

Legal Update

Prohibition on unconscionable conduct now in force

September 2022

The Fair Trading Act 1986 (FTA) was amended last month to ban businesses from engaging in unconscionable conduct. When introducing the legislation at its first reading, Minister David Clark said that it was “necessary to deal with a very small minority of businesses that take advantage of the vulnerabilities and lack of bargaining power of consumers or other businesses”. This update explains the new law, considers some Australian cases where the equivalent law has been applied and suggests some steps businesses can take to avoid breaching the new law.

WHY IS THIS NEEDED?

Before this law was introduced, New Zealand law already contained protections for businesses and consumers against unfair behaviour from businesses. For example:

- misleading and deceptive conduct, false, misleading, or unsubstantiated representations and harassment and coercion are all prohibited under the FTA; and
- the Credit Contracts and Consumer Finance Act 2003, in relation to credit contracts and related transactions, protects against practices which could be considered to be unfair.

The government introduced the unconscionable conduct prohibition to fill in the gaps that the existing law did not extend to, after it received submissions that the existing protections did not go far enough.

WHAT IS THE UNCONSCIONABLE CONDUCT PROHIBITION?

Changes to the FTA

The FTA has been amended to include, at section 7, the following ban on unconscionable conduct:

A person must not, in trade, engage in conduct that is unconscionable.

The prohibition applies irrespective of whether:

- a particular individual is identified as disadvantaged or likely to be disadvantaged by the conduct;
- there is a system or pattern of unconscionable conduct; and
- a contract has been entered into.

The prohibition is broad and will apply to:

- the conduct of all forms of business entity;
- conduct which affects consumers and/or businesses (which could include suppliers and competitors of the offending business);

- single instances of conduct as well as a system or pattern of conduct;
- a variety of business actions and interactions.

What does “unconscionable” mean?

The FTA does not define “unconscionable”. However, the prohibition is modelled on the Australian Consumer Law and we consider it is likely that New Zealand courts will interpret unconscionable in the same way as the Australian courts. The Aussie courts have said that unconscionable conduct is “serious misconduct far beyond what is commercially necessary or appropriate”. According to the Commerce Commission, this is conduct that is more than just hard commercial bargaining but is clearly unfair and unreasonable.

In assessing whether conduct is unconscionable, the court may have regard to factors including:

- the relative bargaining power of the person engaging in the conduct (the **trader**) and any person who is disadvantaged, or likely to be disadvantaged, by the conduct (an **affected person**);
- the extent to which the trader and an affected person acted in good faith;
- whether an affected person was able to understand any documents provided by the trader; and
- whether the trader subjected an affected person to unfair pressure or tactics or otherwise unduly influenced an affected person.

Penalties

Unlike for the unfair contract terms regime, which only the Commerce Commission can enforce, private parties as well as the Commission can enforce the unconscionable conduct prohibition. Breach of the prohibition is an offence and individuals are subject to a fine of up to \$200,000, while body corporates may be fined up to \$600,000.

If a court finds that a person has suffered, or is likely to suffer, loss or damage due to the unconscionable conduct, the court can make a variety of orders, including:

- that any contract between the parties is void;
- for the return of property or refund of money; and
- for the payment of the amount of loss or damage.

UNCONSCIONABLE CONDUCT IN AUSTRALIA

There is a considerable body of Australian case law on unconscionable conduct. Set out below are summaries of three cases.

Sale of vacuum cleaners to elderly women

The Federal Court in August 2013 declared that a business had engaged in unconscionable conduct in its sale of vacuum cleaners to elderly women. Sales representatives had visited the women in their homes on the premise of performing a free maintenance check of their existing vacuum cleaner. However, the purpose of the visit was to sell them a new vacuum cleaner.

The women were pressured into the purchase and subjected to unfair sales tactics. The visits at the women's homes were lengthy (lasting for one and a half to two hours) and resulted in the women buying a new vacuum cleaner at a price of AUD\$1,999 or more.

The business was ordered to pay penalties totalling AUD\$370,000, enjoined from engaging in similar conduct in the future and required to establish a compliance and education program for its employees and agents.

Selling mobile contracts to Indigenous consumers

In 2021 Australia's biggest telecommunications company, Telstra, was ordered to pay AUD\$50 million in penalties for engaging in unconscionable conduct.

The conduct involved sales staff at licensed Telstra branded stores signing up 108 Indigenous consumers, some of whom spoke English as a second or third language, to mobile phone contracts that they did not understand and could not afford. The Chair of the Australian Competition and Consumer Commission (**ACCC**) said that the "conduct included manipulating credit assessments and misrepresenting products as free, and exploiting the social, language, literacy and cultural vulnerabilities" of the customers.

In addition to the fines (which were the second highest imposed under Australian Consumer Law) the ACCC accepted an undertaking from Telstra in which it undertook to provide remediation to the affected consumers and improve its compliance program.

Franchisor's charges

The Federal Court in 2019 found that a former hand car wash and detailing franchisor engaged in unconscionable conduct in respect of amounts of money it charged to its franchisees. The court described the franchisor's business model as "inherently dishonest". The conduct involved:

- the franchisor negotiating with prospective franchisees a "purchase price" which reflected the amount that the franchisor considered the franchisee was willing to pay rather than the likely cost of the franchise;
- representing to prospective franchisees that the amount was for actual costs to fit out and set up a franchise when it was in fact calculated with the expectation that that it would also cover sales

commissions and funds that the franchisor could use for its general purposes;

- the franchisor took the funds and used them to pay sales commissions and to meet its own costs and expenses; and
- consequently, money that should have been available for fit out costs was not available which exposed franchisees to the risk that they would not be able to establish a franchise at all.

The court also found that the franchisor had breached other consumer laws in its dealings with franchisees and it imposed penalties which totalled over AUD\$4 million. The respondents in this case were the franchisor company, which was in liquidation, as well as a director of the company, and an employee. As well as being fined, the individuals were disqualified from managing a corporation for five and four years respectively.

HOW TO AVOID UNCONSCIONABLE CONDUCT

A court finding that a business's conduct was unconscionable will cause significant reputational damage and a potential liability for hefty fines. To avoid unconscionable conduct, businesses should act fairly, reasonably and in good faith in their dealings with their customers and other businesses. The ACCC offers the following tips:

- do not exploit the other party when negotiating the terms of an agreement or contract;
- take care to be reasonable when exercising your rights under a contract;
- consider the characteristics and vulnerabilities of your customers. For example, use plain English when dealing with customers from a non-English speaking background;
- make sure your contracts are thorough, easy to understand, not too lengthy and do not include harsh, unfair or oppressive terms;
- ensure you have clearly disclosed important or unusual terms or conditions of an agreement;
- ensure customers understand the terms of any agreement associated with the transaction and give them the opportunity to consider the offer properly. If the contract is long, you may decide to provide a summary of the key terms;
- observe any cooling-off periods that may apply or consider offering a cooling-off period;
- give customers the opportunity to seek advice about the contract before they sign it;

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- if things go wrong, be open to resolving complaints; and
- do not reward your staff for unfair, pressure-based selling.

To actively avoid engaging in unconscionable conduct, we recommend that businesses create appropriate guidance and training materials for their staff and agents which they update from time to time.

FOR FURTHER HELP

The Commerce Commission has discussed the prohibition against unconscionable conduct on its website [here](#). For help and advice about this new law please contact your usual Jackson Russell Business Law advisor or one of the team listed.

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