Submission to the Australian Law Reform Commission in response to Interim Report A of the Review of the Legislative Framework for Corporations and Financial Services Legislation

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Scope of This Submission

This Submission concentrates upon the ALRC's suggested reform proposals about legislative design and reform, definitions and objectives, statutory unconscionability, and delivery of financial services 'efficiently, honestly, and fairly'.[1] It does so mainly in terms of the interactions between those different components and their implications for the ALRC's proposals to reform regulation of unconscionable business conduct towards other businesses and consumers in the financial services industry. It is structured for ease of reference by readers as a self-contained document with all relevant ALRC questions and proposals, and the statutory provisions in question, included in this Submission, which makes it lengthier than it otherwise might be.

The ALRC's approach is rightly multi-layered and its suggested reforms are rightly multi-pronged, as part of a badly needed new way forward on financial services laws. It raises a number of different and related levels of analysis with contrasting aspects, all of which are implicated in assessing the ALRC's proposals, especially the following five (5) levels of analysis of particular relevance for the scope of this Submission:

(1) 'rules-based' versus 'principles-based' approaches to legislation and other regulation;
(2) 'unfairness' versus 'unconscionability' as operative legal doctrines underlying standards of conduct;
(3) 'unconscionability' under the general (ie 'unwritten' or judge-made) law ('general unconscionability') versus 'statutory unconscionability' (comprising 'simple statutory unconscionability' (equivalent in scope to unconscionability under the general law but with regulatory and remedial additions) and 'amplified statutory unconscionability' (including but extending beyond unconscionability under the general law, and with equivalent legislative bolstering));
(4) 'statutory unconscionability' versus 'efficiently, fairly, and honestly' as standards governing delivery of financial services; and
(5) 'statutory unconscionability' under the Corporations Act (Chapter 7) and ASIC Act concerning delivery of financial services and products versus 'statutory unconscionability' under other Australian legislation, especially the Australian Consumer Law and sub-national commercial and retail leasing legislation.

The ALRC's questions and proposals touching upon those matters, even at this earliest stage of its reform journey, and coming off the back of the recommendations of the recent Financial Services Royal Commission ('Hayne Royal Commission') into banks and other financial institutions, together position financial services licensees, their regulation, and its reform at the broader intersection of law, broader regulation, ethics, and morality. Judges at

[1] This Submission is a stand-alone submission by the author in his personal academic capacity, not in his university role or in his capacity as an expert panel member for the Australian Government on an earlier and related inquiry. In some sections, it uses, updates, and amplifies some material presented by the author in a 2020 conference paper and in a 2021 public submission to another Australian Government inquiry. It also incorporates for ease of reference important parts of the ALRC's Interim Report, key passages from relevant judgments of Australian courts, and key statutory provisions. The author gratefully acknowledges the research assistance of Monash University law student, Jarryd Shaw, in preparing this Submission.

the highest level recognise the intermingling of law, ethics, and morality that is as crucial in the design of business and financial services laws as it is in their operation and the practices surrounding them. 'There is an obvious tension between the drive for profit and competitive advantage which is at the heart of the market economy, and conscience-based regulation which calls for ethical self-awareness, restraint and sensitivity to the customer's potential vulnerability or disadvantage', according to the President of the Victorian Court of Appeal, Justice Chris Maxwell, in his influential Victoria Law Foundation Oration in 2019.[2]

Similarly, according to Chief Justice James Allsop of the Federal Court of Australia in the same year, 'many of the commercial problems of corporate and financial regulation exposed in the recent [Hayne] Royal Commission would be made more ruthlessly manageable by a full understanding and a daily application of the fiduciary principle, rather than by ever more detailed regulation which has as its [false] working assumption the ability exhaustively to define good faith, fiduciary responsibility, and behaviour in good commercial conscience.'[3] Such comments have broader implications for various matters of concern to the ALRC in its questions and proposals, such as approaches to principles-based regulation, the incorporation of norms in objects provisions of legislation, the futility of trying to capture everything in increasingly detailed legislative amendments and exceptions, the wrongness of thinking that rules-based approaches inherently guarantee more clarity and certainty than principles-based approaches, and the optimal interplay between the various standards and obligations that would meaningfully cure the problems and cover the gaps exposed by the Hayne Royal Commission.

Summary of This Submission's Responses and Recommendations

Here is a summary of how this Submission responds to the ALRC's specific questions and proposals, for which more detailed analysis follows throughout this Submission. First, the author of this Submission supports the ALRC's preference for a principles-based approach instead of a rules-based approach, essentially because the pre-existing rules-based approach has led to laws and amendments that result in undue complexity, uncertainty, non-accessibility, overlaps, and uneasy navigability of the law, and which no further legislative amendment under the pre-existing approach can cure.

Secondly, the author of this Submission recommends that past public and parliamentary inquiry reports that have extensively addressed the respective benefits and limits of fairness-orientated and unconscionability-orientated standards in the law are consulted and discussed as a data-set of available and relevant material in their own right, in concluding work on the ALRC's current questions and proposals and in commencing other stages of this ALRC Inquiry.

Thirdly, the author of this Submission supports the ALRC's suggested norm of fairness for inclusion in an objects clause, suggests that such a norm is not alone sufficient to cover

[2] Justice C. Maxwell, 'Equity and Good Conscience: The Judge as Moral Arbiter and the Regulation of Modern Commerce' (Speech, Victoria Law Foundation Oration, 14 August 2019) 13.
[3] Chief Justice J. Allsop, 'The Intersection of Companies and Trusts' (Lecture, Harold Ford Memorial, 26 September 2019) 3.

norms associated with statutory unconscionability, and recommends that norms underlying statutory unconscionability are also considered for inclusion in an appropriate objects clause.

Fourthly, the author of this Submission supports the ALRC's suggested proposal to remove the single unconscionability provision in Chapter 7 of the Corporations Act, essentially because of the (albeit not complete) duplication of coverage of simple statutory unconscionability in each of s 991A of the Corporations Act and s 12CA of the ASIC Act, provided that s 12CA remains in the law.

Fifthly, the author of this Submission does *not* support the ALRC's suggested proposal to repeal s 12CA of the ASIC Act, essentially for the following summarised reasons. The repeal of s 12CA at this point in the evolution of the law on statutory unconscionability unnecessarily risks more than one potential substantive impact on how widely statutory unconscionability is interpreted.

It breaks the symmetry with the essentially identical statutory unconscionability regime in the Australian Consumer Law, and undertakes a reform through the lens of financial services law reform that is best considered (if at all) by a view of all statutory unconscionability regimes as part of the integrated package of regulation of what high-level Australian judges commonly refer to as a properly informed and instructed Australian business conscience.

In those and other ways, this particular proposal goes beyond mere avoidance of redundancy or duplication of provisions in legislative design and reform. Put another way, the worthy goals of simplification and rationalisation of statutory provisions as principles at a high level of abstraction do not easily cover the substantive issues and effects at lower levels of granular detail that arise if the proposal to repeal s 12CA is accepted.

References to unconscionable conduct in all three provisions of statutory unconscionability in the ASIC Act (and their equivalents in the Australian Consumer Law) are recognised by judges as shaping the coverage of the three provisions as a united package of measures. If s 12CA picked up all of the ways that unconscionability arises under the general law, and not just the equitable doctrine of unconscionable conduct and dealings, for example, the potential reach of s 12CB would be affected accordingly. As noted below, there are also unresolved questions about when simple statutory unconscionability in s 12CA might be needed as a matter of substance to regulate unconscionable conduct involving a third party, beyond what might operate between the specific parties identified in amplified statutory unconscionability in s 12CB.[4]

Put another way, unconscionable conduct in the *Amadio*[5] sense might catch conduct by a financial services licensee affecting third parties, even if that conduct would not be caught by the amplified notion of unconscionable conduct arising between parties whose relationship to each another is as supplier and acquirer of products and services. There are

[4] See the discussion by Justice Jagot in *Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 v Kingsmede Pty Ltd* (2021) 284 FCR 424, 451 [104].
[5] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 ('*Amadio*').

other ways in which the courts see an interaction between the meaning and scope of s 12CA and s 12CB, and the fact that s 12CA does explicitly says that it does not apply where s 12CB applies does not cover all aspects of the relationship between the two sections, and does not alone mean that s 12CA is duplicative or redundant.

So, while amplified statutory unconscionability makes it explicit that s 12CB can displace s 12CA where s 12CB applies, s 12CA might yet have substantive work to do, for example, where conduct towards or affecting other parties is out of scope under s 12CB and s 12CB does not apply and hence does not displace s 12CA. Put another way, together s 12CA, s 12CB, and s 12CC constitute a package of legislative measures grounded in unconscionability, and one that is not readily amenable to a cherry-picking exercise where some parts are repealed and some parts remain on the statute book. Symmetry and consistency of legislative design and precedential guidance across Commonwealth laws would be implicated if the repeal of s 12CA was followed by repeal of the equivalent provision on simple statutory unconscionability in the Australian Consumer Law, at least as a result of a review focused upon financial services law reform alone. The tail should not wag the dog.

Finally, noting that the ALRC simply identified the 'second path' ([13.115]-[13.118]) for reform of statutory unconscionability to outline available options, but ultimately decided against recommending the second path, the author of this Submission agrees with the ALRC's position and three identified reasons for not going down this path ([13.119]-[13.120]), and independently cautions strongly against going down that path for the additional reasons summarised below and outlined further in this Submission.

The state of the law on amplified statutory unconscionability and exploration of its full potential remains in flux. The status of statutory unconscionability in its ASIC Act form as a package of three interwoven provisions, and the reliance placed by more than one High Court judge on the significance of the federal parliament's deliberate and successively reinforced choice to use the term, 'unconscionable conduct', in all three provisions, together mean that selectively picking and choosing from amongst the package of provisions adds risk and is done at the peril of diluting or otherwise upsetting the balance of the full range of protection provided collectively by statutory unconscionability, specific fairness norms (including aspects of each of statutory unconscionability and the unfair contract terms regime), the 'efficiently, honestly and fairly' standard, any bolstering of protection from unfair business practices, and other components of judicially acknowledged Australian regulation of an informed business and finance conscience.

Even if the financial services industry and other industries are subjected to regulator-endorsed reform in the area of unfair business practices, such a reform can complement further judicial exploration and enhancement of amplified statutory unconscionability. It is not a zero-sum exercise. Such related reforms can bolster the overall package of protection for businesses and consumers from unfair, unconscionable, unjust, and unreasonable business terms and behaviour, without diluting existing protection. Moreover, as the ALRC acknowledges, there is presently no equivalent of the 'efficiently, honestly and fairly'

standard from the Corporations Act in the Australian Consumer Law, to pick up any of the work of amplified statutory unconscionability if it were repealed from the latter.

Such wide-ranging reform of a Commonwealth Act that regulates all business and industry sectors should not occur by a side wind from any reform of statutory unconscionability confined to the financial services industry alone. Until such time as the High Court has an opportunity to consider and either accept or reject the post-*Kobelt*[6] view of amplified statutory unconscionability articulated by the Full Court of the Federal Court in a series of recent cases, there is an elevated risk that the removal of s 12CA might have some impact on the substantive view ultimately reached on the scope and operation of amplified statutory unconscionability in s 12CB and s 12CC, and the correlative provisions in the Australian Consumer Law.

ALRC Proposals for Public Consultation Affecting Regulation of Unconscionable Conduct

The key ways in which the ALRC proposals directly or indirectly affect statutory unconscionability are as follows:

(1) whether (and to what extent) the analysis and outcomes of previous major governmental inquiries and reports that have considered unfairness, unconscionability, and related matters provide useful material to inform final decisions on the ALRC's proposals, in the interest of overall coherence and consistency of policy and legislative design and reform over time, from a whole-of-government standpoint;
(2) whether (and to what extent) unconscionability can and should be conceptualised as an aspect of fairness, for the purposes of making reform decisions about objects clauses, heuristic examples, and other matters;
(3) whether norms concerning unconscionable business conduct under the general law and legislation should be included in a reformed objects clause;
(4) whether the prohibition on unconscionable conduct in s 991A of the Corporations Act alone should be repealed;
(5) whether the prohibitions on unconscionable conduct in both s 991A of the Corporations Act and s 12CA of the ASIC Act should together be repealed, while retaining the broader prohibition and indicators of unconscionable conduct in s12CB and s 12CC of the ASIC Act;
(6) whether even the broader prohibition and indicators of unconscionable conduct in s 12CB and s 12CC of the ASIC Act should also be repealed, leaving the existing or reformed 'efficiently, honestly and fairly' standard for financial services licensees in s 912A of the Corporations Act to cover the equivalent work of any such repealed sections; and
(7) whether there are related reform measures that could bolster the ALRC's proposals.

[6] *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 ('*ASIC v Kobelt*').

The relevant ALRC proposals about statutory unconscionability appear in Proposal A22 and associated paragraphs [13.108]-[13.120]. For ease of reference, Proposal A22 is included here as follows:[7]

> **Proposal A22** In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, s 991A of the *Corporations Act 2001* (Cth) and s 12CA of the *Australian Securities and Investments Commission Act 2001* (Cth) should be repealed.

Significant Parts of the ALRC Interim Report for the Purpose of This Submission

The ALRC aims through this Interim Report to do the following concerning the treatment of statutory unconscionability in relation to objects clauses, simplification and rationalisation of the law, and overlap or correlation with the 'efficiently, honestly and fairly' standard:[8]

> 13.6 The ALRC first invites feedback on whether Chapter 7 of the *Corporations Act* should be amended to expressly flag the fundamental norms that underlie existing conduct regulation law through the inclusion of certain norms as an objects clause.
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> 13.7 With the aim of clarifying the 'efficiently, honestly and fairly' standard for the conduct of AFS Licensees pursuant to s 912A(1)(a) of the *Corporations Act*, the ALRC proposes amendments to:
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> - make clear that the constituent terms are standalone obligations, which is currently the subject of some uncertainty;
> - replace the word 'efficiently' with 'professionally', in accordance with the meaning established by case law; and
> - include examples of conduct that is likely to be unfair, in order to clarify what is otherwise an open-ended and uncertain obligation.
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> 13.8 The ALRC makes further proposals that aim to simplify and rationalise the law (such as by reducing duplication and redundancy), and to ensure 'the consistent use of terminology to reflect the same or similar concepts' (in accordance with the Terms of Reference for this Interim Report). To this end, the ALRC proposes to:
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> - repeal specific obligations imposed on AFS Licensees that are already captured within the requirement to act 'efficiently' in s 912A(1)(a) of the *Corporations Act*;
> - repeal more specific prohibitions on unconscionable conduct contained in s 991A of the *Corporations Act* and s 12CA of the *ASIC Act*, while retaining the broadest prohibition on such conduct contained in s 12CB of the *ASIC Act*; and
> - consolidate the many provisions that broadly relate to misleading or deceptive conduct and false or misleading representations into a single provision.
>
> 13.9 These proposed amendments aim to simplify the law by reducing unnecessary particularisation and removing overlapping provisions that are subject to different

[7] Australian Law Reform Commission, *Financial Services Legislation: Interim Report A* (Report No 137, November 2021) 525.
[8] Ibid 500 [13.6]-[13.9].

> and highly technical thresholds, promoting meaningful compliance through a more navigable framework.

In addition, the ALRC identifies a more radical 'second path' in reforming statutory unconscionability, which involves repealing statutory unconscionability altogether in both the Corporations Act and the ASIC Act, which is a total of four provisions regulating different forms of statutory unconscionability across two Acts, which have cognate provisions in another Commonwealth Act (ie the Australian Consumer Law). The significance of such a radical outcome is that, between them, the current provisions of statutory unconscionability across those two Commonwealth Acts provide a complete coverage of simple and amplified statutory unconscionability for all industry sectors.

However, having identified the 'second path' as a possible option, the ALRC's Interim Report goes on to advance sound reasons why that option should be rejected, as follows:[9]

> 13.119 Ultimately, the ALRC has not recommended the adoption of the second path – even though it may facilitate greater simplification – for two key reasons. First, because of difficulties in transposing the proscriptions in the *ASIC Act* into the *Corporations Act.* For example, relying on the 'efficiently, honestly and fairly' obligation to do the work of the *ASIC Act*'s unconscionable conduct provisions would require that the former obligation be expanded so as to apply to non-licensees (as the latter provisions do). Aligning the definitions of 'financial product' and 'financial service' as between the *ASIC Act* and *Corporations Act*, as discussed in **Chapter 7**, would also be a necessary precursor to this reform. Further, there may be a need to attach some additional remedies (such as the availability of an action for damages under s 12GF of the *ASIC Act*) to the 'efficiently, honestly and fairly' obligation. Second, as unconscionable conduct represents a very serious contravention of the law – of a higher order of moral wrongdoing than simply failing to be 'fair' – there may be expressive value in the availability of a provision by which that conduct may be specifically denounced or stigmatised.
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> 13.120 Lastly, it may also be observed that the second path would remove the symmetry that currently exists with the regulatory approach of the *Australian Consumer Law*, which includes analogous proscriptions, rather than a broader 'efficiently, honestly and fairly' type obligation. The introduction of such inconsistency in regulatory approach should generally be avoided, absent strong countervailing benefits.

Still, to the extent that the ALRC or other stakeholders (or both) flag or pursue such a radical reform option as the 'second path' in concluding this stage or later stages of this Inquiry, it is important to say something further in this Submission about it.

A Broader Context for the ALRC Questions and Proposals at This Stage of Its Inquiry

At present, there is understandable concern in Australian legal and regulatory circles about the complexity, non-accessibility, and workability of corporate and financial services rules, exceptions, and exemptions.[10] In broad terms, the commercial arms of the legal profession and their business clients are simultaneously deeply dissatisfied with the state of corporate

[9] Ibid 528 [13.119]-[13.120].

[10] Eg Justice S. Derrington, 'W A Lee Equity Lecture' (Lecture, Banco Court, Supreme Court of Queensland, 18 November 2021).

and financial services law on multiple fronts, and deeply sceptical of the possibility of meaningful reform, not least given the vested interests at stake.[11] Those constituencies are stuck between two extremes. On the one hand, the business sector and the professional services firms advising business commonly agree that the existing regulatory regime is flawed and overly complex. On the other hand, they are used to navigating through and around the existing regime, and are perhaps rightly sceptical and suspicious of the promised benefits of change in the abstract.

So, there is a demonstrable and strong need throughout this Inquiry to 'win over' and build consensus with the external participants in the regulatory ecosystem, particularly the commercial arms of the legal profession and business, for changes in the approach and design for financial services laws. Other regulatory innovations and mechanisms might also be used to galvanise industry and professional support, demonstrating the benefits of the new legislative and regulatory approach suggested by the ALRC. This might pave the way to substantiate that the conventional approach is not redeemable and that a radically different approach is required, as modelled by the ALRC and with reference to equivalent financial services regulation overseas (eg new UK standards on financial integrity). The fact that the new ASIC Chair has labelled Chapter 7 of the Corporations Act on financial services 'a "disgrace" that was in desperate need of reform'[12] can only help in this cause.[13]

Clear thinking is needed to grapple fully with reform initiatives aimed at corporate and financial services laws that are rethinking the approach to legislative definition of concepts, balance between rules-based and principles-based regulation, and the place and workability of using 'fairness' and 'unconscionability' as touchstones for financial services regulation. For example, in the 2021 W A Lee lecture, ALRC President and Federal Court Justice, Justice Sarah Derrington, rightly queried the appropriateness of putting all regulatory eggs in the 'fairness' basket, contemplated the enactment of values-based standards limiting parties' capacity to contract out of decent behaviour, and suggested the incorporation of conscience-based notions in a redefined purpose for financial services legislation, as follows: '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'.[14] Financial services law reform is clearly headed in the direction of principles-based regulation.[15]

Unconscionability in all of its statutory forms is not completely co-extensive with notions of efficiency, honesty, and fairness for the purposes of s 912A of the Corporations Act. The fact that they can be pleaded and litigated in the alternative for financial services matters (but

[11] Eg R. Gluyas, 'Errant Act Needs Reform', *The Australian* (2 September 2021).
[12] M. Pelly, 'ASIC enforcers dish out warning to banks', *The Australian Financial Review* (Sydney, 3 September 2021).
[13] See also: Interview with J. Longo, Chairman of the Australian Securities and Investments Commission, and S. Court, Deputy Chairman of the Australian Securities and Investments Commission (Guardian Australia, 2 September 2021).
[14] Justice S. Derrington, 'W A Lee Equity Lecture' (Lecture, Banco Court, Supreme Court of Queensland, 18 November 2021).
[15] Australian Law Reform Commission, *Financial Services Legislation: Interim Report A* (Report No 137, November 2021).

not for business conduct more generally) does not detract from that point. Such notions might well transcend simple statutory unconscionability in both the Corporations Act and the ASIC Act, in the sense that unfairness will cover more than the equitable notion of unconscionable conduct that is enshrined in simple statutory unconscionability (including in its form governing financial services licensees in the Corporations Act). However, none of that means or justifies the further conclusion that notions of efficiency, honesty, and fairness cover the same ground as *amplified* statutory unconscionability, whatever the degree of overlap. In any event, the law on each of section 912A and statutory unconscionability is still developing, making any conclusive evaluations of the degree of co-extensiveness problematic.

Post-*Kobelt* test cases are relevant in assessing the merits of any proposals to change the law on statutory unconscionability, and regulatory views change according to the different outcomes for the regulators in a series of cases. Regulators who were initially unhappy with the outcome in *ASIC v Kobelt* and criticised it for taking a narrow view of statutory unconscionability that made regulatory enforcement more difficult were nevertheless happy with the broader view of statutory unconscionability and the outcome gained in post-*Kobelt* cases.[16] The public debate about whether the regulatory touchstone should be 'unfairness' or 'unconscionability', and any related discussion about the co-extensiveness of section 912A and statutory unconscionability, are both complex and not simple matters.

Yet, there also remains a serious and macro-level question still to be asked, perhaps in later stages of this Inquiry, about the ethical and legal capacity of current Australian corporate, financial, and investment laws to meet and guide business decision-making and advice that is not only fully and equally responsive to business ethics, fair market expectations, and 'good conscience' laws, but also to the fourth industrial revolution's marketplace dynamics worldwide of interconnected economies, ESG-based financial and investment decision-making and disclosure, cross-industry and cross-jurisdictional institutional investment, and the business sector's (including bank's) shared role with governments and communities in climate change mitigation, management, and disclosure in achieving global net-zero emissions in the wake of COP26.[17]

'Wicked' transnational problems require complex, coordinated, transnational, cross-sectoral, and otherwise interconnected solutions, with multinational companies and financial institutions exerting influence and setting standards that transcend what any one sovereign government or multilateral institution can impose and control. However, those macro-level issues also implicate matters of integrity, ethics, professionalism, fairness,

[16] Australian Competition and Consumer Commission, 'Full Federal Court Ruling Provides Vital Clarification of the Law on Statutory Unconscionable Conduct', (Media Release, 22 March 2021), referring to the ACCC's post-*Kobelt* win on statutory unconscionability in *ACCC v Quantum Housing Group Pty Ltd* [2021] FCAFC 40.

[17] The Centre for Policy Development has commissioned three publicly available legal opinions on the legal obligations of companies and their directors for climate change management and disclosure, all by N. Hutley SC and S. Hartford Davis, both of whom are known to the author, who was a member of the expert reference group and industry roundtables for CPD concerning this work. See also: Monash Law, 'Directors Face Greater Exposure to Liability for Climate Change Risks' *Monash University* (Article) <https://www.monash.edu/law/news/articles/current/Directors-face-greater-exposure-to-liability-for-climate-change-risks>.

honesty, and other norms and standards. They need capturing in broader reform of corporate, financial, and investment laws under 21st century conditions. The national and global ecosystem in which Australian financial services operate has many interactive and intersectional parts.

Even the supposedly simple incorporation of moral and ethical notions in various laws – notions such as honesty, fair play, and non-exploitation of vulnerable parties, for example – presents more challenges of interpretation and application for commercial courts, official regulators, businesses, and their (internal and external) legal advisers than more specific, absolute, and prescriptive laws, not least because the former are more likely to be explicitly principles-based, values-orientated, open-textured, and context-sensitive. Moreover, recent and ongoing inquiries of business relevance by the ALRC, Commonwealth Attorney-General's Department (AGD),[18] and other public agencies and departments fall for consideration against the background of an emerging body of written and unwritten law that thematically coheres in regulating an informed Australian business conscience and promoting commercial morality and business integrity – something that the Full Court of the Federal Court of Australia ('FCAFC') has characterised as 'what a modern Australian commercial, business or trade conscience contains and requires, in both consumer and business contexts'.[19] Clearly, in terms of the current ALRC Inquiry, statutory unconscionability and the 'efficiently, honestly and fairly' standard are both important planks in regulating such a good conscience in business and finance.

While some of these broader concerns might lie beyond the ALRC's strict terms of reference, at this stage or even at all, it is impossible to consider matters within its terms of reference without some regard to matters of such broader concern, some of which even go to questions within scope in this Inquiry, such as whether or not the norms reflected for statutory interpretation purposes in objects clauses should be based wholly or substantially on the six principles identified by Commissioner Hayne in the Financial Services Royal Commission.

Support for the ALRC's Underlying Principles-Based Approach

There is much to be gained and nothing to be lost in terms of clarity and certainty in financial services law and regulation by supporting the ALRC's suggested principles-based approach. Clarity and certainty in this area of law and regulation has not been achieved to the satisfaction of key stakeholders by a conventional approach characterised by progressively lengthier, more detailed, more complex, and fragmented laws and other regulation. A different and better approach is necessary.

[18] Attorney-General's Department, *Inquiry into the use of the term 'good faith' in civil penalty and offence provisions in Commonwealth legislation* (Final Report, November 2021). The author made a public submission to this inquiry. See B. Horrigan, Submission No 12 to Attorney-General's Department, *Inquiry into the use of the term 'good faith' in civil penalty and criminal offence provisions in Commonwealth legislation* (23 July 2021).

[19] *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199, 274 [296] (Allsop CJ, Besanko and Middleton JJ separately agreeing).

Support for the broad thrust of the ALRC's suggested move away from a strictly rules-based approach and mindset, and towards a more principles-based approach and mindset, can also be found in high-level Australian judicial discussions about the importance of certainty and clarity in the law, and how absolute and detailed rules do not necessarily provide more certainty than more flexible principles and norms. Much also hinges upon the expectations and state of understanding of the law and its underlying norms by regulators and industry participants. Judicial support exists at the highest level for certainty being a priority in the law, even where the law relies upon normative standards and open-textured concepts, such as good faith, unconscionability, reasonableness, and fairness.

For example, certainty in commercial dealings is explicitly recognised by a number of High Court of Australia ('HCA') judges in the 2019 *Kobelt*[20] case as amongst the values enshrined by the Commonwealth Parliament in the standards of good conscience in statutory unconscionability. In the words of two judges in the majority in that case, Chief Justice Susan Kiefel and Justice Virginia Bell:[21]

> The values that inform the standard of conscience fixed by [statutory unconscionability] include those identified by Allsop CJ in *Paciocco v Australia and New Zealand Banking Group Ltd*: certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made and:
>
> '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'.[22]

All of those broader considerations and more are implicated in sorting the overlaps and distinctions in the regulatory work done respectively by 'unfairness' and 'unconscionability' standards, in charting a sound and balanced course for reform. Moreover, the association of fairness with other notions (or norms or standards) can qualify and condition the meaning and aspects of fairness in view.

For example, in a passage also highlighted and relied upon by the ALRC, Professor (later Justice) Paul Finn identified the 'core idea' behind 'good faith and fair dealing' (at least as understood at his time of writing more than 30 years ago) as being that '(t)hough not disentitled from pursuing self-interest in or because of a relationship, 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'.[23] In that broad sense, undue advantage-taking by a stronger party (eg a bank) of a weaker party's vulnerability rising to the level of a special disadvantage – the core idea behind equitable relief for unconscionable conduct (as distinct from broader aspects of

[20] *ASIC v Kobelt* (2019) 267 CLR 1, 17 [14], 28 [50] (Kiefel CJ and Bell J), 37-8 [85] (Gageler J), 98 [288], 99-100 [290] (Edelman J).
[21] Ibid 17 [14] (Kiefel CJ and Bell J).
[22] *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199, 274 [296] (Allsop CJ).
[23] P. Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University Law Review* 87, 95.

unconscionability) – can be viewed as an aspect of fairness, at least for some purposes. Speaking at a high level of generality in the legally famous *Amadio* case, about the equitable notion of unconscionable conduct contained in the doctrine of special disadvantage, Sir Anthony Mason described it in terms that incorporated reference to an aspect of fairness, invoking reference to 'an underlying general principle which may be invoked whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created'.[24]

Empirical and Other Data

In its Interim Report A into Financial Services Legislation, the ALRC highlights the definitions of various normative standards in corporate legislation, such as 'efficiently, honestly and fairly', and unconscionable conduct. The ALRC notes but ultimately and rightly does not suggest the radical option of repealing all three unconscionable conduct provisions in the ASIC Act. At the same time, the ALRC supportively cites material suggesting that the 'efficiently, honestly and fairly' standard in s 912A(1)(a) of the *Corporations Act 2001* (Cth) overlaps with statutory unconscionability.[25] According to the ALRC, in reliance upon such material, '(a)rguably, provisions concerning unconscionability are an instance of … redundancy', having regard to s 991A.[26]

This recommendation that a standard of 'unfairness' is to be preferred over one of 'unconscionable conduct' is not novel, whether the justification is grounded in perceived legislative duplication and redundancy, perceived difficulty of achieving enforcement and litigious success for official regulators, relative evaluation of standards in periodic review and reform of the appropriate level and scope of business regulation, or something else. It has arisen in various forms in previous parliamentary inquiries over four decades. Therefore, the current proposals must be positioned, framed, and assessed along the continuum of debate on this matter, and not simply as a discussion as a discussion at first instance.

One avenue for doing so arises in response to the ALRC's Question A1, which goes to the matter of additional data to which the ALRC should refer, as follows:[27]

> **Question A1:** What additional data should the Australian Law Reform Commission generate, obtain, and analyse to understand:
>
> a. legislative complexity and potential legislative simplification;
> b. the regulation of corporations and financial services in Australia; and
> c. the structure and operation of financial markets and services in Australia?

Whether characterised as 'data' or not, the series of previous public and parliamentary inquires that have considered nomenclature and standards about 'fairness' and 'unconscionability' should be consulted and publicly analysed further, as there is a long

[24] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J).
[25] Ibid 527 [13.115].
[26] Ibid.
[27] Australian Law Reform Commission, *Financial Services Legislation: Interim Report A* (Report No 137, November 2021) 15.

history of public and parliamentary inquiry debates and reports about such matters as using 'fairness' or alternatively 'unconscionability' as the touchstone for business regulation in this field and others, the use and presumptive force of examples and indicators of unconscionability, the desirability of successive amendments to statutory unconscionability over time, and the relationship between good faith and unconscionability in Commonwealth laws.

The series of important modern public reports canvassing the respective merits of alternative or complementary standards regulating unfairness and unconscionability in legislation for different industry sectors spans the work of the Swanson Committee in 1976 to the CAANZ report in 2017, the ACCC Digital Platforms Inquiry in 2019, and even the AGD inquiry into good faith in Commonwealth laws in 2021.[28] Included in that series of reports is the work of the author of this Submission, as part of a three-member expert panel whose recommendations were accepted by the Australian Government and enacted in three major pieces of national economic regulation, including reforms to statutory unconscionability in the ASIC Act and what is now the Australian Consumer Law.[29]

Taken together, that 2010 report, the 2015 Harper Review, the 2017 CAANZ report, and the 2021 AGD inquiry, for example, can be used to support the following relevant propositions for this ALRC Inquiry, to enhance coherence and (where justified) consistency of policy and legislative approaches over time to standards relating to unfairness, unconscionability, and 'efficiently, honestly and fairly', the relationships between them, and the different means by which they can best be achieved:

(1) There are risks to be navigated in matching the scope of any legislative reform to the scope of any identified problem or need in terms of industry regulation, and in the choice of legislative or other regulatory measures (eg further definitions, examples, additional provisions etc);
(2) There is room and a need for statutory unconscionability as part of a package of broader legal and regulatory protection for business and consumers in all industry sectors, including the financial services industry;
(3) The courts should be left to continue working through the interpretation, application, and precedential elucidation of the full potential of statutory unconscionability, through appropriate test cases and any necessary legislative reform;
(4) Regulation through statutory unconscionability (including good faith's relevance to characterisations of unconscionable conduct) is part of and connected to broader and coherent regulation of good faith across Commonwealth laws; and

[28] Trade Practices Act Review Committee, Parliament of Australia, *Report to the Minister for Business and Consumer Affairs* (20 August 1976); Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (Final Report, March 2017); Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019); Attorney-General's Department, *Inquiry into the use of the term 'good faith' in civil penalty and criminal offence provisions in Commonwealth legislation* (2021) (report unavailable at the time of writing).

[29] This is included to declare the author of this Submission's interest and past involvement in reform of laws relevant to this Inquiry.

(5) Any gap in protection against unfair business practices can be filled without necessarily detracting from (and in addition to) the work done by statutory unconscionability, as part of a holistic package of legislative measures and reforms in promoting good conscience, good faith, and fairness in business and finance.

For ease of reference, the relevant series of major public reports to canvass and discuss in final decisions to ensure coherence and consistency of public policy and regulatory approaches over time, from a whole-of-government perspective, and also to achieve the best balance of measures covering aspects of fairness, reasonableness, and good conscience in the financial services industry, includes the following reports from the 1976 Swanson Committee report onwards:

1. Trade Practices Act Review Committee (Swanson Committee), *Report to the Minister for Business and Consumer Affairs*, 20 August 1976;
2. Trade Practices Consultative Committee (Blunt Committee), *Small Business and the Trade Practices Act*, December 1979;
3. Gareth Evans, Attorney-General, Barry Cohen, Minister for Home Affairs and Environment, and Ralph Willis, Minster for Employment and Industrial Relations, Parliament of Australia, *The Trade Practices Act Proposals for Change* (Green Paper), February 1984;
4. House of Representatives Standing Committee on Legal and Constitutional Affairs (Griffiths Committee), *Mergers, Takeovers and Monopolies: Profiting from Competition*, May 1989;
5. The House of Representatives Standing Committee on Industry, Science and Technology, Parliament of Australia (Beddall Committee), *Small Business in Australia: Challenges, Problems and Opportunities*, January 1990;
6. Australian Labor Party, *Special Caucus Committee of Inquiry into Aspects of the Australian Petroleum Industry (Wright Report)*, 16 April 1991;
7. Trade Practices Commission, *Unconscionable Conduct and the Trade Practices Act: Possible extension to cover commercial transactions*, July 1991;
8. Senate Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies & Acquisitions: Adequacy of Existing Legislative Controls (Cooney Report)*, December 1991;
9. House of Representatives Standing Committee on Industry, Science and Technology (Reid Committee), *Finding a balance: Towards fair trading in Australia*, May 1997;
10. Committee of Inquiry for the Review of the Trade Practices Act, *Review of the Competition Provisions of the Trade Practices Act (Dawson Report)*, January 2003;
11. Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004;
12. Senate Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974*, December 2008;
13. Bryan Horrigan, David Lieberman and Ray Steinwall, *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct* (Report for the

Australian Government Department of Innovation, Industry, Science and Research), February 2010;

14. Ian Harper et al, *Competition Policy Review* (Harper Review), March 2015;
15. Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review*, March 2017;
16. Australian Competition and Consumer Commission, *Digital Platforms Inquiry*, June 2019;
17. Australian Competition and Consumer Commission, *Customer loyalty schemes*, December 2019;
18. Consumer Affairs Australia and New Zealand Legislative and Governance Forum on Consumer Affairs, *'Meeting of Ministers for Consumer Affairs'*, 6 November 2020;
19. Australian Competition and Consumer Commission, *Perishable Agricultural Goods Inquiry*, November 2020;
20. Attorney-General's Department, *Inquiry into the use of the term 'good faith' in civil penalty and offence provisions in Commonwealth legislation*, November 2021; and
21. Australian Law Reform Commission, *Financial Services Legislation: Interim Report A (Report No 137)*, November 2021.

Norms in Objects Clauses

The identity and range of appropriate norms in an objects clause, not least for use as an aid in legislative interpretation, is the focus of the ALRC's Question A18, as follows:[30]

> **Question A18:** Should Chapter 7 of the *Corporations Act 2001* (Cth) be amended to insert certain norms as an objects clause?

The ALRC's preliminary view on this question appears in paragraphs [13.36]-[13.38] of its Interim Report, as follows:[31]

> 13.36 A question remains as to the identification of the norms that could be legislated. Notably, the Financial Services Royal Commission identified six norms which it considered to be 'well-established, widely accepted, and easily understood'. It was the Commission's view that each of these norms was already 'reflected in existing law'. The norms are:
>
> 1. Obey the law;
> 2. Do not mislead or deceive;
> 3. Act fairly;
> 4. Provide services that are fit for purpose;
> 5. Deliver services with reasonable care and skill; and
> 6. When acting for another, act in the best interests of that other.
>
> 13.37 The ALRC agrees that these six norms are reflective of the key financial services conduct obligations, as discussed in the remainder of this chapter – including the prohibitions on misleading, deceptive, and unconscionable conduct; obligations on providers of personal advice to act in the best interests of consumers. The norm of 'obey the law' is

[30] Australian Law Reform Commission, *Financial Services Legislation: Interim Report A* (Report No 137, November 2021) 18.
[31] Ibid 508 [13.36]-[13.38].

> arguably referable to specific statutory provisions, although could be considered redundant because the requirement to obey is fundamental to the law, and is not a norm specifically attributable to this statutory regime.
>
> 13.38 ALRC consultees broadly indicated support for incorporating these specific norms as an objects clause (or clauses). Concern, or hesitancy, was expressed by some consultees about the 'act fairly' norm. However, such a norm reflects the obligation of fairness imposed in the 'efficiently, honestly and fairly' standard, and in the resolution of consumer disputes by AFCA. Whether greater clarity can be provided in relation to the standard of fairness is considered in greater detail later in this chapter. The ALRC invites interested stakeholders to comment on the suitability of the six norms identified above for inclusion in an objects clause.

In answer to Question A18, from the standpoint of statutory unconscionability, it would be desirable to include norms relating to unconscionable conduct if other norms of conduct are included, because otherwise a significant part of the general and statutory law would be missing from stated norms of conduct. Doing so will require navigation of other issues, such as whether such norms need any legislative encapsulation or clarification of meaning, and the relationship between objects clauses, definitional clauses, and obligation-conferring clauses.

What are the conscience-related values enshrined in statutory unconscionability? Speaking about statutory unconscionability, Chief Justice Allsop summarises the relevant values enshrined in that law as 'fairness and equality, ignorance of a party, the risk and worth of the bargain, inequality of bargaining power, good faith and fair dealing'.[32] A number of HCA judges in *ASIC v Kobelt* variously characterise the coverage of conscience-related values and doctrines in statutory unconscionability in terms that cover 'certainty in commercial transactions', 'honesty', absence of 'trickery or sharp practice', fair treatment of customers, fidelity to the contractual bargain and the promises freely made in it, 'respect for the dignity and autonomy and equality of individuals', 'power imbalance', and avoidance of 'predatory' exploitation of vulnerable victims and conditions of disadvantage.[33]

In addition, there are specific reasons why a norm of fairness should be included, whether further clarified or not ([13.138]). Put aside for the moment the understandable reaction from some business, commercial lawyer, and parliamentary scrutiny representatives about the breadth, lack of clarity, and change in the law that a general and overarching 'fairness' obligation would involve, as well as the author of this Submission's doubts about the complete co-extensiveness of prohibitions of unconscionable conduct under the general and statutory law with a norm or fairness and the 'efficiently, honestly and fairly' standard. The following discrete reasons apply independently from those concerns. They support the ALRC's proposal to include a fairness norm, notwithstanding other concerns in this Submission about discrete conceptualisation, coverage, and particularisation of that norm and its constituent aspects.

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[32] Chief Justice J. Allsop, 'Conscience, Fair-Dealing and Commerce' (2017) 91 *Australian Law Journal* 820, 839.
[33] *ASIC v Kobelt* (2019) 267 CLR 1, 17 [14] (Kiefel CJ and Bell J), 40 [93] (Gageler J), 48 [118] (Keane J), 54-5 [138], 80-1 [241]-[244], 84-5 [257] (Nettle and Gordon JJ).

There is a plethora of existing law and regulation grounded in norms and aspects of fairness of relevance to the financial services industry. One explicitly fairness-based concept is enshrined in the object of the *Competition and Consumer Act 2010* (Cth): 'The object of this Act is to enhance the welfare of Australians through the promotion of competition and *fair trading* and provision for consumer protection'.[34] Under conventional norms of interpretation, that purpose and any revised purpose or objects clause has at least some work to do in conditioning the interpretation of statutory unconscionability.

The obligation to act 'fairly' already exists in the statutory law for financial services licensees, albeit not in its own right but as part of the 'efficiently, honestly and fairly' standard. Next, the general law also contains underpinning norms of fairness of relevance for financial services licensees. In particular, there are cognate notions and norms of fairness for the financial services industry that are part of broader statutory law governing unfair contract terms, unfair business practices, good faith (and associated fair dealing), and even unfairness as an aspect of indicators of statutory unconscionability.

The Australian Consumer Law already has a regime for unfair contract terms. The Corporations Act already requires financial services to be provided 'efficiently, honestly, and fairly'. One of Commissioner Hayne's six basic principles for banks and other financial institutions is to 'act fairly'. Additional protection against unfair business practices can be integrated within this mix of fairness-based laws.

The Full Federal Court described a number of indicators of statutory unconscionability as being concerned with 'fairness and equality' in the *Paciocco* case.[35] Statutory unconscionability already contains provisions going to 'unfair tactics' and fair dealing. More than a decade ago, before its current incantation, but in analysis that still holds true, Justice Finn characterised the listed indicators of statutory unconscionability as heading 'in the direction of proscribing unfair dealing and unfair trading', especially 'unfair dealing in relational contracts'. In his view, this is confirmed by 'considerations that focus on possible discrimination, industry codes and standards, good faith etc'. The set of listed indicators having that character is joined by another set of indicators, which focus more directly upon exploitation of vulnerability through avenues of advantage-taking and coercion.[36]

In addition, there are codes of conduct of relevance in regulating and adjudicating matters in the financial services sector that make explicit reference to notions of fairness, indicating a certain level of industry understanding and acceptance of a standard of fairness in dealings with the customers and other clients of financial services licensees. For example, there are various references to fairness in the Banking Code of Practice that commenced on 1 March 2021. Its 'Guiding Principles' include statements that neatly dovetail or overlap with notions of fairness, such as standards that are labelled under 'Integrity', saying 'We will

[34] *Competition and Consumer Act 2010* (Cth) s 2 (emphasis added).
[35] *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199, 272 [285] (Allsop CJ, Besanko and Middleton JJ separately agreeing).
[36] Justice P. Finn, 'Unconscionable Conduct?', *UNISA Trade Practices Workshop - 2006*, 14-5.

act honestly and with integrity', 'We will be fair and responsible in our dealings with you', and 'We will take a responsible approach to lending'.[37]

By way of further example, one of the specific commitments in the Code is that 'We will engage with you in a fair, reasonable and ethical manner',[38] and there are others using the language of fairness too. Given the status of the Code as a co-regulatory measure for the financial services industry, a series of specific commitments including fair treatment, and a document of considerable regulatory and perhaps judicial relevance, it provides extra support for enhanced financial services reform grounded in norms and standards of fairness, of the kind suggested by the ALRC.

Codes of conduct containing notions of fairness can be picked up and applied for the purpose of statutory unconscionability. This supplies another reason not to abandon amplified statutory unconscionability, and also to doubt the capacity of the 'efficiently, honestly and fairly' standard to take over the field completely from statutory unconscionability, given the range of specific matters addressed in detail in many codes of conduct.

Finally, as highlighted by the ALRC, the Hayne Royal Commission included fairness as a fundamental norm reflected in the existing law as well as open to further clarification and elucidation, which is picked up by the ALRC in its proposals. So, informed industry observers and participants would not be caught by surprise by the suggestion that norms and standards of fairness exist and should be bolstered in financial services law and regulation.

The residual questions for consideration in answering this particular question are:

(1) whether the norms in any objects clause should be centred wholly or mainly around those identified by Commissioner Hayne; and
(2) whether any such norms should be amplified to include related elements, in the light of industry co-regulation accepting broader notions of integrity (eg 'Act fairly' versus 'Act fairly and ethically').

Legislative Devices to Clarify and Illustrate the 'Fairness' Standard

While the ALRC ultimately stops short of recommending the repeal of amplified statutory unconscionability at this stage of its Inquiry, its comments and suggestions elsewhere in its Interim Report suggest that it conceptually co-locates at least some aspects of unconscionability with notions of fairness. For example, the ALRC suggests the use of legislative and perhaps other devices to illuminate and illustrate aspects of fairness that it also relates to unconscionability, as follows:[39]

[37] Australian Banking Association, *Banking Code of Practice* (Code of Practice, 1 March 2020) 5.
[38] Ibid 15.
[39] Australian Law Reform Commission, *Financial Services Legislation: Interim Report A* (Report No 137, November 2021) 522 [13.95]-[13.96].

> 13.95 … Accordingly, a provision or note to accompany the 'efficiently, honestly and fairly' obligation could helpfully provide that examples of conduct that may contravene the requirement to act fairly include, but are not limited to:
>
> - conduct that exploits another person's vulnerability, or is otherwise unconscionable;
> - conduct that substantially and adversely affects the interests of another, undertaken in the pursuit of self-interest; and
> - conduct that indicates a lack of reciprocity, including a lack of fair or agreed value, such as by the making of misleading or deceptive representations.
>
> 13.96 The ALRC would welcome the views of stakeholders as to the appropriateness of these proposed examples, and as to whether any additional examples could further enhance clarity, and therefore facilitate compliance with the obligation.

Whichever of the ALRC's proposals about statutory unconscionability are accepted, there is little harm in unconscionability being associated with fairness in this specific way, subject to the following caveats. After all, there are specific aspects of fairness mentioned in the list of indicators of statutory unconscionability going to both exploitative advantage-taking and good faith and fair dealing, so there are clear points of intersection and alternative pleading, in regulatory enforcement, litigation, and adjudication.

First, as outlined in this Submission, there are limits to treating unconscionability as simply one species of the genus of fairness. Secondly, as each of fairness and unconscionability have various aspects in the law, the desired clarity about each of them usually requires indications and examples at more specific levels of analysis and language, such as the ALRC's references above to exploitation of vulnerability and lack of reciprocity, although even those are more abstract than parties in litigation might desire in terms of predictive certainty.

Thirdly, greater and more detailed specificity about examples, indicators, or even presumptive factors does not necessarily produce greater clarity and certainty in the law. The nature of notions such as 'unfairness' and 'unconscionability' as values-based, open-textured, and context-sensitive notions is that they will always involve a degree of judgment and evaluation in particular circumstances that is not amenable to a strictly rules-based approach.

Fourthly, acceptance of a proposal about prohibitions on unconscionable conduct and the extent of its coverage by alternative provisions presupposes a common understanding of what level of meaning of unconscionable conduct is being engaged and subsumed. As discussed elsewhere in this Submission, unconscionability has different possible levels of meaning under the general law, as well as different forms across the various provisions of statutory unconscionability. Decisions to repeal any provision of unconscionability, like judgments about the respective coverage of each of the provisions of statutory unconscionability, presuppose a view, sometimes contestable or at least not yet conclusively determined by the High Court, about the relevant meaning or form of unconscionability that is engaged.

Framed in terms of the ALRC's endorsement of the six norms identified by the Financial Services Royal commission, and with the greatest respect to those who see it differently, it

is not self-evident that everything in the general and statutory law about unconscionability alone or about norms of fairness, reasonableness, and good conscience is adequately captured or explicated at more detailed levels of analysis by either first-order norms such as 'Obey the law' and 'Act fairly', or the 'efficiently, honestly and fairly' standard.

Finally, the question of clarifying examples and other 'useful heuristics' raises additional questions, some well-traversed in past inquiries, about inserting examples in legislation, the presumptive or other force of such examples, and the desirability of cognate regulation with clarifying examples (through ASIC guides and codes of conduct, for example).

Approaches to the 'Efficiently, Honestly and Fairly' Standard

This Submission does not contain a comprehensive analysis of the 'efficiently, honestly and fairly' standard. The following select comments suffice for the purposes of this Submission.

First, for the reasons outlined in this Submission and illustrated in the terminology used by judges when discussing each of statutory unconscionability and the 'efficiently, honestly and fairly' standard (including the judgment extracts below), it is doubtful that the latter wholly subsumes the former in content, as distinct from the different but related assessment of the range of conduct caught by regulatory nets based alternatively on each standard.

Secondly, and as a corollary, much more business conduct will be caught by an 'unfairness' standard than by the higher bar of an 'unconscionability' standard, given the different levels of moral blameworthiness involved in each case. Some harsh or sharp business conduct might clearly be unfair and yet not be sufficiently predatory or exploitative to be unconscionable under the general law. So, any expansion of the regulatory reach of any standards grounded in fairness arising from this Inquiry, if it goes beyond the current state of the law, whether intended or otherwise, is likely to attract considerable interest and perhaps push-back from the business sector and its advisers.

Thirdly, given the key issue about the status of the 'efficiently, honestly and fairly' standard as a compendium standard or a set of three separate but interlocking standards, reform that goes to that issue might have some impact upon the respective coverage of that standard and the 'unconscionability' standard, for future advice, enforcement, pleading, and adjudicative purposes.

Fourthly, as the Corporations Act is not the only Commonwealth law to incorporate notions of 'efficiency' when imposing obligations, ideally some account should be taken of equivalent uses of that term in public and private sector contexts, and the respective purposes served by the use of such terms as well as consistency across the Commonwealth statute book, before making a final decision to replace a term such as 'efficiently' with a perhaps more limiting term such as 'professional'.

For example, 'efficiently' is juxtaposed with 'effectively' and 'ethically', and also used and defined, in the context of imposing public sector obligations on senior Commonwealth officials, as follows:[40]

> **Section 26: Duty to act honestly, in good faith and for a proper purpose**
>
> An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties honestly, in good faith and for a proper purpose.
>
> **Section 8: The Dictionary**
>
> ***proper***, when used in relation to the use or management of public resources, means efficient, effective, economical and ethical.

For the sake of clarity, the point here is not to support or reject the ALRC's proposal about changing the terminology of the 'efficiently, honestly and fairly' standard. The point is to highlight other and broader matters for equal consideration in the interest of legislative coherence and consistency about the use of terms such as 'efficiently', in making a final decision about legislative reform in this area.

In addition, the fact that such cognate legislation, albeit in the context of the public sector, refers to ethical obligations, when combined with the fact that the relevant code of conduct for the banking sector explicitly refers to its signatories acting ethically, together at least raise a question about the desirability or otherwise of including an ethical dimension in any statement of norms for a new objects clause, and perhaps in any revised formulation of the 'efficiently, honestly and fairly' standard. At the very least, in light of the broader aspects of integrity and ethicality highlighted equally in some Australian judicial decisions about the standard, comments by Commissioner Hayne in his reports, and equivalent standards regulating the financial services industry in comparable jurisdictions (eg UK), and if the ALRC's proposal is accepted to replace a reference to efficiency with a reference to professionalism in any revised standard, consideration should be given to indicating by notes, examples, or other legislative and regulatory devices that acting ethically in accordance with professional ethics and standards is part of the overall obligation.

The other matter worth highlighting about the 'efficiently, honestly and fairly' standard in the context of this Submission is that the comments of judges in recent cases about it suggest that standards such as that one and statutory unconscionability have at least some things in common. Each standard fits more easily into a principles-based approach than a wholly rules-based approach, given their nature as evaluative standards predicated on a balance of circumstances. Neither standard can be exhaustively defined in advance and for all purposes, although indicative examples can be of assistance in making the evaluative judgments needed.

Each standard is at a particular point in its evolving trajectory that has many important unresolved issues. The meaning, scope, and available body of precedent for each standard in resolving such issues must not risk significant change, fracture, or redirection unless

[40] *Public Governance, Performance and Accountability Act 2013* (Cth) ss 8, 26.

absolutely justified. Resolving the vexed question of whether the 'efficiently, honestly and fairly' standard is a compendious standard or a set of three distinct but related standards is a matter worthy of reform in the name of simplification and rationalisation of legislative provisions. Replacing any or all of the three statutory unconscionability provisions in the ASIC Act, in the expectation or hope that a reformed 'efficiently, honestly and fairly' standard could pick up all of that work does not rise to the same level of necessity and justification, and adds additional and unnecessary risks to be navigated, for the reasons canvassed elsewhere in this Submission.

For ease of reference, relevant judicial comments in this context appear below. In *Australian Securities and Investments Commission v Westpac Securities Administration Ltd and Another*,[41] Chief Justice Allsop noted that instances or examples of conduct failing to satisfy the phrase, 'efficiently, honestly and fairly', would be of guidance. Yet, his Honour had no issue applying the ordinary meaning of the word 'fair' to section 912A(1)(a):[42]

> None of the cases to which the primary judge referred sought to define the phrase. Words such as "efficiently", "honestly" and "fairly" and a composite or compendious phrase or expression such as "efficiently, honestly and fairly" do not admit of comprehensive definition. Certainly a degree of articulation of instances or examples of conduct failing to satisfy the phrase will be helpful and of guidance, as will an articulation or description of the norms involved.
>
> The provision is 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, but nevertheless an abstraction to be directed to the "infinite variety of human conduct revealed by the evidence in one case after another."
>
> …
>
> ***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":*** Macquarie Dictionary. It could hardly be seen to be fair, or to be providing financial product advice fairly, or efficiently, honestly and fairly, to set out for one's own interests to seek to influence a customer to make a decision on advice of a general character when such decision can only prudently be made having regard to information personal to the customer.

Similarly, Justice Michael O'Bryan saw no good reason why the word 'fair' cannot carry its ordinary meaning:[43]

> One of the meanings of the word "efficiently", and the meaning well adapted to the statutory provision, is competent, capable and having and using the requisite knowledge, skill and industry: cf *ASIC v Camelot* at [69(c)]. The word "honestly" includes dishonesty in the criminal sense but may also comprehend conduct which is not criminal but which is

[41] (2019) 272 FCR 170. On appeal, see *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* (2021) 270 CLR 118.
[42] Ibid [172]-[174] (Allsop CJ) (emphasis added).
[43] Ibid, [426]-[427] (O'Bryan J) (emphasis added).

> morally wrong in the commercial sense: *RJ Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* (1989) 1 ACSR 93 at 110. The word "fair" as used in s 912A(1)(a) has not received detailed judicial consideration. ***However, it seems to me that there is no reason why it cannot carry its ordinary meaning which includes an absence of injustice, even-handedness and reasonableness.*** As is the case with legislative requirements of a similar kind, such as provisions addressing unfair contract terms, the characterisation of conduct as unfair is evaluative and must be done with close attention to the applicable statutory provision: cf *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [364].
>
> …
>
> In the present case, the significant aspect of s 912A(1)(a) is the requirement to ensure that the financial services covered by the licence are provided fairly. Fairness must be assessed having regard to all relevant circumstances bearing upon the provision of the financial services in question.

However, whilst Justice Jonathan Beach in *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) and Others (No 3)*[44] accepted that a normative standard such as 'fair' would be 'suitably vague and flexible',[45] his Honour questioned the applicability of this ordinary meaning:[46]

> Let me say something about "fairly". Judges applying s 912A(1)(a) have usually not sought to define "fairly" except to explain its structural setting in the composite phrase. This is unsurprising. And of course *no dictionary definition could be adequate for the task given the intrinsic circularity with such definitions*. For example, take the Macquarie Dictionary definition. First, the concept of "free from injustice" is question begging and conclusionary. It adds little to elucidate "fairly". Second, the phase "that which is legitimately sought, pursued, done, given etc." is also question begging. No content is given to what is legitimate. There is irremediable circularity unless legitimacy simply incorporates other statutory or common law/equitable normative standards of behaviour. Third, the phrase "proper under the rules" is also devoid of content unless "proper" means "in compliance with". Fourth, if one construes "fair" to include "free from dishonesty", then this all just suggests that the phrase "efficiently, honestly and fairly" should be read compendiously.
>
> Could you convincingly define "fairly" by what it lacks? To say that fairly means free from bias, free from dishonesty, etc, is to stipulate necessary negative conditions. And to do so may give you some boundary conditions. But no positive conditions are stipulated. No content is given, let alone sufficient conditions. But to stipulate negative conditions may not be unhelpful.
>
> Should "fairly" only be viewed from the perspective of an investor, borrower or other person interacting with the licensee? No. Fairness is to be judged having regard to the interests of both parties. Other statutory provisions may be designed to tilt the scales, but not s 912A(1)(a) and the statutory composite norm it enshrines. Disproportionate emphasis should not be given to what is the third part of a composite phrase in a manner which creates unsatisfactory asymmetry in favour of those with whom the licensee deals. This

[44] (2020) FCR 57.
[45] Ibid [524] (Beach J).
[46] Ibid [520]-[522], [528] (Beach J) (emphasis added).

> section is not a back door into an "act in the [best] interests of" obligation. Other specific provisions of the Act nicely fulfil that role. There is nothing to indicate that s 912A(1)(a) was to have that bias.
>
> …
>
> In summary, in my view it is not justifiable to take one word from a composite phrase, artificially elevate its significance and read it in a manner asymmetrically in favour of an investor.

Justice Beach again endorsed this position in *Australian Securities and Investments Commission v Commonwealth Bank of Australia*.[47]

In *ASIC v RI Advice Group Pty Ltd (No 2),*[48] Justice Mark Moshinsky determined it was unnecessary to resolve the above issue in the present case:[49]

> Section 912A(1)(a) was considered by the Full Court in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 (*ASIC v Westpac*) at [169]-[175] per Allsop CJ, at [286], [289] per Jagot J, at [421]-[427] per O'Bryan J; and by Beach J in *Australian Securities and Investments Commission v AGM Markets Pty Ltd (In Liq) (No 3)* (2020) 275 FCR 57 (*AGM Markets*) at [505]-[528]. I adopt the statements of principle concerning s 912A(1)(a) in those passages and note that they emphasise the breadth of the expression "efficiently, honestly and fairly". To the extent that different views have been expressed as to whether "efficiently, honestly and fairly" is a compendious expression, it is unnecessary to resolve that issue for present purposes.

Background and Reform Options on Statutory Unconscionability

Clarity and Certainty in the Context of Evaluative Standards

As foreshadowed earlier in this Submission, high-level judicial support exists for the proposition that absolute predictive certainty in the law is illusory in general, and certainly not secured automatically by progressively more complex, detailed, and lengthier rules-based laws. Recall, for example, the earlier quoted comments on this point by Chief Justice James Allsop, directly contemplating the lessons for financial services law and regulation from the Hayne Royal Commission:[50]

> I venture to suggest that many of the commercial problems of corporate and financial regulation exposed in the recent Royal Commission would be made more ruthlessly manageable by a full understanding and a daily application of the fiduciary principle, rather than by *ever more detailed regulation* which has as its (false) working assumption the ability exhaustively to **define** *good faith*, fiduciary responsibility, and behaviour in good commercial conscience.

[47] [2020] FCA 790, [50] (Beach J).
[48] [2021] FCA 877.
[49] Ibid, [377] (Moshinsky J).
[50] Chief Justice J. Allsop, 'The Intersection of Companies and Trusts' (Lecture, Harold Ford Memorial, 26 September 2019) 3 (bold emphasis in original, italicised emphasis added).

To similar effect are Chief Justice Allsop's comments in the *Paciocco* appeal:[51]

> 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.

The search for absolute clarity and certainty in the law is sometimes a misguided search for the legal equivalent of the Holy Grail. Some people invest false hope in the belief that absolute rules and complete definitions constitute the sole gateway and guarantor of certainty under the law. In terms that resonate for this Inquiry and in support of the ALRC principles-based approach, a former Chief Justice of Australia, Sir Anthony Mason, offered the following comments almost 30 years ago about the futility of searching for clarity and certainty in the law beyond the boundaries of what is actually possible, especially where normative judgments based upon a multiplicity of considerations are involved:[52]

> As we endeavour to express principles which are attuned to the attainment of justice in a range of particular cases, we are compelled to express those principles in broad terms. Criticism of that approach often stems from a preference for a more rigid rule-based system of justice. That preference, not infrequently voiced by judges and practitioners, is generally associated with the belief, in my view erroneous, that rigid rules promote clarity and certainty in the law.

The comments accepted by three judges of the FCAFC in the *Paciocco* appeal are to similar effect:[53]

> Certainty is a quality sometimes posited as a reason for removing from the expression of rules to govern conduct (in particular in regard to commercial conduct) standards, values and norms that *lack precise definition*, or that involve the application of values, or that apply or operate in contestable fields or with contestable results. But no sophisticated legal system, or society, seeks intellectual refuge in the proposition that rules alone are the guardians of the security of certainty.
>
> … The place of norms, values and principles in commercial law, lacking particular precision, but stating a value or general standard, can be seen in the common law, statutes on commercial subjects, in Equity, and in other branches of commercial law. *Sometimes, a rule can only be expressed at a certain level of generality*, often involving a value judgment. To do

[51] *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199, 276 [304] (Allsop CJ, Besanko and Middleton JJ separately agreeing).
[52] Sir A. Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 255-6.
[53] *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199, 267 [266]-[267] (Allsop CJ, Besanko and Middleton JJ separately agreeing) (emphasis added).

> otherwise, and *to seek precise rules for all circumstances, may be to risk complexity, incoherence and confusion*.

Sometimes the problem is not so much the clarity of legislation, and a futile search for absolute certainty, but rather the mindset of regulatory participants, from law-makers and official regulators, at one extreme, to industry members and the lawyers advising them, at the other extreme, in terms of how they each view different kinds of regulation (eg rule-based versus principles-based regulation, prescribed and detailed rules versus normative standards, and so on). Normative standards such as legislated good faith and statutory unconscionability, and the additional legislated factors that inform their meaning and application, are part of a judicially accepted process of judgment in which a series of factors that might or might not point in different directions, according to the circumstances in particular situations, are weighed judicially in the balance. The recent extra-judicial views on the respective merits of rules-based and principles based approaches of Justice Mark Leeming on commercial equity in the early 21st century[54] and Justice Sarah Derrington in her recent W A Lee Equity Lecture,[55] together with Professor John Braithwaite's seminal discussion of this topic 20 years ago,[56] provide ample justification for a principles-based approach to law-making and law reform without any automatic loss of clarity and certainty in the law, and indeed some gains.

For another judicial example, while still a judge of the Federal Court in 2016 and prior to his elevation to the High Court, Justice James Edelman described 'open-textured' concepts such as good faith and statutory unconscionability (which also includes good faith as a legislated factor) in terms that show the futility of trying to bed down such concepts completely in prescriptive laws:[57]

> These [statutory unconscionability] provisions are examples of **open-textured provisions** about which it is likely that **no precise or universal test for application** will ever be stated. There are numerous examples in Australia and overseas … In the United States, there has long been legislation, now in all fifty states, giving effect to **the open-textured concept of 'good faith'** in § 1-304 of the *Uniform Commercial Code* which provides that, for commercial contracts, '[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement'.
>
> Like other instances of **open-textured criteria**, there is **no unitary test** for the application of a statutory proscription of unconscionability. One reason for this is that a judicial conscience is **not a yardstick capable of direct application** … But the concept of unconscionability [in the CCA, including reference to undefined 'good faith'] is not determined solely by reference to the circumstances of each case. The assessment of conscience in those circumstances will

[54] Justice M. 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.
[55] Justice S. Derrington, 'W A Lee Equity Lecture' (Lecture, Banco Court, Supreme Court of Queensland, 18 November 2021).
[56] J. Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47.
[57] *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 442 [85]-[87] (Edelman J) (bold emphasis added).

> have regard to **underlying principles governing the concept** of unconscionability in its particular statutory context, including **the list of factors prescribed for consideration**.

Indeed, general laws and terms in them can be open-ended and still sufficiently clear and certain for those making, administering, interpreting, and complying with them. What matters in substance is a sufficient consensus of understanding and aspiration amongst all of the regulatory participants – law-makers, official regulators, courts, industry members, and the lawyers advising all of them. The absence of such an immediate consensus, particularly after the introduction of a new or amended law, or other regulatory standard, does not necessarily mean that the law is uncertain and unclear, that it needs fixing, and that the only or best means of fixing it is through more elaborate legislative definition or clarification. A variety of legal and regulatory measures can be deployed together to reinforcing effect to achieve optimal guidance for all stakeholders.

A more nuanced set of regulatory appreciations and levers is often necessary, all working in tandem. Financial services reform faces a similar prospect, if the ALRC's proposals are fully accepted, and this is a natural consequence of a maturing approach and continuous improvement in legislative design and reform. There are ways to handle understandable concerns about any changes to the law, transitional issues, and necessary complementary measures that arise as a result of reform of financial services law in the genuine name of simplification and rationalisation, whatever disagreements might arise about what reforms genuinely meet that characterisation.

Judicial Guidance on the Legal, Practical, and Litigious Dimensions of Unconscionability

In a much-cited passage referring to 'moral obloquy', former NSW Chief Justice James Spigelman warned more than 15 years ago against anything less than a well-ordered development of statutory unconscionability according to accepted categories and reasoning approaches, as follows:[58]

> Over recent decades legislatures have authorised courts to rearrange the legal rights of persons on the basis of vague general standards which are clearly capable of misuse unless their application is carefully confined. *Unconscionability is such a standard.*
>
> Unconscionability is a well-established but narrow principle in equitable doctrine. It has been applied over the centuries with considerable restraint and in a manner which is consistent with the maintenance of the basic principles of freedom of contract. It is not a principle of what 'fairness' or 'justice' or 'good conscience' requires in the particular circumstances of the case … Even if the concept of unconscionability [in the NSW Retail Leases Act] is not confined by equitable doctrine as the decisions under s 51AC of the Trade Practices Act suggest, restraint in decision-making remains appropriate. *Unconscionability is a concept which requires a high level of moral obloquy.* If it were to be applied as if it were equivalent to what was 'fair' or 'just', it could transform commercial relationships …

The significance of this important passage in his judgment for this ALRC Inquiry is as follows. First, it is one of many judicial and extra-judicial comments that contrast 'unfairness' and

[58] *Attorney-General (NSW) v. World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [119]-[121] (Spigelman CJ) (emphasis added).

'unconscionability', while also highlighting that neither concept operates as a first-order principle in a free-standing way. So, for example, there are differences between the two concepts that matter in assessing proposals about repealing provisions and coverage of norms in objectives clauses, and in delineating the second-order and even third-order aspects of what fits under the umbrella of each notion, and to which norms in objectives clauses and particular provisions can connect in legislative interpretation and other regulatory measures.

Secondly, the final sentences of the quoted passage summarise a position also reached in a series of public and parliamentary inquiries about the relative coverage of 'unfairness' and 'unconscionability'. Chief Justice Spigelman makes it clear that, if the legal bar is set simply at catching what is 'unfair', much more business conduct will be caught than if the bar is set at the higher standard of 'unconscionability', whatever the level of meaning of unconscionability that is properly engaged. In other words, the much-cited requirement for 'a high level of moral obloquy' to sustain a finding of unconscionability was used by Spigelman CJ in the *World Best Holdings* case to indicate a quality of wrongfulness that rises above simple unfairness or injustice.[59] In that sense, something that is unconscionable is also probably unfair, but there are still considerable advantages of public prominence, regulatory priority, and granular particularity in having a package of specific provisions based upon statutory unconscionability, rather than positioning it simply as an aspect of 'unfairness', encapsulated within the 'efficiently, honestly and fairly' standard.

Subsequent cases emphasise that 'moral obloquy' is not an external quality that is superimposed upon the legislated standards and indicators of unconscionability, but rather a characterisation that flows from them. Nevertheless, the ongoing usefulness of 'moral obloquy' in discourse in this field of commercial law and practice is doubtful after confinement and criticism of it in the *Kobelt* case and earlier intermediate appellate court authorities,[60] as the term adds little analysis and generates much confusion.[61]

However, nothing in the subsequent criticism and non-unanimous abandonment[62] of judicial references to 'moral obloquy' undermines or detracts from two key points arising form Chief Justice Spigelman's use of the term, which bear directly upon this Inquiry's treatment of statutory unconscionability – namely, that there is a moral blameworthiness that characterises 'unconscionability' and its features in a way that might not be duplicated or apply with equal force for 'unfairness', and that the legal bar to characterise something as 'unconscionable' rises above what is needed to characterise something as 'unfair'. On his

[59] *Attorney-General (NSW) v. World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121] (Spigelman CJ), as explained in *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199, 265-6 [260]-[262] (Allsop CJ, with Besanko J and Middleton J agreeing). The Full Federal Court's treatment of 'moral obloquy' is to similar effect in *Kobelt v Australian Securities and Investments Commission* [2018] FCAFC 18, [193] (Besanko and Gilmour JJ), [296] (Wigney J).

[60] *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389; *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90; *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199; *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421; *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* [2017] FCAFC 75; *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15.

[61] *ASIC v Kobelt* (2019) 267 CLR 1, 31 [60] (Kiefel CJ and Bell J).

[62] Ibid 48 [118] (Keane J).

characterisation, properly understood, 'moral obloquy' is not an extra and substantive requirement in addition to what the statute says, and the relationship between the two concepts is not a relationship where one is a sub-set of, subsumed by, or an aspect of, the other.

Any amplification of fairness-based regulation, both generally and in the specific context of financial services law and regulation, would still need to take account of what is already provided by the regulation of unreasonable and unconscionable conduct. Fairness and its cognate standards are familiar benchmarks for lawyers and judges. Justice James Edelman nominated three aspects of fairness in his comments in a panel session at the NSW Supreme Court's 2019 Corporate and Commercial Law conference – fairness in the context of framing and achieving corporate purposes, fairness as a touchstone guiding choices by official regulators in fulfilling their mandates, and incorporation of fairness-based standards in legislation and regulations. In commenting about the third aspect, and with passing illustrative reference to the High Court's decision in the *Kobelt* case, he said:[63]

> The third dimension of fairness is perhaps the most difficult – and that's where fairness has been instantiated into legal rules, particularly into legislation or regulations as a specific requirement …
>
> It might be that fairness, in those contexts, might mean nothing more than reasonableness, in which case we get back to the areas in which lawyers are comfortable.
>
> But in other contexts, fairness doesn't mean the same thing as reasonableness.
>
> The High Court hasn't yet grappled with any of those specific legislative provisions although we did grapple with the meaning of the word unconscionable and split 4-3'.

While there might not yet be an optimal level of fairness-based regulation to suit everyone, and there might be some emerging gaps that need filling, there is an existing platform of statutory and non-statutory law based upon notions of fairness in commercial contexts, to be integrated with any further reform in the overall direction of fairness as a touchstone. Even if the regulatory and public calls for enhanced fairness-based regulation have force, because of emerging gaps in protection from unfair practices in the digital economy, that need can be met in a number of ways, and does not occur in a vacuum, but rather against the background of intertwined laws preventing unfair, unreasonable, unconscionable, and otherwise unconscientious business and financial services behaviour, in regulating an informed business conscience in the financial services industry and beyond.

Different Forms of Statutory Unconscionability

Statutory unconscionability appears in Commonwealth legislation in the Corporations Act, the Competition and Consumer Act (and Australian Consumer Law), and the ASIC Act. In a 2019 test case on the scope of statutory unconscionability, two HCA judges describe statutory unconscionability as a prohibition of conduct 'that objectively answers the

[63] As quoted in: M. Pelly, 'Hayne's Six Rules for Business Become One Legal Obligation: Be Fair' *The Australian Financial Review* (Sydney, 1 November 2019).

description of being against conscience'.[64] Conscience-based norms and other values therefore underlie and guide the descriptive and normative use of unconscionable business conduct regulation.[65]

What is the structure of statutory unconscionability, and to what extent does or should it encompass any of the various levels of meaning for unconscionable conduct, as outlined further below? The first form of statutory unconscionability is simple statutory unconscionability. The relevant cognate provisions in the Australian Consumer Law (ACL) and ASIC Act simply pick up the judge-made law on unconscionable conduct, with the various legislative and regulatory advantages canvassed further below. For example, the relevant ACL provision is section 20:[66]

(1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.

(2) This section does not apply to conduct that is prohibited by section 21.

The second form of statutory unconscionability is amplified statutory unconscionability. The relevant cognate provisions in the ACL and ASIC Act have a number of features. They proscribe conduct if it is 'in all the circumstances, unconscionable'.[67] They are subject to a special set of interpretative provisions, just for amplified statutory unconscionability. They explicitly broaden the scope of amplified statutory unconscionability beyond simple statutory unconscionability – a crucial relationship between the two forms that is affected by how narrowly or broadly simple statutory unconscionability is cast, bearing in mind the different possible meanings of 'unconscionable conduct' under the judge-made law. They contain an indicative and non-exhaustive set of indicators of unconscionable conduct of two broad kinds, to use Professor (later Justice) Paul Finn's schema – a top set of indicators going to predatory exploitation of vulnerability and advantage-taking, and a bottom set of indicators going to good faith and fair dealing.[68]

Other features of the legislative scheme have been amended over time, with more indicators being added, as well as a set of interpretative principles, some of which are not strictly content-based and hence fall outside what might otherwise be associated or subsumed under the content of a 'fairness' standard, such as the enforcement advantage for official regulators in being able to rely upon systems or patterns of conduct towards a vulnerable class of victims instead of having to proving everything for every single one of

[64] *ASIC v Kobelt* (2019) 267 CLR 1, 17 [14] (Kiefel CJ and Bell J).
[65] For a recent discussion of this aspect, see, for example: P. Toy, 'An Examination of Legal Values in Statutory Unconscionable Conduct' (2020) 48 *Australian Business Law Review* 406; Justice S. Derrington, 'W A Lee Equity Lecture' (Speech, Banco Court, Supreme Court of Queensland, 18 November 2021).
[66] *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') s 20.
[67] Eg Ibid s 21(1).
[68] P. Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37, 45-50. Other indicators and other features of the provisions that have been added since then might not fit neatly or at least completely within Finn's two-part characterisation or the distinction between substantive and procedural unconscionability. Nor would they easily or necessarily flow self-evidently from references to fairness and honesty in any revised 'efficiently, honestly and fairly' standard, if all provisions of statutory unconscionability disappeared from the law without ongoing relevance and particularisation.

them. Finally, both sets of statutory indicators apply since 2012 to both business and consumer transactions. All of those features are important to the overall legislative package, and impact upon the matters covered by this Inquiry and its proposals about statutory unconscionability.

Statutory unconscionability in financial services law takes two forms. In its first form ('simple statutory unconscionability'), in s 12CA of the ASIC Act and probably s 991A of the Corporations Act as well, it largely embodies the equitable notion of unconscionable conduct, at least under the conventional approach to that provision in judge-made law as a matter of precedent. As recognised in the landmark *Amadio* case and its acknowledgement of the 'special disadvantage' doctrine, unconscionable conduct is present whenever a stronger party engages in exploitative advantage-taking of a vulnerable party, in circumstances where the weaker party is under a special disadvantage or disability, whose nature prevents the weaker party properly assessing what is in their own best interests, and the stronger party knowingly takes advantage to the stronger party's benefit of that weaker party's position. It is likely that s 12CA also picks up related doctrines, such as the special protection afforded to guarantor wives and potentially others under the spousal doctrine affirmed in *Yerkey v Jones*[69] and *Garcia v NAB*,[70] and which the High Court has not yet assimilated in the broader *Amadio* form of unconscionability encapsulating the notion of unconscientious exploitation by a stronger party of a vulnerable party's 'special disadvantage', although they are branches of the same tree.

The second form of statutory unconscionability ('amplified statutory unconscionability') is enshrined in s 12CB and s 12CC of the ASIC Act, and cognate provisions in the Australian Consumer Law, covering both business-to-business (B2B) and business-to-consumer (B2C) transactions since 2012. Together, those provisions contain a form of statutory unconscionability that is broader than simple statutory unconscionability, specific principles of interpretation for amplified statutory unconscionability, and a harmonised list of indicators of unconscionable conduct that is non-exhaustive and applicable equally to B2B and B2C contexts.

In theory, there are five possible levels of meaning for statutory unconscionability, only three of which are still live possibilities in terms of their enshrinement within the law. Professor (later Justice) Paul Finn once postulated four possible meanings and uses of the term, 'unconscionable conduct', as discussed immediately below.[71]

First, and at the broadest possible level of meaning and application in the abstract, a term such as 'unconscionable conduct' might in theory operate directly as a basis for judicial intervention and remedial action in its own right, unmediated by conventional legal

[69] *Yerkey v Jones* (1939) 63 CLR 649.
[70] *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.
[71] P. Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37, 38-9, referred to in *Australian Competition and Consumer Commission (ACCC) v Samton Holdings Pty Ltd* (2002) 117 FCR 301, [46] (Gray, French and Stone JJ).

doctrines from the general law. No serious judge or expert commentator suggests that unconscionability operates in that way in any of its statutory or non-statutory forms.

Secondly, and still at a fairly broad level of abstraction, but one grounded in an identified body of law, notions of what is unconscionable, unconscientious, or otherwise against good conscience underlie the whole of the law of equity, and perhaps aspects of the common law too. Accepting that level of meaning for unconscionability under the general law decides nothing one way or another about the scope of what is covered across the four main provisions enshrining statutory unconscionability in the Corporations Act and the ASIC Act. That is a separate but related exercise of adjudicative interpretation, in deciding the reach of each of simple and amplified statutory unconscionability.

Thirdly, and at a lower level of abstraction, references to 'unconscionable conduct' could signify a range of equitable norms that go to unconscionability, without necessarily requiring 'an explicit finding of unconscionable conduct'.[72] On this level of abstraction, notions of unconscionability or even broader unconscientiousness are a specific element or precondition of recovery. Examples include the doctrines covering relief against forfeiture, estoppel, constructive trusts, penalties, economic duress, mistake, and unconscionable conduct and dealings.

On this view, as explained by judges at a time when this third level of abstraction held greater sway than it now appears to do, at least in terms of the scope of s 12CA, 'specific equitable doctrines of which estoppel, unilateral mistake, relief against forfeiture and undue influence are examples' are also doctrines 'united by the idea that equity will prevent an unconscionable insistence on strict legal rights and are conditioned upon the explicit finding of unconscionable conduct in the persons against whom they are invoked'.[73] After all, judges and other lawyers commonly say that a contractual clause operates as a penalty when it would be unconscionable to enforce it, that a constructive trust should be imposed when it would be unconscionable to allow someone to retain the benefit of property themselves, that someone should be held to their word or deed under the law of estoppel when it would be unconscionable to allow them to go back on either, and that relief against forfeiture should be given when it would be unconscionable (or unconscientious) not to do so.

For a time, courts below the level of the High Court, as in the Full Federal Court's decision in *ACCC v Samton Holdings*,[74] entertained the possibility of this third level of abstraction being the form of unconscionability under the general law that is applied as 'the unwritten law' under simple statutory unconscionability. Such an outcome left open the door to the possibility that simple statutory unconscionability (ie unconscionable conduct 'within the meaning of the unwritten law') could embrace all actions that have a connecting thread back to notions of unconscionability and unconscientiousness, of the kinds canvassed in

[72] Ibid.
[73] Ibid.
[74] *Australian Competition and Consumer Commission (ACCC) v Samton Holdings Pty Ltd* (2002) 117 FCR 301.

more than one category of Finn's four-fold analysis of unconscionable conduct, but that door seems closed for the moment.[75]

Fourthly, and more discretely, 'unconscionable conduct' could serve as a label for the group of doctrines conventionally associated with the term, 'unconscionable conduct', embracing notions of unconscionable bargains, unconscionable dealing, considerations of special disadvantage, and related doctrines. If that is the settled position, simple statutory unconscionability mainly encapsulates and legislatively bolsters the conventional equitable notion of unconscionable conduct associated with unconscionable dealing and exploitation of *Amadio*-like special disadvantage, and probably related notions such as the spousal doctrines accepted separately by the High Court in *Yerkey v Jones* and *NAB v Garcia*.

However, if simple statutory unconscionability is so confined, that leaves amplified statutory unconscionability to be explored, at least in part, through the prism of other bases of equitable relief in which unconscionability is an explicit or implicit element. Those equitable notions arguably are joined by statutory innovations beyond such bases of relief and shaped by what successive federal parliaments have created as the legislative infrastructure for amplified statutory unconscionability, with possibilities that post-*Kobelt* cases are only beginning to explore. The extent to which the non-exhaustive list of indicators of statutory unconscionability and associated provisions in the latter encompass or extend beyond the former's inclusion of actions based upon undue influence, mistake, duress, estoppel, penalties, relief against forfeiture, compliance with time and notice stipulations, protection of reposed trust and confidence, and so on,[76] then becomes part of the ongoing working through of statutory unconscionability by the courts.

Fifthly, and beyond what unconscionable conduct might mean under the general law, which is the meaning and scope of unconscionability picked up under simple statutory unconscionability, amplified statutory unconscionability might cover not only the third and fourth bases of recovery associated with unconscionability under the general law, but also bases of recovery beyond that body of law, as generated and conditioned by the specific provisions of s 12CB and s 12CC. The High Court is yet to rule decisively on this last possibility. No reform arising from the present Inquiry should prejudge that important matter, one way or another.

Needless to say, good law reform means that reform measures for the sake of simplification and rationalisation of legislation desirably should not unintentionally trespass upon or adversely affect unresolved substantive questions about the full potential of statutory unconscionability. If the full range of what is canvassed immediately above is picked up in

[75] Eg *Razdan v Westpac Banking Corporation* [2014] NSWCA 126, [150] (Bergin CJ in Eq, McColl JA [1] and Macfarlan JA [22] separately agreeing), citing *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* (2001) 117 FCR 23, but without explicitly addressing the possibility left open in *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301, [46], [48]; and *ASIC v Kobelt* (2019) 267 CLR 1, 36 [82] (Gageler J), explicitly rejecting that possibility.

[76] For a point-in-time assessment of the possible unconscionability-related bases of equitable relief picked up by statutory unconscionability, see: P. Strickland, 'Rethinking Unconscionable Conduct Under the Trade Practices Act' (2009) 37 *Australian Business Law Review* 19; See also Justice S. Derrington, 'W A Lee Equity Lecture' (Lecture, Banco Court, Supreme Court of Queensland, 18 November 2021).

statutory unconscionability, with the extra advantages of additional statutory remedies and an official regulator to investigate and bring actions, statutory unconscionability still has some work to do, and its work in future test cases desirably should remain unaffected in substance by any reform of statutory unconscionability that arises from the ALRC's Interim Report.

The High Court's Future Possibilities on Statutory Unconscionability

In light of the analysis above and elsewhere in this Submission, which go to the question of whether any ALRC-identified options or proposals on statutory unconscionability might affect unresolved and substantive issues about statutory unconscionability as it continues to evolve, it is worthwhile looking ahead and considering the High Court's future options on statutory unconscionability, given the split decision in the *Kobelt* case, subsequent retirements from and appointments to the High Court and potentially changing the balance of views on statutory unconscionability, and further test cases winding their way back to the High Court. The High Court could go in a number of different and equally possible directions in the next suitable test case on statutory unconscionability, depending upon the composition of the Court, the way in which parties or regulators run the test case, and where the current bench ultimately lands in the choice between narrow and broad readings of statutory unconscionability.

What is left out of scope in the following analysis is any realistic chance that the High Court accepts that the general law on unconscionable conduct, as reflected in simple statutory unconscionability, extends beyond *Amadio*-like and *Yerkey v Jones*-like unconscionability – a change of view that would also have a knock-on effect upon the scope of unconscionability-based doctrines picked up by amplified statutory unconscionability. Such a change of view about the scope of unconscionable conduct under the general law and hence simple statutory unconscionability seems a bridge too far at this stage, especially given the preponderance of cases that have come before the High Court and been framed by parties with a strong leaning towards the 'special disadvantage' end of the unconscionability spectrum.

The first possibility is that a new majority of High Court judges forms around Justice Keane's *Kobelt* view that amplified statutory unconscionability remains grounded in the 'special disadvantage' doctrine, whatever allowable adjustments to that doctrine are afforded by the statute, thereby rejecting the delinking of amplified statutory unconscionability from the 'special disadvantage' doctrine that post-*Kobelt* decisions of the Full Court of the Federal Court have emphasised. It is hardly inconceivable that Justice Keane might yet be joined in his stated view of statutory unconscionability by Chief Justice Susan Kiefel and the latest two additions to the High Court bench, Justice Jacqueline Gleeson and Justice Simon Steward, forming a new majority position on the breadth of statutory unconscionability, notwithstanding the more expansive view of its breadth signalled collectively in the judgments of Justices Gageler, Nettle, Gordon, and Edelman in the *Kobelt* case.

The second possibility is that the High Court achieves a neat separation between the equation of simple statutory unconscionability with unconscionable conduct and dealings

under the law of equity, on one hand, and the equation of amplified statutory unconscionability with all of the actions in which unconscionability is an element under the general law, as conditioned by the further principles of interpretation and non-exhaustive indicators in the statute. In both cases, unconscionability under the general law would still be the predominant feature in shaping the structure and boundaries of statutory unconscionability.

The third possibility is that the High Court permits the structure and terms of statutory unconscionability to embrace all of the notions of unconscionability under the general law, as well as an additional set of bases for relief on the ground of statutory unconscionability that are not shaped or confined by the manifestations of unconscionability under the general law, drawing their character and features from the statute, and not curtailed by any absolute requirement for the conditions for 'special disadvantage' to be present, whether under the general law or as modified by the statute. In other words, the High Court might embrace and even amplify the position reached by a series of decisions since *Kobelt*.

The ALRC's Reform Options

In short, outlining those five different levels of meaning for unconscionable conduct, and those three possible future directions on statutory unconscionability, sets up a framework for understanding the interactive possibilities between various provisions of statutory unconscionability, the options for reform, and the reasons why reform in the name of simplification and rationalisation must stop short of reform in this first stage of the ALRC's Inquiry that risks a point-in-time substantive intrusion upon the evolution of that body of statutory law in any particular respect.

The ALRC's approach leaves open the following four basic reform options on statutory unconscionability, only some of which the ALRC actively recommends at this first stage of its three-stage Inquiry:

(1) leave the four statutory unconscionability provisions in the current form in the Corporations Act (s 991A) and the ASIC Act (s 12CA, s 12CB, and s 12CC) – the ALRC does not propose this outcome in all respects, and the author of this submission agrees with the ALRC that at least some reform is desirable and appropriate in the name of simplification and rationalisation;
(2) repeal only one of the four statutory unconscionability provisions affecting financial services, from the Corporations Act – the ALRC favours at least this reform, and the author of this Submission supports that proposal;
(3) repeal statutory unconscionability as it appears in both s 991A of the Corporations Act and s 12 CA of the ASIC Act – the ALRC favours this twin proposal, but it is not supported by the author of this Submission; and
(4) repeal all four of the key provisions covering statutory unconscionability, including s 12CB and s 12CC as provisions enshrining amplified statutory unconscionability – the ALRC identifies this option as a 'second path', but ultimately does not endorse and propose this option for two very good reasons, and it is also not supported by the author of this Submission for those and other equally good reasons.

For the reasons outlined at the outset and elsewhere in this Submission, all of s 12CA, s 12CB, and s 12CC should be retained. First, unconscionability is not simply a sub-set or aspect of fairness. Secondly, repeal of s 12CA at this point in time risks having substantive effects beyond the ALRC's stated aims of legislative simplification and rationalisation. Put another way, s 12CA is neither redundant nor duplicative, in the way that other provisions for suggested repeal might be so characterised.

Thirdly, amplified statutory unconscionability in s 12CB and s 12CC is still on an evolutionary and post-*Kobelt* trajectory in the courts that potentially complements and adds to the regulatory and enforcement toolkit, such that the jury is still out on conclusive assessments of the relative scope, limits, and benefits of both the 'efficiently, honestly and fairly' standard and statutory unconscionability.[77] There is room for both in the regulatory and enforcement toolkit.

Fourthly, all of the provisions of statutory unconscionability matter in the unresolved judicial division of opinion about the scope of statutory unconscionability as a whole. It is at least reasonably arguable that a stand-alone and general norm or obligation of fairness might not be sufficient to do all of the work and with the right level of particularity and force (including moral and legal force) that is done by the collective body of norms and doctrines regulating fairness, justness, reasonableness, and good conscience in the general and statutory law, and recognised collectively as a body of Australian law representing an informed business conscience. For example, former Chief Justice of Australia, Sir Anthony Mason, noted the law of equity's focus upon 'standards of conscience, fairness, and equality'.[78] The interplay between what is 'unfair', 'unjust', and 'unconscionable' under the law is a feature of the High Court of Australia's otherwise problematic decision in *ASIC v Kobelt*.[79]

For example, '[t]he use of the word 'unconscionable' in s 12CB [of the ASIC Act] – rather than terms such as 'unjust', 'unfair' or 'unreasonable' which are familiar in consumer protection legislation – reflects a deliberate legislative choice to proscribe a particular type of conduct', according to Justice Patrick Keane in that case,[80] who added that '(t)he legislative choice of 'unconscionability' as the key statutory concept, rather than less morally freighted terms such as 'unjust', 'unfair' or 'unreasonable', confirms that the moral obloquy involved in the exploitation or victimisation that is characteristic of unconscionable conduct [in the law of equity] is also required for a finding of unconscionability under s 12CB'.[81] So, notions and different aspects of fairness are a big part of the regulatory toolkit here, but they neither replace nor occupy exactly the same space as the discrete norms and doctrines that regulate what is otherwise unjust, unreasonable, or unconscionable.

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[77] Cf J. Zarkovic, 'Are the "Efficiently, Honestly and Fairly" and Unconscionable Conduct Civil Penalty Provisions Equally as Effective in Combating Unfair Practices By Licensees' (2020) 48(3) *Australian Business Law Review* 272.

[78] Sir A. Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 239.

[79] *ASIC v Kobelt* (2019) 267 CLR 1.

[80] Ibid 48 [118] (Keane J).

[81] Ibid 48-9 [119] (Keane J).

Indeed, as the ALRC accepts and as Justice Keane's relative ordering of 'unconscionability' and the more 'morally freighted' standard of 'unfairness' reinforces, the only real sense in which 'unfairness' could replace 'unconscionability' as a regulatory touchstone in any of its meanings is if everything that is 'unconscionable' under the statutory and non-statutory law would of necessity also be 'unfair', for the reason that 'unconscionability' sets a higher bar of morally and legally blameworthy conduct, above and beyond what is simply 'unfair'. One can readily accept that ALRC assessment and rationale and yet still accept, as does the ALRC, that folding all unconscionability regulation of financial services licensees into a pre-existing obligation of fairness is a bridge too far. The author of this Submission agrees with that position.

Fifthly, repealing s 12CA would have ripple effects that are yet to be resolved. If, contrary to this Submission, s 12CA is repealed, important transitional implications and ripple effects will need further consideration, whether at this first stage or at a later stage of the ALRC's current Inquiry, including consideration of what is needed to protect the body of existing precedent on simple statutory unconscionability in the financial services context, how the different set of resulting provisions in the ASIC Act and the Australian Consumer Law are interpreted for precedential purposes, what is necessary to protect amplified statutory unconscionability from any substantive change in interpretation simply by the removal of s 12CA, and what changes (if any) should be made to cognate Commonwealth provisions on statutory unconscionability in the Australian Consumer Law.

Finally, because of the almost identical provisions on statutory unconscionability in the ASIC Act and the Competition and Consumer Act's Australian Consumer Law, consideration of legislative reform of statutory unconscionability for the financial services industry for the stated public policy goals of simplification and rationalisation should not drive or pre-empt any need for legislative reform of statutory unconscionability for all other industry sectors under the Australian Consumer Law. To reiterate earlier comments: the tail must not wag the dog.

Moreover, it is one thing to highlight the need to reform other Commonwealth laws beyond the Corporations Act and ASIC Act that might also impact upon the financial services industry, as the ALRC correctly does. It is another thing altogether, in reliance upon abstract justifications grounded in first-order principles of simplification and rationalisation in legislative design, to implement proposals that extend beyond those two Acts and beyond the financial services industry itself, and which have clear implications for other industries, if any of the ALRC's proposals or identified options on statutory unconscionability in the ASIC Act are followed and cognate provisions in the Australian Consumer Law are likewise amended as a result. The ALRC's terms of reference might reasonably encompass the former but not the latter, where many other and different regulatory, industry, and community constituencies would have a legitimate stake in any reform process or outcome.

Post-Kobelt Aftermath and Continuously Evolving Landscape on Statutory Unconscionability

The 4:3 split in the HCA's *ASIC v Kobelt* decision[82] inevitably and unsurprisingly raised publicly ventilated questions in its immediate aftermath about the future policy desirability, doctrinal comprehensibility, and commercial workability of the current regime for statutory unconscionability. In particular, the High Court's division over statutory unconscionability in the *Kobelt* case immediately revived past reform calls to increase consumer and small business protection by resetting the standard from 'unconscionability' to 'unfairness'.

Unsurprisingly, there are renewed calls for an alternative or supplemental regime to address perceived regulatory deficiencies or gaps in tackling unfair commercial conduct and practices.[83] The latest public attacks upon the current regime for statutory unconscionability come with correlative calls for its replacement by legislative standards that are more 'specific' and 'certain' in nature,[84] more harmonious with transnational business regulation and expectations,[85] and more aligned with notions of 'fairness' (as distinct from 'unconscionability').

One recent high-level judicial criticism is that the current conscience-based standards grounded in unconscionability are so unclear in their generality, meaning, and application, and with a net cast so broadly over such a wide span of circumstances and conduct 'that even some of the most experienced legal minds in the country cannot agree', so 'how are we to expect lay individuals … to take these matters into account as part of their everyday decision-making?'.[86] Even such robust critiques occur without the availability and benefit of systematic evidence-based research about the actual impact of such legislative regimes on commercial understanding and behaviour.[87] Where they see a vice in commercial uncertainty and legal indeterminacy, others see a virtue in conceptual coherence and contextual flexibility, so that any concern about lack of precision in standard-setting can be obviated to a degree by a precautionary approach.[88]

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[82] *ASIC v Kobelt* (2019) 267 CLR 1.

[83] M. Pelly, 'Fairness the Right Weapon, Says Crennan' *The Australian Financial Review* (Sydney, 7 February 2020); J. Thomson, 'Andy Penn Backs Unfair Conduct Push' *The Australian Financial Review* (Sydney, 7 February 2020); M. Pelly, 'Judge Pleads for End to Vague Laws' *The Australian Financial Review* (Sydney, 6 February 2020); J. Thomson, 'Rod Sims' Unfair Conduct Challenge for Business' *The Australian Financial Review* (Sydney, 2 January 2020); M. Pelly, 'Hayne's Six Rules for Business Become One Legal Obligation: Be Fair' *The Australian Financial Review* (Sydney, 1 November 2019); B. Butler, 'Not Fair? Why Judges Have Been Accused of Failing Australian Consumers' *The Guardian*, (Sydney, 7 September 2019); and L. Main, 'Lawyers Need a Lesson on Good Conscience: Says Court of Appeal Judge' *The Australian Financial Review* (Sydney, 15 August 2019); Cf J. Albrechtsen, '"Fairness" the New Frontier for a Failing Regulator' *The Australian* (Sydney, 12 February 2020).

[84] Chief Justice T. Bathurst, 'Law as a Reflection of the "Moral Conscience" of Society' (Speech, Opening of Law Term Address, 5 February 2020).

[85] Justice A. Bell, 'An Australian International Commercial Court – Not a Bad Idea or What a Bad Idea?' 94 *Australian Law Journal* 24, 38.

[86] Chief Justice T. Bathurst, 'Law as a Reflection of the "Moral Conscience" of Society' (Speech, Opening of Law Term Address, 5 February 2020) 18 [40].

[87] Ibid 14 [33].

[88] 'On this view, uncertainty in the application of the law should advance the high aspirations of equity – to promote and encourage moral awareness and moral agency in the market place. That is, the risk of conduct being found to be unconscionable, and uncertainty about where the limits might be drawn if the matter went

In short, the critics do not yet represent a monolithic and reliable national evaluation of the post-*Kobelt* landscape, which is still unfolding on judicial, regulatory, political, and law reform fronts. Some of the critics have a stake in the outcomes that they seek, whether in expansion of regulatory options and success rates, preferred law reform options, or the minimisation by some and maximisation by others of the level of legal protection available for consumers and small business under fairness-based and unconscionability-based laws.

At the same time, a reality-check is needed on whether or not the post-*Kobelt* landscape for future advice and litigation is as bad for regulators as some people think. One swallow does not a summer make. The outcome turned more on ultimate characterisation and evaluation of the circumstances than on any difference between broad and narrow views of statutory unconscionability.[89] A loss for the regulators using statutory unconscionability in the *Kobelt* case has been matched by wins for the regulators in subsequent cases invoking statutory unconscionability,[90] generating warnings by commercial lawyers for business clients about such decisions 'open[ing] the door wider for more allegations of unconscionable conduct to be made in commercial disputes as well as cases pursued by ASIC and the ACCC'.[91]

One disappointing aspect of the *Kobelt* decision is how much judicial space is spent trying to justify an approach to amplified statutory unconscionability that is confined to relaxing limitations to simple statutory unconscionability, construed as a provision that is itself confined by those judgments to that meaning of 'unconscionable conduct' associated with unconscionable exploitation of a vulnerable party's special disadvantage. While a split bench in the *Kobelt* case took a narrow rather than broad view of statutory unconscionability,[92] the context before the Court focused heavily upon unconscientious exploitation of vulnerability, including but not limited to situations of special disadvantage.[93]

Most of the HCA's recent cases on unconscionable conduct are skewed by the choice of test cases and tactical framing of litigation towards the end of the spectrum associated with predatory behaviour, advantage-taking, and vulnerable victims. One is left with a lingering concern after the *Kobelt* case that the line of HCA authority comprising the *Amadio*,[94] *Berbatis*,[95] *Garcia*,[96] *Kakavas*,[97] and *Thorne*[98] cases, focused upon the same discrete form of

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to Court, should encourage a precautionary approach': see Justice C. Maxwell, 'Equity and Good Conscience: The Judge as Moral Arbiter and the Regulation of Modern Commerce' (Speech, Victoria Law Foundation Oration, 14 August 2019) 10.

[89] Eg *ASIC v Kobelt* (2019) 267 CLR 1, 107 [312] (Edelman J).

[90] Eg Australian Competition and Consumer Commission, 'Full Federal Court Ruling Provides Vital Clarification of the Law on Statutory Unconscionable Conduct', (Media Release, 22 March 2021), referring to the ACCC's post-*Kobelt* win on statutory unconscionability in *ACCC v Quantum Housing Group Pty Ltd* [2021] FCAFC 40.

[91] Eg E. Martin, 'The expansion of statutory unconscionable conduct risk in commercial transactions', *Gadens* (Article, 24 March 2021), referring to *ACCC v Quantum Housing Group Pty Ltd* [2021] FCAFC 40.

[92] Justice A. Bell, 'An Australian International Commercial Court – Not a Bad Idea or What a Bad Idea?' 94 *Australian Law Journal* 24, 39.

[93] *ASIC v Kobelt* (2019) 267 CLR 1, 31 [61] (Kiefel CJ and Bell J).

[94] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

[95] *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

[96] *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.

[97] *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392.

[98] *Thorne v Kennedy* (2017) 263 CLR 85.

unconscionable conduct (corresponding to that level of meaning of unconscionable conduct in Finn's multi-level analysis that concentrates upon unconscionable conduct and dealings), has exerted an undue gravitational pull on judicial framing of statutory unconscionability's potential that no amount of successive legislative indications to the contrary can easily displace.

In other words, none of the HCA cases seriously addressing statutory unconscionability have yet occurred in contexts other than mainly (although not exclusively) unconscientious advantage-taking of the special disadvantage of individuals (eg consumers, guarantors, gamblers, and separated couples), and nothing in *ASIC v Kobelt* is determinative of the scope of statutory unconscionability beyond such contexts. Under the HCA's own precedential instruction in the *Farah Constructions* case,[99] Australian courts below the HCA are presumptively bound until it rules otherwise by more than one intermediate appellate court authority since *ASIC v Kobelt* that accepts that the HCA's decision in that case does not make exploitation or other advantage-taking of someone's special disadvantage a prerequisite for accessing the statutory unconscionability regime.[100]

In any case, four of the seven High Court judges in *ASIC v Kobelt*[101] explicitly contemplated that statutory unconscionability does not require all of the elements of the equitable doctrine, and only one of the remaining three HCA judges[102] refused to separate statutory unconscionability from the equitable doctrine, with the other two judges[103] expressly reserving such questions for another day. Justice Gageler heavily relied upon statutory unconscionability's explicit immunity from limitations under the judge-made law in accepting both that 'the statutory conception of unconscionable conduct is unconfined to conduct that is remediable on that basis by a court exercising jurisdiction in equity'[104] and that 'conduct of the requisite gravity need not be found only in a fact-pattern which fits within the equitable paradigm of a stronger party to a transaction exploiting some special disadvantage which operates to impair the ability of a weaker party to form a judgment as to his or her best interests'.[105]

While Justices Nettle and Gordon remain close to the equitable doctrine in their overall characterisation of the situation in ASIC v Kobelt,[106] they also use the provisions on systems or patterns of behaviour in statutory unconscionability as justification for stating that '(i)t follows from the fact that a specific person need not be identified that special disadvantage of an individual is not a necessary component of the prohibition'.[107] Justice Edelman unequivocally indicated that the Commonwealth Parliament has mandated 'a less restrictive

[99] *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89.
[100] *ACCC v Quantum Housing Group Pty Ltd* [2021] FCAFC 40; *Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 v Kingsmede Pty Ltd* (2021) 284 FCR 424.
[101] *ASIC v Kobelt* (2019) 267 CLR 1, 37 [83] (Gageler J), 56 [144], 77-8 [232] (Nettle and Gordon JJ), 102 [295] (Edelman J).
[102] Ibid 48 [118] (Keane J).
[103] Ibid 27 [48] (Kiefel CJ and Bell J).
[104] Ibid 37 [83] (Gageler J).
[105] Ibid 39 [89] (Gageler J).
[106] Ibid 80 [239] (Nettle and Gordon JJ).
[107] Ibid 77-8 [232] (Nettle and Gordon JJ).

approach' than the equitable doctrine in its 20th century form, with the result that 'statutory unconscionability permits consideration of, but no longer requires, (i) special disadvantage, or (ii) any taking advantage of that special disadvantage'.[108] His framing of statutory unconscionability in those terms has additional significance for future test cases. Chief Justice Kiefel and Justice Bell used the same language as Justice Edelman in expressly declining to decide that question in *ASIC v Kobelt*, with the necessity and nature of any disadvantage as well as any advantage taken of it being the direct focus of subsequent test cases.[109]

So, despite the outcome in the *Kobelt* case, four of the High Court Justices deciding it seemed open to amplified statutory unconscionability being extended beyond and not necessarily tethered to the law on 'special disadvantage' in the *Amadio* sense. However, even that narrow point-in-time majority is diluted by Justice Nettle's departure from the High Court bench and the addition of two HCA Justices (Justices Steward and Gleeson) whose views on this front as High Court Justices are untested. Justice Keane remains available to decide one of the next test cases on statutory unconscionability for which special leave has already been granted, and his *Kobelt* position was clearly informed by the kind of case that it was, the way in which ASIC ran the case, the parliamentary use of the language of 'unconscionable conduct' across the provisions, the meaning of unconscionable conduct in the law of equity, and the extent to which statutory unconscionability modified or added to the general law.

In his view, amplified statutory unconscionability is broader than simple statutory unconscionability (which is not a controversial view), but remains tied to the general law on unconscionable conduct and its co-extensive treatment in simple statutory unconscionability, whatever other statutory adjustment might operate (which remains a contestable view even amongst other High Court Justices, let alone other courts and commentators). In other words, on his view, amplified statutory unconscionability remains grounded in notions of special disadvantage, whatever other adjustments statutory unconscionability might make to that precondition.

Even though he favoured a narrower view of statutory unconscionability than some of his High Court colleagues in the *Kobelt* case, Justice Keane is not amongst those who subscribe to the view that conscience-based standards are inherently and fatally subjective. In his 2009 lecture in honour of Professor Tony Lee, Justice Keane remarked: 'It is, I think, possible to accept that the standards enforced by equity have evolved since the 14th century without acceding to the view that the conscience of equity is no more than the subjective view of the individual judge as to what is fair and reasonable in any given case'.[110]

[108] Ibid 102 [295] (Edelman J).
[109] *ACCC v Quantum Housing Group Pty Ltd* [2021] FCAFC 40; *Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 v Kingsmede Pty Ltd* (2021) 284 FCR 424.
[110] Justice P. Keane, 'The 2009 W. A. Lee Lecture in Equity: The Conscience of Equity' (2010) 10 *QUT Law and Justice Journal* 106, 114.

Each of unfairness, unreasonableness, and unconscionability cover different but related ground, and they lack an underlying thematic unity or substantive commensurability.[111] A holistic approach to commercial regulation uses a balance of all three. One risk in the rush to embrace fairness as an alternative regulatory touchstone is that this delicate balance and body of judge-made and statutory precedent surrounding it is upset. We should be slow to throw out the baby of unconscionability as a legal touchstone with the bath-water of post-*Kobelt* dissatisfaction with statutory unconscionability. We should equally pause before rushing to unite or unify disparate notions in the law, heeding the warning issued by Justice Keane in his W A Lee Equity Lecture:[112]

> We can readily recognise radical differences between the standard of absolute loyalty required of a fiduciary and the standard of reasonable care in negligence and reasonableness in the law of contract. These differences ought to provide a warning to resist the human urge to see patterns which suggest an underlying unity of concepts. To elide these differences in pursuit of a common standard of fair and reasonable behaviour is to fail to recognise that the rules of equity and the common law reflect radically different views of the legitimacy of human selfishness and of occasions for its control.

The post-*Kobelt* reaction to the merits or otherwise of the present law obscures but does not preclude a more systematic approach and conceptual framework for statutory unconscionability. Nothing in *Kobelt*'s outcome or divergence between narrow and broad views of statutory unconscionability explicitly precludes further judicial elaboration of a conceptual framework that comprises a multi-level approach to statutory unconscionability, in terms of the range of judge-made doctrines and statutory innovations brought together under the rubric of unconscionability. Under that framework, both simple statutory unconscionability and amplified statutory unconscionability together constitute a comprehensive scheme that draws upon judge-made and statutory law based upon the notions of unconscionability, unconscientiousness, and (to an extent) unreasonableness and unfairness animating the law's norms of good conscience in commercial contexts.

Analogical reasoning from legislation can also inform judicial interpretation. Symmetry and cohesion in the statutory and non-statutory sources of law applying to commercial parties gains even greater significance from a transactional perspective, especially in an integrated approach to regulating an informed business conscience, which affects conduct as well as agreements. The relationship between contractual good faith and fair dealing, on one hand, and statutory unconscionability, on the other, is only one fruitful avenue for further exploration in the post-*Kobelt* phase. The bar and judiciary are yet to pursue to their fullest extent the potential arguments available about the analogous impact of legislation upon judge-made law in key areas of commercial regulation with conscience-based elements, as foreshadowed by Professor (formerly Justice) Finn:[113]

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[111] Ibid 115.

[112] Ibid.

[113] P. Finn, 'Common Law Divergences' (2013) 37 *Melbourne University Law Review* 509, 535 (quoting *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 61-2 [23] (Gleeson CJ, Gaudron and Gummow JJ) (emphasis added).

> The High Court has on some number of occasions acknowledged the possibility of the common law adapting itself to a 'consistent pattern of legislative policy'. The Trade Practices Act and the Australian Consumer Law, and their State and Territory equivalents, surely provide just such a pattern. It is more than likely that with these statutory analogues so close to hand, *and with the Bar slowly awakening to this matter*, our equity jurisprudence will continue to mutate in ways that are consistent with the policy of fair dealing in commercial and consumer dealings which is fundamental to that in legislation.

Indeed, with the greatest respect to those who see it otherwise, the package of legislative instructions on statutory unconscionability to Australian courts over time and after extensive reviews makes it abundantly clear that something more is contemplated than simply playing around at the edges of the discrete doctrine of unconscionable conduct concerned with unconscionable advantage-taking of a victim of special disadvantage at the point of executing an agreement. There is a set of legislated presumptions of interpretation just for statutory unconscionability. They direct courts that statutory unconscionability goes beyond the judge-made law. Unconscionable conduct includes but extends beyond contracts and conduct relating to contracts.

Indeed, amplified statutory unconscionability applies before and after execution of contracts, and even without any contract in existence. Good faith in negotiating contracts is an aspect of amplified statutory unconscionability, although there is no such absolute obligation under the general law of contracts, and this is another example of a substantive change in the law that would result if amplified statutory unconscionability is not part of the law.

Statutory unconscionability can embrace both 'personal' and 'situational' aspects of 'special disadvantage' for victims of unconscionable conduct, as also accepted by courts. Amplified statutory unconscionability now covers procedural unconscionability, substantive unconscionability (eg see references to the substantive terms of agreements), and more (eg see provisions facilitating proof of systemic patterns of conduct in place of proving specific instances of victimisation).

The latter also has much significance if anyone down the track of this Inquiry actively pursues the 'second path' on amplified statutory unconscionability, notwithstanding that there are aspects of amplified statutory unconscionability that do not translate across at levels of granular detail to anything that conventionally falls under the 'efficiently, honestly and fairly' standard. While they could still do more, successive federal parliaments have provided ample instructions and tools for courts to develop statutory unconscionability to its full potential, but there is only so much that can be done in the face of judicial conservatism and *Kobelt*-like divisions of judicial views.

Better selection and framing of test cases under both section 912A and statutory unconscionability will produce more results to go into the regulatory assessment mix, especially test cases on statutory unconscionability that steer around the entrenched judicial preoccupation with notions of special disadvantage, predatory conduct, and unconscientious exploitation of vulnerability, and start building a coherent body of precedent about good faith and fair dealing, as part of a fully balanced framework for

statutory unconscionability. More empirical research is also needed, about the collective effectiveness of current fairness-based and conscience-based laws across the board.

Key Judicial Decisions on Statutory Unconscionability in the Post-Kobelt Period

Since the *Kobelt* decision, the Full Federal Court has seized the opportunity in a number of cases to go beyond *Kobelt* and separate amplified statutory unconscionability from any automatic precondition grounded in *Amadio*-like notions of special disadvantage. An indication of that line of thinking is apparent for ease of reference from the following 2021 judgment of Chief Justice Allsop in the Full Court of the Federal Court of Australia, speaking about the statutory unconscionability provisions in the Australian Consumer Law:[114]

> 4 Thirdly, until the High Court says otherwise the principles informing s 20 and the unwritten law, and those informing s 21 and the concept of statutory unconscionability are related but distinct and different. The relationship is that **the principles of equity governing the setting aside of transactions by reason of unconscionable conduct** (see *Commercial Bank of Australia Limited v Amadio* [1983] HCA 14; 151 CLR 447; *Kakavas v Crown Melbourne Limited* [2013] HCA 25; 250 CLR 392; and *Thorne v Kennedy* [2017] HCA 49; 263 CLR 85**) inform but do not control s 21**: s 21(4)(a) of the ACL and *Paciocco* 236 FCR at 271 [282]–[283]. **The difference is that the "fact-pattern which fits within the equitable paradigm"** (see Gageler J in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; 267 CLR 1 at 39 [89]) **requires for s 20 a special disability of which the stronger party takes unconscientious advantage, whereas s 21 involves an evaluative inquiry which is not so limited**: see *Paciocco* 236 FCR at 271 [283], which dealt with the equivalent provisions to s 20 and s 21 in the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), s 12CA and s 12CB:
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> > By the incorporation of the unwritten law into the ASIC Act, Parliament can be taken to have adopted, for the operation of the Act and arising out of its text, the values and norms that inform the living Equity in that doctrine. Section 12CB(4)(a) makes it plain that the operation of s 12CB is not limited by the unwritten law referred to in s 12CA. That is not to say, however, that the values and norms that underpin the equitable principle recognised within s 12CA do not have a part to play in the ascription of meaning to, and operation of, s 12CB, notwithstanding s 12CA(2).
>
> 5 Fourthly, the facts in this case demonstrated no special disability of the appellants or those for whose economic interests they stood. The appellants gave security for a commercial guarantee which it was in their interests to give. There was no position of vulnerability or disability under which they laboured and of which the respondents may be said to have taken advantage. The case under s 20 was misconceived.
>
> 6 Fifthly, as to the case under s 21, the facts, at whatever level or perspective of focus one attends them, do not disclose conduct of the respondents or of Mr Somerton that can be characterised as unconscionable. In *Unique* 266 FCR at 667 [155], the Full Court said:
>
> > [155] ... To behave unconscionably should be seen, as part of its essential conception, as serious, often involving dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worthy of

[114] *Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 v Kingsmede Pty Ltd* (2021) 284 FCR 424, 428-431 [4]-[10] (Allsop CJ; emphasis added in bold).

> criticism. None of these terms is definitional. The *Shorter Oxford Dictionary on Historical Principles* (1973) gives various definitions including "having no conscience, irreconcilable with what is right or reasonable". The *Macquarie Dictionary* (1985) gives the definition "unreasonably excessive; not in accordance with what is just or reasonable". (The search for an easy aphorism to substitute for the words chosen by Parliament (unconscionable conduct) should not, however, be encouraged: see *Paciocco* at [262]). These are descriptions and expressions of the kinds of behaviour that, viewed in all the circumstances, may lead to an articulated evaluation (and criticism) of unconscionability. It is a serious conclusion to be drawn about the conduct of a businessperson or enterprise. It is a conclusion that does the subject of the evaluation no credit. This is because he, she or it has, in a human sense, acted against conscience. The level of seriousness and the gravity of the matters alleged will depend on the circumstances. Courts are generally aware of the character of a finding of unconscionable conduct and take that into account in determining whether an applicant has discharged its civil burden of proof. We see no reason to doubt the primary judge was conscious of this: so much is apparent from some of the passages in his Honour's reasons to which we have earlier referred. We reject Unique's invitation to make some broader statement of principle about *Briginshaw* in the context of alleged contraventions of s 21. ...

7 This expression of the matter did not introduce a notion of moral obloquy or a requirement for any pre-existing disability or vulnerability. Rather, it recognised the seriousness of an evaluative judgment that conduct was against or offended good conscience. The words "conscionable" and "unconscionable" may not be words of daily parlance of many, but they have an ordinary meaning derived from an inner human sense of doing right. The human values that can be seen in s 22 and in the common law and equity as set out in *Lux* [2013] FCAFC 90; [2013] ATPR 42-447 at [23] and *Paciocco* 236 FCR at 274–275 [296] inform the concept. These are basal values familiar to business people and ordinary people and, along with the circumstances in s 22, find their place in the text, structure and context of the legislation.

8 Sixthly, s 21 (like s 12CB of the ASIC Act) prescribes a statutory normative standard of conduct by proscribing conduct which is "unconscionable". As the Full Court said in *National Exchange* 148 FCR at 140 [33], "unconscionable conduct, on its ordinary and natural interpretation, means doing what should not be done in good conscience". The function of the Court is to recognise and administer that normative standard in the totality of the circumstances. **Those circumstances include the considerations identified in s 22 and in the values of the common law and equity in which context the statute sits.** The nature of the task was set out in *Paciocco* 236 FCR at 274–275 [296]–[298], 275 [300], 276 [304] and 276 [306]:

> [296] The working through of **what a modern Australian commercial, business or trade conscience contains and requires, in both consumer and business contexts**, will take its inspiration and formative direction from the nation's legal heritage in Equity and the common law, and from modern social and commercial legal values identified by Australian Parliaments and courts. The evaluation of conduct will be made by the judicial technique referred to in *Jenyns*. It does not involve personal intuitive assertion. It is an evaluation which must be reasoned and enunciated by reference to the values and norms recognised by the text, structure and context of the legislation, and made against an assessment of all connected circumstances. The evaluation includes 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; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.

[297] The variety of considerations that may affect the assessment of unconscionability only reflects the variety and richness of commercial life. It should be emphasised, however, that faithfulness or fidelity to a bargain freely and fairly made should be seen as a central aspect of legal policy and commercial law. It binds commerce; it engenders trust; it is a core element of decency in commerce; and it gives life and content to the other considerations that attend the qualifications to it that focus on whether the bargain was free or fair in its making or enforcement.

[298] The normative standard of a business conscience referred to in the statute is permeated with accepted and acceptable community values: *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90; [2013] ATPR 42-447 at [23]; *Perpetual Trustee Company Limited v Khoshaba* [2006] NSWCA 41; (2006) 14 BPR 26,639 at [64] and *Australian Securities and Investment Commission v National Exchange Pty Ltd* [2005] FCAFC 226; (2005) 148 FCR 132 at 139-140, esp [30].

...

[300] It should also be borne in mind that the conduct in s 12CB is of sufficient seriousness as to warrant the punishment involved in a civil penalty: s 12GBA. The penal character of the provision is relevant to its construction: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 at [57]; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; (2005) 224 CLR 193 at [45].

...

[304] 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.

...

[306] As Deane J said in *Muschinski v Dodds* at 616, property rights (and the same can be said of jural relations in trade or commerce) should be governed by law, and not some mix of judicial discretion or the subjective views as to who should win based on the formless void of individual moral opinion. Nothing in Subdiv C and ss 12CB and 12CC or the other statutes with which this case is concerned should be seen as requiring this. The notions of conscience, justice and fairness are based on enunciated and organised norms and values, including the organised principles of law and Equity, taken from the legal context of the statutes in question and the words of the statutes themselves. Employing judicial technique involving a close examination of the complete attendant facts and rational justification, the Court must assess and characterise the conduct of an impugned party in trade or commerce against the standard of business conscience, reflecting the values and norms recognised by Parliament to which I have referred.

9 This expression of the matter was the view of the Court in *Paciocco*: 236 FCR at 289 [371] and 295 [398], in *Kojic* 249 FCR at 434–437 [54]–[59], 438–439 [69]–[72] and 442 [85], in

Colin R Price 251 FCR at 416–418 [50]–[56], and in *Unique* 266 FCR at 667–668 [156]–[157]. In *Medibank* 267 FCR at 569 [102] and [103] and 602–609 [232]–[255], the expression of principle was similar and was recognised expressly to be consistent with the above: see 267 FCR at 609 [255].

10 Seventhly, the conduct must depart sufficiently from societal norms of acceptable commercial behaviour as to be characterised as against or as offending conscience, recognising that such is a serious matter which Parliament has considered sufficient to warrant censure by the imposition of a civil penalty to deter such conduct. There may be more or less serious manifestations of unconscionable conduct.

The delinking of notions of special disadvantage from preconditions for relying upon amplified statutory unconscionability is even more clear in the joint judgment of all three judges of the Full Court of the Federal Court of Australia in another 2021 decision, as follows for ease of reference:[115]

THE COURT:

1. This appeal raises an important issue as to the meaning and application of statutory provisions that call for a standard of business conduct in Australia that is not, in all the circumstances, unconscionable, in this case s 21 of the *Australian Consumer Law* being Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (the **ACL** and the **CC Act**, respectively).

2. The issue is whether, for conduct to be unconscionable, there is required to be present vulnerability or disadvantage in the person or persons to whom the conduct can be seen as directed and that such was exploited or taken advantage of. That vulnerability or disadvantage was expressed in argument in two alternative ways, although in both the vulnerability or disadvantage was necessarily something more than an attribute or feature of the relationship, whether contractual or commercial. At its highest, the vulnerability or disadvantage had to be a special disadvantage as would be required in the equitable doctrine of unconscionability in setting aside a transaction: see generally *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; 151 CLR 447; *Kakavas v Crown Melbourne Ltd* [2013] HCA 25; 250 CLR 392; and *Thorne v Kennedy* [2017] HCA 49; 263 CLR 85. Alternatively, if the equitable requirement of the taking advantage of a special disadvantage was not required to be shown, at least the taking advantage or exploitation of some vulnerability, disability or disadvantage of the person or persons was a necessary aspect of the character or structure of the conduct apt to attract a conclusion of unconscionability.

3. As is discussed below, contrary to the primary complaint of the appellant, the Australian Competition and Consumer Commission (the **ACCC**), the primary judge did not approach the matter by reference to a requirement of special disadvantage in the sense of the equitable doctrine. His Honour did, however, approach the matter on the basis of the alternative argument expressed above. This can be seen in how his Honour expressed himself at [35] and [53] of the reasons, to which we will come.

4. For the reasons that follow, we respectfully consider that this approach is erroneous. Whilst some form of exploitation of or predation upon some vulnerability or disadvantage of people will often be a feature of conduct which satisfies the

[115] *ACCC v Quantum Housing Group Pty Ltd* [2021] FCAFC 40, [1]-[5] (Allsop CJ, Besanko and McKerracher JJ).

characterisation of unconscionable conduct under s 21, such is not a necessary feature of the conception or a necessary essence in the embodied meaning of the statutory phrase. The circumstances of this case reveal why this must be so. Here the facts that were agreed for the penalty hearing are such as to permit the conclusions (substantially drawn by the primary judge) that the respondents engaged in deliberate systematic conduct of misusing their superior bargaining position by dishonestly misleading commercial counterparties (referred to as the **investors** of no proven particular vulnerability other than from their place in the relevant commercial circumstances) and pressuring the investors by imposing entirely unjustified and unnecessary requirements upon the investors as their contractual counterparties, thereby clearly exhibiting a dishonest lack of good faith, all in order to extract for at least one of them financial benefits which were surreptitious and undisclosed to the investors.

5. The primary judge considered himself bound to reach the view he did by the reasons for judgment of the members of the High Court in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; 267 CLR 1. With respect, that conclusion was in error. *Kobelt* does not dictate that conclusion; neither does a consideration of precedent otherwise, principle or statutory interpretation.

Section 12CA of the ASIC Act Should Not Be Repealed

There would be nothing objectionable about the proposal to repeal s 12CA, if it were truly a matter purely of simplification, consolidation, duplication, and redundancy of targeted statutory unconscionability provisions in the ASIC Act. However, the matter is not that simple. Significant substantive issues in both the content and reform of the law are engaged, as highlighted throughout this Submission. The purpose of this last part is to distil from that analysis the key reasons why s 12CA should remain part of the law of statutory unconscionability, and to amplify some of them as summarised earlier in this Submission. This final section and the related summary provided at the outset of this Submission should be taken together as a statement of reasons why s 12CA should not be repealed.

At the outset, it can be admitted that amplified statutory unconscionability picks up simple statutory unconscionability in the ASIC Act. In other words, the legislation itself specifies that s 12CA does not apply where s 12CB applies. But that alone does not render s 12CA redundant or duplicative, and is far from the end of the matter. Section 12CA's replaceability by s 12 CB in particular circumstances simply means that the notion of unconscionability covered by s 12CA is one of the notions of unconscionability picked up by s 12CB, so that recovery for the same thing under both sections is avoided. However, that says nothing about whether or not there are circumstances where the different wording of the provisions results in there being a situation where s 12CA applies and section 12CB does not apply. Any genuinely unresolved issues on that score are substantive matters that would be affected in the interpretation of statutory unconscionability by the repeal of s 12CA.

So, s 12CA is more than simply a provision that is displaceable under particular circumstances by s 12CB. It forms part of a package of provisions of statutory unconscionability. It is one amongst three key provisions – s 12CA, s 12 CB, and s 12CC – each of which successive federal parliaments have deliberately chosen to describe in terms of 'unconscionable conduct'. Moreover, as s 12CB is widely acknowledged by courts and

expert commentators alike to be broader in coverage than s 12CA, the independent existence of s 12CA and its correlative meaning and scope are pivotal in determining the broader meaning and scope of s 12CB, as shaped by additional principles of interpretation for amplified statutory unconscionability and indicators of it in s 12CC.

The presence of s 12CA does other legislative work too. It attaches additional remedies, the attention of an official regulator, and legislative backing for the moral and legal blameworthiness of unconscionable conduct. To that extent, it has stand-alone relevance and adds something of weight to the package of legislative measures regulating unjust, unreasonable, unfair, and unconscionable business conduct, and hence to the regulatory shaping of an informed Australian business and finance conscience.

In addition, Australian law and precedent stands poised at a point where the full reach of statutory unconscionability remains undetermined by the High Court, with further test cases winding their way through the courts to intermediate appellate court and ultimately High Court levels. The High Court's split decision in the *Kobelt* case did not answer the question of whether or not amplified statutory unconscionability requires or diverges from simple statutory unconscionability. Put another way, the High Court did not have to decide and did not decide if amplified statutory unconscionability can be detached from the equitable doctrine of unconscionable conduct grounded in notions of 'special disadvantage' and exemplified in cases such as the *Amadio* case.

In the absence of s 12CA, which gives special and discrete legislative focus and priority to the equitable doctrines associated with unconscionable conduct and dealings, those doctrines arguably become simply one set of doctrines amongst others scooped up by amplified statutory unconscionability, but with no special priority amongst the range of unconscionability aspects covered by statutory unconscionability, as further conditioned by the principles of interpretation in s 12CB and indicators of unconscionability in s 12CC. To highlight merely one of the ongoing substantive issues of controversy in the courts until settled by the High Court, if both the specific form of unconscionability in s 12CA and its replaceability where s 12 CB applies are removed by repeal of s 12CA, as the ALRC recommends, there is less reason to suppose that the form of unconscionability enshrined in s 12CA is an essential anchor for recovery on the ground of unconscionable conduct under s 12CB, whatever its scope. That is an ongoing issue of some substance in the evolving trajectory of amplified statutory unconscionability.

To that extent, another legislative buttress would be removed that supports the contestable proposition that amplified statutory unconscionability is tethered to the equitable doctrine in a key way, however much it amplifies or extends it. A possible consequence of that nature would be an influence upon an ongoing matter of substantive judicial and academic attention, untested at High Court level. As such, it would have an effect that goes beyond what should be contemplated at this first stage of the ALRC's referral purely in terms of simplification, consolidation, duplication, and redundancy of provisions.

Both the proposal that the ALRC does recommend (ie repeal of s 12CA) and the option that the ALRC flags but does not endorse (ie the 'second path' option of repealing s 12CB and

s 12CC as well) would result in a fragmentation of co-extensive statutory unconscionability regimes across two Commonwealth Acts, with such regimes presently providing comprehensive coverage of the regulation of unconscionable conduct within and beyond the financial services sector. Whether or not either or both of those proposals are supported by any official regulator or other key stakeholder, the knock-on effect of their acceptance in any resulting changes to the Australian Consumer Law would be more than simply a natural extension of reform of financial services regulation in other laws beyond the Corporations Act and ASIC Act. The substantive and precedential dimensions of such reform would be significant.

The ALRC rightly acknowledges the problems of asymmetry that would result if the 'second path' was followed (see paragraph [13.120]), but at this stage is treating the repeal of s 12CA as simply a matter of simplification and consolidation in general, and non-duplication and avoidance of redundancy in particular. The author of this Submission suggests that the latter characterisation misfires in this instance, and hence does not justify the repeal of s 12CA. The problem with the asymmetry in statutory unconscionability that results across its two major Commonwealth laws even if only s 12CA is repealed, or if symmetry is superficially restored by the equivalent provision in the Australian Consumer Law also being repealed as a by-product of acceptance of the ALRC's proposal, is that each consequence is only justifiable if those cognate provisions are truly duplicative and redundant, and of no substantive significance. Of course, once the ALRC's final recommendations are known about this aspect, it might well be the case that there are ways in which s 12CB and s 12CC can be simplified and consolidated to cover what is otherwise lost simply by repealing s 12CA and doing nothing else. But that is speculative at this early stage, and in any case would raise the same issue as the repeal of any of the provisions of statutory unconscionability about the desirability of making any changes to statutory unconscionability through this Inquiry that either produce asymmetry across two major Commonwealth laws on statutory unconscionability or require reform of the Australian Consumer Law to avoid asymmetry, and without losing any substantive regulatory coverage as a result.

For final ease of reference, a juxtaposition of statutory unconscionability in the ASIC Act (for the financial services industry), the Australian Consumer Law (for all other industry sectors), and in an indicative state commercial leasing law, shows the high degree of commonality in structure and content across these laws, and hence the questions of legislative asymmetry, legal uncertainty, and fragmented precedential reliance that will arise as ripple effects if any change is made to s 12CA of the ASIC Act, or if the 'second path' identified (but not recommended) by the ALRC is adopted and statutory unconscionability is removed altogether from the ASIC Act.

The relevant provisions of the ASIC Act are as follows:[116]

> **Section 12CA: Unconscionable conduct within the meaning of the unwritten law of the States and Territories [ie 'simple statutory unconscionability']**
>
> (1) A person must not, in trade or commerce, engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
>
> (2) This section does not apply to conduct that is prohibited by section 12CB.
>
> **Section 12CB: Unconscionable conduct in connection with financial services [ie 'amplified statutory unconscionability']**
>
> (1) A person must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of financial services to a person; or
>
> (b) the acquisition or possible acquisition of financial services from a person;
>
> engage in conduct that is, in all the circumstances, unconscionable.
>
> (2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:
>
> (a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or
>
> (b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.
>
> (3) For the purpose of determining whether a person has contravened subsection (1):
>
> (a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
>
> (b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.
>
> (4) It is the intention of the Parliament that:
>
> (a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and
>
> (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
>
> (c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
>
> (i) the terms of the contract; and
>
> (ii) the manner in which and the extent to which the contract is carried out;

[116] *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA, 12CB, 12CC.

and is not limited to consideration of the circumstances relating to formation of the contract.

Section 12CC: Matters the court may have regard to for the purposes of section 12CB

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***supplier***) has contravened section 12CB in connection with the supply or possible supply of financial services to a person (the ***service recipient***), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the service recipient; and

(b) whether, as a result of conduct engaged in by the supplier, the service recipient was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient or a person acting on behalf of the service recipient by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the financial services; and

(e) the amount for which, and the circumstances under which, the service recipient could have acquired identical or equivalent financial services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the service recipient was consistent with the supplier's conduct in similar transactions between the supplier and other like service recipients; and

(g) if the supplier is a corporation—the requirements of any applicable industry code (see subsection (3)); and

(h) the requirements of any other industry code (see subsection (3)), if the service recipient acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the service recipient:

(i) any intended conduct of the supplier that might affect the interests of the service recipient; and

(ii) any risks to the service recipient arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the service recipient); and

(j) if there is a contract between the supplier and the service recipient for the supply of the financial services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the service recipient; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the service recipient in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the service recipient engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the service recipient for the supply of the financial services; and

(l) the extent to which the supplier and the service recipient acted in good faith.

(2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***acquirer***) has contravened section 12CB in connection with the acquisition or possible acquisition of financial services from a person (the ***supplier***), the court may have regard to:

(a) the relative strengths of the bargaining positions of the acquirer and the supplier; and

(b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and

(c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the financial services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the financial services; and

(e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent financial services to a person other than the acquirer; and

(f) the extent to which the acquirer's conduct towards the supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like suppliers; and

(g) the requirements of any applicable industry code (see subsection (3)); and

(h) the requirements of any other industry code (see subsection (3)), if the supplier acted on the reasonable belief that the acquirer would comply with that code; and

(i) the extent to which the acquirer unreasonably failed to disclose to the supplier:

(i) any intended conduct of the acquirer that might affect the interests of the supplier; and

(ii) any risks to the supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the supplier); and

(j) if there is a contract between the acquirer and the supplier for the acquisition of the financial services:

(i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the acquirer and the supplier in complying with the terms and conditions of the contract; and

(iv) any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the financial services; and

(l) the extent to which the acquirer and the supplier acted in good faith.

(3) In this section:

applicable industry code, in relation to a corporation, has the same meaning as it has in subsection 51ACA(1) of the *Competition and Consumer Act 2010*.

industry code has the same meaning as it has in subsection 51ACA(1) of the *Competition and Consumer Act 2010*.

The equivalent provisions in the Competition and Consumer Act, which are located in Schedule 2, known as the Australian Consumer Law, are as follows:[117]

Section 20: Unconscionable Conduct within the meaning of the unwritten law [ie 'simple statutory unconscionability']

(1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(2) This section does not apply to conduct that is prohibited by section 21.

Section 21: Unconscionable conduct in connection with goods or services [ie 'amplified statutory unconscionability']

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person; or

(b) the acquisition or possible acquisition of goods or services from a person;

[117] *Australian Consumer Law* ss 20, 21, 22.

engage in conduct that is, in all the circumstances, unconscionable.

(2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:

(a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or

(b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

(3) For the purpose of determining whether a person has contravened subsection (1):

(a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

Section 22: Matters the court may have regard to for the purposes of section 21

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***supplier***) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the ***customer***), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the customer; and

(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the customer:

(i) any intended conduct of the supplier that might affect the interests of the customer; and

(ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and

(l) the extent to which the supplier and the customer acted in good faith.

(2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***acquirer***) has contravened section 21 in connection with the acquisition or possible acquisition of goods or services from a person (the ***supplier***), the court may have regard to:

(a) the relative strengths of the bargaining positions of the acquirer and the supplier; and

(b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and

(c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and

(e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and

(f) the extent to which the acquirer's conduct towards the supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like suppliers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the supplier acted on the reasonable belief that the acquirer would comply with that code; and

(i) the extent to which the acquirer unreasonably failed to disclose to the supplier:

(i) any intended conduct of the acquirer that might affect the interests of the supplier; and

(ii) any risks to the supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the supplier); and

(j) if there is a contract between the acquirer and the supplier for the acquisition of the goods or services:

(i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the acquirer and the supplier in complying with the terms and conditions of the contract; and

(iv) any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the goods or services; and

(l) the extent to which the acquirer and the supplier acted in good faith.

As an example of a state commercial leasing statutory unconscionable conduct provision, the *Retail Leases Act 2003* (Vic) states the following:[118]

> **Section 77: Unconscionable Conduct of a landlord**
>
> (1) A landlord under retail premises lease or a proposed retail premises lease must not, in connection with lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.
>
> Note:
>
> Section 78 deals with unconscionable conduct by a tenant.
>
> (2) Without limiting the matters to which the Tribunal may have regard for the purpose of determining whether a landlord has contravened subsection (1), the Tribunal may have regard to—
>
> (a) the relative strengths of the bargaining positions of the landlord and 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 landlord's legitimate interests; and
>
> (c) whether the tenant was able to understand any documents relating to 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 the tenant's behalf by the landlord or a person acting on the landlord's behalf in relation to the lease, for example—
>
> (i) concerning trading on Sundays or days that are public holidays where the premises are located; or
>
> (ii) to agree to a lease term of less than the minimum period provided by section 21; and
>
> (e) the amount for which, and the circumstances under which, the tenant could have acquire an identical or equivalent lease from a person other than the landlord; and
>
> (f) the extent to which the landlord's conduct towards the tenant was consistent with the landlord's conduct in similar transactions between the landlord and other similar tenants; and
>
> (g) the requirements of any applicable industry code; and
>
> (h) the requirements of any other industry code, if the tenant acted on the reasonable belief that the landlord would comply with that code; and
>
> (i) the extent to which the landlord unreasonably failed to disclose to the tenant—
>
> (i) any intended conduct of the landlord that might affect the tenant's interests; and

[118] *Retail Leases Act 2003* (Vic) ss 77-79.

(ii) any risks to the tenant arising from the landlord's intended conduct that are risks that the landlord should have foreseen would not be apparent to the tenant; and

(j) the extent to which the landlord was willing to negotiate the terms and conditions of any lease with the tenant; and

(k) the extent to which the landlord acted in good faith; and

(l) the extent to which the landlord was not reasonably willing to negotiate the rent under the lease; and

(m) the extent to which the landlord unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and

(n) the extent to which the landlord required the tenant to incur unreasonable fit out costs.

(3) In considering whether a landlord has contravened subsection (1), the Tribunal—

(a) must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.

SECTION 78: Unconscionable Conduct of a tenant

(1) A tenant under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.

(2) Without in any way limiting the matters to which the Tribunal may have regard for the purpose of determining whether atenant has contravened subsection (1), the Tribunal may have regard to—

(a) the relative strengths of the bargaining positions of the tenant and landlord; and

(b) whether, as a result of conduct engaged in by the tenant, the landlord was required to comply with conditions that were not reasonably necessary for the protection of the tenant's legitimate interests; and

(c) whether the landlord was able to understand any documents relating to the lease; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the landlord or a person acting on the landlord's behalf by the tenant or a person acting on the tenant's behalf in relation to the lease; and

(e) the amount for which, and the circumstances under which, the landlord could have granted an identical or equivalent lease to a person other than the tenant; and

(f) the extent to which the tenant's conduct towards the landlord was consistent with the tenant's conduct in similar transactions between the tenant and other similar landlords; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the landlord acted on the reasonable belief that the tenant would comply with that code; and

(i) the extent to which the tenant unreasonably failed to disclose to the landlord—

(i) any intended conduct of the tenant that might affect the landlord's interests; and

(ii) any risks to the landlord arising from the tenant's intended conduct that are risks that the tenant should have foreseen would not be apparent to the landlord; and

(j) the extent to which the tenant was willing to negotiate the terms and conditions of any lease with the landlord; and

(k) the extent to which the tenant acted in good faith; and

(l) the extent to which the tenant was not reasonably willing to negotiate the rent under the lease; and

(m) the extent to which the tenant unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and

(n) the extent to which the tenant was willing to incur reasonable fit out costs.

(3) In considering whether a tenant has contravened subsection (1), the Tribunal—

(a) must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.