

Unconscionable Conduct under the ACL as a Cause of Action Against Non-Corporate Commercial Landlords in Tasmania

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1. When preparing a claim against a landlord on behalf of a tenant, litigation practitioners should consider the potential application of section 21 of the *Australian Consumer Law*. In all the circumstances, there may have been conduct by the landlord that was “not in good conscience”, “that which was irreconcilable with what is right or reasonable” and done with “high level of moral obloquy”.¹ Given the wide discretionary powers for orders under section 237 of the *Australian Consumer Law*, section 21 should be on the litigator’s checklist.²
2. Section 21 of the ACL applies not only to consumer transactions but also to business-to-business (other than supply to listed public companies) transactions.³ By virtue of section 10(1) of the *Australian Consumer Law (Tasmania) Act 2010* (Tas.) which commenced on 1 January 2011⁴, the text of the *Australian Consumer Law* contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) applies as state law to and in relation to persons carrying on business within the state of Tasmania. So it is not only constitutional corporations (trading) but also individuals and partnerships that are caught by the concept of statutory unconscionable conduct, which is a much wider concept than that in general law. Section 21 is intended to build on and not be constrained by common law or equitable case authorities.⁵
3. A Landlord of a commercial property carries on the enterprise of leasing the property on a commercial basis and as a ‘business activity’. It follows that conduct of a landlord in relation to the leasing of commercial property is in ‘trade or commerce’.⁶
4. The definition of ‘services’ in the *Australian Consumer Law* includes ‘any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce.’⁷ The granting of a lease of a commercial property amounts to the provision of a service for the purposes of section 21(1).⁸ It follows that both corporate and non-corporate commercial property owners are prohibited from engaging, in connection with the leasing, including the possible granting of a further term of a lease, in conduct that is, in all the circumstances, unconscionable in contraventions of section 21 of the *Australian Consumer Law*. The only difference is jurisdictional. The state courts apply the *Australian Consumer Law* (Tas.) “borrowing written law from the Feds” whereas they exercise federal jurisdiction applying the *Australian Consumer Law* (Cth.) in the cases against trading corporations. This is perhaps only important to consider when deciding whether to file proceedings in a state or federal court.

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5. When drafting the unconscionable conduct allegations, the practitioner should turn his or her mind to the matters listed in section 22 of the *Australian Consumer Law*. Without limiting the matters that may be taken into account, section 22 contains a list of the matters a court may take into account when determining whether conduct is unconscionable under section 21. In a leasing context the matters may be paraphrased as:

- (a) the relative strengths of the bargaining positions of the landlord and the tenant; and
- (b) whether, as a result of conduct engaged in by the landlord, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the landlord; and
- (c) whether the tenant was able to understand any documents relating to the supply or possible supply of the lease; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the tenant or a person acting on behalf of the tenant by the landlord or a person acting on behalf of the landlord in relation to the supply or possible supply of the lease; and
- (e) the requirements of any applicable industry code; and
- (f) the requirements of any other industry code, if the tenant acted on the reasonable belief that the landlord would comply with that code; and
- (g) the extent to which the landlord unreasonably failed to disclose to the tenant:
 - (i) any intended conduct of the landlord that might affect the interests of the tenant; and
 - (ii) any risks to the tenant arising from the landlord's intended conduct (being risks that the landlord should have foreseen would not be apparent to the tenant); and
- (h) if there is a contract between the landlord and the tenant for the supply of the lease:
 - (i) the extent to which the landlord was willing to negotiate the terms and conditions of the contract with the tenant; and
 - (ii) the terms and conditions of the contract; and
 - (iii) the conduct of the landlord and the tenant in complying with the terms and conditions of the contract; and
 - (iv) any conduct that the landlord or the tenant engaged in, in connection with their commercial relationship, after they entered into the contract; and
- (i) without limiting paragraph (j), whether the landlord has a contractual right to vary unilaterally a term or condition of a contract between the landlord and the tenant for the lease; and
- (j) the extent to which the landlord and the tenant acted in good faith.

6. Whilst crafting their case, practitioners should also bear in mind the recent words of the Chief Justice of the Federal Court in *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50 at [304]. Allsop CJ said:

In any given case, the conclusion as to what is, or is not, against conscience may be contestable. That is inevitable given that the standard is based on a broad expression of values and norms. Thus, any agonised search for definition, for distilled epitomes or for shorthands of broad social norms and general principles will lead to disappointment, to a sense of futility, and to the likelihood of error. The evaluation is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules. It is an evaluation of business behaviour (conduct in trade or commerce) as to whether it warrants the characterisation of unconscionable, in the light of the values and norms recognised by the statute.

¹ *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; (2003) 214 CLR 51 at [42]; *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226; (2005) 148 FCR 132; *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90; [2013] ATPR 42-447 at [41]; *Hurley v McDonald's Australia Ltd* [1999] FCA 1728; (2000) ATPR 41-741 at [22] and [31] cited with approval in *Ange v First East Auction Holdings Pty Ltd* [2011] VSCA 335; (2011) 284 ALR 638 at [96] and [104] and followed in *Australian Competition and Consumer Commission v Simply No-Knead Franchising Pty Ltd* [2000] FCA 1365; (2000) 104 FCR 253 at [30]; *Australian Competition and Consumer Commission v 4WD Systems Pty Ltd* [2003] FCA 850; (2003) 200 ALR 491 at [183]- [185]; *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 2)* [2009] FCA 17; (2009) 253 ALR 324 at [113] and *Perdaman Chemicals and Fertilisers Pty Ltd v ICICI Bank Ltd* [2013] FCA 175 at [22]; *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [291]; *APF Properties Pty Ltd v Robinson Investments Capital Pty Ltd* [2013] TASSC 59 per Blow CJ at [32] to [37].

² See also *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas.) prohibits “harsh, unjust or unconscionable” conduct carrying a fine but does not go as far as to provide a cause of action of unconscionable conduct outside of the common law and laws of equity.

³ See *Competition and Consumer Legislation Amendment Bill 2011* Explanatory Memorandum. The amendments unified section 21 and section 22 in relation to unconscionable conduct in business transactions.

⁴ *Proclamation under the Australian Consumer Law (Tasmania) Act 2010*

⁵ See sub-section 21(4).

⁶ See section 2 of the *Australian Consumer Law* definition of ‘trade or commerce’.

⁷ See section 2 of the *Australian Consumer Law* definition of ‘services’.

⁸ See *APF Properties Pty Ltd v Robinson Investments Capital Pty Ltd* [2013] TASSC 59

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