Submission to the Australian Law Reform Commission in Response to Interim Report C (*ALRC Report 140*) of the Review of the Legislative Framework for Corporations and Financial Services Legislation

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Scope of this Submission

1. This Submission on *ALRC Report 140* is confined to Proposal C2, which covers reform of statutory unconscionability concerning financial services, across more than one Commonwealth law.[1] For ease of reference, Proposal C2 says:

> Section 991A of the *Corporations Act 2001* (Cth) and s 12CA of the *Australian Securities and Investments Commission Act 2001* (Cth) should be repealed, and s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to expressly provide that it encompasses unconscionability within the meaning of the unwritten law.

Relationship to My Earlier Submissions and ALRC Interim Reports

2. I incorporate by cross-reference here what is said and recommended in my previous submissions to the ALRC on this referral. That includes the legislative drafting suggestions to optimise the public policy outcome if the thrust of the ALRC's reform is accepted by the Australian Government. We all have a mutual aim in achieving the best possible reform outcome. Those suggestions are not confined in their applicability to the superseded Amended Proposal A22, and I reiterate them here in relation to equivalent Proposal C2.

3. I note that Proposal C2 does not explicitly incorporate the former Amended Proposal A22(c), and that the ALRC does not recommend the assimilation and merger of consumer protection regulation across the Corporations Act, ASIC Act, and Australian Consumer Law (*ACL*). To the extent that statutory unconscionability is part of such consumer protection regulation, and that Amended Proposal A22(c) is now superseded as a result, I support that outcome, both for the reasons given in my earlier submissions and the reasons given by the ALRC in *ALRC Report 140*.[2]

4. In short, there are multiple good reasons why Proposal C2 should be confined to reform of statutory unconscionability only in relation to financial services and not more broadly. If there is to be reform of other consumer protection laws beyond the financial services industry, including statutory unconscionability in the ACL, such reform is best done holistically, comprehensively, and with a direct focus upon that Act and related laws, rather than as a side-wind reform of equivalent legislation in one industry sector alone.

[1] As with my earlier submissions to the ALRC on this referral, this Submission is made in my individual academic capacity, not in any institutional capacity.
[2] Australian Law Reform Commission, *Financial Services Legislation: Interim Report C* (ALRC Report 140, June 2023) 45 [2.8]-[2.10].

Recent Developments to Reference

5. Both recent post-*Kobelt*[3] cases on statutory unconscionability in 2022-2023 and the ALRC's own previous analysis show that some clarification and consolidation of statutory unconscionability across multiple pieces of legislation is desirable, provided of course that no unintended change in the law or unproductive argument about that uncertainty arises in legal advice or litigation as a result of such reform. At this end-stage of the law reform process, reducing the number of provisions of statutory unconscionability applied to the financial services industry, down from four (4) provisions across two (2) Acts to two (2) provisions in one (1) Act needs to have other value beyond its superficial numerical appeal.

6. Yet, repealing the two suggested provisions from two Acts still leaves the task of interpreting and applying the remaining two inter-related and multi-factorial provisions – s 12CB and s 12CC of the ASIC Act – with the additional new factor of the substance of s 12CA simply being moved into s 12CB. Nevertheless, as recently confirmed by the Full Court of the Federal Court of Australia, it is undesirable for Australian law to be in a state where regulators and courts enforcing the law must each grapple with alternative pleadings and 'multiple repetitive allegations',[4] where essentially the same facts are used to substantiate more than one charge, cause of action, or basis of relief, simply to gain forensic advantage by pleading all available possibilities, thereby effectively hedging a party's litigious or enforcement bets.

7. Moreover, it is a legitimate, important, and judicially acknowledged public policy that 'simplification of regulatory proceedings (to the extent possible) is desirable to allow regulatory action to be resolved promptly and to place no more demands upon the Court's resources than necessary', to avoid enforcement action involving pleadings that are 'prolix, repetitive, and complex'.[5] Similarly, it is good law reform and public policy to minimise the incidence of alternative pleadings that are done out of prudence, for what essentially covers the same facts and culpability, but under overlapping charges and provisions – a 'result [that] is undesirable', as concluded by Justice Roger Derrington[6] in terms endorsed in *ALRC Report 140*.[7]

8. Those particular reinforcing and very recent judicial comments in two recent cases in the Federal Court are worth including in the rationale for Proposal C2, if that is what the ALRC ultimately recommends to the Australian Government in its final report. They

[3] *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 ('*Kobelt*').
[4] *Australian Competition and Consumer Commission (ACCC) v Mazda Australia Pty Ltd* [2023] FCAFC 45, [534] (Mortimer and Halley JJ) ('*ACCC v Mazda Australia*').
[5] Ibid [623] (Lee J).
[6] *Australian Securities and Investments Commission (ASIC) v National Australia Bank Ltd* [2022] FCA 1324, [379] (Derrington J).
[7] Australian Law Reform Commission (n 2) 51 [2.27].

amplify what the ALRC has already quoted from one of the two cases, and provide further justification of the ALRC's rationale for its reform proposal on statutory unconscionability, provided that simplification is not achieved at the expense of certainty about the post-reform state of the law.

Differences of Views – State of Play

9. The ALRC sees less risk than I do with its reform proposals, in terms of any (unintended) impact upon the pre-existing substantive law, as well as further debate and potential litigation about it. The final drafting choices to implement Proposal C2 are a necessary part of the processes to follow. At this stage of the iterative reform process, if there is to be a merging of two provisions of statutory unconscionability into one single provision, what remains essential is that there is no change in the law and available comparative precedent that is risked, argued about, or actually occurs unproductively as a result, for both the financial services industry under the ASIC Act and other industries under the ACL.

10. If there is to be reform of statutory unconscionability concerning financial services, it therefore needs to be limited to the reform that is now suggested in Proposal C2 in *ALRC Report 140* and implemented in a way that avoids with absolute certainty the mischief and risks identified here and in earlier submissions. The ALRC is to be applauded for its extensive consultations, and for being willing to listen and change tack accordingly with the iterative development and refinement of its proposals on statutory unconscionability and related topics, in the mutual endeavour of striving for the best possible reform outcome, with differences of view publicly visible and debated in the process.

11. Although nothing of substance should be allowed to turn on this, for completeness in the follow-up processes of assessing, adopting, and implementing Proposal C2, it is important that there is absolute certainty that Proposal C2's reference to '*unconscionability* within the meaning of the unwritten law' (emphasis added) is understood as not directly suggesting or unintentionally allowing a change in the pre-existing substantive law on statutory unconscionability in what is imported into s 12CB, even though it uses slightly different wording from s 12CA (as did its predecessor proposal). That section is clearly talking about the concept of unconscionable conduct under the unwritten law, but broader notions of 'unconscionability' and related concepts also permeate the general law.

12. Indeed, while 'unconscionable conduct' is a distinct equitable basis for relief in its own right under the general law, both court decisions and the academic literature are replete with references to the different and occasionally overlapping work done by concepts of 'unconscionable conduct', 'unconscionability', 'unconscientiousness', and conduct in

'good conscience' under the law. In addition, and as also canvassed in my earlier submissions, there is still some unresolved debate about the scope of doctrines under the general law that are picked up by s 12CA *and* the knock-on effect of that inclusion for the scope of s 12CB. That issue remains live in the reworking of s 12CB under Proposal C2. No difference in wording should be allowed to create any unintentional legal change or room for debate other than what is already possible under the pre-existing law. This matters in the means and wording chosen to implement Proposal C2.

Contingent Support for Proposal C2

13. The remainder of this Submission accepts Proposal C2 at face value. The Submission from here onwards focuses upon how best to achieve and implement it as a matter of optimal policy and law reform. This exercise has two practical purposes. It is necessary for the further stakeholder consultations, governmental consideration, legislative drafting, and regulatory guidance that are to come once the ALRC's work is done. In addition, it is necessary to minimise costly and unnecessary legal advice and litigation that tries to leverage for precedential reasons the difference in the text of the law that arises from adoption of Proposal C2, in terms of both:
    a. the resulting difference in wording between the current s 12CB and the post-reform s 12CB in the ASIC Act; and
    b. the resulting difference in wording between the post-reform s 12CB in the ASIC Act and the equivalent and unamended provision on statutory unconscionability in the ACL (ie s 21).

How Best to Implement ALRC Proposal C2

14. If s 12CA is repealed, it is imperative to enact Proposal C2 into law in its place. To that extent, Proposal C2 has my contingent support. However, *ALRC Report 140* does not go into detail about the various legislative means of doing so, and the necessary extrinsic material in support, which would be available to courts for statutory interpretation of the amendments to statutory unconscionability in the ASIC Act. Moreover, depending upon how Proposal C2 is enacted into law, other legislative guidance for courts, regulators, and litigating parties can and should usefully be inserted into the supporting extrinsic material accompanying the amending legislation. As intimated above, the purpose in taking these additional precautionary steps is to ensure with absolute certainty that there is no substantive change in the law that results from the reform in fact or that needs determination to that effect by any court in wasteful post-reform test cases.

15. For clarity, that is the mischief and risk that must be avoided altogether in the political, stakeholder, legislative, and litigious processes that follow. Despite *ALRC Report 140*'s different view of the '(c)oncerns … that consolidating s 12CA may reduce the scope of statutory unconscionable conduct under the ASIC Act', those concerns (of mine) have

ongoing relevance and greater or lesser force depending upon the particular way in which Proposal C2 is legislated. Those legislative choices are yet to be finalised and implemented. My concerns about the risk of an unintended precipitation of substantive change in the pre-existing law have more force if, in reinserting the substance of the repealed s 12CA back into s 12CB, the status quo under the current law is not adequately safeguarded.

Preserving the Legal Status Quo

16. In particular, the amending legislation on Proposal C2 must adequately accommodate and preserve the following elements of the legal status quo on statutory unconscionability, with appropriate reinforcement in the extrinsic material available in aid of statutory interpretation:
    a. the judicially unresolved possibility[8] that unconscionable conduct under the unwritten law (as enshrined in s 12CA, and to be reinserted in s 12CB) might extend beyond the equitable notion of unconscionable exploitation of a vulnerable party's special disadvantage (as exemplified in various High Court cases[9]), with correlative effect upon the range of other notions of unconscionability and unconscientiousness from the general law picked up by s 12CB;
    b. the full range of meanings of unconscionable conduct under the unwritten law that might yet be judicially imported into s 12CB, either by the reinsertion of s 12CA's substance or based on s 12CB's existing potential scope;
    c. maintaining the position under the current law for the status (ie as a precondition for accessing all of s 12CB, or not) and presence and priority (ie relative to other considerations in s 12CB and s 12CC) of unconscionable conduct under the unwritten law;
    d. the judicially unresolved possibility that the coverage of parties under s 12CA is broader than the coverage of parties under s 12CB and s 12CC, because of the difference of wording in both provisions, such that the repeal of s 12CA produces less rather than more protection for affected parties, depending upon how the substance of s 12CA is relocated in s 12CB; and
    e. the full precedential advantage of having a consistent and coherent body of judicial decisions on equivalent provisions of statutory unconscionability under the ASIC Act and the ACL.

[8] Despite Gageler J's obiter view to the contrary in *Kobelt* (n 3) 36 [82], in reliance upon authority below the level of the High Court.

[9] See eg *Yerkey v Jones* (1939) 63 CLR 649; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2004) 214 CLR 51; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; *Thorne v Kennedy* (2017) 263 CLR 85; and *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409.

Evidencing the Risk and Mischief to Avoid

17. Simply for ease of cross-reference with earlier reports and submissions, my concern about the scope of risk and mischief to be avoided in adopting and legislating Proposal C2 can be distilled as follows. Section 12CA is a stand-alone provision. It currently forms part of a package of provisions, comprising s 12CA, s 12CB, and s 12CC, with inter-relationships between them. Its presence adds force to the argument that unconscionable conduct under the unwritten law is not simply one amongst a range of possible meanings or equal considerations in statutory unconscionability, but rather has primary or exclusive status in statutory unconscionability, as the precondition for s 12CB applying or as otherwise conditioned by the rest of s 12CB and s 12CC operating together, without the essence of unconscionable conduct under the unwritten law being compromised. That argument is still ongoing in Australian courts, as illustrated further below.

18. Section 12CA's scope affects the correlative scope of s 12CB. In other words, there is an interplay between s 12CA and s 12CB, on a number of levels (eg range of doctrines from the general law captured by each provision, significance of unconscionable conduct under the unwritten law in accessing s 12CB, range of parties within scope etc). The more that s 12CA encapsulates meanings of unconscionable conduct beyond the equitable notion of unconscientious exploitation of a vulnerable party's special disadvantage (the 'special disadvantage' doctrine), the less that those additional meanings need to be picked up by s 12CB, except of course to the extent that s 12CA envisages that s 12CB picks them up and applies instead of s 12CA.

19. Accordingly, the structural and substantive effect of that combined package of provisions is affected by the repeal of s 12CA. For so long as s 12CA exists as a stand-alone provision, the doctrine(s) that it enshrines from the unwritten law have more force than if s 12CA is not present, as a gateway to accessing the protection under s 12CB. That effect will be greater or lesser, and the net of consumer and business protection from unconscionable conduct will accordingly be smaller or larger, depending upon how unconscionable conduct under the unwritten law is reinserted back into s 12CB.

20. Without s 12CA and no reinsertion in the right way back into s 12CB, there is less rather than more reason to interpret s 12CB so that unconscionable conduct under the unwritten law has a special priority in the various meanings and sources of statutory unconscionability, such that it serves as the entry point for access to everything in s 12CB. The High Court of Australia is yet to rule conclusively on that contestable point, and there are differences of views between the Full Court of the Federal Court and some High Court judges on that important substantive issue. The practical significance of the

point is that one interpretation increases the scope of protection for vulnerable businesses and individuals, and the other interpretation decreases it.

21. The fact that this remains a contestable point in the law is clear from the following two judgments. In *ACCC v Mazda Australia*,[10] two Federal Court judges (including one later appointed as the present Chief Justice of the Federal Court of Australia) followed other post-*Kobelt* decisions of the Full Court of the Federal Court of Australia in noting 'that whilst exploitation of "some form of pre-existing disability, vulnerability or disadvantage" is often a feature of unconscionable conduct, it is not a *necessary* feature for the impugned conduct to fall within the meaning of s 21 of the ACL' and equivalent provision in s 12CB of the ASIC Act.

22. Yet, in *Kobelt*, there were clear differences of views from a number of judges, both with one another and with the enunciated Federal Court position. Justice Edelman indicated that 'statutory unconscionability permits consideration of, but no longer requires, (i) a special disadvantage, or (ii) any taking advantage of that special disadvantage'.[11] In direct contrast to Justice Edelman, Chief Justice Kiefel and Justice Bell considered that the *Kobelt* case 'does not provide the occasion to consider any suggestion that statutory unconscionability no longer requires consideration of (i) special disadvantage, or (ii) any taking advantage of that special disadvantage'.[12]

23. Justice Keane thought that '(t)he use of the word "unconscionable" in s 12CB … reflects a deliberate legislative choice to proscribe a particular type of conduct' and that '(i)n its ordinary meaning, the term "unconscionable" requires an element of exploitation [and] a finding of unconscionable conduct requires the unconscientious taking advantage of a special disadvantage'.[13] Conversely, 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'[14] 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'.[15] Similarly, and focusing upon aspects of the principles of interpretation for statutory unconscionability that govern s 12CB, 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 [statutory] prohibition'.[16]

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[10] *ACCC v Mazda Australia* (n 4) [487] (Mortimer and Halley JJ) (emphasis in original).
[11] *Kobelt* (n 3) 102 [295] (Edelman J).
[12] Ibid 27 [48] (Kiefel CJ and Bell J).
[13] Ibid 48 [118] (Keane J).
[14] Ibid 37 [83] (Gageler J) (emphasis added).
[15] Ibid 39 [89] (Gageler J) (emphasis added).
[16] Ibid 77-8 [232] (Nettle and Gordon JJ) (emphasis added).

24. Those quoted extracts from the judgments show that the High Court does not yet speak with one voice on this important and unresolved issue of substance about s 12 CB, and its cognate provision in the ACL.[17] Three judges with diametrically opposed views on this issue have since left the bench, and three other judges have been appointed to the High Court, and their views in a suitable test case will make a difference to the state of the law. So, nothing in adopting and enacting Proposal C2 must be allowed to leave any room for doubt about whether or not there is a change in the law that is effected or influenced by repealing s 12CA as one of two different but related statutory prohibitions of unconscionable conduct, and rolling its substance back into s 12CB in some way, via a legislative mechanism that we still await. As always, the devil is in the detail.

25. For those summary reasons, the residual uncertainty, potential substantive impact upon the law, and unintended intrusion into unresolved substantive debates can be safeguarded to the extent legally possible by appropriate legislative drafting and extrinsic interpretative aids. However those drafting the amendments finally give effect to the ALRC's proposal, and even if acting 'out of an abundance of caution',[18] what remains important is to ensure the same scope, effect, and priority for the unwritten law on unconscionable conduct in its repeal in s 12CA and reinsertion in s 12CB, and to effect no potential change in the law (or unproductive argument about it in future legal advice and test cases) *from such amendment alone*. That can be done in a number of ways.

New Principle of Interpretation

26. What is the best way to achieve this objective, legislatively? My suggestion and preferred option would be to implement Proposal C2 via an additional principle of interpretation for statutory unconscionability, joining others in the list appearing in s 12CB(4). If the ALRC agrees with this suggestion, it could usefully be included in the final form of Proposal C2, draft provisions, or accompanying recommendations made to the Australian Government.

27. The reasons for implementing Proposal C2 in that way are as follows. <u>First</u>, there is already a listed principle of interpretation that relates to one aspect of the unwritten law. Section 12CB(4)(a) makes it clear that s 12CB is not limited to the unwritten law on unconscionable conduct, and has a broader operation. However, s 12CB being *unlimited* by the unwritten law is not the same thing as s 12CB *including* the unwritten law. So, an additional principle of interpretation on the second aspect relating to the unwritten law would dovetail neatly with the current principle of interpretation on the first aspect.

28. <u>Secondly</u>, the repeal of s 12CA as a whole means the repeal of s 12CA(2), which explicitly recognises that s 12CB can cover the unwritten law on unconscionable conduct. In the

[17] Nothing in the post-*Kobelt* decision in *Stubbings v Jams 2 Pty Ltd* (n 9) conclusively resolves this issue.
[18] Australian Law Reform Commission (n 2) 53 [2.31] fn 30.

absence of s 12CA(2), the state of the law moves from a position where s 12CB's inclusion of the unwritten law is absolutely certain and explicit in the legislation, to a position where it is not, and instead is absent, implicit, or in need of additional legislative clarification. So, it is best to be explicit about the intended legislative effect, and to leave no room for doubt. In that sense, Proposal C2 is the desirable end, and a suitable additional principle of interpretation dovetailing with s 12CB(4)(a) is the best means.

29. Thirdly, if Australian law is to operate for any period of time with a structural but not substantive difference between statutory unconscionability as it regulates the financial services sector (under the ASIC Act) and statutory unconscionability as it regulates other industry sectors (under the ACL), the best way to achieve that is to match s 12CA's repeal with an explicit and appropriate principle of interpretation added to s 12CB(4), with extrinsic material indicating that there is no change in the meaning or scope of statutory unconscionability under both Acts. In that sense, the repealed provision and added principle of interpretation in the financial services domain can be co-extensive with the unamended provisions of statutory unconscionability in the ACL for other industries.

30. Fourthly, as the ACL also has equivalent principles of interpretation for statutory unconscionability, the mechanism of adding an appropriate principle of interpretation in s 12CB(4) allows for the possibility of similar reform of the ACL down the track, as part of the wider review of consumer protection regulation signalled by the ALRC. This would then bring statutory unconscionability under both Acts back into perfect alignment, in both form and substance.

Extrinsic Material

31. To reinforce the position explicitly that there is to be no change in the law of statutory unconscionability under the ASIC Act and divergence from its equivalent in the ACL, merely as a result of legislative adoption and enshrinement of the ALRC's proposal, statements to that effect could usefully be included in the ministerial second reading speech and other extrinsic material accompanying the amending legislation and available as aids in statutory interpretation. While courts are not strictly bound by such extrinsic aids and do not always refer to them, they are better than nothing and have the advantages highlighted here.

32. Taking this necessary precaution to signal legislatively to courts, regulators, and others litigating statutory unconscionability under the ASIC Act (as well as the ACL) that there is no such change in the law will also preserve the precedential integrity of the body of law on statutory unconscionability applying across both Commonwealth Acts. It will also support where the ALRC has now landed in its declared position that 'the ALRC has not

proposed merging the two legislative architectures for consumer protection',[19] in the ASIC Act (for the financial services industry) and the ACL (for all other industries).

33. Accordingly, I recommend that appropriate focus and action of the kind described above is also recommended by the ALRC or otherwise considered by others in the governmental consultative and legislative drafting processes that follow any adoption of ALRC Proposal C2, directed to each of the amending legislation, ministerial second reading speech, and other extrinsic aids to interpretation.

Concluding Remarks

34. The precautionary steps highlighted above, if adopted, make the legislative adoption of the ALRC's Proposal C2 as safe as legally possible, from the full range of policy, regulatory, precedential, and related legal standpoints. Their adoption also avoids unnecessary speculation, legal uncertainty, and wasted expense in legal advice and litigation for courts, regulators, businesses, consumers, and their legal advisers. To that extent, I support ALRC Proposal C2 and its implementation in the form recommended above.

[19] Ibid (n 2) 45 [2.10].