

3 Steps to Statutory Unconscionable Conduct

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Statutory Unconscionability

Australian Consumer Law

21 Unconscionable conduct in connection with goods or services

- (1) A person must not, in trade or commerce, in connection with:
- (a) the supply or possible supply of goods or services to a person; or
 - (b) the acquisition or possible acquisition of goods or services from a person;
- engage in conduct that is, in all the circumstances, unconscionable.

...

- (4) It is the intention of the Parliament that:
- (a) this section is not limited by the unwritten law relating to unconscionable conduct; and

...

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Statutory Unconscionability

ASIC Act 2001

12CB Unconscionable conduct in connection with ~~goods or~~ financial services

- (1) A person must not, in trade or commerce, in connection with:
- (a) the supply or possible supply of ~~goods or~~ financial services to a person; or
 - (b) the acquisition or possible acquisition of ~~goods or~~ financial services from a person;
- engage in conduct that is, in all the circumstances, unconscionable.

...

- (4) It is the intention of the Parliament that:
- (a) this section is not limited by the unwritten law relating to unconscionable conduct; and

...

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Statutory Unconscionability

Retail Leases Act 2003 (Vic)

77/78 Unconscionable conduct of a landlord

(1) A landlord/tenant under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.

...

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Unconscionable Conduct?

Predation, exploitation, taking advantage of vulnerability

“a high level of moral obloquy”: per *Spigelman CJ A-G NSW v Worlds Best Holdings Ltd* (2005)

“No regard for conscience; irreconcilable with what is right and reasonable”: *Qantas v Cameron* (1996)

involving a “a pejorative moral judgment”: per Lindgren in *Qantas*

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Unconscionable Conduct?

“the utility of the concept of unconscionability to a lawyer [can be compared] with the utility of the concept of a small brown bird to an ornithologist. . .”

per Edelman J, *ASIC v Kobelt* [2019] HCA 18 at [267]

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3 Questions

1. What is the standard of conduct required (i.e. the “normative standard”)?
2. What (precisely) is the impugned conduct?
3. How does the conduct compare to the normative standard?

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Preliminary points

- Conduct - not the consequences
 - See *ACCC v Quantum Housing Group Pty Ltd* [2021] FCAFC 40

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Preliminary points

- Conduct - not the consequences
 - See *ACCC v Quantum Housing Group Pty Ltd* [2021] FCAFC 40
- Not limited by the “unwritten law” relating to UC: s.21(4)(a)

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What is “Unconscionable Conduct”

- No definition in the Act (or anywhere else)
- 12 matters a court MUST have regard to in s.22
- None of them are determinative

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The Normative Standard

ACCC v Lux Distributors (2013)

- “The task of the Court is the evaluation of the facts by reference to a normative standard of conscience.”
- ...
- “recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure.” (at [23])

“A deceptive ruse” = unconscionable

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The Normative Standard

Paciocco v ANZ Bank (2016)

- Accepted Allsop CJ’s reasoning in FCAFC:
“The task involved is not the choice of synonyms [i.e. moral obloquy]; rather, it is to identify and apply the values and norms that Parliament must be taken to have considered relevant to the assessment of unconscionability” (at [262])
- ...
- “The values and norms that informed the equitable notion of conscience included honesty, fraud, surprise, mistake and hardship. The broad scope of these notions, extending beyond deceit and misrepresentation at common law, can be seen in the principles of unconscionable conduct picked up in statutory form by [the legislation].” (at [281])

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The Impugned Conduct

ASIC v Kobelt [2019] HCA 18

- Indigenous customers
- Book-up* system of credit
 - Surrender of cards and PIN
 - Withdrawal of 100% of funds before customer could access
 - Anangu were greatly disadvantaged
 - System made Anangu customers dependant on Nobbys for basic necessities

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Evaluating the conduct

ASIC v Kobelt [2019] HCA 18

Normative standards of the *National Consumer Credit Protection Act 2009* (including the National Credit Code)

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No need for vulnerability or exploitation

ACCC v Quantum Housing Group Pty Ltd [2021] FCAFC 40 (19 March 2021)

"Surely to predate on vulnerable consumers or small business people is unconscionable. But why is it not also unconscionable to act in a way that is systematically dishonest, entirely in bad faith in undermining a bargain, involving misrepresentation, commercial bullying or pressure and sharp practice, using a superior bargaining position, behaving contrary to an industry code, using significant market power in a way to extract an undisclosed benefit that will harm others who are commercially related to the counterparty? The proposition that such conduct (not all of which might be seen to be present here) is not unconscionable by an Australian statutory business standard of conscience because the counterparty to the business transaction suffered from no relevant pre-existing disadvantage, disability or vulnerability (other than, perhaps, having a decent degree of trust and faith in its business counterparty's honesty and good faith) is difficult to accept ..."

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Conclusion

Not a process of intuitive synthesis or personal moral judgment

1. What is the standard of conduct required (i.e. the "normative standard")?
2. What (precisely) is the impugned conduct?
3. How does the conduct compare to the normative standard?
