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O EQUITY, WHEREFORE ART THOU EQUITY?
THOU ART THYSELF, THOUGH NOT FAIRNESS.
WHAT'S FAIRNESS?
(WITH APOLOGIES TO THE BARD)

The Hon Justice S C Derrington *

I am sincerely humbled to have been asked to deliver the 2021 W A Lee Lecture in the series that honours the contribution of Tony Lee to the legal academy and the legal profession throughout his career. Many of you in attendance this evening will have had the good fortune to have been taught by Tony Lee – I certainly did – in both Trusts and Succession. I tried to emulate some of his methods when I began teaching, particularly the requirement that students be prepared before attending tutorials. I am afraid that by the 2000s that was a lost cause. One of the things that has captured my imagination is the, perhaps apocryphal, fact that Tony attended kindergarten with another great trusts scholar who was very kind to me as a junior academic, Derek Davies, the Founding Law Fellow at St Catherine's College Oxford, but who sadly is no longer with us. I have often wondered whether it was the quality of the teaching at that Welsh kindergarten, or merely something in the water, that inspired similarly outstanding scholarship on either side of the globe. The academy owes a great debt both to Tony and Derek, and to Wales.

Introduction

1. The impetus for my topic this evening is the current work of the Australian Law Reform Commission in its Inquiry into the Legislative Framework for Financial Services and Corporations Law. The aim of this work is to reduce legislative complexity to facilitate an adaptive, efficient, and navigable framework of legislation within the context of existing policy settings. I posit that one way of achieving this aim might be through reliance on equitable doctrines and remedies.

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2. The origin and history of the equitable jurisdiction has been recounted by numerous scholars over the centuries since its emergence in the 14th century. This paper cannot and does not seek to add to that wealth of scholarship. Rather, it seeks to explore the extent to which the indeterminate language of ‘fairness’ – identified by Commissioner Hayne in the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (‘FSRC’) as a fundamental norm of behaviour – might suborn the application of settled principles of equity in the context of financial services law and regulation.
3. It also asks whether statutory recognition of those settled principles, as has occurred in relation to unconscionable conduct,¹ would simplify the statutory law and, perhaps counter-intuitively, create greater certainty than is provided by the ‘plethora of pointlessly technical and befuddling statutory provisions scattered over many Acts in defined situations’.²
4. Since Lord Mansfield’s observations in 1774 that the great object in all mercantile transactions should be certainty³, it remains the case that commercial law ‘must be certain, but it must also be fair and just; simple and practical, but comprehensive; and it must be able to be employed and enforced, without undue expense, delay or confusion’⁴. That is not the general experience of those who engage regularly with financial services legislation.
5. Justice Mark Leeming has argued that the ethically, normative ‘principles’ of equity (often associated with value judgments) arguably create greater certainty than the more rigid rules of the common law in complex areas.⁵ He points particularly to the operation of rules in complex environments such as corporations and taxation law, citing Professor Braithwaite’s observations that such rules will have a penumbral area of uncertainty, to which ‘wealthy legal game players aim for the penumbra, play the game in ways that expand the grey area of the law’.⁶ This is sometimes described as ‘creative compliance’ or ‘compliant non-compliance’ – essentially ‘box-ticking’ – the conduct of the bank that led to the decision of the high Court in *Westpac v ASIC*⁷ being an example of this type of creativity. Similarly, Allsop CJ has said:⁸

¹ Australian Consumer Law (ACL) ss 21 & 22; *Australian Securities and Investments Commission Act 2001*(Cth) (*ASIC Act*) ss 12CA-12CC.

² *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1, [2012] FCA 1028, Summary.

³ *Vallejo v Wheeler* (1774) 1 Cowp 143

⁴ James Allsop, ‘Conscience, Fair-dealing and Commerce – Parliaments and the Courts’ in Tim Bonyhady, *Finn’s Law – An Australian Justice* (Federation Press, 2016) 92, 93.

⁵ Mark Leeming, ‘The Role of Equity in 21st Century Commercial Disputes – Meeting the Needs of any Sophisticated and Successful Legal System’ (2019) 47 *Australian Bar Review* 137, 156.

⁶ *Ibid*; John Braithwaite, ‘Rules and Principles: A Theory of Legal Certainty’ (2002) 27 *Australian Journal of Legal Philosophy* 47, 54.

⁷ *Westpac Securities Administration Ltd v ASIC* [2021] HCA 3.

⁸ *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 [268].

Sometimes, a rule can only be expressed at a certain level of generality, often involving a value judgment. To do otherwise, and to seek precise rules for all circumstances, may be to risk complexity, incoherence and confusion,

a matter that the ALRC's inquiry has found to be so in the context of our current financial services law.

6. The Chief Justice's statement resonates with Lord Ellesmere's explanation of the underlying rationale for the very existence of equitable principles and doctrines in the *Earl of Oxford's Case* in 1615:

The Cause why there is a Chancery is, for Men's Actions are so divers and infinite, That it is impossible to make any general law which may aptly meet with every Act, and not fail in some Circumstances.

The financial services eco-system

7. The suite of Commonwealth statutes that provides for consumer protection in relation to financial products and services and that regulates the market for those products and services, is comprised, in the main, of the *Corporations Act 2001* (Cth) (*Corporations Act*), the *National Consumer Credit Protection Act 2009* (Cth) (*NCCPA*), and the *Australian Securities and Investments Commission Act 2001*(Cth) (*ASIC Act*). Of relevance too are the protections within the *Superannuation Industry (Supervision) Act 1993* (Cth), and the obligations arising under the *Insurance Contracts Act 1984* (Cth) (*ICA*) and the *Marine Insurance Act 1909* (Cth) (*MIA*).
8. These various statutes are not simply concerned with contractual arrangements, but are also necessarily concerned with complex equitable constructs, such as the trust arrangements underlying superannuation funds, investments in financially engineered products, or in derivatives, forms of securitisation, and many other forms of modern capital raising which depend upon doctrines of equity for their very existence.⁹
9. The complexity of the financial services ecosystem cannot be underestimated. The size and diversity of Australian financial markets has increased from \$4.3 trillion in 2001 to \$19.5 trillion in 2021.¹⁰ Particular markets, such as those for derivatives and employee share schemes have exploded from \$120 billion in 2001 to \$727 billion in 2021.¹¹ Australian financial markets, and the nature of their participants are under constant evolution. Unsurprisingly, the legislature lags behind the entrepreneurs and is engaged in a constant cycle of amendments to the statutes, the regulations, and the creation of legislative instruments (including to exempt or exclude emerging products and services from provisions of the law that are no longer fit for purpose). It has become a game of whack-a-mole, which explains its growth from 445,996 words in 2001 to today's count

⁹ Mark Leeming, 'The Role of Equity in 21st Century Commercial Disputes – Meeting the Needs of any Sophisticated and Successful Legal System' (2019) 47 *Australian Bar Review* 137, 149.

¹⁰ ABS, 'Key economic indicators', <https://www.abs.gov.au/statistics/economy/key-indicators>.

¹¹ *Ibid*.

at 805,821 words – the second largest Commonwealth statute.¹² This is precisely the type of environment in which the flexibility of equitable doctrines and remedies is essential.

10. The length and complexity of the financial services legislation is, however, also a consequence of a ‘tendency, almost a mania, to deconstruct, to particularise, to define to the point of exhaustion and sometimes incoherence’.¹³ This is particularly so in relation to the regulation of financial services which is subject to rules, protocols, and checklists which often obscure the underlying conduct to which such rules are directed.
11. Obligations in the *Corporations Act* alone are numerous and widely dispersed. Approximately 1495 sections require that something ‘must’ be done.¹⁴ The failure to comply with existing conduct obligations, and broader community expectations concerning the conduct of financial services entities, was well documented in the Financial Services Royal Commission. It found that ‘conduct by many entities’ had ‘broken the law’ or ‘fallen short of the kind of behaviour the community not only expects of financial services entities but is also entitled to expect of them’.¹⁵ It is therefore not surprising that the *Corporations Act* has consistently been among Commonwealth statutes most frequently considered by the Commonwealth and NSW courts, including the Court of Appeal.
12. The Financial Services Royal Commission noted that ‘[i]ndustry, community groups and regulators agreed the current law is too complex’.¹⁶ The FSRC seemed to consider that a clearer body of law – particularly as concerns the conduct obligations of financial services entities – may lead to better compliance, noting that ‘[t]he more complicated the law, the harder it is to see unifying and informing principles and purposes’.¹⁷
13. The current statutory regime does not identify expressly which unifying and informing principles and purposes are being pursued in the various detailed rules and prescriptive provisions of the legislation. There is also significant overlap and duplication amongst the statutes, which detracts from clarity, simplicity and certainty. The provisions relating to prohibited conduct, and through which individuals and corporations may be subject to civil and/or criminal penalties, are particularly opaque.
14. The FSRC recommended that

¹² ALRC data; Word counts exclude tables of contents, endnotes, and subsection, paragraph, subparagraph, and sub- subparagraph lettering and numbering.

¹³ Chief Justice Allsop AO, ‘The Judicialisation of Values’ (Law Council of Australia and Federal Court of Australia Joint Competition Law Conference Dinner, 30 August 2018).

¹⁴ ALRC data.

¹⁵ Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, 2019) 1.

¹⁶ *Ibid* 494.

¹⁷ *Ibid* 44.

As far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter.¹⁸

The fundamental norms

15. Six fundamental norms of behaviour were identified by Commissioner Hayne:
- obey the law;
 - do not mislead or deceive;
 - act fairly;
 - provide services that are fit for purpose;
 - deliver services with reasonable care and skill; and
 - when acting for another, act in the best interests of that other.
16. Commissioner Hayne also observed that these six fundamental norms of behaviour are all reflected in existing law, but the reflection is piecemeal.¹⁹ They are reflected in the general obligations of holders of an Australian Financial Service Licence (AFSL licensees) under the *Corporations Act*, the general obligations of holders of an Australian Credit Licence (ACL licensees) under the (*NCCP Act*), the provisions of the *ASIC Act*, the obligations of registrable superannuation entity (RSE) licensees under the *Superannuation Industry (Supervision) Act 1993* (Cth), and in the obligations of utmost good faith on both insureds and insurers under the *Insurance Contracts Act 1984* (Cth) (*ICA*) and the *Marine Insurance Act 1909* (Cth) (*MIA*).
17. It is important to understand the role or purpose that the fundamental norms are expected to have in the legislative structure. Commissioner Hayne described the fundamental norms as the ‘fundamental precepts’. He observed that statutes have often given legislative expression to fundamental precepts with little textual analysis.²⁰ He suggested, by way of example, the detailed rules about conflicts of interest and conflicted remuneration should be expressly identified as giving effect to the principle that when a person is acting for another, the person must act in the best interests of that other.²¹
18. To identify them simply as ‘fundamental precepts’ does not necessarily assist. One question that may arise is whether a fundamental norm or precept imposes a legal duty that sounds in damages for breach or some other remedy? A straightforward example of how a fundamental precept operates at a higher level than a rule is s 23 of the *MIA*. Whilst it is often described as the ‘duty’ of utmost good faith, breach of that duty does not sound in damages.²² Rather, the contract will be void because the fundamental

¹⁸ Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, 2019) Rec 7.4.

¹⁹ *Ibid* 9.

²⁰ *Ibid* 495.

²¹ *Ibid*.

²² *Re Zurich Australian Insurance Ltd* [1999] 2 Qd R 203, per Chesterman J ‘in each instance the relationship, that of good faith, is not expressed in terms of an obligation but is the basis for implying a more specific duty’.

precept, on the basis of which the contract was made, utmost good faith, has been shown not to exist. The contract therefore cannot stand.

19. A misunderstanding of the role played by the fundamental norms can lead to suspicion or distrust about the practical operability of those norms. Whether referred to as ‘principles’ or ‘fundamental norms of behaviour’, the effect is the same – **they are an informing norm, or organising principle**;²³ not a separate implied term. For example, if good faith is simply a term implied in fact, it can itself be construed and applied and found a separate head of damages. This then opens up arguments about whether the principles of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* have been satisfied²⁴, or whether ‘entire agreement’ clauses operate to the exclusion of good faith. If, however, good faith is recognised as an informing but binding principle or duty – a means by which the courts can recognise and give effect to an expected standard of behaviour – then there is no debate as to whether or not the principle is applicable; it is simply a basic assumption of all contractual dealings.²⁵
20. At least since the time of the commercial statutes drafted by Sir Mackenzie Chalmers, statutes have created norms of conduct expressed generally as commands for an expected standard of behaviour in relation to commercial transactions. Examples include s 23 of the *MIA*, referred to earlier, and the circumstances in which there is an implied warranty or condition in relation to fitness for purpose of goods or merchantable quality in the *Sale of Goods Acts* of the early 19th century. More recently, s 52 of the now repealed *Trade Practices Act 1974* (Cth) (*TPA*) provided that ‘a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive’. This proscription is now found in s 18 of the *ACL*, and in s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act*. Modern commercial statutes eschew generally expressed norms for detailed prescription.
21. In Equity, norms and values permeate – as maxims, principles, doctrines, and rules. Equitable intervention in commerce is not exceptional. One of those norms is a rejection of unconscionable conduct.
22. The statutes with which we are concerned all involve contracts for some type of financial service or product. Some of the provisions apply only to consumers, others apply generally. Where they apply generally, certain direct competitive and self-interested aspects of commerce may negate, limit or constrain the applicability of equitable principles. By their very nature, these types of contracts involve risk. In *Kobelt*, Keane J observed that the purpose of s 12CB of the *ASIC Act* is to regulate commerce and that

²³ *Bhasin v Hrynew* [2014] 3 SCR 494 but see *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* (2015) 329 ALR 1, [1007] per Edelman J who expressly declined to follow the Canadian authority.

²⁴ *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266.

²⁵ James Allsop, ‘Conscience, Fair-dealing and Commerce – Parliaments and the Courts’ in Tim Bonyhady *Finn’s Law – An Australian Justice* (Federation Press, 2016) 92, 112-113.

‘The pursuit by those engaged in commerce of their own advantage is an omnipresent feature of legitimate commerce’.

23. The conduct obligations contained throughout financial services legislation can be divided broadly into two categories, prohibited conduct and positive obligations. Prohibited conduct refers to the various proscriptions contained in the *Corporations Act* and the *ASIC Act* on conduct that is misleading or deceptive²⁶, unconscionable, both within the meaning of the general law and by virtue of statute²⁷, imposes unfair contract terms²⁸, or involves unfair practices (including making false or misleading representations about products or services or certain business activities)²⁹. These proscriptions apply generally and are not limited in their scope to financial services licensees. Broadly, the proscription of such conduct is reflective of at least three of the fundamental norms identified by Commissioner Hayne – to obey the law, not to mislead or deceive, and to provide services that are fit for purpose.
24. Positive obligations are created by the *NCCPA* and the *Corporations Act* which impose an obligation on credit and AFS licensees respectively to do all things necessary to ensure that the activities authorised by their licence are engaged in or provided ‘efficiently, honestly and fairly’,³⁰ and by the *Corporations Act* in requiring financial advisors providing personal advice to retail clients to act in the best interests of the client,³¹ and to prioritise the interests of clients where there is a conflict. These duties reflect the norms to provide services that are fit for purpose, to deliver services with reasonable care and skill, and when acting for another, act in the best interests of that other.³²
25. In the ‘first substantive appellate discussion’³³ of the obligation in the *Corporations Act* to act ‘efficiently, honestly and fairly’, the provision was described as:

part of the statute’s legislative policy to require social and commercial norms or standards of behaviour to be adhered to. The rule in the section is directed to a social and commercial norm, expressed as an abstraction.³⁴
26. That is consistent with the view expressed in the Explanatory Memorandum that accompanied the introduction of this norm into the *NCCPA*, which considered that the obligation would require an assessment ‘which reflects an appreciation of ... the need to meet community standards of efficiency, honesty and fairness’.³⁵

²⁶ *Corporations Act* ss 1041H, *ASIC Act* s 12DA, 12 DF, *ACL* ss 18, 33 and 34.

²⁷ *ASIC Act* 12CA(1), *ACL* s 20(1).

²⁸ *ASIC Act* s 12BF, *ACL* s 23.

²⁹ *Corporations Act* ss 1041E and 1041G, *ASIC Act* s 12DB, *ACL* ss 29 and 37.

³⁰ *National Consumer Credit Protection Act* (Cth) s 47(1)(a); *Corporations Act* s 912A(1)(a).

³¹ *Corporations Act* s 961B(1).

³² *Corporations Act* s 961J.

³³ Patrick Hall, ‘Community Standards and Expectations: Has there been a fundamental shift in obligations on financial services licensees under Pt 7.6 of the *Corporations Act 2001* (Cth)?’ (2020) 31 *Journal of Banking and Finance Law and Practice* 221, 228.

³⁴ *ASIC v Westpac Securities Administration Ltd* (2019) 272 FCR 170, [173].

³⁵ Explanatory Memorandum, *National Consumer Credit Protection Bill 2009* (Cth) [2.110].

27. Thus, once the norm of behaviour is identified, the detailed and prescriptive rules that follow in s 912A(1)(aa)-(j) are to be construed and applied by a court in a particular case having assessed whether a body of conduct satisfied or failed to satisfy the norm. Section 912A(1) makes no reference to fitness for purpose or reasonable care and skill. But if it is accepted these are fundamental norms, then in assessing, for example, whether or not a licensee was competent, or had adequate resources, or took reasonable steps to ensure their representatives complied with the law, a Court is to determine whether a body of conduct satisfied or failed to satisfy the norm. Simply ticking of the list of prescribed obligations in s 912A cannot answer the question of whether, in all the circumstances and permutations of a particular transaction, a licensee complied with the standard of conduct to which s 912A(1) is directed. And if that is true, might it not be both appropriate and sufficient to give statutory force to those norms of conduct by providing that a financial services licensee must provide financial services that are fit for purpose and deliver services with reasonable care and skill?
28. If the fundamental norms are indeed properly understood as the statutory expression of a standard of expected community behaviour in commerce as understood by reference to the principles and values of the common law and equity,³⁶ no higher level of abstraction is required to inform the exhortations ‘to obey the law’, ‘not to mislead or deceive’, ‘to provide services that are fit for purpose’, ‘to deliver those services with reasonable care and skill’, or ‘when acting for another, act in the best interests of that other’. They readily contemplate requirements of honesty, fairness when dealing with consumers, the faithful performance of bargains and promises freely made, the rejection of trickery or sharp practice, the protection of those whose vulnerability places them in a position such that a just legal system will protect them from victimisation or predation, the reversibility of enrichments unjustly received, and the importance of behaviour in commerce that exhibits good faith and fair dealing.³⁷ All are readily identifiable as falling within existing principles of common law and equity, most particularly those relating to unconscionable conduct, undue influence, mistake, duress, equitable fraud, and fiduciary obligations
29. The question is whether attempts to describe conduct at a higher level of abstraction – in particular, by exhortations to ‘act fairly’ – will have the consequence of decoupling the norms from the anchoring principles and values of the common law and equity, allowing them to float amongst broad standards of morality, fairness, and justice, thereby ‘risking descent into moral and distributive justice, lacking stability and consistency’.³⁸

The interaction between norms and equitable principles

30. So what is to be made of the interaction between the fundamental norms of behaviour and the equitable doctrines and principles, whether as enacted by statute or as generally

³⁶ As posited by James Allsop, ‘Conscience, Fair-dealing and Commerce – Parliaments and the Courts’ in Tim Bonyhady, *Finn’s Law – An Australian Justice* (Federation Press, 2016) 92, 124.

³⁷ *Ibid* 123.

³⁸ Rohan Havelock, ‘Conscience and unconscionability in modern equity’ (2015) 9 *Journal of Equity* 1, 23.

applicable? Presumably ‘to obey the law’ is an expression of a social standard of behaviour that extends to obeying all law, not merely the particular provisions of the financial services legislation. Taken to its logical extension, behaviour that, for example amounts to equitable fraud, undue influence or duress in the provision of financial services would, or should, be assessed against this norm.

31. There is nothing controversial about accepting as a binding principle or duty that, when acting for another, one must act in the best interests of that other, as prescribed by s 961B of the *Corporations Act*. Such has been the classical understanding of fiduciary relationships as described by Mason J in *Hospital Products Ltd v United States Surgical Corp*.³⁹
32. However, what does it mean to say that, within the framework of the financial services legislation, there is a fundamental norm, an informing but binding principle or duty – a means by which the courts can recognise and give effect to an expected standard of behaviour – namely, to act fairly? Further, is there any distinction to be drawn between that norm and the obligation in s 912A – to provide financial services efficiently, honestly and fairly? Is such a norm expected to inform the interpretation of the proscription on unconscionable conduct and, if so, to inform the interpretation of the proscription in relation to both the unwritten law and the statutory provisions?⁴⁰ Further, is such a norm expected to inform the interpretation of the statutory definition of ‘unfair’?⁴¹
33. A principled understanding and application of notions of conscience and unconscionability is of itself difficult enough, at least in the Australian context,⁴² without superimposing a norm of ‘fairness’. Havelock has observed that modern courts have not adopted consistent conceptions of what conscience means; ‘instead, the tendency is to invoke conscience (and the variant form of ‘unconscionability’) uncritically, as if it has (and has always had) a static meaning and role in Equity’.⁴³ But that is not to deride the concept of conscience itself and its underpinning of equitable principles; still less to dismiss equity’s essential role in commerce and in commercial litigation.⁴⁴
34. So what of ‘fairness’?
35. Persons who enter into contracts relating to financial products or financial services usually expect a financial return. When that does not happen, a disappointed person may be heard to say that the outcome was unfair. Does the fundamental norm ‘to act fairly’ impose some immeasurable concept of fairness as between a financial product provider

³⁹ *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 96-97.

⁴⁰ *ASIC Act* ss 12CA, 12CB, 12CC.

⁴¹ *ASIC Act* s 12BG.

⁴² Charles Rickett, ‘Unconscionability and Commercial Law’ (2005) 24 UQLJ 74; Rohan Havelock, ‘Conscience and unconscionability in modern equity’ (2015) 9 *Journal of Equity* 1, 23.

⁴³ Rohan Havelock, ‘The evolution of equitable ‘conscience’’ (2014) 8 *Journal of Equity* 129, 159.

⁴⁴ Mark Leeming ‘The role of equity in 21st century commercial disputes – Meeting the needs of any sophisticated and successful legal system’ (2019) 47 *Australian Bar Review* 137, 139.

and a consumer or service recipient? Is fairness to be judged from the point of view of the consumer/recipient or that of the provider, or both?⁴⁵ Is the contract prima facie unfair if the consumer/recipient does not achieve the objective of the product or service?

36. Fairness cannot be about subjective views about which party ‘ought to win’. This was clear from some of the earliest criticisms of Equity dating back to at least 1526,⁴⁶ but was perhaps most famously said by John Selden in 1617:⁴⁷

Equity is A Roguish thing, for Law wee have a measure know what to trust too. Equity is according to ye conscience of him yt is Chancellor, and as yt is larger or narrower soe is equity Tis all one as if they should make ye Standard for ye measure we call A foot, to be ye Chancellors foot; what an uncertain measure would this be; One Chancellor ha’s a long foot another A short foot a third an indifferent foot; tis the same thing in ye Chancellors Conscience.

37. In *Muschinski v Dodds*, Deane J observed that long before Selden’s statement, undefined notions of ‘justice’ and what was ‘fair’ had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law.⁴⁸ He went on to say that it is not to say ‘that general notions of fairness and justice have become irrelevant to the content and application of equity. They remain relevant to the traditional equitable notion of unconscionable conduct which persists as an operative component of some fundamental rules or principles of equity.’⁴⁹

38. Concerns about the indeterminacy of standards such as ‘fair’ elsewhere in the law have been commonly aired. For example, in the context of equitable obligations, Birks has commented that the concept of fairness is ‘so unspecific that it simply conceals a private intuitive evaluation’.⁵⁰ Similarly, Beach J has written, in the context of statutory unconscionability, that reference to

intellectual ideas of customary morality and societal values without further delineation and ready identification may be at too high a level of abstraction to be an objective touchstone.⁵¹

39. If that be the case for ‘fairness’, it may give rise to rule of law concerns, since it would mean that substantial discretion is reposed in judges to make moral evaluations, free from meaningful constraint, on matters about which reasonable people commonly disagree. As Dixon CJ observed, ‘[i]ntuitive feelings for justice seem a poor substitute for a rule antecedently known, more

⁴⁵ *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 [522] per Beach J, ‘[f]airness is to be judged having regard to the interests of both parties’.

⁴⁶ Rohan Havelock, ‘The evolution of ‘equitable conscience’’ (2014) 8 *Journal of Equity* 128, 151 fn 221 attributed to Thomas Audley.

⁴⁷ F Pollock (ed), *Table Talk of John Selden* (Selden Society, London, 1927) 43.

⁴⁸ *Muschinski v Dodds* (1985) 160 CLR 583, 616; *Ward v James* [1966] 1 QB 273, 293 per Lord Denning MR.

⁴⁹ *Ibid.*

⁵⁰ Peter Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 *University of Western Australia Law Review* 1, 16–17.

⁵¹ *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 [365].

particularly where all do not have the same intuitions'.⁵² Albeit in an entirely different context, the Full Court of the Federal Court has observed that 'a process determined by intuition is open to criticism as lacking in predictability and transparency and governed by subjectivity, personal proclivity, arbitrariness and lack of confined boundaries'.⁵³

40. The difficulty with the scope of a norm of behaviour to 'act fairly' can be illustrated by some of the judicial attention that has been given to 'fairly' in the context of 'efficiently, honestly and fairly.' In *ASIC v Westpac Securities Administration*, Allsop CJ observed that

The word 'fair' in its adjectival form, directed to conduct, includes a meaning of 'free from bias, dishonesty, or injustice; that which is legitimately sought, pursued, done, given etc; proper under the rules'.⁵⁴

41. In the same case, O'Bryan J considered that there seemed to be 'no reason why it cannot carry its ordinary meaning which includes an absence of injustice, even-handedness and reasonableness'.⁵⁵
42. One criticism of such descriptions is that they merely invoke synonyms that 'are of little assistance' because they 'simply re-express the concept of fairness in terms of other values and societal norms'.⁵⁶ As Beach J wrote in the *AGM* case about the s 912A(1)(a) use of 'fairly', 'no dictionary definition could be adequate for the task given the intrinsic circularity with such definitions'.⁵⁷
43. Joshua Anderson conceptualises fairness in three ways. First, that conduct is likely to be unfair if it involves 'the exploitation of another's vulnerability', as is comprehended by the law concerning unconscionable conduct.⁵⁸ This is supported by case law which has established that 'fairness' imposes a 'lower moral or ethical standard than unconscionability',⁵⁹ so that a party who had acted unconscionably, by exploiting another's vulnerability, would almost certainly have failed to act in a manner that was fair. Conceptualised in this way, a fundamental norm of behaviour to act fairly does not assist with understanding how it interacts with the normative standard that proscribes unconscionable conduct.
44. The second conception is 'fairness as the suppression of individual interest'.⁶⁰ This appears to be the conception of fairness reflected in the *ASIC Act's* unfair contract regime and was also recognised by Finn, who observed that

⁵² *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 529, 572.

⁵³ *Northern Territory v Griffiths (Timber Creek)* [2017] FCAFC 106; (2017) 256 FCR 478 [385].

⁵⁴ *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 [174].

⁵⁵ *Ibid* [426].

⁵⁶ Joshua Anderson, 'Duties of Efficiency, Honesty and Fairness Post-Westpac: A New Beginning for Financial Services Licensees and the Courts?' (2020) 37 *Company & Securities Law Journal* 450, 453.

⁵⁷ *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 [520].

⁵⁸ Joshua Anderson, 'Duties of Efficiency, Honesty and Fairness Post-Westpac: A New Beginning for Financial Services Licensees and the Courts?' (2020) 37 *Company & Securities Law Journal* 450, 459.

⁵⁹ *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, [2015] FCAFC 50 [363].

⁶⁰ Joshua Anderson, 'Duties of Efficiency, Honesty and Fairness Post-Westpac: A New Beginning for Financial Services Licensees and the Courts?' (2020) 37 *Company & Securities Law Journal* 450, 459.

one party's decision or action may bear so directly upon the interests of the other that basic fairness to that other may require that in some circumstances he should have regard to those interests in addition to his own, and if necessary, should desist from or modify the proposed course of action in consequence.⁶¹

45. Donald considers that this conception is reflected in the existing cases concerning 'efficiently, honestly and fairly', which
- all involve situations in which the interests of the client have been adversely affected by the pursuit of the licensee's self-interest. This highlights that, in this context at least, the requirement to act fairly limits the autonomy of the party to act in its own self-interest.⁶²
46. The difficulty with this conception is the interaction of the norm with the statutory definition of 'unfair' in s 12BG of the *ASIC Act*. Parliament has clearly expressed its intention as to what is meant by an 'unfair' contract term in a consumer or small business contract. Is it to be contemplated that a court should apply some other notion of fairness informed by the court's idiosyncratic understanding of whether or not the transaction is 'fair'?
47. Anderson's third conception of fairness involves 'reciprocity, in the sense of whether the terms of the impugned transaction are reasonable, and both parties receive "fair or agreed value"'.⁶³ On this conception, arguably conduct that is misleading or deceptive, or the making of false or misleading representations, would be unfair, since it indicates that a party has not received the 'agreed value' of the transactions. If it is accepted that misleading or deceptive conduct (including the making of false representations) is a fundamental norm of behaviour, the interaction with an additional norm of fairness is apt to contaminate the well-established jurisprudence in relation to misleading or deceptive conduct.
48. This conception of fairness resonates most clearly with a standard of behaviour in a business and consumer context that exhibits good faith and fair dealing. The demands of honest commerce conform with a degree of right behaviour. This conception is now largely, although not universally, recognised as an implication or feature of Australian contract law.⁶⁴

If not fairness, then what?

49. Unconscionability has become very much part of modern commercial jurisprudence, having been given statutory force in the *ACL* and the *ASIC Act*. In this way the legislature has set a standard in Australian commerce of a form of decent behaviour, by prohibiting conduct of a proscribed standard – just as it did when s 52 of the *TPA* was first enacted. If modern commercial law is to

⁶¹ Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University Law Review* 450, 495.

⁶² Scott Donald, 'Regulating for Fairness in the Australian Funds Management Industry' (2017) 35(7) *Company and Securities Law Journal* 406, 411.

⁶³ Joshua Anderson, 'Duties of Efficiency, Honesty and Fairness Post-Westpac: A New Beginning for Financial Services Licensees and the Courts?' (2020) 37 *Company & Securities Law Journal* 450, 460–1.

⁶⁴ *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, [2015] FCAFC 50 [287], citing *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Hughes Aircraft Systems International v Airservices Australia* (No 3) [1997] FCA 558; (1997) 76 FCR151; cf *Commonwealth Bank of Australia v Barker* [2014] HCA 32 [42],[107].

be understood as fully encompassing the values that come from statute, the common law, and equity, those equitable values should be comparably enacted, thereby restricting the ability to contract out of behaving decently.

50. In *ASIC v Kobelt*, Gageler J explained that s 12CB of the *ASIC Act* (statutory unconscionability):⁶⁵

operates to prescribe a normative standard of conduct which the section itself marks out and makes applicable in connection with the supply or possible supply of financial services. The function of a court exercising jurisdiction in a matter arising under the section is to recognise and administer that normative standard of conduct.

...

The Commonwealth Parliament's appropriation in s 12CB of the terminology of courts administering equity in the expression of the normative standard which the section prescribes serves to signify the gravity of the conduct necessary to be found by a court in order to be satisfied of a breach of that standard.

51. To interpret the proscriptions on unconscionable conduct by reference to a norm of 'fairness' runs the risk of diluting 'the gravity of the equitable conception of unconscionable conduct so as to produce a form of equity-lite'.⁶⁶
52. It is worth recalling the matters that a court may have regard to, as provided for in s 12CC, for the purposes of determining whether a person has contravened s 12CB. They include: the relative strength of bargaining power and whether the parties were able to understand the documents (*undue influence/unconscionable conduct?*); whether any *undue influence* or pressure (*duress?*) was exerted by either party; whether the extent to which either party failed to disclose various factors (*mistake/misrepresentation?*); the amount for which and circumstances in which equivalent services could be obtained and the parity of conduct with other recipients of the same services (*equitable fraud?*). All of these factors also fit comfortably within Anderson's third conception of fairness.
53. A coherent body of principle concerned with good faith, fair dealing and conscience in commercial dealings must necessarily encompass the equitable doctrines of undue influence, duress, equitable fraud, mistake, misrepresentation in addition to the existing statutory recognition of unconscionable conduct and fiduciary duties. Whether the scope of those principles is limited to the meaning of the unwritten law (as in s 21 of the ACL and s 12CA of the *ASIC Act*), or is given additional breadth (as in s 22 of the ACL and ss 12CB and 12CC of the *ASIC Act*) is a policy choice – one that I suggest should be vigorously resisted so as to avoid yet further prescription. But a court directed to the equitable rules and principles, rather than to any social or commercial norm 'to act fairly', will not risk descent into 'a formless void of personal intuition'.⁶⁷ The administration of equity

⁶⁵ *ASIC v Kobelt* [2019] HCA 18; (2019) 267 CLR 1, 38.

⁶⁶ *Ibid* 39.

⁶⁷ James Allsop, 'Conscience, Fair-dealing and Commerce – Parliaments and the Courts' in Tim Bonyhady *Finn's Law – An Australian Justice* (Federation Press, 2016) 92, 122.

has always paid regard to the infinite variety of interests and has refrained from formulating or adhering to fixed universal and exhaustive criteria with which to deal with such varying situations. The approach traditionally adopted by equity has been to retain flexibility so as to accommodate the multitudinous instances in which the fundamental equitable rules fall to be applied.⁶⁸

54. It may be that the best hope for simplification of the financial services law so as to ensure there is meaningful compliance with the substance and intent of the law will be through the restoration of the incremental development and application of equitable rules and principles through the commercial law. The financial services legislation could make plain that its object is:

To enhance the integrity and stability of the financial services industry and to provide for consumer protection informed by common law and equitable principles of fair-dealing and good conscience.

55. This would enable the clear statutory expression of proscribed and prescribed standards of conduct without the need for prolix rule-making that results in ‘legislative porridge’.⁶⁹
56. In this way we might, counter-intuitively, enhance the certainty of the commercial law. That such might be the case was already understood centuries ago. Plato, writing in his Seventh Letter, said:

the soul seeks to know not the quality but the essence, whereas each of these four instruments [the name, the definition, the image, knowledge, reason and right opinion] presents to the soul, in discourse and in examples, what she is not seeking, and thus makes it easy to refute by sense perception anything that may be said or pointed out, and fills everyone, so to speak, with perplexity and confusion.⁷⁰

57. I should also have heeded Plato’s warning in a later passage of that same letter, that ‘anyone who is seriously studying high matters will be the last to write about them’,⁷¹ but I thank you nonetheless for your polite attention.

⁶⁸ *Burns Philp Trustee Co Ltd v Viney* [1981] 2 NSWLR 216, 223-4 per Kearney J.

⁶⁹ *Wingecarribee Shire Council v Lehman Bros Australia (in Liq)* [2012] FCA 1028 at [947]-[948] per Rares J.

⁷⁰ John M Cooper (Ed), *Plato – Complete Works* (Hackett Publishing Company, 1997) 1660.

⁷¹ *Ibid* 1661.