



Unconscionable conduct in the Indigenous art and craft sector

Know your rights and how to protect yourself—a guide for artists and art centres assisting artists

Negotiating with commercial acquirers of art (dealers) is a part of being an artist or running an art centre. The process of negotiation is essential for a competitive art industry.

However, the nature of the Indigenous art and craft sector means there may be a power imbalance between some dealers and the artist or art centre.

The *Trade Practices Act 1974* (the Act) limits how far dealers can go in their negotiations with artists and art centres. In particular the Act contains both a broad prohibition of unconscionable conduct, as determined through the decisions of the courts over time, and more specifically unconscionable conduct between people in a business relationship (for example, a dealer and an artist).

What is unconscionable conduct?

Unconscionable conduct is not a fixed concept. It is generally defined as conduct which is so unreasonable that it goes against good conscience. Conduct against conscience is determined by the **specific circumstances** of each case. Over time, judges have attempted to quantify exactly what unconscionable conduct encompasses with some broad definitions:

- where one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstance affecting his ability to conserve his own interests and the other party unconscientiously takes advantage of the opportunity
- an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour

- actions showing no regard for conscience or that are irreconcilable with what is right or reasonable
- unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests
- advantage taken of an innocent party who ... is unable to make a worthwhile judgement as to what is in his best interest.

The Act also lists a number of factors the court may consider in determining unconscionable conduct in business transactions (for example, between a dealer and an artist):

- the relative bargaining strengths of the artist and the dealer
- whether the artist was required to comply with conditions not 'reasonably necessary' to protect the legitimate interests of the dealer
- whether the artist was able to understand any documentation used
- whether the dealer used undue influence or pressure or unfair tactics
- the price and terms on which the artist could have sold the same or equivalent artwork elsewhere
- the extent to which the dealer's conduct was consistent with dealings with other artists
- whether the dealer met the requirements of an industry code and, for voluntary codes, the artist reasonably believed the dealer would abide by that code
- the extent to which the dealer failed to disclose any intended conduct (and any risks arising from this conduct) that might affect the artist
- the extent to which both the artist and the dealer acted in good faith.

Importantly, these factors are not intended to be exhaustive, and the court may have regard to any other factors it considers relevant. The court will determine whether the conduct is unconscionable by having regard to **all** the circumstances, meaning each of these factors by themselves may not amount to unconscionable conduct.

How can artists avoid being treated unconscionably?

Many circumstances increase the risk of artists being treated unconscionably. For example, agreeing to produce art for dealers where the artist has little or no opportunity to negotiate or does not understand the:

- terms of payment
- timeframes for finishing the artwork
- quantity of artwork required.

However, being in these positions does not necessarily mean the artist is being treated unconscionably.

To protect themselves artists should:

- get advice from a third party before agreeing to produce artwork
- know how much their art might be worth
- ask the dealer about how much they will be paid
- ask the dealer when they will be paid
- ask the dealer how they will be paid
- get an agreement in writing
- before accepting non-cash payments, check the value of those payments and whether they will cost them anything
- before accepting cash in hand, check how much they could get for their art if they used a dealer or an art centre selling on commission.

What does the ACCC do?

The ACCC is responsible for enforcing the Act. When it receives complaints about unconscionable conduct it investigates those complaints to determine whether there is evidence of a breach. The best evidence is firsthand information from the people involved. In the Indigenous art and craft sector, this would be the artist or artists who have been subjected to unconscionable conduct. Witnesses who see the conduct occurring firsthand should contact the ACCC.

When the ACCC gathers sufficient evidence it may take legal action against the business or dealer involved. If the court finds conduct unconscionable, it can change the terms of a contract or arrangement or set it aside completely, declare breaches, prohibit the conduct in the future and make other orders it considers appropriate in the circumstances.

Where can artists and art centres get more information?

The ACCC's *Small business guide* to unconscionable conduct is a comprehensive guide covering the main areas of unconscionable conduct law applying to small business. A companion publication, the *Guide to unconscionable conduct*, is a more comprehensive guide to this complex area of law. It contains detailed discussions of statutory unconscionable law and important case law. These guides are available from the ACCC website or by calling the ACCC Infocentre.

ACCC contacts

ACCC Infocentre
1300 302 502

ACCC Indigenous Infoline
1300 303 143

TTY service for people with hearing or speech difficulties: 1300 303 609.

ACCC website
www.accc.gov.au

ACCC publications

The ACCC has a wide range of publications available to assist businesses understand their rights and obligations under the Act.

These include:

Small business guide

Guide to unconscionable conduct

Your consumer rights: Indigenous art and craft

Publications can be ordered through the ACCC Infocentre or you can download electronic copies for free from the ACCC website.

Important notice

The information in this brochure is for general guidance only. It does not constitute legal advice and cannot be relied on as a statement of the law relating to the *Trade Practices Act 1974*.