

Unconscionable Conduct means ([as defined by the ACCC](#)) conduct which is so harsh that it goes against good conscience. Under the Australian Consumer Law, businesses must not engage in unconscionable conduct, when dealing with other businesses or their customers.

Unconscionable Conduct affecting consumers is covered under [section 21 of the Competition and Consumer Act 2010](#).

Read Nine Examples of [Unconscionable Conduct](#) in [Labyrinth of 'Concealed Spiders'](#).

Unconscionable conduct does not have a precise legal definition as it is a concept that has been developed on a case-by-case basis by courts over time. Nevertheless, unconscionable conduct is generally accepted to mean conduct which should not be done in good conscience. Unconscionable conduct is more than simply unfair or harsh – **it must have an element of bad conscience**.

Business behaviour may be deemed unconscionable **if it is particularly harsh or oppressive**, and is beyond hard commercial bargaining.

For example, Australian courts have found transactions or dealings to be 'unconscionable' **when they are deliberate, involve serious misconduct or involve conduct which is clearly unfair and unreasonable**.

Determining whether conduct is unconscionable

A court will consider a number of factors when assessing whether conduct in relation to the selling or supplying of goods and **services to a customer**, or to the supplying **or acquiring of** goods or **services to or from a business**, is unconscionable.

These include:

- the relative bargaining strength of the parties
- whether any conditions were imposed on the weaker party that were not reasonably necessary to protect the legitimate interests of the stronger party
- **whether the weaker party could understand the documentation used**
- the use of undue influence, pressure or unfair tactics by the stronger party
- the requirements of applicable industry codes
- the willingness of the stronger party to negotiate
- the extent to which the parties acted in good faith.

This is not an exhaustive list and it should be noted that the court may also consider any other factor it thinks relevant.

How to avoid becoming a victim of unconscionable conduct

The following practical tips may assist businesses to avoid becoming a victim of unconscionable conduct:

- ensure all commercial agreements are in writing
- make sure you fully understand all the terms of the transaction
- do not sign any agreements without reading them carefully
- ask for plain language explanations and obtain independent professional legal or financial advice if unsure
- if you think you are being treated differently, ask why
- do not allow yourself to be talked into a deal that is wrong for you by high pressure sales tactics. Be wary of tight decision deadlines
- look for the best deal and try to negotiate the outcome you want

- be prepared to walk away from a deal that does not 'feel' right. It could be an unreasonable or oppressive deal.

How to avoid engaging in unconscionable conduct

The following practical tips may assist businesses to avoid engaging in unconscionable conduct:

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

Penalties and remedies

If the court determines that unconscionable conduct has occurred, a variety of remedies may be ordered including:

- **compensation for loss or damage**
- **financial penalties**
- having the contract declared void in whole or in part
- having the contract or arrangement varied
- a refund or performance of specified services.

"The Australian Securities and Investments Commissions Act 2001 (Cth) regulates consumer protection in relation to financial services, and covers unconscionable conduct, misleading and deceptive conduct and false or misleading representations."

Australian consumer law – unfair contract terms (new provisions since 1 July 2010)

"The unfair contract term provisions apply to 'standard form consumer contracts'. Standard form contracts are commonly used across a range of industries including telecommunications, utilities, domestic building and finance.

Consumers and investors enter into standard form contracts for financial products and financial services every day. Contracts for home loans, **credit cards** and client or broker agreements for example, are almost certainly standard form contracts."

"In determining whether a **term** of a consumer contract is **unfair** a court must take into account the extent to which the term is transparent (that is, expressed in reasonably plain language, legible, presented clearly and readily available to all parties), and the contract as a whole.

If a court finds that a term in a standard form consumer contract is unfair, the term is void. **This means that the term is treated as if it never existed**. However, the contract will continue to bind parties if it is capable of operating without the unfair term."

The **COMPETITION AND CONSUMER ACT 2010 - SCHEDULE 2** includes:

18 Misleading or deceptive conduct

19 Application of this Part to information providers

20 Unconscionable conduct within the meaning of the unwritten law

21 Unconscionable conduct in connection with goods or services

22 Matters the court may have regard to for the purposes of section 21

22A Presumptions relating to whether representations are misleading

Below is an extract from page 7 of "**Essential Banking Law and Practice**"

"Consumer protection in financial services: ASIC's role

The role, powers and responsibilities of ASIC are set out in the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act). They include the power to regulate unconscionable conduct and consumer protection in the financial services industry, contained in Part 2 Division 2. It is important to be aware that the consumer protection provisions contained in Part IVA and Part V of the Trade Practices Act 1974 (Cth) (Trade Practices Act) no longer apply to financial services.²² This means that when considering bringing claims for misleading or deceptive conduct or unconscionable conduct, you will need to refer to and plead the relevant provisions in the ASIC Act. For example, the prohibition against misleading or deceptive conduct by a financial services provider is s12DA of the ASIC Act, not s52 of the Trade Practices Act."

See:

**Unfair Contract Terms - A DISCUSSION PAPER - Standing Committee of Officials of Consumer Affairs
Unfair Contract Terms Working Party - January 2004**

Discussion Paper: Unfair trading and Australia's consumer protection laws - July 2015