- *Australian guidelines for electronic Commerce* seek to 'enhance further consumer confidence in electronic commerce by providing guidance to businesses on how to deal with consumers when engaged in B2C e-commerce (~~B2B/C2C~~) e.g. iTunes. Europe (Distance Selling Directive, Council Directive, [1997] OJ L 144/19), UK (*Consumer Protection (distance Selling) Regulations 2000* (SI 2000/2334) includes a cooling-off period during which the consumer can withdraw from the transaction & contractual terms that are inconsistent with the Regulations are void.

Jurisdictional issues

- Application of state-based consumer protection laws against interstate suppliers—*Oubani v MCI Technologies*: Oubani (NSW) purchased software from MCI (Qld) who contended that as the contract was formed in Qld, NSW Tribunal had no jurisdiction to hear Oubani's application. Oubani (MCI agreeing) submitted that the relevant consideration was whether goods or services were supplied to a consumer in NSW. Section 3 of the Consumer Claims Act. 'Consumer' & 'Consumer Claims': "whether under a contract or not". Whether goods or services were supplied to a consumer in NSW, & not where the contract was made.
- Choice of law & venue clauses—*Law v MCI Technologies*: licence agreement 'governed exclusively by the laws of Qld' & Law also signed a 'Software & Copyright Declaration': "the user hereby acknowledges that this contract of sale is formed exclusively within Southport in the State of Qld. The parties involved irrevocably submit to the exclusive jurisdiction of Southport in the State of Qld". VCAT ordered a full refund to law.
 - Morris P: Section 6 FTA (Act in Vic) provides that the act applies 'within & outside Victoria ... to the full extent of the extra-territorial legislative power of the Parliament' (needs connection with Victoria—connection is liberal). If supply of goods occurs or is proposed to occur in Vic, the FTA applies to any dispute or claim, whether supplier is a resident of Vic or not. Jurisdiction of VCAT to hear an action for damages does not depend on the existence of a contract—turns on whether there has been a contravention of the FTA. FTA is designed to be protective. Important that courts & tribunals interpret legislation to further the intent of Parliament.

Electronic contracting & unfair terms

- Unilateral variation of contract terms—*Douglas v Talk America*: Talk America added four provisions to the service contract in their favour⁶⁴⁸ but never informed Douglas of the amendments. Douglas could have only become aware if he visited Talk America's website & examined the contract for possible changes but he had no reason to, let alone visit the contract page (AOL changed his credit card automatically). A revised contract is merely an offer & is not binding until it is accepted, & an offeree cannot assent to an offer unless he knows of its existence—cannot unilaterally change a contract. New customers would necessarily be on notice that they were required to assent to contract terms but arbitration clause is unenforceable against existing customers, even when they are given notice by mail. Even if Douglas were bound, the new terms would conflict with California's fundamental policy as to unconscionable contracts.