
Fair Trading Act and unconscionable conduct

Change for businesses

Aotearoa New Zealand has joined Australia in legislating against unconscionable conduct by making a number of changes to the Fair Trading Act 1986. These changes came into force on 16 August 2022, prohibiting unconscionable conduct by businesses in trade towards other businesses and/or individuals.

The new prohibitions apply to a range of business activities, including pricing, sales techniques and advertising.

The Commerce Commission's guidance describes "unconscionable conduct" as conduct or a business activity that is a "substantial" departure from New Zealand's generally accepted or expected standards of business conduct: and conduct that "obviously" departs from what is to be expected from persons acting in good commercial conscience.

Interestingly, the threshold for "substantial" or "obvious" departure is relatively high and we are yet to see how the courts here will apply it in assessing unconscionability.

The Law

Section 7(1) of the Fair Trading Act 1986 states that the courts may make a finding of unconscionable conduct against a person in trade whether or not:

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

Under section 8(1), the courts may have regard to certain matters in deciding whether a person's conduct is unconscionable, including:

- the relative bargaining strength of the parties;
- the extent to which the parties acted in good faith;
- the extent to which the affected party could protect their interest;
- whether the affected party could understand the documents;
- the use of undue influence, pressure or unfair tactics; and
- whether any adverse impacts or risks to the affected party's interests were explained.

Ultimately, the courts' assessment of these matters will be influenced by any other relevant factors, the specific facts of the case before them: and what is fair, just and reasonable in the overall

circumstances of the case.

New Zealand businesses can take lessons from Australia...

Until New Zealand courts have considered these issues, lessons can be taken from the Australian experience. Below are some examples of conduct or behaviour that have been found to be unconscionable by the Australian courts in:

- **deception and unconscionable sales techniques** (particularly where the affected party is vulnerable) e.g. the sale of expensive vacuum cleaners, by creating a sense of obligation to buy, to elderly who did not want or need the cleaners;
- **misstatements, non-disclosure of information, threats and intimidation for unilateral profit gouging** e.g. where a franchisor demanded a 50% fee increase from franchisees for access to a national telephone number which the franchisees relied on to receive consumer inquiries and work, not only requiring existing franchisees to vary their franchise agreements accordingly but also disconnecting franchisees who did not pay the increased fee;
- **false advertising, taking advantage and unconscionable sales techniques** e.g. an online education provider enticed students to enrol in full-time courses with claims the courses were free and with offers of free laptops, but they were enrolled under a student loan scheme and left with large debts. The company did not assess the students' suitability for the courses including their language, literacy and numeracy skills and students were unlikely to complete the course. The company also paid large commissions to salespeople who they did not train and monitor.

What to do

While the New Zealand courts develop their own jurisprudence around what is and isn't unconscionable, we recommend businesses play it safe, always asking themselves "what is reasonable and fair here". Consider the section 8(1) list of matters in relation to any marketing or sales initiative, any negotiating conduct or any contracting that could lead to customers or others you engage with incurring an obligation to you or being potentially misled.

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