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Commercial Law e-alert

No bullying in business in Australia: unconscionable conduct regime to be broadened

What does this mean for you and your business?

We describe below the changes expected to come in on 1 January 2012 to the *Australian Consumer Law (ACL)* provisions outlawing unconscionable conduct (UC). These changes are designed to cast the net wider and will affect a broader class of conduct than before. Despite the fact they are in the ACL, all businesses, large and small, (except for publicly listed companies) will benefit from these changes, as well as consumers. If you have experienced attitudes and tactics in your business dealings that are highhanded or unfair, they may well be unconscionable and therefore unlawful. Please contact us if you have been bullied in business, (or as a consumer, by a business) to learn more about your rights.

Unconscionable conduct in the ACL now

At the moment sections 21 (UC in consumer dealings) and 22 (UC in business dealings) of the ACL each incorporate a "grey list" of examples of UC which a court may consider when deciding whether conduct has been unconscionable.

In 2008, an inquiry by the Senate Economics Committee recommended changes be made to clarify the law in relation to UC, but last year's federal election interrupted the passing of this new law. On 15 June a replacement bill was introduced and is expected to become law by 1 January 2012.

The changes

The new law will:

- Introduce a list of interpretive principles to assist the courts in applying the law in relation to UC, which is expected to broaden the definition of UC; and
- Merge sections 21 and 22 of the ACL into one section so that businesses are given the same rights as consumers in this area, and vice versa.

The Minister's second reading speech explains that the new interpretive principles will ensure the grey list will not operate to narrow the application of these provisions to certain factual scenarios. In summary, the interpretive principles and amendments clarify the following:

- the ACL UC provisions will have a wider application than the existing common law and equitable principles;
- UC refers to not only conduct prior to the formation of a contract, but also any conduct during the entire term of the contract, including the way a contract is renewed, renegotiated or terminated;
- UC can arise due to the effect of patterns of behaviour over a period of time, and does not need to be an individual act or transaction;
- a party does not need to be particularly vulnerable or suffer a special disadvantage for there to be UC; and
- the meaning of UC is to be interpreted in the same manner, regardless of whether the victim is a business or consumer.

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