

Competition Law News

ACCC wins unconscionable conduct appeal against Lux

WHAT YOU NEED TO KNOW

- The Full Federal Court has declared that Lux Distributors Pty Ltd (**Lux**) engaged in illegal unconscionable conduct when its door-to-door sales representative sold vacuum cleaners to elderly, vulnerable customers in 2010 and 2011.
- This is an important case in the developing law on what constitutes illegal "unconscionable conduct" in connection with the supply, or possible supply of goods to both consumers, and other businesses under the Australian Consumer Law.
- Evaluating "unconscionable conduct" involves making a moral judgment, based on community values and expectations. "Notions of justice and fairness are central, as are vulnerability, advantage and honesty."
- The case emphasises the broad range of factors a court may consider when assessing unconscionable conduct cases – in both consumer and business transactions.

Overview

On 15 August 2013, the Full Federal Court declared that Lux Distributors Pty Ltd (**Lux**) engaged in illegal unconscionable conduct when its door-to-door sales representative sold vacuum cleaners to elderly, vulnerable customers in 2010 and 2011, setting aside the first instance decision of Justice Jessup.

While this case concerned unconscionable conduct by a business towards consumers, the same law applies to supply or possible supply of goods or services from one business to another. The decision is also relevant to the developing law of unconscionable conduct generally.

In setting aside the decision, the Full Federal Court had regard to "the normative standard of conscience". This may be shaped by the legislature, but also "values, norms and community expectations can develop and change over time". The Court held that unconscionability "means something not done in good conscience ... it is conduct against conscience by reference to the norms of society ... notions of justice and fairness are central, as are vulnerability, advantage and honesty". It should reflect the recognised legislative and broader societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure.

Importantly, the Court did not take up (and may be inferred as having set to one side) the threshold referred to in previous authorities, that unconscionable conduct requires "high moral obloquy".

The appeal was limited to three of the five alleged instances of unconscionable conduct addressed in the first instance decision.

Reasoning

The Full Federal Court identified several key errors in the approach of the primary judge in deciding that Lux's conduct did not amount to unconscionable conduct. Those errors included:

- a) that the primary judge gave little weight to the fact that the opportunity to enter the consumers' homes was gained by deception, under the ruse of a "free maintenance check", and deliberately not disclosing the true purpose of the visit;
- b) that the primary judge failed to give sufficient weight to the effect of the deception, that unfairly deprived the consumers of a meaningful opportunity to decline to have the Lux representatives enter their homes;
- c) that the primary judge wrongly assessed the relative bargaining strengths of the parties, in that the opportunity for the Lux representatives to enter and remain in the consumers' homes created

a position of strength, which was obtained by deception;

- d) that the primary judge failed to give weight to the conduct of the Lux representatives having contravened State direct selling legislation designed to ensure fairness in the context of door to door selling; and
- e) that the primary judge gave too much weight to the cooling-off periods in the contracts, given that the evidence suggested that the consumers were not aware of their rights.

The obligation to act honestly, fairly and without deception

Significantly, the Court emphasised that evaluating "unconscionability" involves evaluating the facts against a "normative standard of conscience ... permeated with accepted, and acceptable, community values". Those values and expectations include that consumers will be dealt with honestly, fairly and without deception or unfair pressure.

The Court paid particular attention to the fact that skilled sale people had used a deceptive tactic to gain entry to each customer's home.

In setting aside the decision, the Court observed that the norms and standards of today require businesses who wish to gain access to the homes of people for extended selling opportunities to exhibit honesty and openness in what they are doing and not to apply deceptive ruses to gain entry.

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Lessons

The Full Court's decision points to the breadth of factors to be taken into account in considering unconscionable conduct under the *Competition and Consumer Act*. Rather than point to the presence of "high moral obloquy" (per previous authorities), the Court has, in our view, grounded its reasoning in the ordinary meaning of the word "unconscionable". As noted above, this "means something not done in good conscience ... it is conduct against conscience by reference to the norms of society ... notions of justice and fairness are central, as are vulnerability, advantage and honesty".

In taking this approach, the Full Court has made clear that assessing unconscionable conduct requires reference to moral or normative standards, broadly cast. Unfairness will be an element, as may be other factors such as those mentioned expressly by the Court (justice, vulnerability, advantage and honesty) – no prescriptive threshold or attribute has been identified – rather a broad-ranging consideration of the conduct is to be made in each case. Businesses should take this into account in both dealings with consumers, and dealings with other businesses.

First instance decision

Details of the first instance decision are set out in our earlier [Competition Law News dated 22 March 2013](#).

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