

COMPETITION & CONSUMER

LAW AMID THE PANDEMIC:

YOUR GUIDE TO AVOIDING VIRAL CONFUSION

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What does COVID-19 mean for your business?

This alert examines the key competition and consumer laws that businesses may encounter during this time, discusses how the ACCC, the Courts and the Government may approach the unfolding situation, and provides suggestions on how to navigate unexpected challenges, including:

- How can competitors work alongside each other to meet the community's needs without legal risk?
- What will happen if a business drastically increases its prices for scarce goods?
- When is it fair to rely on cancellation clauses in contracts, and what is a business required to do if its customers want refunds?
- What can and can't a business say when selling, promoting and comparing its products?

Depending on your industry, you may have already been impacted by the effects of COVID-19— for example, by a spike in the number of customers calling in relation to their rights under the consumer guarantees, or by 'supply shock' up and down the chain.

While these unprecedented and challenging times are placing profound pressure on the operations and financial position (even solvency in some instances) of businesses, it's important to remember that businesses are not exempt from complying with the *Competition and Consumer Act 2010* (Cth) (**CCA**) and the Australian Consumer Law (**ACL**). Businesses need to be acutely aware of their obligations under the CCA and the ACL with respect to their dealings with competitors, consumers and other parties, even during this health crisis.

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Cartel conduct and concerted practices

The COVID-19 pandemic is creating pressure across the economy, with critical sectors looking to find the best way to continue to service the community. In some instances, this can be most effectively achieved by market participants working together, giving rise to cartel conduct risk.

On 19 March 2020, the UK government temporarily relaxed competition laws in response to COVID-19 by amending legislation to allow competing supermarkets to **“work together to feed the nation”**¹. This move allows retailers to engage in conduct which would otherwise contravene the anti-competitive conduct provisions in the UK Competition Act 1998, including sharing data with each other on stock levels, cooperating to keep shops open, pooling staff to meet demand or sharing distribution depots and delivery vans.

Businesses have taken the lead in Australia, with the ACCC granting interim authorisation to supermarket operators to **“coordinate immediately to ensure consumers have reliable and fair access to groceries during the COVID-19 pandemic”**².

The interim authorisation extends beyond the coordination of acquisition and supply activities or retail products to activities to ensure fair access to products and in particular greater access those most in need (including the elderly and disadvantaged) and those in rural areas. The interim authorisation does not, however, allow supermarkets to agree on retail prices for products.

On 20 March 2020, the ACCC also provided urgent interim authorisation to allow the Australian Banking Association and banks to work together to implement a small business relief package, which will allow for the deferral of principal and interest repayments by small businesses impacted by the COVID-19 crisis. At the time, ACCC Chairman, Mr Rod Sims stated:

“The ACCC recognises the significant financial hardship many Australian small businesses and their staff are experiencing as a result of this unprecedented crisis.”

Mr Sims also acknowledged the urgency of the situation, noting that the relief package would not only enable banks to quickly provide relief to impacted businesses, but would also allow them to keep employing their staff³.

Most recently, and perhaps most expectedly, on 25 March 2020 the ACCC granted interim authorisation to the Medical Technology Association of Australia (MTAA) on behalf of itself, its members and other relevant businesses to implement a coordinated strategy in relation to the supply of medical equipment and supplies in response to the coronavirus.

The ACCC’s conduct in promptly authorising the supermarkets’, banks’ and MTAA’s proposals, which would otherwise be prohibited under certain competition provisions of the CCA, indicates that the ACCC is taking a pragmatic and flexible approach to responding to the outbreak. On 27 March 2020, the ACCC issued a statement which outlined its response to COVID-19⁴. Relevantly, the ACCC stated that it “will continue to actively engage with governments and businesses about potential authorisations that support coordination between competitors that is ordinarily prohibited but which is necessary and in the public interest at this time”, as evidenced by the recent interim authorisation granted to retail supermarkets. Further, it is clear that the ACCC is alive to the urgency of such applications and will act upon them expeditiously. The ACCC also indicated in its statement that

any potential authorisations “will be progressed very quickly.” The need for coordination in some sectors has also been recognised by the Federal Government, with the establishment of the National COVID-19 Coordination Commission to support coordination between public and private sector entities.

Notwithstanding the above, it is important for businesses to remember that specific prohibitions relating to cartel conduct and ‘concerted practices’ under the CCA will continue to apply even during the current crisis, unless an existing exemption applies or specific statutory protection is obtained.

In order to comply with these provisions, businesses should avoid:

- Entering into any agreement or arrangement (formal or informal) with a competitor – this includes agreeing on prices, market sharing, restricting outputs or rigging bids; or
- Sharing commercially sensitive information with a competitor. This means that businesses should avoid disclosing information to competitors such as details of the price of its products, where it sells its products, to whom it sells its products, specific tenders or the quantity of the product offered. This also captures not making such information available in a new way, such as more quickly, in a form which can be more readily processed or in a manner which makes the information more reliable.

This is the case **even where there are potential public benefits in doing so**, such as improvements to continuity of supply, or positive public health outcomes. In the





Cartel conduct and concerted practices (cont'd)

absence of authorisation by the ACCC, unless the conduct is otherwise exempt from the cartel laws, a business may be in breach of the CCA if it engages in such conduct. In participating in any industry-led response to the outbreak, businesses should tread particularly carefully – for example, when attending industry and professional association meetings, or any gatherings that involve one or more competitors.

Having said that, there are exceptions to these rules.

First, sharing information which is **not** commercially sensitive with a competitor is less likely to be viewed as problematic from a competition law perspective. For example, details of remote working arrangements or details of internal policies regarding “social distancing” within the office can likely be disclosed to a competitor. A detailed record should be taken of any information provided to a competitor. To the extent that you are unsure as to whether a specific type of information is commercially sensitive, you should obtain legal advice before disclosing it to a competitor.

Second, as flagged above, some businesses, particularly those in industries which are experiencing an unprecedented level of demand, may find that there are potential synergies to be gained from collaborating with a competitor that could benefit the community more broadly. For example, in order to cope with excess demand, it may be more efficient to coordinate your business’ delivery trucks with a competitor’s delivery trucks to ensure timeliness of supply. In such circumstances, you should seek legal advice to discuss your options **before** approaching any

competitor with a proposal (or responding to any proposal from a competitor), as such conduct is potentially in breach of the CCA.

As seen in the examples above, a temporary exemption may be granted by the ACCC (in the form of an interim authorisation) where it is satisfied that the proposed practice would not substantially lessen competition or that the

likely public benefit outweighs the likely public detriment. While there may be good arguments to support the proposition that a proposed practice will result in public benefits, your business must obtain any authorisation before it engages in the said conduct given authorisations apply to future conduct only and not retrospectively.



¹ UK Government, Supermarkets to join forces to feed the nation, Press release, 19 March 2020: <https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation> (accessed 23 March 2020)

² ACCC, Supermarkets to work together to ensure grocery supply, Media release, 24 March 2020: <https://www.accc.gov.au/media-release/supermarkets-to-work-together-to-ensure-grocery-supply> (accessed 24 March 2020)

³ ACCC, Australian Banking Association small business relief package, Media release, 20 March 2020: <https://www.accc.gov.au/media-release/australian-banking-association-small-business-relief-package> (accessed 23 March 2020)

⁴ ACCC, ACCC response to COVID-19 pandemic, Media release, 27 March 2020: <https://www.accc.gov.au/media-release/accc-response-to-covid-19-pandemic> (accessed 27 March 2020).





Price gouging

In free market economies, where the basic economic laws of supply and demand interact to determine prices and quantities, opportunism is to be expected, even during a global public health emergency. We have already seen instances of businesses attempting to profiteer from the COVID-19 crisis at the expense of consumers. Amazon, for example, has in recent weeks removed **“tens of thousands”** of offers (including face masks) from its website that it considers were unfairly priced.⁵

Ordinarily, consumers are **“empowered to choose to avoid purchasing from retailers who are price gouging or otherwise offering uncompetitive prices”**.⁶ In these extraordinary circumstances, however, that ‘luxury’ is diminished where there is limited supply and intense demand.

While price gouging behaviour may be considered unfair and even unethical in the present climate, it is not expressly prohibited by the CCA or the ACL. Nevertheless, the ACCC has a few cards up its sleeve which businesses should be aware of:

1. The ACCC has indicated that, as part of its response to COVID-19, it will prioritise its activities in relation to price gouging conduct. Though not illegal, if a business is making misleading claims about the reason for price increases, it will be in breach of the ACL. For example, if an electricity retailer informed consumers that it was increasing the price of electricity on the basis of a surge in wholesale costs, when in fact the increase was implemented for the purpose of maximising profit (by leveraging off the temporary surge in demand from consumers). The ACCC has also indicated that **“extreme price gouging for essential products may amount to unconscionable conduct.”** Statutory unconscionability is explored further below.

2. The ACCC has also made it clear that it will continue to focus on affordability issues in sectors such as energy, communications and petrol, particularly in a time of growing unemployment. The ACCC will draw attention to those sectors where it considers **“excessive pricing”** to have occurred and, where necessary, will ‘name and shame’ specific businesses engaging in this conduct. Recent press reports indicate that the ACCC has launched a new team to look out for **“price gouging and consumer rip offs as the economy faces a flood of insolvencies and massive diminution in competition”**.⁷

Businesses should expect the ACCC to be publicly pointing the finger at brands across all industries that are engaging in questionable pricing practices during the present outbreak. While many businesses have taken their corporate social responsibility very seriously during this unprecedented time, and have gone above and beyond to help their employees and customers, the reputational consequences of the ACCC identifying those engaging in price-gouging could be serious.

3. The Treasurer or other responsible Minister, or the ACCC with the relevant Minister’s approval, is entitled to declare specific goods or services for the purpose of requiring price increases to be approved by the ACCC under sections 95X and 95Z of the CCA. This power has not been widely used in recent years, with the latest declaration made in 2015, and the ACCC recently stated that **“it has no role in setting prices”**. While this makes it hard to see the ACCC deploying this power to directly regulate the prices of face masks and hand sanitisers, it is a tool that remains available to Government.

4. The ACCC previously recommended that government introduce an ‘unfair trading practices’ prohibition (including in the Digital Platforms Inquiry final report and the Customer Loyalty Schemes final report), arguing that the ACL prohibitions on unconscionable conduct, misleading or deceptive conduct, and unfair contract terms are limited in their ability to prevent conduct **“which has the potential for significant consumer harm.”** While work is already underway through Consumer Affairs Australia and New Zealand on exploring how an unfair trading practices prohibition could be adopted in Australia, any widespread price gouging in light of the COVID-19 emergency may provide an added incentive, from a public policy perspective, to introduce such a legislative amendment. In fact UK Prime Minister, Boris Johnson, is being urged to bring in emergency laws to prevent **“black market profiteers”** from cashing in on the coronavirus crisis.⁸

⁵ AFR, 2000pc mark up: Online price gouging on sanitiser, masks, 4 March 2020: <https://www.afr.com/companies/retail/amazon-battles-price-gouging-on-coronavirus-products-20200304-p546rz> (accessed 19 March 2020)

⁶ Rod Sims, Populism and the CCA, transcript of speech delivered to RBB Economics conference, 30 November 2017: <https://www.accc.gov.au/speech/populism-and-the-cca> (accessed 19 March 2020)

⁷ Adam Creighton, The Australian, ACCC launches team to crackdown on price gouging, consumer rip offs amid coronavirus shutdowns, 22 March 2020: <https://www.theaustralian.com.au/business/accc-launches-team-to-crackdown-on-price-gouging-consumer-rip-offs-amid-coronavirus-shutdowns/news-story/f241782acf704f66187b4345b88f018f> (accessed 24 March 2020)

⁸ Independent, Boris Johnson urged to bring in emergency laws to stop ‘black market’ profiteering during coronavirus crisis, 18 March 2020: <https://www.independent.co.uk/news/uk/politics/coronavirus-black-market-boris-johnson-emergency-bill-a9409031.html> (accessed 19 March 2020)





Misuse of market power and predatory pricing

Suppliers, generally speaking, are free to decide for themselves with whom to deal. However, there are some important qualifications to this:

- Such decisions must be made unilaterally, and not in coordination with other companies; and
- If higher prices were found to be driven by a business withholding supply, questions could arise as to whether it is an exercise of market power. Misuse of market power is prohibited under section 46 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition.

Predatory pricing, which may also contravene section 46, is unlikely to be a prevalent issue in the immediate to medium term. In the longer-term, however, any attempts by incumbent firms with market power to sell below cost in order to destroy competition by vulnerable small businesses, who may lack the liquidity and resources to keep fighting, or to scare off potential new entrants, would certainly pique the ACCC's interest.





Consumer guarantees

Even while COVID-19 continues to spread and cause mass disruption around the world, the consumer guarantees may still apply to goods and services (such as transportation services, music concerts and sporting events) cancelled due to the virus. With the Government increasingly imposing more stringent measures to contain the virus, including shutting down **“non-essential”** services in Victoria and New South Wales, banning gatherings of over 100 persons and restricting international and domestic travel, there is no doubt that in certain circumstances businesses will be required to provide refunds or credit notes to customers.

The consumer guarantees, found in Division 1 of Part 3-2 of the ACL, apply automatically in relation to the supply of goods or services to consumers. These provisions set out the circumstances in which a business is required to provide a consumer with a remedy. Focusing on the provision of services, a person will be a **“consumer”** in relation to particular services if the amount payable is \$40,000 or less, or the services are of a kind normally acquired for personal, domestic or household use or consumption.

Except in limited circumstances, the guarantees cannot be excluded, modified or limited by contract, and any contractual term purporting to do so is void. Importantly, it is also a contravention to make false or misleading representations in relation to the existence or effect of these guarantees.

Suppliers are entitled to limit their liability to the cost of providing the service again (subject to a fairness test), other than for services ordinarily acquired for personal, domestic or household use or consumption..

If a service or event is cancelled due to COVID-19, or if it goes ahead, but in a manner different than that which was reasonably

expected by the consumer, then the business may be required to provide a remedy to the customer. This will not extend to circumstances where the supply issue was due to a cause independent of human control that occurred after the services were supplied.

Importantly, the definition of **“supply”** of services under the ACL includes the future supply of services. Therefore, if as a result of COVID-19 related issues, a business does not comply with the guarantees as to fitness for purpose or reasonable time to supply, the customer may not be able to take action against the supplier if there is a sufficient nexus between the failure to comply with the guarantees and COVID-19 (arguably, the **“cause independent of human control”**).

Remedies available to consumers may include an entitlement to consequential damages for loss or damage suffered as a result of the failure by the business to comply with the consumer guarantees if it was reasonably foreseeable that the consumer would suffer such loss or damage.

Set out below are three scenarios which may arise in the current climate and attract remedies under the consumer guarantees:

■ **Scenario 1: A consumer decides they do not wish to attend an event or wish to cancel their booking due to COVID-19**

Where a business is still providing a service, but a consumer decides to cancel their receipt of that service, this decision would likely be treated as a **‘change of mind’** and no refund under the statutory consumer guarantees would be available to the consumer. However, it is important to consider the terms and conditions of any contract between the business and the consumer, as well as any cancellation policy, as these may provide the consumer

with additional rights, including a remedy.

■ **Scenario 2: A business decides to cancel a service or event due to COVID-19 (but is not legally required to do so)**

Where a business decides to cancel a service or event, however there is no practical or legal barrier preventing them from going ahead with it (for example, where a bus company has agreed to transport 20 passengers from Melbourne to Geelong), it is likely that a remedy under the statutory consumer guarantees would be available.

Again, it is important to consider the terms and conditions of any contract between the business and the consumer, as well as any cancellation policy, as these may provide the consumer with additional rights, or instead limit the supplier’s liability to the cost of providing the service again (provided the supplier is entitled to do so under the ACL).

■ **Scenario 3: A business cancels an event or service due to Government-imposed restrictions**

Where a business is forced to cancel an event or the provision of services due to Government-imposed COVID-19 restrictions, it is unlikely that the consumer guarantees will operate to provide the customer with a remedy. In such a situation, it is more likely that the failure to comply with the guarantees could be said to have occurred only by reason of a cause independent of human control (being the outbreak of a pandemic).

The ACCC has indicated that it will update its website as new issues emerge, and in response to consumer enquiries.





Misleading or deceptive conduct, and false or misleading representations

The ACCC has already warned Australian consumers about scammers **“playing on people’s fears around coronavirus”**, and noted that the number of reports of scams is rising⁹. Some examples of scams reported to the ACCC include **“fake online stores selling products claiming to be a vaccine or cure for coronavirus, and stores selling products such as face masks and not providing the goods.”**

In its recent statement on 27 March 2020, the ACCC indicated that they will continue to raise awareness of COVID-19 scams, particularly as **“scammers adapt old methods to prey on new fears at a time when large parts of vulnerable.”**

Businesses must remember that the misleading or deceptive conduct and false or misleading representation provisions under sections 18 and 29 of the ACL are far-reaching, and are not confined to **“scams”** or **“scammers”** in the strict sense of those words and continue to apply even during this global challenge.

To this end, of particular relevance to the continually evolving COVID-19 pandemic, businesses must ensure that:

- All product descriptions are accurate and correct. Amazon claims to have removed **“1 million listings”** due to misleading product descriptions related to COVID-19;
- All claims about the efficacy of a product are substantiated by robust documentary evidence. The *Therapeutic Goods Act 1989* (Cth), as well as the Therapeutic Goods Advertising Code¹⁰, impose additional obligations on businesses advertising therapeutic goods to consumers for the prevention or treatment of novel coronavirus. The Therapeutic Goods Administration has noted that **“[c]laims such as preventing the spread of coronavirus (for example, through the use of face masks or disinfectants),**

or increasing immunity to coronavirus (for example, by taking supplements), are considered to be therapeutic use claims”.¹¹

- Misleading comparisons are not made with competitors or a competitor’s products. Comparisons should only be made with an appropriately comparable product, and care must be taken to ensure any representation does not omit any material required to make it a fair comparison (i.e. a **“half truth”** may contravene the ACL);
- They honour their cancellations or refunds policy. Mr Sims recently **“urge[d] consumers to exercise patience”** as businesses work to fulfil consumer requests for refunds and remedies in these exceptional circumstances¹²; and
- They do not make any false or misleading representations in relation to the existence or effect of the consumer guarantees.

On 27 March, the ACCC stated that, while its 2020 Compliance and Enforcement priorities remain in place, it will re-focus its efforts to those priorities of most relevance to competition and consumer issues arising from COVID-19 impact. This includes enhancing efforts to address “any behaviour by businesses **which seek to exploit the crisis either to unduly enhance their commercial position or harm consumers.”**

Relevantly, one of the ACCC’s enforcement and compliance priorities for 2020 is **“misleading conduct in relation to the sale and promotion of food products, including health and nutritional claims”**¹³. We may therefore see some ACCC activity in this space in 2020, possibly in the context of the current epidemic.

Having said that, the ACCC is responding to COVID-19 flexibly, and has acknowledged the **“severe disruption”** faced by businesses, particularly small businesses, as a result

of COVID-19. The ACCC has made it clear that it will **“factor these circumstances into its consideration of competition matters in the short term to assist businesses to remain viable in the long term.”**¹⁴

With respect to enforcement activities, the ACCC will **“carefully consider the impact on businesses already under pressure when making decisions about the scope and timing of statutory notices for the production of information and documents”** and will minimise the use of compulsory examinations. In the circumstances, it is clear that the ACCC’s approach to enforcement (for example, the scope of a s155 Notice, and the time given to a business to respond to that notice) will be informed by considerations such as the long term viability of a business **“already under pressure.”**

Businesses should be mindful that laws prohibiting unfair contract terms (UCT) will continue to apply to certain small business contracts and standard form contracts with consumers.

On 27 March 2020, the ACCC announced that it had established an internal COVID-19 Taskforce which is educating businesses on their obligations in relation to cancellations, refunds and

⁹ ACCC, Warning on COVID-19 scams, Media release, 20 March 2020: <https://www.accc.gov.au/media-release/warning-on-covid-19-scams> (accessed 20 March 2020)

¹⁰ Therapeutic Goods Administration, Therapeutic goods advertising code, 31 July 2019: <https://www.tga.gov.au/publication/therapeutic-goods-advertising-code> (accessed 23 March 2020)

¹¹ Therapeutic Goods Administration, Warning about products claiming to treat or prevent the novel coronavirus, 7 February 2020: <https://www.tga.gov.au/media-release/warning-about-products-claiming-treat-or-prevent-novel-coronavirus> (accessed 20 March 2020)

¹² ACCC, Advice on event and travel cancellations due to COVID-19, Media release, 18 March 2020: <https://www.accc.gov.au/media-release/advice-on-event-and-travel-cancellations-due-to-covid-19> (accessed 20 March 2020)

¹³ ACCC, Compliance & enforcement policy & priorities: <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities> (accessed 23 March 2020)

¹⁴ ACCC, ACCC response to COVID-19 pandemic, Media release, 27 March 2020: <https://www.accc.gov.au/media-release/accc-response-to-covid-19-pandemic> (accessed 27 March 2020).





suspension of services as a result of COVID-19. While specific details of the Taskforce have not been released at this stage, it is clear that the ACCC is taking a pro-active approach to consumer engagement.

- Importantly, the presence of an outbreak does not alter the reach and effect of the UCT provisions under the ACL. The ACCC has stated clearly in its guidance regarding COVID-19 that it **“encourages all businesses to treat consumers fairly in these exceptional circumstances”** and that it is **“alert to any instances of unfair... conduct on the part of businesses in dealing with consumers during the current crisis.”** The ACCC has not made any statement to the effect that any special exemptions will apply with respect to compliance with the UCT provisions during the COVID-19 crisis.

A common question that has been asked is whether businesses can rely on specific terms in contracts which would allow them to cancel services or the delivery of goods without refunds.

Businesses should be aware of the risk that a Court may deem a term **“unfair”** under the UCT provisions, particularly where the terms:

- Cause a significant imbalance in the parties’ rights and obligations;
- Are not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and/or
- Cause financial or other detriment (such as delay) to the other party if relied on.

Terms providing for the cancellation of services or delivery of goods

without refunds are likely to be viewed as **“unfair”** where:

- The terms allow the business to unilaterally terminate the agreement through no fault of the other party, and without penalty to the business (particularly where the business in question is significantly more powerful than the other party);
- The terms allow the business to vary important terms of the contract without asking the other party;
- The business is unable to identify any genuine commercial reason for the inclusion of the terms; and/or
- The terms are not sufficiently transparent (for example, the terms are hidden in fine print or written in complex technical language).

Ultimately, the question of whether or not a term is **“unfair”** is a matter for a Court to decide (and would depend on the party claiming the wrong to in fact institute proceedings). If deemed **“unfair”** by a Court, the term will be treated **‘as if it does not exist’**. A judge may also make orders for the business to pay any refunds previously refused in reliance on the now void term.

In the context of the COVID-19 outbreak, there is potential for dispute between parties to a contract as to whether or not certain terms triggered by the outbreak are **“reasonably necessary”** to protect a business’ interests. The resolution of this question will ultimately depend on the way in which the terms are drafted.

Case study

The 2015 Federal Circuit Court decision in ***Ferme v Kimberley Discovery Cruises Pty Ltd***¹⁵ (***Ferme***) indicates that terms which are defined too broadly (for instance, allowing a business to unilaterally terminate a contract in a broad range of scenarios, some of which are not reasonably necessary to protect a business’ legitimate interests) may be viewed as unfair, particularly where a standard form contract is involved.

In ***Ferme***, a cruise service provider cancelled a trip due to a cyclone. The relevant term allowed the provider to cancel a trip due to an **“unexpected event”** without refunding the fares paid by consumers. The Court found that the relevant contract between the provider and consumers was a standard form contract. The Court noted that the definition of **“unexpected event”** (which contemplated **“cyclones”**, in scenarios such as **“unexpected increases in fuel costs”**) was **“very wide”** and would allow the provider to cancel in a range of contexts. In reaching its conclusion that the relevant term was unfair, the Court observed that the term was drafted such that it would allow a provider to retain fares in circumstances where the provider had not incurred any costs in preparation for the cruise (i.e. where the term was not necessary to protect any legitimate commercial interests).

Given the risk that terms which allow for the cancellation of services or delivery of goods without refunds could be deemed void by a Court, businesses should consider obtaining legal advice regarding the above issues before taking any steps to rely on such terms.

¹⁵ [2015] FCCA 2384





Unconscionable conduct

Section 21 of the ACL prohibits conduct that is in all the circumstances **“unconscionable”** in connection with the supply or acquisition of goods or services. This now includes conduct by listed public companies. This prohibition is not limited to unconscionability within the meaning of the unwritten law (i.e. the common law) and is not otherwise defined. Unconscionability has been said to be conduct that is **“against conscience”** or **“unconscientious”** and must be determined against the norms of society.

The values that inform the standard of statutory unconscionability have been held to include:

... a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; [and] the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing...

There is no doubt that community values, norms and expectations develop and evolve over time. During these extraordinary times, it's possible that society's conceptions of, and attitudes towards, what is and is not acceptable business behaviour are evolving, such that a higher standard of good conscience is expected. This is particularly in light of a large number of businesses across the country proactively helping their employees, customers, others in the community (including the vulnerable and disadvantaged) and the broader economy more generally.

As noted above, the ACCC has already flagged that it **“is alert to any instances of unfair or unconscionable conduct on the part of businesses in dealing with consumers during the current crisis”**, and noted that excessive pricing may be unconscionable “for example where the product is **critical to the health or safety of vulnerable consumers.**”

Businesses must remember that honesty and fairness will remain central in dealing with consumers, and any commercial decision to instead exploit consumers' fears or vulnerabilities during this current crisis will almost certainly attract scrutiny.





Conclusion

It is important for businesses to be aware that their competition and consumer law obligations still apply during this unprecedented period. It is clear from its recent guidance on COVID-19 that the ACCC is taking an interest in unfair or unconscionable conduct, and would likely take enforcement action where appropriate.

Having said that, it is clear from the ACCC's guidance that it is taking a pragmatic and flexible approach in responding to the pandemic. With a view to **"maintaining competition in the long term"**, the ACCC's approach to enforcement will be guided by considerations such as the long term viability of businesses **"already under pressure"**.

In addition, in light of the ACCC's recent guidance and the recent interim authorisations granted by

the ACCC to the Australian Banking Association, MTAA and retail supermarkets, we can likely expect to see further activity in this space in coming months (particularly in industries which are experiencing a surge in demand, such as health care).

Finally, businesses should be on the **"front foot"** when it comes to complying with their competition and consumer law obligations during the current crisis. This may involve updating internal policies and procedures, circulating **"do's and don'ts"** guidance and conducting compliance training, particularly for employees who deal directly with competitors or consumers on a regular basis.





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