Submission to the Australian Law Reform Commission in response to Background Paper FSL9 of the Review of the Legislative Framework for Corporations and Financial Services Legislation

Professor Bryan Horrigan

Executive Dean, Faculty of Law, Monash University

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Introduction

In February 2022, the author of this Submission (***the author***) provided a detailed submission to the Australian Law Reform Commission (***ALRC***) in response to the ALRC's Interim Report A of the Review of the Legislative Framework for Corporations and Financial Services Regulation. The author subsequently met with members of the ALRC in July 2022 to discuss the impacts of any potential reform and to clarify his position.

In his previous submission, the author accepted that many areas of financial services regulation suffer from undue complexity, uncertainty, non-accessibility, overlap and uneasy navigability of the law. For this reason, the author supported the ALRC's preference for a principles-based approach instead of a rules-based approach to legislative reform.[1]

However, the author cautioned that any reform in the area of statutory regulation of unconscionable conduct should respect and not affect in substance the *current* and *crucial* stage of the development of the law on statutory unconscionability. Furthermore, any reform should ensure it facilitates this ongoing evolution *and* its setting of the regulatory balance between competing business-to-business (***B2B***) interests and business-to-consumer (***B2C***) interests, rather than unintentionally stymieing this natural evolution by redirecting (however slightly) its course. Most importantly, any reform should not risk, facilitate by others (i.e. courts), or itself introduce *any* substantive change in the law on statutory unconscionability, whether minor or otherwise, because that would fall outside the claimed justifications of simplification and removal of duplication in the law.

The author commends the ALRC for its thorough approach of engaging with a vast range of material and stakeholders to shape its proposals with respect to the reform of financial services legislation (***FSL***). Further, the author agrees with the ALRC that abolishing *all* unconscionable conduct provisions and relying solely on the obligation on financial services licensees to conduct their licensed activities efficiently, honestly and fairly, as expressed in s 912A of the *Corporations Act 2001* (Cth) (***Corporations Act***), is undesirable and should not be recommended to the Australian Government.[2] Such a recommendation would have a substantive impact upon the law, beyond the stated rationales of this law reform initiative.

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[1] Australian Law Reform Commission, *Financial Services Legislation: Interim Report A* (ALRC Report 137, November 2021) 507 [13.33]. The author gratefully acknowledges the research assistance of Monash University law student, Jarryd Shaw, in preparing this Submission. Like the author's earlier submission, this supplementary Submission is made in the author's personal academic capacity, and does not purport to represent the views of his employing institution or anyone associated with it.

[2] Australian Law Reform Commission, *Legislative Framework for Corporations and Financial Services Regulation: All roads lead to Rome: Unconscionable and Misleading or Deceptive Conduct in Financial Services Law* (Background Paper FSL9, December 2022) 4 [17].

The author further notes that the ALRC has amended its recommendation to Amended Proposal A22 in Background Paper FSL9 to try to address some concerns raised by stakeholders about its original proposal. In the spirit of continuing stakeholder consultation and iterative development of reform proposals, the author appreciates the opportunity to engage further with the ALRC and its latest proposal on statutory unconscionability. Accordingly, in this supplementary Submission, the author raises issues that remain unaddressed by the latest reform proposal on statutory unconscionability, highlights its problems and deficiencies from the author's perspective, and suggests ways to mitigate (without fully overcoming) those weaknesses if the ALRC sticks with its revised recommendations on statutory unconscionability and chooses not to make a course correction on them.

For ease of reference and comparison in assessing the views expressed in this supplementary Submission, both the original Proposal A22 and the Amended Proposal A22 are outlined below:

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.

Amended Proposal A22

(a) 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.

(b) *Section 12CB of the Australian Securities and Investments Commission Act 2001 (Cth) should be amended so that it expressly provides that it encompasses unconscionability within the meaning of the unwritten law.*

(c) *Government should, after careful consultation, consider making equivalent changes to the Competition and Consumer Act 2010 (Cth) unconscionable conduct provisions, so as to facilitate greater reliance on s 21 of the Australian Consumer Law as the core unconscionability provision.*

In short, the author contends that there remain unresolved as well as unaddressed issues if Amended Proposal A22 is enacted into law, at least in its current form. To this effect, the author wishes to make the following comments and suggestions for further consideration by the ALRC, before it finalises its ultimate recommendations to the Australian Government.[3]

[3] For further explanation and detail, please refer to Bryan Horrigan, *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* (Submission, Monash University, February 2022).

The detail of those comments and suggestions is preceded by an executive summary that throws into sharp relief the distance between the ALRC position and the position of the author, in terms of the completeness and correctness of the amended reform proposal, its impact upon substantive issues and controversies that remain unresolved in the law of statutory unconscionability, and the cost-benefit assessment of the respective risks and advantages of reform and the trade-off between them. The ALRC comes down on one side of the ledger and the author comes down on the other side. What matters in achieving optimal reform is that the strengths and weaknesses of each position are fully articulated and explored in this fulsome and worthwhile exercise of FSL reform.

Executive Summary

The ALRC view and its revised proposal boil down to one simple and basic proposition. That proposition is that the equitable notion of unconscionable conduct relying upon a vulnerable party being under a special disadvantage (***the special disadvantage doctrine***) is currently covered in three statutory provisions – namely s 991A of the *Corporations Act* and s 12CA and s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***) – and the policy imperatives of simplification and non-duplication mean that it is only needed in one of those provisions. If it really is as simple as that proposition, then everyone, including the author, could agree. It is not.

In its comments and amended proposal, the ALRC is looking in one direction at a few perceived problems of limited scope, without yet widening the lens of scrutiny to address different and broader problems that arise from its latest recommendation on reforming statutory unconscionability. Nor does that recommendation yet address and solve directly all of the issues raised in the author's earlier submission. Notably, nothing in Amended Proposal A22 covers the potential gap in substantive coverage of third parties, as flagged in the author's earlier submission, as well as the real nature and risk of having an unintended effect upon ongoing substantive issues and judicial choices in the development of the law of statutory unconscionability.

If enacted into law, the suggested ALRC reform *will* have a substantive impact on unresolved issues in the law on statutory unconscionability. Treating s 12CA, s 12CB, and s 12CC of the *ASIC Act* as a combined package of provisions regulating statutory unconscionability, the presence or absence of s 12CA has a substantive impact upon the scope of s 12CB, in numerous ways. By removing s 12CA from the combined package of provisions on statutory unconscionability, and then reinserting part of it back into s 12CB (and depending upon how it is done, for which no detail is yet available), Amended Proposal A22 will remove one of the planks supporting one of the two competing and unresolved views in this area of the law. Namely, is Justice Keane right in the narrow view that he takes in *Australian Securities*

and Investments Commission v Kobelt[4] about the relationship between the special disadvantage doctrine (which is also incorporated in s 12CA) and s 12CB of the *ASIC Act*, or is the Full Federal Court right in the broad view that it takes about that relationship in cases such as *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd*?[5]

In practical and business terms, the difference between those diverging views is of considerable significance in the substance of the law on statutory unconscionability, the regulatory balance struck in B2B and B2C transactions, and hence the scope of its protection and the range of parties protected. Further, in policy and regulatory terms, the narrow view provides less protection to affected consumers and businesses than the broad view. This is because, under the narrow view, a vulnerable consumer or group of claimants must first bring themselves within the scope of the equitable notion of special disadvantage, as the gateway through which they must pass to access the broader protection available under amplified statutory unconscionability in s 12CB. Conversely, under the broad view, a wider range of conduct of the kind indicated in s 12CC will be covered, whether or not there are any parties who are within the coverage of the more discrete special disadvantage doctrine. In other words, the scope of coverage and protection (and the kinds of conduct that will constitute unconscionable business conduct towards other businesses and consumers) depends upon the scope of s 12CB, and that issue remains live and controversial. Further, the presence of s 12CA in the statutory regime is of some consequence in deciding between those views.

The net of regulation of unconscionable business conduct is cast more widely or narrowly depending on the view that ultimately prevails. That is a substantive impact on the law. It goes beyond mere simplification and non-duplication of provisions. Different stakeholders and their representatives, peak bodies, and advisers amongst big business, small-to-medium businesses, and consumers are likely to have very different views on how far the regulatory net should be cast in what counts as unconscionable business conduct and where the regulatory balance should be struck between respective financial and commercial interests. Whatever happens, the stakes are raised because the suggested reform has a ripple effect beyond the financial services sector to *all* industry sectors in the national economy, given that statutory unconscionability applies in the Australian Consumer Law (***ACL***)[6] (and other laws) and not just in the *ASIC Act*.

Accordingly, because of the nature of the reform proposed and its domino effect upon equivalent regulation in other laws and industries, the significance of this seemingly minor aspect of FSL reform extends beyond the quarantinable effect and significance of one or two

[4] (2019) 267 CLR 1 ('*Kobelt*').
[5] [2021] FCAFC 40 ('*Quantum Housing*').
[6] *Competition and Consumer Act 2010* (Cth) Sch 2: Australian Consumer Law.

minor provisions amongst others under scrutiny in the FSL reform process. Making equivalent changes in the *ACL* (and other equivalent laws) unduly risks one kind of undesirable substantive impact in the author's view, and yet not making those changes at the same time or at all (if that is where the ALRC and the Australian Government ultimately land on this aspect of reform) unduly risks generating different problems in terms of policy-making and differential regulation of business in different industry sectors.

So, it matters which view ultimately prevails when the High Court next considers it. Further, it matters whether anything is done in the interim that itself creates or otherwise risks or facilitates a substantive change in the law on statutory unconscionability. This is especially the case given the significant changes in the composition of the High Court bench since its decision in *Kobelt*, with three new judges having been appointed – more than sufficient to change the balance of views about statutory unconscionability in the highest court in the land.

Further, amending s 12CB merely to say that it incorporates unconscionability under the unwritten law does not completely fix the broader problem that the ALRC risks creating with its amended proposal. In Amended Proposal A22, the ALRC has already recognised the need to clarify what is desirably not lost in the removal of s 12CA from the combined package of provisions on statutory unconscionability, by indicating that the removal of s 12CA should not leave the unwritten law on unconscionable conduct out of scope for s 12CB. Taken at face value, that is a prudent addition to the ALRC's original proposal, not least because s 12CA says that it does not apply where s 12CB applies, which explicitly locates the unwritten law on unconscionable conduct within s 12CB. So, there needs to be no room for doubt that repealing s 12CA as a whole somehow results in the unwritten law on unconscionable conduct falling outside the scope of coverage in s 12CB – an important point flagged by Professor Bant's submission, as acknowledged by the ALRC in amending its original proposal.

However, that discrete aspect is neither the only thing potentially lost nor the only potential substantive impact on the law that is risked by the latest proposal. In the author's view, the removal of s 12CA from the law affects crucial substantive issues about the protective scope of s 12CB, for reasons explored in more detail below. In passing, it is sufficient to note that the view of Justice Keane in *Kobelt* makes something of all of the following things: the Commonwealth Parliament's deliberate use of the term 'unconscionable conduct' in statutory unconscionability; the correlation between that term and the special disadvantage doctrine under the unwritten law; the appearance of that term in both s 12CB *and* the unwritten law (which is universally accepted as being encompassed in s 12CA, whatever else that section might embrace in its scope); and hence the elevation of the special disadvantage doctrine to a position where amplified statutory unconscionability is not

presently accessible except through the special disadvantage doctrine, whatever modifications that s 12CB might otherwise make to that access.[7]

Put another way, simply confirming in the amended proposal that s 12CB contains the special disadvantage doctrine, without more, does not sufficiently address all of the ways in which the presence or absence of s 12CA matters in adjudicating the difference between the narrow and broad views. The law's ultimate choice between those two views is a matter of substance and controversy for all participants in the regulated national economy, given the knock-on effects for the ACL. Its significance far exceeds the relatively small number of provisions in which statutory unconscionability is encapsulated in each of the ASIC Act and the ACL, in combination with other aspects of the law that regulate what some judges now refer to as an informed business or trade conscience, as canvassed in the author's previous submission.

In short, removing s 12CA does far more in substance than simply reduce complexity (if that) and remove a duplicative provision (again, if that). First, s 12CA arguably has a broad application to third parties that s 12CB does not. So, assimilating within the *structure* of s 12CB the special disadvantage doctrine from s 12CA makes that particular problem worse, not better, unless it is addressed in a further amended recommendation.

Secondly, the scope of s 12CA has a symbiotic effect upon the scope of s 12CB. In other words, the more that s 12CA encompasses uses of unconscionability under the unwritten law beyond the special disadvantage doctrine (which is still an undetermined and open issue at High Court level), the more that the universally acknowledged broader s 12CB will need to extend beyond the scope of unconscionability under the unwritten law, to give effect to the statutory language in s 12CB (and to give it scope beyond what s 12CA covers).

In other words, the presence of s 12CA (i.e. ***simple statutory unconscionability)*** in a distinct provision of its own, with a symbiotic relationship to its sibling provision in s 12CB (i.e. ***amplified statutory unconscionability****)* has a substantive impact upon the interplay and scope of the two key provisions. The removal of s 12CA therefore has a substantive impact upon the reflexive relationship between the two statutory provisions, in a way that simply reinserting the special disadvantage doctrine (or whatever broader scope s 12CA properly has) back into s 12CB will not necessarily correspond, depending upon how that reinsertion is done. For example, simply adding the special disadvantage doctrine to the list of principles of interpretation for statutory unconscionability in s 12CB(4) or to the list of factors and other elements of s 12CC will not necessarily cover all of the work that s 12CA does.

[7] See *Kobelt* (n 4) 48-9 [118]-[123] (Keane J).

To the extent that Amended Proposal A22(b) is limited to the special disadvantage doctrine in whatever is enacted back into s 12CB, that will also be problematic if the true scope of s 12CA extends beyond that doctrine. This aspect might need further consideration in the final review of Amended Proposal A22(b). As the discussion in Background Paper FSL9 about unconscionability under the unwritten law mainly or exclusively focuses on the special disadvantage doctrine, it is important to be clear in any reform enacted into law about the scope and operation of unconscionability under the unwritten law that is being reinserted back into s 12CB. The ramifications of removing s 12CA for the ultimate choice between the three different ways in which s 12CB might operate are canvassed later in this Submission.

Thirdly, while Amended Proposal A22 clearly says that s 12CB should be amended to include '*unconscionability* within the meaning of the unwritten law',[8] it is unclear whether this will be done in a way that singles out the special disadvantage doctrine alone or all of the other uses of unconscionability under the unwritten law. This should be clarified in the final form of the proposal, as the tenor of the discussion about the amended recommendation is mostly about the special disadvantage doctrine alone. Put another way, if s 12CA includes but is not limited to the special disadvantage doctrine – a matter that remains undetermined at High Court level – then reinserting only that doctrine back into s 12CB upsets the balance of the pre-existing symmetry between s 12CA and s 12CB and their potential scope, and creates a substantive difference between the pre-existing law and the post-reform law where none previously existed.

Fourthly, the way in which Amended Proposal A22 is given effect matters, again for various reasons. Arguably, s 12CB(4)(a) implicitly recognises that it encompasses at least the unwritten law on unconscionable conduct, whatever that embraces and however far the section extends beyond it, because it makes reference to being unconstrained by the unwritten law, although that implicit recognition is buttressed at present by the presence of s 12CA in the law. Section 12CB(4) contains the special principles of interpretation that apply to statutory unconscionability. Notwithstanding the limitations of Amended Proposal A22 in the author's view, those principles are an appropriate place to give effect to Amended Proposal A22, if that recommendation is pursued by the ALRC and adopted by the Australian Government. Further, given the symmetry between s 12CB and its equivalent provision in the *ACL*, precedential consistency of interpretation would be facilitated if the same change (if any) occurred in the same way and at the same time in both statutes.

Fifthly, like the scope of s 12CA, the scope of s 12CB remains inconclusively determined at High Court level, and the scope of one has an impact upon the scope of the other. There are three possible options for the scope of s 12CB, as outlined further below. To reiterate: removing s 12CA (and its *ACL* counterpart provision) has an impact on that unresolved

[8] Emphasis added.

substantive debate, and hence the protective scope of statutory unconscionability for consumers as well as business enterprises.

Sixthly, the fact that s 12CA itself contains a provision that says that it does not apply if s 12CB applies indicates the *substantive* effect that its simple repeal would have, if the aspect beyond the special disadvantage doctrine is not *also* dealt with by amendment. While the use of the term 'unconscionable conduct' in s 12CB as well as what appears in some of its indicators in s 12CC might be sufficient to have that effect without such an amendment, Professor Bant is right to warn of the need to avoid any risk of disconnecting s 12CB from the special disadvantage doctrine by the repeal of s 12CA.[9]

Finally, removing s 12CA has an influence upon which of the competing narrow and broad views of amplified statutory unconscionability in s 12CB ultimately prevails. In the absence of s 12CA as a stand-alone provision in a relationship with s 12CB, and together covering the full gamut of statutory unconscionability, the special disadvantage doctrine has no special place or priority in the scheme of amplified statutory unconscionability, and certainly nothing that makes it the gateway through which the broader protection of s 12CB is otherwise accessed. It just becomes one principle amongst others (if included in the principles of interpretation for statutory unconscionability) or one aspect amongst others in s 12CB and s 12CC, which together cover principles of interpretation, the degree of correspondence with the unwritten law (whatever its true scope), and non-exhaustive indicators of unconscionable financial services business conduct, with elements beyond those recognised under the unwritten law of unconscionable conduct.

The amended proposal is ambiguous on this point, if it is intended to address it at all. Saying that s 12CB covers the special disadvantage doctrine does not, without more, go to the priority (or otherwise) of that doctrine in the scheme of amplified statutory unconscionability in s 12CB and s 12CC. Nor does it go to the appropriate scope of s 12CB in terms of what the statute adds to the unwritten law on unconscionability generally or the unwritten law on unconscionable conduct in particular, in the absence of s 12CA.

Those are the substantive impacts of the ALRC's amended proposal. The ALRC's analysis seems to minimise any detrimental impact of its suggested reform, in part because the analysis to date does not yet address all of the substantive impacts that its amended proposal creates or risks. There is an opportunity to remedy that in this iterative reform development process that the ALRC has initiated, to the extent that the ALRC makes any course correction in light of the substantive views and practical suggestions in this supplementary Submission about Amended Proposal A22.

[9] E Bant, *Submission to ALRC Financial Services Legislation Interim Report A* (Submission, The University of Western Australia, 25 February 2022) 8.

On the analysis above and in the author's previous submission, there is an iterative need to review Amended Proposal A22 in light of the following matters:

(1) Amended Proposal A22's potential impact upon substantive and unresolved issues in statutory unconscionability, some of which are itemised specifically in this list;
(2) the different judicial and academic views on the scope of unconscionable conduct under s 12CA;
(3) the different academic and judicial views on the scope of unconscionable conduct under s 12CB, beyond what is covered under whatever is the proper scope of s 12CA (i.e. the three possible interpretations of the scope of s 12CB canvassed in this supplementary Submission);
(4) the different judicial and academic views on the status of the special disadvantage doctrine as the gateway for accessing s 12CB (i.e. the difference between Justice Keane's position in *Kobelt* (i.e. the narrow view) and the Full Federal Court's view in *Quantum Housing* (i.e. the broad view));
(5) the different academic and judicial views on the differences in wording in s 991A of the *Corporations Act* and s 12CA and s 12CB of the *ASIC Act*, and their respective impact upon third-party coverage;
(6) the different ways and terms for reinserting essential aspects of a repealed s 12CA back into s 12CB, to avoid potential substantive impact upon the law of statutory unconscionability; and
(7) the substantive and adverse impact upon precedential guidance, sectoral coverage, and policy and regulatory coherence if equivalent changes to statutory unconscionability in the *ACL* do not follow from any changes to statutory unconscionability in the *ASIC Act*.

To reiterate: in its current form, Amended Proposal A22 goes beyond mere simplification and removal of duplication and trespasses into substantive territory and unresolved issues, with equivalent risks in cascading the same reform through the *ACL*. The next part of this Submission makes comments in further detail about some of the points in this executive summary, to outline why the issues raised here are important to acknowledge and address, and to highlight relevant authorities and arguments in justification of the views and suggestions expressed here. The last part of this Submission contains some minor recommended changes or additions to the ALRC's latest reform proposal on statutory unconscionability, to mitigate (without being able to eliminate) the various problems with Amended Proposal A22 that the author has canvassed in this supplementary Submission.

Comments

First, as examined above, repealing s 12CA of the *ASIC Act* risks having an unintended or unforeseen impact on unresolved substantive issues about the scope and operation of the statutory unconscionability provisions, which are not yet addressed in the amended recommendation. The first such issue concerns coverage of third parties, beyond suppliers and acquirers of financial services as the parties specifically identified in s 12CB. Repealing s 12CA of the *ASIC Act* and s 991A of the *Corporations Act* risks losing the coverage of third parties under the residual provisions of statutory unconscionability, at least to the extent that those sections are broader in their coverage of such parties than s 12CB.

Whilst the wording of the various unconscionable conduct provisions might appear similar at first glance, the distinction in their wording means that the operation of s 12CB of the *ASIC Act* does not fully subsume essential elements of the two provisions that the ALRC recommends be repealed. The ALRC has already adopted the prudent change of clarifying that any repeal of s 12CA must not leave any doubt about s 12CB continuing to embrace unconscionable conduct under the unwritten law. That position is important in its own right, and for its flow-on effects for the nature and scope of s 12CB, as explained above. Another essential element of the two suggested provisions for repeal that should not be lost is the coverage of third parties. If there is to be any change to statutory unconscionability, this too needs consideration in any reform proposal, not least for clarity and the avoidance of any doubt, as well as precedential guidance and avoidance of unnecessary litigation about the post-reform state of the law.

This potential gap in coverage between simple and amplified statutory unconscionability was raised in the context of the equivalent *ACL* provisions in arguments considered by Justice Jagot in the Federal Court of Australia as follows:[10]

> In any event, I am not persuaded that *Monroe Topple* is wrong and that I should depart from the reasoning adopted in that case: *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214; 230 ALR 1; [2006] FCAFC 2 at [187]–[190]. Leaving aside the argument about the operation of ss 236 and 237 of the ACL, the only submission put in support of the proposition that *Monroe Topple* is wrong is an alleged gap in the statutory scheme. It is said that as s 20 does not apply to conduct prohibited by s 21 (s 20(2) of the ACL) no relief would be available to anyone other than the parties contracting for or directly involved in the supply or acquisition of goods or services. This does not follow. If the proper approach is that s 21 does not apply to unconscionable conduct by a supplier/acquirer to a third party then s 20 may be engaged by that conduct. It is also relevant that s 21 of the ACL was enacted after the decision in *Monroe Topple*, which

[10] *Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 v Kingsmede Pty Ltd* (2021) 284 FCR 424, 451 [104] (Jagot J) ('*Good Living Company*'). Justice Jagot makes other relevant comments on this point in this case at [103]-[105].

> supports the proposition that Parliament did not intend to alter the substance of the provision: *BlueScope Steel (AIS) Pty Ltd v Commissioner of Taxation* (2019) 270 FCR 359; 368 ALR 643; [2019] FCAFC 84 at [54]–[55].

Justice Jagot was appointed to the High Court in October 2022. Accordingly, Her Honour's reasoning holds substantial weight in understanding the operation and potential evolution of the doctrine and regulation of unconscionable conduct post-*Kobelt*. Most importantly, the passage quoted above provides the opportunity of having the opinion of a current High Court judge who did not hear the *Kobelt* case on the interplay between simple and amplified statutory unconscionability, in the identical provisions in the *ASIC Act* and the *ACL*.

Justice Jagot's reasoning is, with respect, impeccable. Her Honour's judgment is alert to the problem of there possibly being a gap in coverage of third parties when one provision applies but another does not. She notes in effect that, if it is true that amplified statutory unconscionability also embraces simple statutory unconscionability but does not apply to third parties, that is not the end of the matter. If that gap exists, then the unconscionable conduct in question falls outside the terms of amplified statutory unconscionability, and so the self-executing provision that makes the amplified form prevail over the simple form has no work to do. In that event, simple statutory unconscionability would still apply, including through its broader terms and application to third parties needing protection from unconscionable business conduct.

So far, so good. Third parties would obtain *some* protection under *some* unconscionability provision from unconscionable business conduct. However, it was not necessary in that case for Justice Jagot to go on to address the additional gap in coverage that results for third parties, if amplified statutory unconscionability does not apply. The range of conduct that attracts protection is broader under amplified statutory unconscionability than it is under simple statutory unconscionability. So, the coverage of third parties under amplified statutory unconscionability alone remains a live issue, if the ALRC's revised recommendations proceed into law in their current form.

Accordingly, assimilating all statutory unconscionability provisions into one section might result in the loss of coverage and protection for some third parties, unless otherwise addressed. This risk might not be fully ameliorated by an amendment to s 12CB of the *ASIC Act* stating simply that it includes unconscionability within the meaning of the unwritten law,[11] again unless that aspect is explicitly addressed in any reform proposal, to close the gap to everyone's satisfaction. Preventing unnecessary and expensive 'test case' litigation that seeks to exploit any arguable gap or uncertainty arising from the law and its reform is also a desirable law reform objective. Justice Jagot's exemplary judgment demonstrates that

[11] As the ALRC includes in Amended Proposal A22(b) of Australian Law Reform Commission (n 2) 20.

point, in dealing with the arguments advanced before her, as well as the relevance of extrinsic material when interpreting amended legislation.

The major gap in coverage that the ALRC addresses in its latest report is focused upon the limitation of something being in 'trade or commerce', and the likely extension of that limitation in effect to s 991A of the *Corporations Act*.[12] That is the major basis upon which the ALRC concludes that 'it is very unlikely that the repeal of s 991A would result in any protections being lost in practice'.[13] The third party protection and coverage issue is not explicitly addressed, despite the ALRC's quoting of Professor Pearson's view about the potential non-application of s 991A to 'authorised representatives' of financial services licensees.[14] The ALRC also quotes the catch-all provision in s 991A that is absent elsewhere, covering 'in or in relation to the provision of a financial service', which is apt to pick up third parties, in a way that the wording of s 12CB does not, at least not as directly. If effective and full reform is to be effected, the best policy outcome is to ensure that there is no possible and litigiously exploitable gap in coverage in terms of those associated with powerful parties and in terms of those vulnerable parties within protective scope. Accordingly, if the ALRC persists with Amended Proposal A22, it should be further amended to address this point.

To explain why the issue of third parties is something to consider addressing if the amended proposal proceeds: both s 12CA and s 12CB prohibit 'a person' from engaging in unconscionable conduct (whatever else distinguishes these two sections, as the author argues elsewhere in this supplementary Submission). Ordinarily, a term such as 'persons' is apt to cover third parties, at least those who are the parties engaging in unconscionable business conduct. There is no need to mention expressly the third parties who are protected from unconscionable business conduct where the unwritten law that is picked up by the statute has that effect, as in s 12CA. Put another way, s 12CA is not confined to the suppliers and acquirers of financial services, who are specifically identified as the focus of s 12CB.

However, a further difficulty concerning third parties arises because of the wording and interplay between s 12CB and s 12CC of the *ASIC Act*. The same issue arises if the ALRC's revised proposal is adopted by government and equivalent changes are made to the *ACL*. Section 12CC identifies the non-exhaustive set of statutory indicators of unconscionable business conduct, for the purposes of the prohibition on unconscionable conduct in s 12CB. So, there is a clear connection between s 12CB and s 12CC. In identifying the matters to which a court may have regard for the purposes of determining whether 'a person' has contravened s 12CB, s 12CC refers only to that 'person' being the supplier or acquirer of financial services.

[12] Ibid 14 [60].
[13] Ibid.
[14] Ibid 13-4 [58]; citing Gail Pearson, 'The Ambit of Unconscionable Conduct in Relation to Financial Services' (2005) 23(2) *Company & Securities Law Journal* 105, 128.

As has been considered by Lindgren J in *Monroe Topple and Associates Pty Ltd v Institute of Chartered Accountants in Australia*[15] and Jagot J in *Good Living Company*, the prohibition on unconscionable conduct in s 12CB arguably might not apply to third parties involved in the supply or acquisition of financial services. This is therefore a live and substantive issue. Accordingly, any proposed reform that involves changes – even seemingly minor ones - to simple and amplified statutory unconscionability should not unintentionally affect the substantive 'constructional choices' (to use a favoured judicial term in statutory interpretation) involved in this debate if they remain genuinely open on the current law. In other words, if any change is to be made, it should address and settle any uncertainty concerning the scope and coverage for third parties.

Secondly, there is a different and unresolved substantive debate about how narrowly or broadly to interpret the simple statutory unconscionability provision found in s 12CA of the *ASIC Act*. For clarity, this unresolved substantive debate about the scope of s 12CA and its counterpart in the *ACL* (and hence with knock-on effect for the scope of s 12CB and its counterpart in the *ACL*) is *in addition to* the other unresolved substantive issues already canvassed above. Under the narrow interpretation, simple statutory unconscionability is limited to notions of *Amadio*[16]-like special disadvantage and exploitation, as encapsulated in the special disadvantage doctrine. In other words, on this view s 12CA is completely co-extensive with and only with the special disadvantage doctrine. However, under a second and broader potential interpretation of s 12CA (and its *ACL* counterpart), simple statutory unconscionability includes not only *Amadio*-like special disadvantage, but also extends to other causes of action in equity (and perhaps the common law) in which some notion of unconscionability or (perhaps) unconscientiousness is an element. These additional areas of law and bases for action beyond the specific notion of unconscionable conduct as encapsulated in the special disadvantage doctrine include, but are not limited to, constructive trusts, duress, estoppel, penalties, mistake, and relief against forfeiture.

This broad view was left open in obiter comments by Justices Gray, French, and Stone of the Federal Court of Australia in *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* - a case largely concerning the special disadvantage doctrine.[17] Conversely, some intermediate appellate court judges have favoured the narrow interpretation.[18] Only Justice Gageler of the High Court of Australia in *Kobelt* addressed the scope of simple statutory unconscionability. Whilst His Honour preferred the narrow interpretation and

[15] [2001] FCA 1056; see also *Monroe Topple and Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110 (Black CJ, Heerey and Tamberlin JJ).
[16] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
[17] (2002) 117 FCR 301, 317-8, [46], [48] (Gray, French and Stone JJ).
[18] 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, [114]-[115], [123], [126] (Gyles J).

considered the issue resolved,[19] he referred only to cases favouring the narrow view. For this reason, the author contends that the scope of simple statutory unconscionability is not yet conclusively resolved, at least not at High Court level.

The scope of simple statutory unconscionability raises a separate but related point. The breadth of simple statutory unconscionability under more than one Commonwealth Act regulating industry sectors across the national economy affects the breadth of amplified statutory unconscionability, because of the interrelationship of the two statutory provisions. More specifically, the breadth of s 12CA of the *ASIC Act* affects the breadth of s 12CB of the *ASIC Act*, to which s 12CC applies. Accordingly, as the scope of simple statutory unconscionability remains unresolved, so too does the scope of amplified statutory unconscionability, both generally and in relation to the legislation covered by the current ALRC inquiry. The ALRC correctly notes that the full scope of amplified statutory unconscionability remains unclear post-*Kobelt*.[20] The point of this supplementary Submission is that it remains unclear (or, more precisely, undetermined conclusively, at least at High Court level) in more than one way, and any reform should not affect the substantive resolution of the various unresolved issues about the true scope of s 12CA and s 12CB (and their *ACL* counterparts).

However, because the ALRC's analysis does not yet fully address the gaps and problems outlined in this supplementary Submission and the author's earlier submission, and therefore frames the problem mainly as one of ending perceived duplication and with no real risk of substantive impact once s 12CA is removed, it appears unconcerned by this unresolved scope of amplified statutory unconscionability, at least when it comes to addressing the risks arising from accepting its revised proposal. In other words, if the scope of problems to be cured *and* the problems that reform might create are *both* minimised, the risks of the amended proposal seem minimal and its palatability increases. The significance of this point increases if equivalent changes are made to the *ACL*, which will affect businesses and consumers in *all* industry sectors of the national economy, not just the financial services sector.

What are the substantive impacts on the scope of amplified statutory unconscionability that are risked by any acceptance of Amended Proposal A22 in its current form? At a conceptual level, amplified statutory unconscionability might yet be interpreted in three possible ways.[21] First, as held by Justice Keane in *Kobelt*, amplified statutory unconscionability might remain grounded in notions of special disadvantage.[22] On this view, the protection of

[19] *Kobelt* (n 4) 36 [82] (Gageler J).
[20] Australian Law Reform Commission (n 2) 11 [49].
[21] For further discussion, see: P Strickland, 'Rethinking Unconscionable Conduct Under the Trade Practices Act' (2009) 37 *Australian Business Law Review* 19.
[22] *Kobelt* (n 4) 48-9 [118]-[123] (Keane J).

amplified statutory unconscionability is only accessed through the gateway of *Amadio*-like special disadvantage and, further, the scope of amplified statutory unconscionability is determined through the lens of statutory adjustments to that doctrine that do not reduce its essential nature or scope of protection under the unwritten law. For example, as Justice Keane notes, some aspects of s 12CB enable greater protection for the cohort of parties protected by the special disadvantage doctrine, without threatening or altering its essential features. On this first possible view of amplified statutory unconscionability, it cannot stray too far from the special disadvantage doctrine when interpreting and applying s 12CB and s 12CC.

Secondly, if simple statutory unconscionability is interpreted narrowly to be limited to the special disadvantage doctrine, amplified statutory unconscionability might be interpreted broadly to include other doctrines in which unconscionability or unconscientiousness is an element, but still without necessarily diverging from the various uses of unconscionability or even unconscientiousness under the unwritten law.[23] As Peter Strickland argued about statutory unconscionability at an earlier stage of its development, 'while [simple statutory unconscionability] covers only the equitable doctrine of unconscionable conduct, [amplified statutory unconscionability] could be broader, and may cover all of the equitable grounds that involve unconscionability as an element',[24] not least because of the incorporation of at least some of the elements of the various uses of unconscionability under the unwritten law in the list of indicators in what is now s 12CC of the *ASIC Act*. On this view, s 12CB and s 12CC still might not stray too far from what is captured by the concept of 'unconscionable conduct' under the unwritten law, with the caveat that the concept is not limited simply to the special disadvantage doctrine.

In other words, if s 12CA picks up only the special disadvantage doctrine, s 12CB can pick up other uses of unconscionability and unconscientiousness in the unwritten law, many of which have at least some elements (eg duress, unfair tactics, undue influence, inequality of bargaining power etc) included in the list of non-exhaustive indicators of unconscionable business conduct in s 12CC. Moreover, courts would not need to stray too far (if at all) from the unwritten law when interpreting and applying statutory unconscionability, with the additional statutory advantages of an official regulator who might bring actions and a broader range of statutory remedies for unconscionable business conduct than those available under the unwritten law.

Thirdly, and whatever the proper scope of s 12CA, amplified statutory unconscionability might yet be interpreted as including a broad statutory framework and matrix of indicators

[23] This is the equivalent to the possible broad interpretation of simple statutory unconscionability, as left open by the Federal Court of Australia in *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 317-8, [46], [48] (Gray, French and Stone JJ).
[24] Strickland (n 22) 23.

under the combined effect of s 12CB and s 12CC, including the statutory factors expressly listed in ss 12CB(4)-12CC of the *ASIC Act*, and which extends considerably beyond the unwritten law. This might extend more than judicially acknowledged or developed to this point into coverage that is not grounded simply in the uses of unconscionability generally and unconscionable conduct in particular under the unwritten law. On this third possible view, amplified statutory unconscionability provides a framework and structure for its own development in judicial exposition and application that extends considerably beyond what the body of precedent says about 'unconscionable conduct' and its range and elements under the unwritten law, with consequential impact for its protective scope.

After all, as the High Court constantly reminds us, statutory interpretation starts with the structure and wording of the statute, not the pre-existing general (or unwritten) law. It is at least arguable (and hence ripe for further 'test case' litigation) that, while some of the listed indicators in s 12CC mention at least some of the elements associated with unconscionability in its various forms under the unwritten law, other indicators and the statutory framework itself might permit an even broader application, in protecting consumers and businesses from unconscionable business conduct.

Those three possible ways of interpreting the breadth of s 12CB also cut across and hence bring into play other unresolved substantive issues, such as the competition between the 'thin' and 'thick' views of the relationship between unconscionable conduct under the unwritten law and s 12CB, and the interactive effect that the full scope of s 12CA has upon the scope of s 12CB. There is a consensus of academic and judicial opinion that amplified statutory unconscionability (as in s 12CB) is broader than simple statutory unconscionability (as in s 12CA), whatever their respective and interdependent scope.

Take one of the three possible interpretations of the scope of amplified statutory unconscionability, as an example of the various interdependencies in play and hence the substantive impact of removing s 12CA depending upon how that is done and what from s 12CA is shifted back into s 12CB. If simple statutory unconscionability extends to cover more than just the special disadvantage doctrine, and picks up all of the uses of unconscionability and unconscionable conduct under the unwritten law, logically amplified statutory unconscionability must extend even further, and beyond those uses under the unwritten law, which brings into play a new, broader, and statute-driven body of law about unconscionable conduct.

The correct interpretation of amplified statutory unconscionability therefore remains the subject of academic and judicial debate. More than one view remains open about its full and proper scope, which in turn is affected by the relationship between s 12CA and s 12CB and what the removal of the former does to the latter, if not otherwise accommodated in any reform. In its present form, Amended Proposal A22 risks cutting across a number of

unresolved issues about amplified statutory unconscionability, in ways that are not yet explicitly addressed in the analysis otherwise supporting that amended proposal.

To ensure statutory coherence and to avoid substantive impact upon evolving law when none is intended, any reform of the regulation of unconscionable conduct should not disrupt these ongoing judicial and academic debates and evolutionary working out of statutory unconscionability over time, especially since many of the most recent test cases are only now addressing reforms that were introduced into the law of statutory unconscionability a little over a decade ago, arising in part from work in which the author was involved as an expert panel member for the Australian Government. Repealing simple statutory unconscionability in s 12CA of the *ASIC Act* would have a significant potential impact on the interpretation of amplified statutory unconscionability, in the ways canvassed throughout this supplementary Submission and the author's earlier submission. At present, s 12CA and s 12CB are like conjoined twins. Put another way, s 12CA of the *ASIC Act* has a reciprocal and interdependent effect upon the scope of *ASIC Act* ss 12CB-12CC. There *is* a relationship between these provisions, and they must be read together.

At a conceptual level, if s 12CA is limited to the special disadvantage doctrine, then s 12CB must encapsulate a broader meaning of unconscionable conduct. That point is uncontroversial. Alternatively, if s 12CA itself has a broader meaning, then s 12CB must have other and more extensive work to do than simply duplicate what s 12CA covers in scope. Put another way, carving out one important piece of the combined statutory package has, or unduly risks having, an impact upon that package as a whole, in a way that is not fully ameliorated by simply putting back into s 12CB something of the kind suggested and limited by Amended Proposal A22(b).

Thirdly, judicial debate remains as to whether special disadvantage is required as a necessary gateway in order to access the amplified statutory unconscionability provision in s 12CB of the *ASIC Act*. The ALRC notes this uncertainty, stating that 'just how much further s 12CB goes is not free from doubt.'[25] Many of the High Court of Australia'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 exploitation of vulnerable parties. In other words, none of the High Court 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.

In any case, four of the seven High Court judges in *Kobelt* explicitly contemplated that amplified statutory unconscionability does not require all of the elements of the special

[25] Australian Law Reform Commission (n 2) 11 [49].

disadvantage doctrine. Justice Gageler held that 'the statutory conception of unconscionable conduct is unconfined to conduct that is remediable on that basis by a court exercising jurisdiction in equity'[26] 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'.[27] Relying on the provisions on systems or patterns of behaviour in statutory unconscionability, Justices Nettle and Gordon held 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'.[28] Justice Edelman unequivocally indicated that the Commonwealth Parliament has mandated 'a less restrictive 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'.[29]

However, of the remaining three High Court judges, only Justice Keane held that amplified statutory unconscionability remains grounded in notions of special disadvantage.[30] Chief Justice Kiefel and Justice Bell expressly declined to answer the question of whether special disadvantage is required as a gateway to access amplified statutory unconscionability.[31] On this analysis, two of the four High Court judges arguably with different views about amplified statutory unconscionability not being tethered completely to the special disadvantage doctrine have now left the bench, and three other High Court judges have joined the bench post-*Kobelt* whose views on this crucial point are not yet known. Who knows what a newly constituted majority might yet decide on this point? A reform proposal and statutory amendment that trespasses onto the territory of this crucial and unresolved substantive debate does so at some peril and must tread carefully, lest it upset the balance of unresolved issues about constructional choices in the statute and tip the law in one direction over another, however unintentionally or incrementally.

Put another way, *any* arguable uncertainty or change in the pre-existing law, no matter how minor or major, is problematic if it arises unintentionally from reform in the name of simplification and removal of duplication. At this stage in the iterative reform process, the only and important question is whether or not that point and its underlying reasons are accepted, and what could be and is done about it in final recommendations for reform.

These are live, ongoing, and important issues in the law of statutory unconscionability. In 2021, the Full Court of the Federal Court of Australia in *Quantum Housing* further delinked

[26] *Kobelt* (n 4) 37 [83] (Gageler J).
[27] Ibid 39 [89] (Gageler J).
[28] Ibid 77-8 [232] (Nettle and Gordon JJ).
[29] Ibid 102 [295] (Edelman J).
[30] Ibid 48-9 [118]-[123] (Keane J).
[31] Ibid 27 [48] (Kiefel CJ and Bell J).

special disadvantage as a precondition for amplified statutory unconscionability. Chief Justice Allsop and Justices Besanko and McKerracher held that '(w)hilst some form of exploitation of or predation upon some vulnerability or disadvantage of people will often be a feature of conduct which satisfies the 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.'[32] Under the High Court's own precedential instruction in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[33] Australian courts below the level of the High Court are presumptively bound by *Quantum Housing*, subject to subsequent High Court direction, unless a subsequent Full Federal Court panel or those intermediate appellate courts and trial judges in the States and Territories can successfully distinguish the Full Federal Court's previous decisions on the facts or show that they are demonstrably wrong in principle.

However, despite the judgments of Justices Gageler, Nettle, Gordon, and Edelman signalling a more expansive (or 'thick') view of amplified statutory unconscionability, which was not essential to the final outcome and differently composed 4:3 majority vote in *Kobelt*, there has been a significant change on the bench post-*Kobelt*. Justices Keane, Nettle, and Bell have departed from the bench and have been replaced by Justices Steward, Gleeson and Jagot, whose views on this issue remain largely untested, as are the views of Chief Justice Kiefel, given that she (along with Justice Bell) explicitly avoided ruling on this exact issue in the *Kobelt* case. The consequence is that the question of whether special disadvantage is required to access amplified statutory unconscionability remains a live and controversial issue in the law of statutory unconscionability. Due to the practical importance of resolving this gateway issue, any reform of unconscionable conduct must not disrupt this ongoing judicial and academic debate.

This level of granularity of analysis in stress-testing the amended recommendation and its potential substantive impact is neither unnecessary nor esoteric. It is exactly what is likely to occur in practice if a statutory change is made, no matter how minor or inconsequential it seems, and parties and their lawyers on one side of litigation or another see any advantage in starting to exploit the resultant differences in statutory language between the unreformed law and the reformed law, in a series of test cases that leverage any uncertainty about the amended proposal's substantive impact, and not necessarily just in financial services cases.

Even if equivalent reforms are not made by the Commonwealth Parliament to the *ACL*, parties in litigation who see advantages in doing so might be expected to present arguments that exploit any argued precedential and substantive differences between the amended

[32] *Quantum Housing* (n 5) [4] (Allsop CJ, Besanko and McKerracher JJ). Please note this discussion was in the context of unconscionable conduct within the Australian Consumer Law.
[33] (2007) 230 CLR 89.

financial services laws and the *ACL* (and cases on it) more broadly. Further, there is a policy issue of equality and equity in access to justice if equivalent reforms are not cascaded through the *ACL*, and a differential substantive outcome results in the scope of available protection and coverage being greater in one industry sector over others. Avoiding those risks of non-efficiency and non-effectiveness are just as important in policy and regulatory terms as obtaining the benefits of real legislative simplification and non-duplication.

Fourthly, if s 12CA of the *ASIC Act* is simply repealed, and even if the special disadvantage doctrine is retained within s 12CB in the way that the ALRC proposes, there is no inherent reason under the current structure and terms of s 12CB and s 12CC (which contains some factors referencing elements of the special disadvantage doctrine and related doctrines) why special disadvantage would be given any particular weighting, priority, or other significance amongst all of the other elements listed in ss 12CB-12CC. It is possible that the continued use of the term 'unconscionable conduct' in the statute and the obvious relation back to the equivalent equitable doctrine bearing that name might suffice to achieve that effect, especially if the ALRC's amended proposal about the special disadvantage doctrine is legislated, but that is speculative.

The equitable notion of unconscionable conduct purports to protect against the exploitation of special disadvantage. It is one thing to accept that amplified statutory unconscionability might extend beyond the strict equitable notion of unconscionable conduct. It is quite another thing altogether to contend that special disadvantage has no particular significance in determining whether conduct is, in all the circumstances, unconscionable under amplified statutory unconscionability. Repealing s 12CA of the *ASIC Act* seriously risks upsetting the existing balance between simple and amplified statutory unconscionability, and the effect they have upon each other, on a number of important and unresolved substantive levels. Those important debates are yet to be resolved by the High Court, with its post-*Kobelt* composition.

Fifthly, the author wishes to clarify for the record that, whilst he supported the repeal of s 991A of the *Corporations Act* in his earlier submission in the name of overall simplification and rationalisation, that support was always conditional upon the retention of s 12CA (and its statutory equivalents elsewhere) in the law. In any case, that support was the subject of further discussion and clarification in subsequent meetings between the author and the ALRC in July 2022. At that time, the author expressed similar caveats and concerns about such a repeal to those articulated above with respect to s 12CA of the *ASIC Act*. The amended proposal raises similar *and* additional concerns, in the author's view.

Finally, the author notes the ALRC's position that s 12CA of the *ASIC Act* and s 991A of the *Corporations Act* should be repealed *even if* equivalent changes are not made

simultaneously with unconscionable conduct provisions in the *ACL*.[34] However, that view seemingly rests upon an underlying assessment that the suggested reform is minor, no substantive impact upon the law will result, and any reform risks are manageable, whether or not equivalent changes occur in the *ACL*. If that underlying assessment is challengeable, the view that it supports is also challengeable.

Further, the author cautions that such an approach to acceptance of differential regulation will create or risk further inconsistency between statutory regimes that depend upon a single and consistent interpretative approach by courts in a system of precedent across *all* industry sectors in the national economy, and hence further increase complexity and uncertainty in the law. Similarly, it is less than ideal from a policy and business perspective for different industry sectors to be regulated by differently worded laws and potentially different standards of coverage and protection, if the ALRC's current proposal is accepted by government, enacted into law, and then followed by 'test case' litigation about whether or not the post-reform position on statutory unconscionability is substantively different. In short, given that the *ASIC Act* regulates the financial services sector, and the *ACL* regulates *all* other businesses in *all* other sectors, reforming the unconscionable conduct provisions in one statutory regime but not the other would have significant policy, regulatory, and judicial implications. This would be incongruent with the ALRC's worthy goal of simplifying financial services regulation.

Where to From Here? – A Pragmatic Assessment

The ALRC is invested in its successive proposals about the reform of statutory unconscionability. The author is invested in his views as expressed throughout his submissions. There is distance between those views.

The author does not believe that Amended Proposal A22 is the best way forward in any form, and certainly not in its current form. In the absence of a full course correction that addresses the matters raised in this supplementary Submission and the author's earlier submission, the better course is to at least retain s 12CA as is. At present, the author seems to be a minority or perhaps even a lone voice opposing the move to repeal s 12CA in the original proposal and now Amended Proposal A22, subject to whatever other submissions are received in response to the amended proposal.

However, the fact that there is general support, at least amongst those who made submissions about the ALRC's unamended proposal, is not alone determinative. Unless those submissions and any others received on the amended proposal engage at a granular

[34] Australian Law Reform Commission (n 2) 19 [85].

level with the substantive gaps and problems addressed here, they represent 'soft' support for such proposals at best.

The ALRC's suggestion is that 'government should consider making equivalent changes [to the *ACL*] at the same time'.[35] But that recommended extension of any change into the *ACL* is because, as presently advised, the ALRC does not see significant risks from its suggested reform of statutory unconscionability in the financial services domain. In addition, the ALRC's view is that its suggested reform of statutory unconscionability for financial services should occur even if equivalent changes are not made at the same time or ever to the *ACL*.[36] But its stated reason is about not trying to solve all problems across all statutory regimes all at once, especially if there is a demonstrable need in one area of unconscionability legislation and the reform risks are manageable. However, as indicated above, that view rests upon a particular assessment of the range and likelihood of reform in one area of unconscionability legislation risking unintended substantive changes or gaps. Put another way, the ALRC view assesses the benefits of its proposed reform as outweighing any otherwise manageable risks in introducing it, for one or all industry sectors. However, that assessment and the author's different assessment each turn on what risks are in scope and what weight is given to them in the cost-benefit reform calculus.

Everyone wants to avoid the unintended consequence where the cure is worse than the disease – in substantive impact upon the law, test cases about any difference between old and new provisions, test cases about any difference between the amended *ASIC Act* and the unamended *ACL*, and a resultant period of further uncertainty. If the author is correct (or might be correct, in terms of presenting future scenarios that might yet play out in test cases to High Court level) in any or all of his concerns, there is some work yet to be done in sense-testing the amended recommendation in its current form, even if no course correction is otherwise made.

In any case, there are additional risks in cascading change through the equivalent provisions in the *ACL* on the work to date. The financial services sector is important to the national economy, but so are other business and industry sectors. It is just one sector. Its stakeholders have had extensive and multiple opportunities to express views in the long course and at each stage of this referral, confined to financial services reform. On the author's view, the statutory changes as now proposed would have substantive impact on the scope of regulation of unconscionable business conduct, in ways that would concern all business and consumer stakeholders and their peak bodies and professional advisers in industries regulated by the *ACL*, and about which they might be expected to want some form of consultation, beyond whatever consultation might be possible by government at the end of a long reform process whose primary focus is the financial services sector.

[35] Ibid.
[36] Ibid.

In assessing what is now proposed, various knock-on effects warrant consideration, in terms of their substantive impact, scope of risk, likelihood of risk, consequences if the risks materialise, and range of sectors and parties affected. For example, if the ALRC's reforms unintentionally change the dynamic between the two opposing views outlined earlier about the special disadvantage doctrine being the precondition to accessing amplified statutory unconscionability, the *ACL* is amended, the *Quantum Housing* view ultimately prevails in the High Court in part because of those reforms, and some parties across all industry sectors have greater protection because the scope of statutory unconscionability is not limited by the need to pass through the gateway of the special advantage doctrine, the pendulum will swing more towards consumers and some businesses than towards other businesses. All sides would be expected to have a view on the desirability of that outcome as a matter of policy and regulation. Similarly, if the ALRC's reforms unintentionally affect the interplay between simple and amplified statutory unconscionability, in the sense of the effect that the scope of s 12CA has upon the scope of s 12CB under the *current* law, that too is a substantive impact that affects the future interpretative trajectory of the law on statutory unconscionability, unless that risk is also given further consideration and addressed in further amendment to the revised proposal.

In the same way that the ALRC has consulted so admirably with many stakeholders in the sphere of financial services, those involved with consumer protection more broadly should also be appropriately consulted before any changes are made to unconscionable conduct provisions in the *ACL*. Government has various means of achieving that but, even if the ALRC's recommendation to government to make equivalent changes to the *ACL* is accepted, it is difficult to imagine a public consultation on that aspect as long or extensive as the one currently conducted by the ALRC about financial services regulation.

In short, such an approach to law reform risks underplaying the policy ramifications, in both policy process and policy outcomes, for the Australian Government and national economy of cascading any regulatory changes to unconscionable conduct regulation in the finances services sector across *all* business sectors in the whole economy, without all relevant stakeholders in those sectors yet having an opportunity to contribute to the framing of any law reform options affecting them in their industry contexts. When it comes to law reform, the tail should not wag the dog. Any necessary reform of the unconscionable conduct provisions in the *ACL* is not best undertaken and stress-tested via a side-wind reform initiative arising from any reform in a single industry sector.

Practical Suggestions to Improve the Amended Proposal and Limits Its Risks

In the area of statutory unconscionable conduct, the analysis in this Submission to this point suggests that the better reform outcome is for the ALRC to make a course correction and to abandon its recommended proposal, at least in relation to s 12CA and its counterpart in the

ACL. If the ALRC holds to its current course and the Australian Government accepts Amended Proposal A22, both should do more to ensure that any reform does not impact upon unresolved substantive issues in the law of statutory unconscionability, affect the regulation of third parties concerning unconscionable business conduct, upset the regulatory balance between the legally protected interests of business and consumers, or result in inconsistency with unconscionable conduct provisions in other pieces of legislation. In the view of the author, the ALRC's Amended Proposal A22 still needs more work.

The clear difference between the ALRC's position and the position of the author on the important regulatory area of statutory unconscionability does not lessen this author's respect and admiration for how the ALRC has conducted this referral. It has done a superb job that provides a model for others in Australia and elsewhere to follow, in reform analysis that is systematic, extensively researched, conceptually rigorous, evidence-based, and widely consultative. This open and public disagreement of views on an important issue of regulation is a sign of its success, not its weakness, in the iterative process of achieving sound law reform.

Notwithstanding that clear difference of views, everyone has a stake in any reform being as good as it can possibly be, if that is the course ultimately chosen by the ALRC and endorsed by government and industry. Critics and commentators have a responsibility to undertake reality checks and suggest viable alternatives. To reiterate: Amended Proposal A22 should be abandoned, at least in relation to s 12CA, for the reasons already given. However, if the ALRC ultimately proceeds with its amended proposal, there are ways in which some of the problems and gaps highlighted above can be addressed, without being avoided altogether.

First, the ALRC should ensure that s 12CB is amended to address identified gaps in coverage about associates of financial services providers and acquirers as well as other third parties. This is also important if equivalent changes are to be made to the *ACL*, to minimise legislative inconsistency and precedential disharmony. Further, to the extent that any substantive differences emerge from the difference in wording between s 12CA and s 12CB of the *ASIC Act* and s 991A of the *Corporations Act*, it would be prudent to ensure that any proposed amendment of s 12CB extends to what might otherwise be a gap in coverage and protection. If reform is to happen, all gaps should be closed and hence placed beyond reasonable dispute in post-reform test cases.

Secondly, Amended Proposal A22(b) should be clarified so that it is not taking sides on the unresolved substantive question of whether the use of unconscionability under the unwritten law, as currently reflected in s 12CA, is confined to the special disadvantage doctrine alone, or rather extends beyond that use to also include other uses of unconscionability in the unwritten law. This is important not only for any cascading of reform into the *ACL*, but also because of the impact that the scope of s 12CA has upon the

scope of s 12CB, and equivalents in the *ACL*. Similarly, the ultimate reform proposal on statutory unconscionability should do what it reasonably can to avoid it risking any substantive impact upon the other unresolved questions about the true scope and operation of amplified statutory unconscionability. To reiterate: there is more than one potential substantive impact upon the law to be navigated and avoided here.

In addition, with a view to harmonisation of statutory regimes and precedential consistency across those regimes, the way in which Amended Proposal A22(b) is implemented should not be bespoke in the reform of FSL, but should optimise the potential for equivalent reform in the *ACL*, after further governmental or public consultation with all *ACL* stakeholders. Any reform of FSL and the *ACL* should ideally occur simultaneously. In other words, both Amended Proposal A22(b) and Amended Proposal A22(c) should be reframed and implemented to reflect their common interest in harmonisation of the law and precedent across equivalent statutory regimes.

Thirdly, the other ancillary and minor drafting changes to the amended proposal that are suggested throughout this Submission should be collated and adopted in shaping the ultimate reform recommendation from the ALRC.

Fourthly, the ministerial Second Reading Speech and Explanatory Memorandum accompanying the abolition of s 12CA and the addition of 'unconscionability within the meaning of the unwritten law' into s 12CB should indicate expressly that, in doing both, the Commonwealth Parliament is not intending to bring about any other substantive change in the pre-existing law on statutory unconscionability. While not determinative of judicial interpretation of any legislated reforms and their impact upon the pre-existing law of statutory unconscionability, such extrinsic aids to statutory interpretation have worthwhile guiding effect for courts.

An additional or alternative option is to add something appropriate to the existing statutory principles of interpretation for statutory unconscionability in s 12CB(4) of the *ASIC Act*. This would allow the ongoing judicial debates about the scope of amplified statutory unconscionability and the preconditions for accessing its protection to remain unaffected by changes that the ALRC believes do not and should not have substantive effect beyond mere simplification and removal of duplication. It would also minimise legislative inconsistency if equivalent changes need to be made to the *ACL*, given the equivalent principles of interpretation in that statutory regime. This would not be the first time that special principles of interpretation for statutory unconscionability refer to the relationship between statutory unconscionability and the pre-existing unwritten law.

Fifthly, Amended Proposal A22(c) should be amended to indicate that no changes should be made to s 12CA and s 12CB if, after careful consultation, the same changes are rejected for

the *ACL*. If that scenario were to occur, the stated policy objective in Amended Proposal A22(c) of being able 'to facilitate greater reliance on s 21 of the Australian Consumer Law as the core unconscionability provision' would not be able to be achieved.[37] The same assessment and outcome applies if the ALRC's recommendation about s 12CA and s 12CB is legislated before or while consultation on cascading it through the *ACL* is under way, but that cascading effect is ultimately rejected. In fact, the only scenario in which the ALRC's Amended Proposal A22(c) and its stated policy and precedential rationale work in their current form is if equivalent changes to the *ACL* are eventually made or at least agreed to in principle by government at the time that the ASIC Act is amended to give effect to them. Further, if that harmonisation of equivalent statutory regimes is broken, for whatever reason, it will be the first time in the author's experience that changes to statutory unconscionability in one statutory regime that are thought to be desirable on policy grounds are not made simultaneously or eventually to an equivalent statutory regime.

Harmonisation of this kind is both legally and economically important, so that there can be no argument about any difference across different industry sectors, at least potentially arising from any arguable difference between the pre-existing and post-reform law on statutory unconscionability, and to maintain precedential consistency, coherence, and efficiency. Otherwise, there will be asymmetry and inequality in policy, regulation, and precedent. In economic terms, if any substantive impact upon the law arising from changes in one statutory regime but not another means that something might be unconscionable conduct in one industry sector but not another under two different laws, or the scope of coverage and protection of relevant parties is otherwise different, such a result would be a worrying anomaly. The only circumstance in which those undesirable policy and regulatory consequences of the proposed reform are avoided for certain is if there really is no arguable substantive impact upon the pre-existing law, gap or differential impact in regulatory coverage, or risk assessment limitation in the reform analysis and proposals to date.

Whether or not this final suggestion is accepted, the other practical suggestions above build upon Amended Proposal A22 and are intended to enhance the ultimate reform recommendation that results from this reform process, if the ALRC proceeds with its proposed reform of the law of statutory unconscionability, as outlined in Amended Proposal A22 in its current form.

[37] Australian Law Reform Commission (n 2) 20.

Concluding Remarks

For ease of reference and comparison in the one document, when considering the views outlined in this Submission, the statutory unconscionable conduct provisions in the *ASIC Act*, *ACL* and *Corporations Act* have been provided in the annexure below.

The author would welcome the opportunity to further consult with the ALRC on any of these points and practical suggestions.

Annexure

The relevant provisions of the *ASIC Act* are as follows:[38]

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

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

(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 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 2010* (Cth), which are located in Schedule 2, known as the Australian Consumer Law, are as follows:[39]

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;

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.

[39] *Competition and Consumer Act 2010* (Cth) Sch 2: Australian Consumer Law ss 20, 21, 22.

(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.

The relevant provision of the *Corporations Act* is as follows:[40]

> **Section 991A: Financial services licensee not to engage in unconscionable conduct**
>
> (1) A financial services licensee must not, in or in relation to the provision of a financial service, engage in conduct that is, in all the circumstances, unconscionable.
>
> (2) If a person suffers loss or damage because a financial services licensee contravenes subsection (1), the person may recover the amount of the loss or damage by action against the licensee.
>
> (3) An action under subsection (2) may be begun at any time within 6 years after the day on which the cause of action arose.
>
> (4) This section does not affect any liability that a person has under any other law.

[40] *Corporations Act 2001* (Cth) s 991A.