

The Federal Court Clarifies Unconscionable Conduct

Litigation Update

Commencing litigation against those who have engaged in unconscionable conduct is again on the radar of the Australian Competition and Consumer Commission (“ACCC”). Specifically, where the ACCC considers it to be appropriate, it will pursue litigation in circumstances where it suspects that companies have engaged in unconscionable conduct¹. A recent decision of the Federal Court of Australia, *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCA 47 (**Lux**) has provided some timely clarification on the meaning of unconscionable conduct, and how Courts will, going forward, determine whether someone has engaged in unconscionable conduct.

Lux – The Facts

Lux concerned the sale of vacuum cleaners by door-to-door salesmen. The ACCC alleged that Lux engaged in unconscionable conduct by telephoning three elderly women and offering them “free maintenance checks” on their vacuum cleaners. After making an appointment, a Lux sales agent attended their houses and allegedly engaged in “pressure selling” techniques for extended periods of time in order to sell them a new vacuum cleaner. In essence, the maintenance checks would lead seamlessly to the creation of an apparent need for a replacement of their vacuum cleaners. The ACCC alleged that the telephone call offering a free maintenance check was a deceptive tactic in order for the sales representatives to gain access to the consumers’ homes. In the course of the home visits, each of the women eventually purchased a new vacuum cleaner for \$1,999 or more.

At first instance, the trial judge dismissed the ACCC proceedings finding the conduct of Lux was on the whole, “quite benign”, and did not possess the required degree of “moral tainting.” His Honour found that the elderly consumers were not in a subordinate

Who does this affect?

- Anyone who provides goods or services to another person. Particularly business – consumer transactions and transactions between businesses.

Article Highlights

- The ACCC continues to target unconscionable conduct as an enforcement priority.
- The Federal Court provides guidance on the prohibition on unconscionable conduct under the Australian Consumer Law.
- “Cooling off” periods under a contract may not ameliorate unconscionable conduct that has occurred at the time the person entered into a contract.

¹ <http://www.accc.gov.au/media-release/full-federal-court-declares-lux-conduct-unconscionable>



bargaining position, finding that the consumers were of “no-nonsense,” “not pliable” and “of her own mind”. In addition, His Honour considered that the length of time the sales representatives remained in the consumers’ homes was nothing more than an irritation, and did not constitute unfair or pressure sale tactics. He found that the techniques used by Lux were conventional and traditional and that the consumers would have been aware of such tactics. The existence of the “cooling off period” in the contract of sale, which permitted the customers to cancel any purchase during this period, was also a relevant factor in negating any risk of unconscionable conduct.

ACCC appealed the decision, contending that the Judge had set the bar too high for conduct that ought to be deemed unconscionable.

The Decision

The Full Federal Court allowed the appeal by the ACCC, and found that Lux had, in all of the circumstances, acted unconscionably. In delivering this finding, the Court clarified certain aspects of the prohibition of unconscionable conduct under the Australian Consumer Law (“ACL”). The Court considered section 21 of the ACL in the context of the conduct of the sales representatives occurring after 2011. Section 21 provides that a person must not in trade or commerce, in connection with the supply of goods or services to another person, engage in conduct that is in all the circumstances unconscionable. Section 21(2) provides a list of factors that a court may have regard to in determining whether a supplier has contravened the section. These include, among other things:

- a) the relative strengths of the bargaining position of the supplier to the consumer;
- b) whether the consumer was able to understand any documents relating to the supply of the goods or services; and
- c) whether undue influence, pressure or unfair tactics were exerted.

As a starting point, unconscionable conduct will not be assessed in a vacuum (sorry- we couldn’t resist!). It is to be considered by reference to what the Court described as the “norms of society”, and the Court’s assessment of the values attached to those norms. Other relevant statutory provisions may guide the Court’s assessment of these values. Applied to the facts in Lux, the Court considered that the Lux representatives would be expected – by reference to social norms of society – to act honestly, fairly and without deception.

In the Full Federal Court’s view, the conduct of the Lux was unconscionable because it was incumbent on them to disclose to the consumer that the **primary** purpose of the proposed home visit was to sell vacuum cleaners, rather than to conduct maintenance checks. The fact that the Lux representatives would have actually conducted maintenance checks (as was represented) was, in many respects, an immaterial consideration. In the Full Federal Court’s view, the trial judge ought to have afforded more weight to the fact that the representatives’ failure to comprehensively disclose the underlying purpose and motivation effectively deprived the potential consumers of a meaningful opportunity to decline the sales representative entry to their homes.

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Further, the Court found that the conduct of the sales representatives could readily be characterised as “pressure selling”, in that the sellers had assumed a real position of strength when they remained in the house for an extended period of time. The fact that the assumption of this superior bargaining position stemmed from the deception from the initial contact with the consumers, as outlined above, further reinforced the Court’s finding that the Lux representatives had acted unconscionably.

Of significance is the limited value the Court placed on the fact that each of the relevant contracts of sale had a “cooling off period”. The Court considered that the existence of such a clause was no bar to a finding against Lux, and would afford no relief or otherwise make good what would have been objectively unconscionable conduct.

Practical lessons

The decision is instructive on a number of levels. From an organisational perspective, the key priority is to ensure that the conduct of its sales representatives will be held to an objectively high – and socially acceptable – standard. In light of the approach and analysis adopted by the Courts in construing what precisely constitutes unconscionable conduct, it would be unwise for any company to simply take for granted the fact that sales techniques will not contravene the ACL if they have traditionally been accepted as industry practice. Further, it is evident from the decision that what the Courts will scrutinise carefully is the conduct of the business or its representative, rather than the effect on the consumer. This is significant, in that it is no defence (or will, at most, be a weak defence) to assert that a more resilient customer would not have been misled, deceived or otherwise adversely affected by the conduct complained of.

Further, statutory cooling off clauses in sales contracts will apparently offer little to no relief in defending a claim of unconscionable conduct. Further, the ACL offers a wide scope for a Court to find the presence of unconscionable conduct in commercial dealings. From Lux, it would seem that a high degree of moral turpitude may not necessarily be a prerequisite to a finding of unconscionable conduct. The approach adopted by the Full Federal Court seems to be a fairly general “objective unfairness” test, governed by what would constitute acceptable standards of commercial dealings. So, in defending a claim of unconscionable conduct under this approach, it would seem prudent for organisations to reconsider whether their marketing techniques can be reasonably justified objectively, and to ensure that its employees or agents pay due regard to each of the factors prescribed in section 21(2) of the ACL.

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