

BEYOND UNCONSCIONABILITY: EXPLORING THE CASE FOR A NEW PROHIBITION ON UNFAIR CONDUCT

NICHOLAS FELSTEAD*

*Consumer Affairs Australia and New Zealand conducted a wholesale review of the Australian Consumer Law in 2017. Despite calls for the introduction of an ‘unfair conduct’ prohibition, the review found that a change to the current prohibition on ‘unconscionable conduct’ was unnecessary in light of the statutory prohibition evolving from its equitable origins. The recent High Court decision in *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 has stifled this development and realigned statutory unconscionability with the restrictive equitable doctrine. In light of curial and extra-curial comments from senior members of the judiciary, regulators and commentators, it is appropriate to reconsider the merits of a prohibition on unfair conduct. This article argues that this reform will better promote community understanding, lead to greater certainty in commerce and fulfil the role of a ‘safety net’ provision in the Australian Consumer Law.*

I INTRODUCTION

The *Australian Consumer Law* (‘ACL’) is Australia’s national consumer protection regime, found in schedule 2 of the *Competition and Consumer Act 2010* (Cth) (‘CCA’). While the ACL does not itself contain express objectives, the CCA aims to enhance welfare of Australians through the promotion of ‘fair trading and provision for consumer protection’.¹ The ACL seeks to achieve these objectives by ‘provid[ing] redress to individual plaintiffs’ and ‘influenc[ing] the conduct of traders in the market’.² This article will demonstrate that these twin aims are

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1 *Competition and Consumer Act 2010* (Cth) s 2 (‘CCA’).

2 Elise Bant and Jeannie Marie Paterson, ‘Should Specifically Deterrent or Punitive Remedies Be Made Available to Victims of Misleading Conduct under the *Australian Consumer Law*?’ (2019) 25(2) *Torts Law Journal* 99, 100. See generally *Consumer Protection*, GA Res 70/186, UN Doc A/RES/70/186 (4 February 2016, adopted 22 December 2015) annex (‘*United Nations Guidelines for Consumer Protection*’).

not achieved by the statutory prohibition on unconscionable conduct.³ Parliament should replace the prohibition on unconscionable conduct with a prohibition on conduct which is, in all the circumstances, *unfair*. While this appears to be a small shift in terminology, it will have the effect of better informing consumers of their opportunities for redress, and allowing business traders to more carefully consider their trading practices.

Proposing a prohibition on unfair conduct is not a wholly novel argument, and this article stands on the shoulders of giants.⁴ Importantly, Consumer Affairs Australia and New Zealand ('CAANZ') conducted a wholesale review of the *ACL* in 2017. A decisive consideration for CAANZ's unwillingness to reform unconscionable conduct was the view that courts were signalling that a consistent approach to section 21 was finally being developed. Specifically, CAANZ cited the rejection of 'moral obloquy' and the significant evolution of statutory unconscionability from its equitable origins as reasons why there was no need for reform.⁵ As will be discussed, following the High Court of Australia's decision in *Australian Securities and Investments Commission v Kobelt* ('*Kobelt*'), it is unclear whether this rationale is still sound.⁶

This article commences by outlining the problem of unfair conduct and introducing the current statutory prohibition on unconscionable conduct. Part III critiques this prohibition by demonstrating that it fails to influence conduct due to the lack of community understanding, and that its judicial interpretation has resulted in a gap in the law. Parts IV and V then aim to answer two critical questions – or better put, threshold requirements – for reform: *should* we introduce a prohibition on unfair conduct (Part IV); and *can* we validly assess unfairness (Part V). In particular, Part IV will consider whether the proposed prohibition sufficiently addresses the pitfalls of the current standard. Part V assesses the capacity and competency of courts to make this assessment. Part VI concludes.

3 *CCA 2010* (Cth) sch 2 s 21(1) ('*ACL*').

4 See especially Jeannie Marie Paterson and Gerard Brody, "'Safety Net' Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models' (2015) 38(3) *Journal of Consumer Policy* 331; Gerard Brody and Katherine Temple, 'Unfair but Not Illegal: Are Australia's Consumer Protection Laws Allowing Predatory Businesses to Flourish?' (2016) 41(3) *Alternative Law Journal* 169; Consumer Action Law Centre, 'Unfair Trading and Australia's Consumer Protection Laws' (Discussion Paper, July 2015) ('Unfair Trading Discussion Paper'); Consumer Action Law Centre, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Issues Paper* (30 May 2016) ('CALC Issues Paper Submission').

5 Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (Final Report, March 2017) 49 ('*CAANZ Final Report*'), citing *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 ('*Lux Distributors*'); *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405; *Australian Competition and Consumer Commission v South East Melbourne Cleaning (in liq)* (2015) ATPR ¶42-492. See also Allens, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Issues Paper* (2016) 20; Robert Baxt, 'Continuing "Furore" Over Moral Obloquy and Unconscionability' (2017) 91(10) *Australian Law Journal* 809, 811.

6 (2019) 267 CLR 1 ('*Kobelt*').

II WHY (AND HOW) WE PROHIBIT CERTAIN PRACTICES

This part aims to provide a brief background to the statutory prohibition on unconscionable conduct. Of course, substantial judicial and academic ink has been spilled in detailing the history and application of the prohibition.⁷ This article does not seek to repeat these surveys in facsimile – an overview is merely provided to build a foundation for the critique of unconscionable conduct in Part III and the proposal and defence of a new prohibition on unfair conduct in Parts IV and V.

A The Problem of Unfair Conduct

Harmful business behaviour is ubiquitous in Australia.⁸ The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry revealed consistent and systemic engagement in unfair practices by some of our largest financial institutions.⁹ It is incumbent on these institutions to take action and treat consumers fairly, and James Shipton proposed a simple solution to firms engaging in unfair practices: ‘don’t break the law’.¹⁰ However, as the Royal Commission demonstrated, self-regulated moral behaviour will inevitably give way to the profit-motivated practices that are offensive to good conscience.¹¹ As such, consumer protection legislation has an important role in regulating these practices.

A common criticism of proposals to protect consumers against sharp and unfair practices is that it will have a chilling effect on commercial activity.¹² This was accepted by CAANZ despite pushback from consumer advocates.¹³ However, the cogency of this argument is scarcely assessed. The better view is that regulating against unfair conduct will have a positive effect on competition. Competition policy and consumer policy cannot be assessed in separate vacuums; they are intrinsically linked.¹⁴ Where traders engage in unfair practices, this enables them to

7 See, eg, *ibid* 94–102 [279]–[295] (Edelman J); *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 265–76 [259]–[306] (Allsop CJ) (*Paciocco*); Jeannie Marie Paterson, *Corones’ Australian Consumer Law* (Lawbook, 4th ed, 2019) ch 4; Michelle Sharpe, *Unconscionable Conduct in Australian Consumer and Commercial Contracts* (LexisNexis Butterworths, 2018).

8 See, eg, Gerard Brody, ‘Fairness Must Drive Consumer Policy in 2020’, *Consumer Action Law Centre* (Web Page, 17 December 2019) <<https://consumeraction.org.au/20191220-fairness-2020/>>; Paterson and Brody (n 4) 333–7; Unfair Trading Discussion Paper (n 4) 4–8; Darren Ferrari, ‘On Unconscionability and Unfairness’ (Web Page, 11 September 2019) <<https://darrenferrari.com.au/updates/2019/09/10/unconscionability-and-unfairness>>.

9 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019) (*Royal Commission Final Report*).

10 James Shipton, ‘The Fairness Imperative’ (Speech, Australian Financial Review Banking and Wealth Summit, 27 March 2019).

11 Karen Chester, ‘Consumer Outcomes: A Truth Universally Acknowledged’ (Speech, Australian Institute of Company Directors Leaders’ Lunch, 29 November 2019).

12 See below Part IV(C).

13 See Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (Interim Report, October 2016) 114–16 (*CAANZ Interim Report*).

14 See, eg, Eugene Buttigieg, ‘Synergy between Consumer Policy and Competition Policy’ (2006) 33 (Spring) *Bank of Valletta Review* 1; John Vickers, ‘Healthy Competition and Its Consumer Wins’ (2002) 12(4) *Consumer Policy Review* 142; Andreas Bartels et al, ‘The Interdependence of Competition Policy, Consumer Policy and Regulation in Introducing and Safeguarding Effective Competition in the

obtain an advantage at the expense of their fair-minded competitors. This distorts the marketplace and ‘conspires against effective competition’.¹⁵ While traditional anti-competitive behaviour is invariably captured by the supply-side provisions of the *CCA*, unfair action vis-à-vis consumers often avoids capture. Take the paradigm case of *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*.¹⁶ Door-to-door sales representatives approached elderly consumers in their homes under the guise of a complimentary vacuum maintenance, only to then subject the unprepared and unwitting residents to pressured sales tactics. Moral considerations aside, this behaviour would leave rival vacuum dealers at a loss because their potential customers were unable to enter the market with sufficient information. However, this conduct does not fall squarely within the Part IV provisions of the *CCA*. In these circumstances, the *ACL* can effect protective outcomes for both consumers and competition by preventing such behaviour through the prohibition on unconscionable conduct.¹⁷

Fundamentally, consumer policy seeks to ensure that consumers are able to make well-informed choices.¹⁸ Unfair practices are antithetical to this goal, creating (and in some cases exaggerating) information asymmetries and imbalances in bargaining power. When consumers realise the consequences of these defective decisions, it is a natural outcome that they will lose confidence for the next time they enter the marketplace. Rather, well-informed and confident consumers activate competition through the informed exercise of choice – one of the central ‘purposes of consumer protection law is to ensure they are in a position to do so’.¹⁹ Australia’s consumer protection regime has a number of core provisions aimed at prohibiting conduct that has a detrimental impact on consumers and competition alike. Of course, the focus in this article is the statutory prohibition on unconscionable conduct.

B Statutory Unconscionability

In 1976, the Swanson Committee published its influential report on the *Trade Practices Act 1974 (Cth)* (*‘Trade Practices Act’*). Along with a slew of recommendations relating to the misuse of market power and price discrimination provisions, the report made a range of comments on the consumer protection provisions. Having received a number of submissions calling for a prohibition on

EU Telecommunications Market’ (2017) 19(45) *Amfiteatru Economic* 367, 368–72; Organisation for Economic Co-operation and Development, ‘The Interface between Competition and Consumer Policies’ (2010) 11(1) *OECD Journal of Competition Law and Policy* 136.

15 Brody (n 8). See also Productivity Commission, *Review of Australia’s Consumer Policy Framework* (Inquiry Report No 45, 30 April 2008) vol 2, 28 (*‘Productivity Commission Review 2008’*); Philip Clarke and Sharon Erbacher, *Australian Consumer Law: Commentary and Materials* (Lawbook, 6th ed, 2018) 29 [1.175].

16 (2013) ATPR ¶42-447.

17 See Louise Sylvan, ‘The Interface between Consumer Policy and Competition Policy’ (Consumer Affairs Victoria Lecture, 15 March 2006) 2; *Productivity Commission Review 2008* (n 15) 3–4.

18 Council of Australian Governments, ‘Intergovernmental Agreement for the Australian Consumer Law’ (Agreement, 2009) 3.

19 Trade Practices Commission, *Annual Report 1983–84* (Report, 1984) 184 [A.5.6]. See also Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (Issues Paper, March 2016) 4 (*‘CAANZ Issues Paper’*).

‘unfair or deceptive acts or practices in or affecting commerce’,²⁰ the Committee ultimately considered that any general prohibition on unfair conduct would result in unwarranted levels of uncertainty. Although the Committee recognised that the United States *Federal Trade Commission Act* contains such a general prohibition,²¹ they opined that uncertainty would result ‘under Australian conditions’.²² Unfortunately, there was no elaboration on this point, so it cannot be said what distinguishes the American from Australian conditions. However, the Committee saw the advantages of prohibiting ‘unconscionable’ conduct in trade or commerce and noted that it is a ‘familiar concept to Australian law’.²³

It was a full decade later, in 1986, when the first national statutory prohibition on unconscionable conduct was enacted as section 52A of the *Trade Practices Act*. Without providing a detailed report of the history of the statutory prohibition, it will suffice to say that the provision has been revised and amended over the past 34 years.²⁴ Relevantly, section 21(1) of the *ACL* provides that ‘[a] person must not, in trade or commerce ... engage in conduct that is, in all the circumstances, unconscionable’.²⁵ This sits alongside the section 20 prohibition on unconscionable conduct in trade or commerce ‘within the meaning of the unwritten law’ – a section aimed to make the penalties and remedies in the *ACL* applicable to conduct caught by the equitable doctrine of unconscionable conduct.²⁶ Section 21(1) is a general prohibition that applies to all conduct in trade or commerce ‘in connection with’ the supply (or possible supply) of goods and services.²⁷ Unconscionable conduct in connection with financial services and products is prohibited by section 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*).²⁸ As will be discussed in Part III, the statutory prohibition operates as a ‘safety net’ provision, aiming to capture conduct which escapes more targeted provisions.²⁹

1 Finding Meaning

The *ACL* provides no definition of ‘unconscionable’. The prohibition in section 21(1) is supported by a number of interpretative principles in section 21(4), importantly that section 21(1) is ‘not limited by the unwritten law relating

20 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (Final Report, 20 August 1976) 66 [9.56] (*Swanson Committee Report*).

21 See *Federal Trade Commission Act of 1914*, 15 USC § 45(a)(1) (1914).

22 *Swanson Committee Report* (n 20) 67 [9.58].

23 *Ibid* 67 [9.60]. See also Paterson and Brody (n 4) 352.

24 See generally Paterson, *Corones' Australian Consumer Law* (n 7) 149–151 [4.20]–[4.30].

25 *ACL* s 21(1).

26 See Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 48 [4.22]. See also Paterson, *Corones' Australian Consumer Law* (n 7) 152 [4.50].

27 *ACL* s 21(1).

28 Cases brought under section 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*) draw on the principles applied in section 21 *ACL* cases, and vice versa. For the purposes of this paper, primary reference will be to section 21 *ACL*, but section 12CB *ASIC Act* cases will be discussed.

29 Jeannie Marie Paterson, ‘Unconscionable Bargains in Equity and under Statute’ (2015) 9(2) *Journal of Equity* 188, 190; Paterson and Brody (n 4).

to unconscionable conduct'.³⁰ Further, section 22 contains a list of factors for a court to consider in determining whether conduct in trade or commerce is, in all the circumstances, unconscionable.³¹ These factors provide guidance to the court, but are neither conclusive nor exhaustive, a point often restated by the bench.³²

While a clear definition of statutory unconscionability eludes the courts and commentators, it is evident that the prohibition 'operates to prescribe a *normative standard* of conduct'.³³ Defining this normative standard has proved challenging for the courts, despite the interpretative principles and statutory list of factors. The difficulties faced by the courts in establishing a coherent understanding of unconscionable conduct have led to a situation where the provision fails to achieve its goals, and creates confusion as to the rights and obligations of consumers and traders. Although the standard prescribed by a prohibition on 'unfair' conduct may also be incapable of *precise* definition, it will create greater certainty for those to whom the provision applies and protects.

2 Remedial Consequences

Where a party breaches sections 20 or 21, section 224 empowers a court to make an order for payment of a civil pecuniary penalty.³⁴ At the time of writing, the maximum penalty per breach is \$500,000 for individuals,³⁵ and for body corporates the greater of:

- (a) \$10,000,000;
- (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission – 3 times the value of that benefit;
- (c) if the court cannot determine the value of that benefit – 10% of the annual turnover of the body corporate during the 12month period ending at the end of the month in which the act or omission occurred or started to occur.³⁶

Further, the *ACL*'s 'remedial smorgasbord' is available to parties who suffer loss or damage caused by unconscionable conduct.³⁷ Professors Robertson and Paterson suggest similar principles that apply to remedies for breach of the section

30 *ACL* s 21(4)(a).

31 *Ibid* s 22.

32 See, eg, *Kobelt* (2019) 267 CLR 1, 14–15 [6] (Kiefel CJ and Bell J); *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 181 [44] (Santamaria JA) ('*Scully*'), discussing *Fair Trading Act 1999* (Vic) s 8(1).

33 *Kobelt* (2019) 267 CLR 1, 38 [87] (Gageler J) (emphasis added). See also *Lux Distributors* (2013) ATPR ¶42-447, 43-463 [23] (Allsop CJ, Jacobson and Gordon JJ); Michelle Sharpe, "'More than a Feeling': Finding Statutory Unconscionable Conduct' (2019) 27(2) *Australian Journal of Competition and Consumer Law* 108, 112.

34 *ACL* s 224(1)(a)(i). See generally Cam H Truong and Luisa F Alampi, 'Increased Civil Pecuniary Penalties: The "Cost of Doing Business" or an Effective Deterrent?' (2020) 28(2) *Australian Journal of Competition and Consumer Law* 101.

35 *ACL* s 224(3).

36 *Ibid* s 224(3A).

37 *Ibid* ss 236, 237–43; *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, 364 (Mason P).

18 prohibition on misleading or deceptive conduct will ‘govern the application of the remedy provisions ... to grant relief against unconscionable conduct’.³⁸

Given the size and breadth of the consequences of breaching section 21, the parties to whom the provision applies and protects must be able to understand the meaning and application of the statute. As will be discussed in Part III, this is a core failing of the current formulation of the prohibition.

III HAS STATUTORY UNCONSCIONABILITY FAILED?

CAANZ noted that a new general prohibition on unfair conduct needs to be ‘carefully considered and supported by evidence that there is a gap in the current law that needs to be addressed’.³⁹ This part details why unconscionable conduct is an inappropriate mechanism for dealing with unfair business practices. Through an analysis of the state of statutory unconscionability and the relationship with its equitable origins, a gap in the law will be revealed. Moreover, the call for reform will be strengthened by a critique of the compatibility of the statutory prohibition with the rule of law.

A Freeing Statutory Unconscionability from the Shackles of the Unwritten Law

The reluctance to reform section 21 was in part due to its celebration of the statutory prohibition developing a separate jurisprudence from its equitable origins.⁴⁰ The recent decision in *Kobelt* challenges this argument and has stifled statutory unconscionability’s development.⁴¹ Returning to the statutory framework in part 2-2 of the *ACL*, section 20(1) provides that ‘[a] person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the written law from time to time’.⁴² Again, section 21(4)(a) makes explicit that the section 21(1) prohibition is not confined by the unwritten law. This then raises the question: what is the unwritten law? The received wisdom suggests that this is a reference to the judge-made law of unconscionable conduct as developed in the common law tradition and in courts of equity.⁴³ Courts have considered an understanding of unconscionability within the unwritten law, which suggests that

38 Andrew Robertson and Jeannie Paterson, *Principles of Contract Law* (Lawbook Co, 6th ed, 2020) 819 [38.30].

39 *CAANZ Interim Report* (n 13) 116. See also Allens, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Interim Report* (2016) 4; Business Council of Australia, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Interim Report* (2016).

40 *CAANZ Final Report* (n 5) 49.

41 See *Kobelt* (2019) 267 CLR 1, 102 [295], 106–7 [311] (Edelman J). See generally Jeannie Marie Paterson, Elise Bant and Matthew Clare, ‘Doctrine, Policy, Culture and Choice in Assessing Unconscionable Conduct under Statute: *ASIC v Kobelt*’ (2019) 13(1) *Journal of Equity* 81.

42 *ACL* s 20(1).

43 See, eg, Paterson, *Corones’ Australian Consumer Law* (n 7) 152 [4.50]; *Kobelt* (2019) 267 CLR 1, 36 [82] (Gageler J), 97 [284] (Edelman J).

it can be as expansive as capturing equitable interventions into any bargains where good conscience demands interference;⁴⁴ alternatively, it can be as narrow as the specific ground of equitable relief which has been developed through cases such as *Commercial Bank of Australia v Amadio* ('Amadio')⁴⁵ and *Blomley v Ryan*.⁴⁶

Equity's jurisdiction to intervene and set aside bargains vitiated by unconscionable conduct is well-established.⁴⁷ The Court of Chancery was willing to intervene and set aside bargains so as to 'satisfy the demands of conscience even though their action involved a dispensation with the rigid rules of law'.⁴⁸ Those 'demands of conscience' focus on the 'conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that [they] should do so'.⁴⁹

1 '[Section 21] Is Not Limited by the Unwritten Law'

If section 20 is aimed at making the expansive *ACL* remedies available in actions involving the equitable doctrine of unconscionable dealing, it is a logical step to suggest that section 21 is to perform a different role. This is not simply a logical conclusion though; it is also evident from a plain reading of the statute.⁵⁰ Reading section 21(4)(a) and the list of considerations in section 22 either together (or separately) 'necessarily implies that the statutory conception of unconscionability is more broad-ranging than that of the unwritten law'.⁵¹ The same conclusion can be drawn from various parliamentary records:

This new provision will *extend* the common law doctrine of unconscionability ...⁵²

[Section 21] does not define 'unconscionable conduct', but it also *does not limit it to* the concept as understood under the 'unwritten law' ... [s]tatutory unconscionable

44 See *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 79 [65] (Kirby J); *Kobelt* (2019) 267 CLR 1, 106–7 [311] (Edelman J). But see Matthew DJ Conaglen, 'Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh' (1999) 18(1) *New Zealand Universities Law Review* 509, cited in JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 485 [15–035].

45 (1983) 151 CLR 447 ('Amadio').

46 (1956) 99 CLR 362.

47 See, eg, Heydon, Leeming and Turner (n 44) 501 [16–005]; *Kobelt* (2019) 267 CLR 1, 94–102 [279]–[295] (Edelman J).

48 PA Keane, 'The 2009 WA Lee Lecture in Equity: The Conscience of Equity' (2010) 84(2) *Australian Law Journal* 92, 95, quoting Sir William Holdsworth, *A History of English Law* (Sweet and Maxwell, 3rd ed, 1945) vol 4, 276. See also George Spence, *The Equitable Jurisdiction of the Court of Chancery* (Stevens and Norton, 1846) vol 1, 409; Christopher St Germain, *The Doctor and Student*, tr William Muchall (Lonang Institute, 2006) [trans of: *Dialogus de Fundamentis Legum Anglie et de Conscientia* (1518)].

49 *Amadio* (1983) 151 CLR 447, 461–2 (Mason J), 474 (Deane J). See also *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 424–5 [117]–[118] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); *Thorne v Kennedy* (2017) 263 CLR 85, 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

50 TF Bathurst, 'Law as a Reflection of the "Moral Conscience" of Society' (Speech, Opening of Law Term Address, 5 February 2020) [30].

51 *Kobelt* (2019) 267 CLR 1, 56 [144] (Nettle and Gordon JJ).

52 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1997, 8800 (Peter Reith, Minister for Workplace Relations and Small Business) (emphasis added).

conduct may, where appropriate, continue to develop *independently* from the equitable and common law doctrines.⁵³

In *Kobelt*, Edelman J's historical survey of the distinction between equitable and statutory unconscionability revealed a 'clear legislative intention that the bar ... must be lower than that developed in equity'.⁵⁴ CAANZ celebrated that the meaning of statutory unconscionable conduct was 'continuing to develop in the direction intended by lawmakers', this direction being away from the unwritten law.⁵⁵ However, as will now be discussed, the High Court has seemingly realigned sections 20 and 21 in the recent decision in *Kobelt*.

2 Is Section 21 Limited by the Written Law?

Australian Securities and Investments Commission v Kobelt is the most recent opportunity the High Court has had to provide guidance as to the interpretation of statutory unconscionability. In brief, the case involved Lindsay Kobelt, a proprietor of a general store who operated an informal credit scheme – 'book-up' – to Indigenous people in the Anangu Pitjantjatjara Yankunytjatjara Lands. The High Court was asked to determine whether Kobelt engaged in statutory unconscionable conduct through the operation of this book-up system. In a 4:3 decision,⁵⁶ the High Court held that Kobelt's conduct was not, in all the circumstances, unconscionable.

Although the case was brought under the *ASIC Act* equivalent of section 21 of the *ACL*, the joint judgment of Kiefel CJ and Bell J relied heavily on the equitable doctrine of unconscionable dealing. Their Honours stated that 'unconscionable' is to be understood as bearing its ordinary meaning, and 'requires not only that the innocent party be subject to special disadvantage, but that the other party must also unconscientiously take advantage of that special disadvantage'.⁵⁷ By *requiring* a party to unconscientiously take advantage of a special disadvantage, their Honours effectively realigned statutory unconscionability with the unwritten law. Bant, Barnett and Paterson describe this approach as constituting part of a 'growing line of cases in which the High Court has paid scant attention to the words of the consumer protection legislation before it'.⁵⁸ As a result, their Honours found that Kobelt did not take unconscientious advantage of his customers; although the book-up system 'was open to abuse, Mr Kobelt did not abuse it'.⁵⁹ Chief Justice Kiefel and Bell J were unwilling to consider whether the statutory prohibition was not limited by the unwritten law, because ASIC's pleadings proceeded on the

53 Explanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2010 (Cth) 22 [2.12], 23 [2.19] (emphasis added).

54 *Kobelt* (2019) 267 CLR 1, 102 [295].

55 *CAANZ Final Report* (n 5) 49.

56 The majority was comprised of Kiefel CJ and Bell J, Gageler J and Keane J. Justices Nettle and Gordon, and Edelman J, were in dissent.

57 *Kobelt* (2019) 267 CLR 1, 17–18 [14]–[15] (emphasis added).

58 Elise Bant, Katy Barnett and Jeannie Marie Paterson, "'Plain Sailing'?: Damages for Distress under the ACL and the Performance Interest in Contract' (2020) 36(3) *Journal of Contract Law* 272, 280–1.

59 *Kobelt* (2019) 267 CLR 1, 35–6 [79].

presumption that unconscientiously taking advantage of a special disadvantage was required under statute.⁶⁰

Justice Gageler stated for a court to ‘pronounce conduct unconscionable is ... to denounce that conduct as offensive to a conscience informed by a sense of what is right and proper according to the values which can be recognised by the court to prevail within contemporary Australian society’.⁶¹ Although his Honour warned against allowing the statutory conception of unconscionability to produce a watered down ‘equity-lite’,⁶² there was an explicit recognition that those values informing the statutory prohibition are not confined to the values informing the historical equitable standard.⁶³

The multi-factorial considerations in section 12CC of the *ASIC Act* and section 22 of the *ACL* suggested to Keane J that the determination of statutory unconscionability is ‘consistent with the settled approach of a court of equity’.⁶⁴ As a result, his Honour held that unconscionability requires some element of exploitation, so as to distinguish it from terms such as ‘unjust’, ‘unfair’ or ‘unreasonable’.⁶⁵ This informed his Honour’s decision that Kobelt’s conduct was not predatory.

Justices Nettle and Gordon stepped through each relevant section 12CC consideration to find that Kobelt’s conduct was, in all the circumstances, unconscionable. Their Honours considered the customers to be in a position of vulnerability vis-à-vis Kobelt, and were unable to adequately protect their interests. This vulnerability was a result of the ‘remoteness of their communities, the limitations on their education, their impoverishment, and the limitations on their financial literacy’.⁶⁶

Justice Edelman agreed with Nettle and Gordon JJ, adding further reasons as to why Kobelt’s book-up system was unconscionable.⁶⁷ Justice Edelman took the opportunity to delve into the history of statutory unconscionability.⁶⁸ His Honour ultimately concluded that if the bar for succeeding in a statutory unconscionability claim is lowered, as appears to be Parliament’s intent, it may ‘only be possible if “unconscionable” is replaced with “unjust” or “unfair”’.⁶⁹

60 Ibid 27–8 [48]–[50]. See also Michelle Sharpe, ‘Australian Securities and Investments Commission v Kobelt: A Consumer Protection Blackout?’ (2019) 27(4) *Australian Journal of Competition and Consumer Law* 283.

61 *Kobelt* (2019) 267 CLR 1, 40 [93].

62 Ibid 39 [90].

63 Ibid 40 [93].

64 Ibid 49 [120].

65 Ibid 48–9 [118]–[120].

66 Ibid 78–9 [235].

67 Justice Edelman’s dissent, in particular its survey of the foundations of statutory unconscionability, is explored throughout this article.

68 *Kobelt* (2019) 267 CLR 1, 94–102 [279]–[295].

69 Ibid 106–7 [311] (citations omitted).

3 The Post-Kobelt Gap

If *Kobelt* is to be interpreted by lower courts as realigning the equitable and statutory approaches to unconscionability, then a decisive reason why CAANZ did not push for reform is no longer valid. The question then arises as to whether subsequent cases will follow *Kobelt*.

Justice Beach recently rejected realignment of statutory and equitable unconscionability, but noted that the ‘equitable doctrine provides some background against which the statutory concept may be appreciated’.⁷⁰ Justice Colvin dismissed a claim of statutory unconscionability in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd [No 2]* (*‘Quantum Housing’*).⁷¹ His Honour explicitly endorsed Kiefel CJ and Bell J’s approach, and suggested that because Edelman J agreed with the reasons of Nettle and Gordon JJ, Edelman J ‘must also be taken to accept that unconscionable conduct *requires* that there be a taking advantage or exploitation of a vulnerability of another party’.⁷² However, Edelman J in *Kobelt* expressly stated that ‘statutory unconscionability permits consideration of, but no longer *requires*, (i) special disadvantage, or (ii) any taking advantage of that special disadvantage’.⁷³ This seems to conflict with Colvin J’s characterisation of Edelman J’s position.

At the time of writing, the decision was on appeal before the Full Federal Court. Rod Sims stated that the appeal aimed to ‘seek clarity ... on whether the [ACL] requires there to be special disadvantage’ in the context of statutory unconscionability.⁷⁴ It was uncertain whether the Full Court would diverge from the High Court’s *Kobelt* plurality. There was some indication from other appellate courts, for example the Victorian Court of Appeal in *Jams 2 Pty Ltd v Stubbings*.⁷⁵ There, the Court noted that special disadvantage, while relevant, is not *necessary* to establish statutory unconscionable conduct.⁷⁶ At the time of writing, it was known that Allsop CJ would preside over the *Quantum Housing* appeal, and the following comments appeared to foreshadow his Honour’s approach:

[W]ith respect to Colvin J [in *Quantum Housing*], it is not entirely clear the extent to which special disadvantage comes to be a necessary part of the [statutory unconscionability] analysis or that that special disadvantage is to be understood as

70 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) [No 3]* (2020) 275 FCR 57, 117 [362] (*‘AGM Markets’*). See generally *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 259 [86] (Bell, Keane, Nettle and Edelman JJ).

71 [2020] FCA 802.

72 *Ibid* [27] (emphasis added).

73 *Kobelt* (2019) 267 CLR 1, 102 [295] (emphasis added).

74 Australian Competition and Consumer Commission, ‘Quantum Housing Decision Appealed over Unconscionable Conduct’ (Media Release, 8 July 2020).

75 [2020] VSCA 200.

76 *Ibid* [65] (Beach, Kyrou and Hargrave JJA) (emphasis added). A similar approach was considered by the Western Australian Court of Appeal in *Dewar v Ollier* [2020] WASCA 25, [181] (Beech and Vaughan JJA and Archer J). However, although their Honours thought that ‘proof of statutory unconscionability need not always involve proof of the taking advantage of a special disadvantage’, the way the case was pleaded rendered this comment obiter.

the same kind of special disadvantage referred to in cases such as *Commercial Bank of Australia Ltd v Amadio*.⁷⁷

In brief, the Full Court decision appeared to be a step in the right direction, with Allsop CJ, Besanko and McKerracher JJ rejecting the need for special disadvantage. Their Honours correctly asserted that the ‘judgments of this Court are contrary to the proposition that the taking of advantage of a special disability is an essential ingredient of statutory unconscionability’.⁷⁸ For a short time, it was thought that this decision would bring some much needed stability into the approach to statutory unconscionability.

However, the recent decision of the South Australian Court of Appeal in *Pitt v Commissioner for Consumer Affairs* has potentially disturbed this serenity.⁷⁹ The Court accepted that there may be cases where statutory unconscionability arises without any pre-existing vulnerability or disadvantage, but went on to make the following comments:

Turning now to the normative standard of conduct proscribed by the statutory species of unconscionability, it is not clear to us that a majority of the High Court adopted a standard that is any different from, or lower than, the standard that governs equitable unconscionability.

...

we do not think there is majority support for an approach to the normative standard of conduct required by the form of statutory unconscionability in s 12CB that proscribes any different or lower standard of conduct than that which applies in equity. ... Thus, while we accept that it is appropriate to apply the normative standard articulated by Gageler J ... this standard should be seen as reflecting the gravity of the equitable conception of unconscionability.⁸⁰

Perhaps what is most remarkable is that the Court was firm in its view that this approach to statutory unconscionability is ‘consistent with the analysis of the Full Court of the Federal Court in [*Quantum*]’.⁸¹ The tension between appellate courts demonstrates that there is still considerable uncertainty in the application and interpretation of statutory prohibitions on unconscionable conduct. What is clear is that we cannot say with certainty how closely *Kobelt* will be followed. It appears that the development of a coherent approach to statutory unconscionability has been blurred, and the inaction on reform is no longer justified. There is a gap in the law that ought to be filled.⁸²

77 *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [No 3] [2020] FCA 1421, [43] (citations omitted).

78 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 388 ALR 577, 596 [80] (*‘Quantum Housing Appeal’*). A more fulsome analysis of this case and its potential impact is to be explored in a forthcoming contribution by the author.

79 [2021] SASCA 24 (Doyle, Livesey and Bleby JJA).

80 *Ibid* [162]–[163].

81 *Ibid* [164].

82 See, eg, Financial Counselling Australia, ‘Statement from FCA re High Court Decision in *Kobelt*’ (Media Release, 16 June 2019); Consumer Action Law Centre, ‘Unconscionable Conduct: Divided High Court Confirms the Need for Change to the Law’ (Media Release, 13 June 2019).

B A Tear in the Safety Net

The stubborn resistance to recognising Parliament's attempts to 'decouple' statutory unconscionable conduct from the restrictive equitable doctrine raises the bar to a point often too difficult to reach.⁸³ In its submission to the CAANZ Review Issues Paper, Redfern Legal Centre stated that '[i]ncidents of unconscionable conduct are the most egregious breaches of *ACL* rights, yet the most difficult to prosecute or enforce'.⁸⁴ Rod Sims commented that while the *ACL* addresses misleading conduct, unconscionable conduct and unfair contract terms, the Australian Competition and Consumer Commission ('ACCC') is increasingly cognisant that 'harmful conduct may fall between the gaps of these provisions'.⁸⁵ This section aims to demonstrate that there is such a 'gap' in the law, and that the statutory prohibition fails to serve its purpose as a safety net provision.

Paterson and Brody note that legislative responses to behaviour that harms consumers take the form of 'bright-line' rules aimed at regulating specific conduct and practices, and 'standard-based' regulation prohibiting conduct on the basis of incongruity with moral standards.⁸⁶ The *ACL* is replete with both forms of regulation. Chapter 3 of the *ACL* contains a number of specific protections and prohibitions on, inter alia, pyramid schemes,⁸⁷ unsolicited consumer agreements⁸⁸ and certain false or misleading representations.⁸⁹ The general prohibitions on misleading or deceptive, and unconscionable conduct represent 'polycentric' standard-based regulation that are enshrined in statute and elaborated through judicial and academic consideration.⁹⁰ Black argues that bright-line regulation needs the 'support and coverage of principles [or standard-based regulation] to thwart strategies which seek to exploit gaps and inconsistencies in those [bright-line] provisions'.⁹¹ In the specific context of consumer protection, standard-based regulations such as the prohibition on unconscionable conduct 'provide an important "safety net" response to predatory and other offensive market practices not caught in some other way by more specific forms of regulation'.⁹² The conscious coupling

83 See *Kobelt* (2019) 267 CLR 1, 106–7 [311] (Edelman J). See generally Michael Bridge, 'An English Lawyer Looks at American Contract Law' in FH Buckley (ed), *The American Illness: Essays on the Rule of Law* (Yale University Press, 2013) 291, 296.

84 Redfern Legal Centre, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Issues Paper* (27 May 2016) 8.

85 Rod Sims, '2019 Compliance and Enforcement Policy' (Speech, Committee for Economic Development Australia, 26 February 2019). See also Rod Sims, 'ACCC 2020 Compliance and Enforcement Priorities' (Speech, Committee for Economic Development Australia, 25 February 2020).

86 Paterson and Brody (n 4) 332. But see Lawrence A Cunningham, 'A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation and Accounting' (2007) 60(5) *Vanderbilt Law Review* 1409.

87 *ACL* s 44.

88 *Ibid* ch 3, div 2.

89 *Ibid* ss 29, 30.

90 See Julia Black, 'Forms and Paradoxes of Principles Based Regulation' (Working Paper No 13/2008, Law Department, London School of Economics and Political Science, June 2008) 5.

91 *Ibid* 7.

92 Paterson and Brody (n 4) 332.

of the equitable and statutory concepts of unconscionability make it more difficult to accurately describe the statutory prohibition as a standard-based regulation.

Justice Edelman in *Kobelt* detailed how the Court of Chancery originally considered any bargain that was not fair or reasonable to be unconscionable,⁹³ where the onus was on defendants to prove that the bargain was fair and reasonable.⁹⁴ What his Honour's survey reveals is that even in its original conceptualisation, unconscionability acted as a safety net. As detailed in the previous section, the realignment of the statutory prohibition with the *modern*, more restrictive equitable doctrine has resulted in a situation where the safety net is no longer 'catching bargains'.⁹⁵ This leaves conduct which is clearly unfair and often offensive to conscience unattended by *ACL*. The recent Full Federal Court decision in *Australian Competition and Consumer Commission v Medibank Private Ltd* ('*Medibank*') is demonstrative of this gap.⁹⁶

Medibank had a number of agreements with specialist medical providers who supplied services to hospital patients, whereby Medibank paid its customers' 'gap' amount when the providers charged above the Medicare Benefit Schedule fees. Upon terminating the agreements with providers, thousands of Medibank (and its subsidiary 'ahm') customers were unwittingly forced to pay the 'gap' out-of-pocket. The ACCC alleged that Medibank had a strategy of minimising communications about the change in policy, and failed to provide members with notice in advance. Among other aggravating factors, Medibank allegedly knew that most of its customers did not enquire about out-of-pocket expenses prior to hospital admission. For the ACCC, this conduct was, in all the circumstances, unconscionable.

Justice Beach delivered the key judgment. Although his Honour did not fall into the comfortable position of requiring a 'high degree of moral obloquy' to establish unconscionable conduct,⁹⁷ that 'Medibank acted harshly ... [and] acted unfairly ... [was] not enough to establish statutory unconscionability'.⁹⁸ The finding

93 *Kobelt* (2019) 267 CLR 1, 94–5 [280], citing *Tottenham v Green* (1863) 32 LJ Ch 201, 205; *Earl of Portmore v Taylor* (1831) 4 Sim 182, 209 (Sir L Shadwell VC). See also *Nott v Hill* (1682) 1 Vern 167 (Lord Nottingham). But see Joseph Story, *Commentaries on Equity Jurisprudence*, ed WE Grigsby (Stevens and Haynes, 1884) 216 § 331, citing *Willis v Jernegan* (1741) 2 Atk 251, 252; *Berney v Pitt* (1686) 2 Vern 14 (Lord Nottingham).

94 *Bromley v Smith* (1859) 26 Beav 644, 662 (Sir John Romilly MR).

95 Heydon, Leeming and Turner (n 44) 501 [16–005].

96 (2018) 267 FCR 544 ('*Medibank*').

97 See *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 587 [188] (Gageler J); *Kobelt* (2019) 267 CLR 1, 48 [118] (Keane J); *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* (2018) 356 ALR 440, 477 [191]–[195] (Bathurst CJ) ('*Ipstar Australia*'). Cf *Kobelt* (2019) 267 CLR 1, 39–40 [91] (Gageler J), 59 [152] (Nettle and Gordon JJ); Robert Baxt, 'What Place Does "Moral Obloquy" Have in the Evaluation of Statutory Unconscionable Conduct?' (2014) 88(6) *Australian Law Journal* 396; Robert Baxt, 'Unconscionability: High Court Emphasises Moral Obloquy in Obiter Dicta Statements' (2016) 90(12) *Australian Law Journal* 870. See generally Garth Wooler, *Unconscionable Conduct in Commercial Transactions: Global Perspectives and Applications* (Cambridge Scholars Publishing, 2018) 109–10.

98 *Medibank* (2018) 267 FCR 544, 626 [353]. See generally *Kobelt* (2019) 267 CLR 1, 58 [149] (Nettle and Gordon JJ), citing *A-G (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121] (Spigelman CJ) ('*World Best Holdings*').

that Medibank engaged in unfair conduct was noted to be ‘a step along the way to showing unconscionable conduct’,⁹⁹ but the balance of the section 22 considerations weighed against the ACCC.¹⁰⁰ In an environment where it is clear that Parliament has an intention to lower the bar for what is considered unconscionable, a business is wilfully misleading hospital patients as to their financial obligations, and a judge describes the conduct as both unfair and harsh, it is difficult to see the justice in strict fidelity to the term ‘unconscionable’.

C Unconscionability and the Rule of Law

The lawyer who deals in “unconscionable behaviour” is rather like the ornithologist who is content with “small brown bird”.¹⁰¹

Doctrinal reasons aside, there is a practical issue with the prohibition on unconscionable conduct – it is not a phrase that people understand.¹⁰² Albeit with less flair than Birks, Gageler J in *Kobelt* highlighted the issue with precision, stating that ‘[u]nconscionable is an obscure English word which centuries of use by courts administering equity have transformed into a legal term of art’.¹⁰³ A success of Australia’s consumer protection regime is that it is largely drafted in plain English, making it broadly accessible to the consumers it aims to protect. This instils consumers with confidence to better understand what their rights are vis-à-vis businesses, and allows traders to self-assess whether their practices may fall foul of the law. However, the statutory prohibition on unconscionable conduct is a clear and obvious failing of legislative drafting.¹⁰⁴ In the 34 years since the prohibition on unconscionable conduct was introduced into the *Trade Practices Act*, the search for a clear and precise definition has proved to be an insurmountable challenge. Clarke suggests that the lack of clarity has impaired the development of the provision, a point made clear when it is compared with the ‘success of ... s 18 [the prohibition on misleading or deceptive conduct]’.¹⁰⁵ Paterson and Brody note that both ‘[c]onsumers and business people alike may have to think hard about

99 *Medibank* (2018) 267 FCR 544, 607 [246] (Beach J).

100 The ACCC also alleged that Medibank engaged in misleading and deceptive conduct. The ACCC further claimed that the primary judge erred in holding that its unconscionable conduct claim could not succeed unless its misleading and deceptive conduct claim succeeded. Justice Beach thought this ground lacked substance, and noted that the primary judge had an alternative foundation for the holding: see *ibid* 609–10 [257]–[260].

101 Peter Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26(1) *University of Western Australia Law Review* 1, 16, cited in *Kobelt* (2019) 267 CLR 1, 88 [267] (Edelman J).

102 *Scully* (2013) 303 ALR 168, 174 [22] (Santamaria JA); *Ipstar Australia* (2018) 356 ALR 440, 496 [278] (Leeming JA). See also Jacob Hale Russell, ‘Unconscionability’s Greatly Exaggerated Death’ (2019) 53(2) *University of California (Davis) Law Review* 965, 981–2.

103 (2019) 267 CLR 1, 36 [81]. See also Paterson and Brody (n 4) 352, quoting *World Best Holdings Ltd* (2005) 63 NSWLR 557, 583–4 [122] (Spigelman CJ).

104 Brody and Temple (n 4) 170–1. See generally Arthur Allen Leff, ‘Unconscionability and the Code: The Emperor’s New Clause’ (1967) 115(4) *University of Pennsylvania Law Review* 485; MP Ellinghaus, ‘In Defense of Unconscionability’ (1969) 78(5) *Yale Law Journal* 757.

105 Julie Clarke, ‘Unconscionable Conduct: An Evolving Moral Judgement’ (2011) 106 (September) *Precedent* 30, 34.

what it means'.¹⁰⁶ Merely thinking hard about whether conduct is unconscionable is unlikely to yield an accurate meaning. 'Unconscionable' is not a phrase of widespread use, nor one with a readily ascertained meaning, despite Keane J's insistence that the 'ordinary meaning' imports a 'high level of moral obloquy'.¹⁰⁷

Professor Samet argues that the use of a 'familiar term' such as 'conscience' communicates that actors are expected to make full use of their capability as moral reasoners when they engage in the market.¹⁰⁸ This contention seems compelling, but it grossly overestimates the general population's capability to act as a moral reasoner. While many would be familiar with the concept of 'conscience', properly comprehending and applying it in business activity may prove more challenging.

On a fundamental level, the lack of clarity in the statutory prohibition on unconscionable conduct is inconsistent with basic principles of the rule of law. The law ought to be accessible, intelligible, clear and predictable.¹⁰⁹ Lord Diplock commented that the rule of law 'requires that a citizen, before committing [themselves] to any course of action, should be able to know in advance what are the legal consequences which flow from it'.¹¹⁰ The difficulty in defining unconscionable conduct means citizens are unable to make this assessment. The failure of statutory unconscionability to comply with this basic principle can be illustrated from the perspective of both the consumer and trader.

1 Consumers

The rights and consumer protection provisions in the *ACL* are rendered ineffective if consumers are unable to 'understand and articulate the application of those rights', which is likely when their rights are described using such 'extraneous legal terminology'.¹¹¹ Consumers may engage in the market with an information deficiency, not knowing when they are able to seek recourse against sharp and unfair conduct. As discussed, this can have a deleterious impact on fair competition and incentivises unfair business practices.¹¹² The 'content of the law should be accessible to the public',¹¹³ employing language as opaque as 'unconscionable' ensures that the law is inaccessible.

106 Paterson and Brody (n 4) 352.

107 *Kobelt* (2019) 267 CLR 1, 48 [118]. See also *World Best Holdings Ltd* (2005) 63 NSWLR 557, 583–4 [122] (Spigelman CJ).

108 Irit Samet, *Equity: Conscience Goes to Market* (Oxford University Press, 2018) 62.

109 Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 37–40.

110 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 638.

111 Melbourne Social Equity Institute, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Issues Paper* (May 2016) 5. See generally *Kobelt* (2019) 267 CLR 1, 39–40 [91] (Gageler J); Wooler (n 97) 92; Colleen McCullough, 'Unconscionability as a Coherent Legal Concept' (2016) 164(3) *University of Pennsylvania Law Review* 779, 781.

112 See European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee* (First Report, 14 March 2013) 30; Unfair Trading Discussion Paper (n 4) 21.

113 See, eg, Murray Gleeson, 'Courts and the Rule of Law' (Speech, The Rule of Law Series, University of Melbourne, 7 November 2001), citing *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 672 (Windeyer J); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 214; Lon L Fuller, *The Morality of Law* (Yale University Press, 1969) 51.

2 Traders

Lord Bingham stated that if someone is liable to be fined for doing something, they ‘ought to be able, without undue difficulty, to find out what it is [they] must or must not do’.¹¹⁴ Applied to the present context, if a trader is liable to be penalised for engaging in conduct which is, in all the circumstances, unconscionable, they ought to be able to readily ascertain whether their conduct is unconscionable.

To best illustrate this issue, take a trader who is planning a new marketing campaign and business strategy. The lay reading of ‘misleading or deceptive conduct’ allows the trader to at least make a cursory judgment as to whether their marketing materials are likely to breach section 18 of the *ACL*. The natural meaning of ‘misleading’ is unlikely to deviate far from that accepted by the courts in section 18 jurisprudence.¹¹⁵ However, that same trader will likely run into issues when they start to assess whether their strategy is ‘in all the circumstances, unconscionable’. One may argue that the ordinary meaning of the term indeed connotes notions of fairness, which is not enough to establish unconscionability.¹¹⁶ The statutory provisions should not seek to protect consumers solely because they provide an avenue for redress; they should promote fair trading by guiding business practices. Recall that an objective of the *ACL* is to ‘influence the conduct of traders in the market’.¹¹⁷ Where a trader cannot readily ascertain their obligations and standards by which their conduct will be held, the provision will fail to have ‘any appreciable effect on how an individual decides to carry on their business’.¹¹⁸

IV UNFAIR CONDUCT

The wayward development of statutory unconscionability has left a gap in the law. In light of the recent movement back to a restrictive reading of statutory unconscionability, it is therefore appropriate to reconsider a new general prohibition on unfair conduct.¹¹⁹ This change will provide greater certainty than the current prohibition on unconscionable conduct, and promote community understanding among both consumers and traders.

Justice Edelman in *Kobelt* advised that the only way for the legislative intent to be fulfilled is if “unconscionable” is replaced with “unjust” or “unfair”.¹²⁰ President Maxwell similarly suggested that community understanding would be bolstered if

114 Bingham (n 109) 37. See generally Charles Dickens, *Nicholas Nickleby* (Penguin Classics, 2003) 570.

115 See, eg, *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546; *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

116 See *Medibank* (2018) 267 FCR 544, 626 [353] (Beach J); *Kobelt* (2019) 267 CLR 1, 48 [118] (Keane J).

117 Bant and Paterson (n 2) 100.

118 Bathurst (n 50) [34].

119 *CAANZ Interim Report* (n 13) 116.

120 *Kobelt* (2019) 267 CLR 1, 106–7 [311]. The suggestion to replace, rather than simply supplement, the existing prohibition is preferable considering the ongoing blurring between statutory and equitable unconscionable conduct. A clean replacement would signal that it represents a marked and deliberate change to the law.

the prohibition was on conduct which is ‘in all the circumstances, unfair’.¹²¹ Rod Sims ‘strongly endorsed’ this approach and has put the onus on Parliament to enact change, stating that ‘[i]t’s up to the legislature to be clear about what they mean, and if what they mean is unfairness, which I think they do, then we should change the test to that’.¹²² Sims has recently highlighted the successful advocacy of small businesses with respect to the reform to section 46 of the *CCA*, and suggested that such vocal support would be welcome in the current debate surrounding unfair practices.¹²³ The object of the *CCA* is not to promote ‘conscionable’ or ‘just’ trading, but ‘fair’ trading.¹²⁴ The corollary of this is that unfair trading is repugnant to these objectives. It is uncontroversial to therefore suggest that a prohibition on unfair trading falls within the remit of the *CCA* and would better pursue its objectives than the current prohibition on unconscionable conduct.

In answering whether we ought to advocate for reform, this section will evaluate the merits of the suggestion to replace ‘unconscionable’ with ‘unfair’. Such a change is only warranted if it would respond to the issues raised in Part III: it must promote community understanding, influence trader conduct and fill the gap in the law. Finally, this section seeks to rebut the oft-cited argument that such a broad prohibition would create uncertainty and have a chilling effect on commerce.

A Fairness Will Influence Behaviour and Promote Understanding

Introducing a prohibition on unfair conduct would enable consumers to have a better intuitive understanding of when they may seek redress, and allow traders to prospectively gauge whether their actions are repugnant. Commissioner Hayne, at the outset of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, mentioned that fairness ‘may lie at, or at least close to, the heart of community standards and expectations about dealings with consumers’.¹²⁵ The proposed change in language should have a positive impact through the promotion of better community understanding of the limitations on business practices by both traders and consumers.¹²⁶ Where the existing prohibition on unconscionable conduct invokes ‘subtle and esoteric’ norms,¹²⁷ and raises concerns around compatibility with the rule of law, fairness is a readily understood concept.¹²⁸

121 Justice Chris Maxwell, ‘Equity and Good Conscience: The Judge as Moral Arbiter and the Regulation of Modern Commerce’ (Victorian Law Foundation Oration, 14 August 2019) 16.

122 Rod Sims, ‘Address to the Law Council of Australia Competition Law Workshop 2019’ (Speech, Law Council of Australia, 30 August 2019); Ben Butler, ‘Not Fair? Why Judges Have Been Accused of Failing Australian Consumers’, *The Guardian* (online, 8 September 2019) <<https://www.theguardian.com/australia-news/2019/sep/08/not-fair-why-judges-have-been-accused-of-failing-australian-consumers>>.

123 Rod Sims, ‘Tackling Market Power in the COVID–19 Era’ (Speech, National Press Club, 21 October 2020). In the same address, Sims suggested that the *ACL* be renamed ‘*Australian Consumer and Fair Trading Law*’.

124 *CCA 2010* (Cth) s 2.

125 Transcript of Proceedings, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Commissioner Hayne, 12 February 2018) 8.

126 Brody and Temple (n 4) 173.

127 Bathurst (n 50) [40].

128 Shipton (n 10).

There is much to be gained by ‘using standards that have a relatable meaning to the businesses and consumers affected by those norms’.¹²⁹

1 *Australia’s Moral Vocabulary*

It is not suggested that the meaning of ‘unfairness’ is objectively ascertained. Like unconscionable, it too lacks concrete definition and is open to attacks that it is opaque. However, the very term ‘unfair’ carries more intuitive connotations than ‘unconscionable’ – this is especially the case in Australia.¹³⁰ The House of Representatives Standing Committee on Industry, Science and Technology noted that an advantage of using the specific term ‘unfair’ is that it is part of the ‘moral vocabulary’ of all Australians.¹³¹ Whether such a sweeping suggestion is empirically accurate (or even able to be tested), it is trite to say that fairness is a fantasised aspect of the Australian identity.¹³² Fairness is of course not a uniquely Australian value, but if unconscionability carries with it ‘Dickensian baggage’,¹³³ unfairness carries with it a green Coles shopping bag full of Sunnyboys and Tim Tams.

2 *Influencing Conduct*

If we return to the earlier example of a trader planning their new business strategy, they will no longer have to navigate complex judgments or engage a lawyer to make (at least a preliminary) assessment as to whether their behaviour is legally permissible.¹³⁴ The shift in language is simple, but it can have a significant impact on culture and behaviour.¹³⁵ Moreover, a prohibition on unfair conduct will have a better signalling function and influence over business conduct than the existing prohibition.¹³⁶ A simple intuitive understanding of fair dealing can provide a ‘starting point for self-reflection for businesses about whether a proposed course of conduct is likely to offend’ the prohibition.¹³⁷ Telstra’s Chief Executive Officer

129 Paterson, Bant and Clare (n 41) 110.

130 Shipton (n 10); Unfair Trading Discussion Paper (n 4) 22–3.

131 House of Representatives Standing Committee on Industry, Science and Technology, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia* (Report, May 1997) 179 [6.70] (*‘Finding a Balance’*).

132 Trish Bolton, ‘Land of the Fair Go: An Exploration of Australian Identity’ (2003) 75(2) *Australian Quarterly* 16; Ala Sirriyeh, *The Politics of Compassion: Immigration and Asylum Policy* (Bristol University Press, 2018) 70; Richard Blandly, ‘What’s It All about, Australia?’ (1968) 40(4) *Australian Quarterly* 71, 72. But see Michael Clyne, ‘Words Excusing Exclusion of Asylum Seekers’ in Dean Lusher and Nick Haslam (eds), *Yearning to Breathe: Seeking Asylum in Australia* (Federation Press, 2007) 198, 203.

133 Eileen Webb, ‘Why an Unfairness Test Might Be a Better Way to Tackle Big Business Bullies’, *The Conversation* (Web Page, 16 December 2015) <<https://theconversation.com/why-an-unfairness-test-might-be-a-better-way-to-tackle-big-business-bullies-52375>>.

134 See Paterson and Brody (n 4) 351–2; Iain MacNeil, ‘Uncertainty in Commercial Law’ (2009) 13(1) *Edinburgh Law Review* 68, 69; Roy Goode, ‘The Codification of Commercial Law’ (1988) 14(3) *Monash University Law Review* 135, 150.

135 Consumer Action Law Centre, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Interim Report* (9 December 2016) 15 (*‘CALC Interim Report Submission’*).

136 Choice, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Issues Paper* (26 May 2016) 22.

137 Paterson and Brody (n 4) 352.

commended the advocacy for an unfair conduct prohibition, noting that it will ‘require companies to think deeply about the nature of their relationship with customers and how they are contracting with them’.¹³⁸

3 Empowering Consumers

Importantly, the change in language will promote better understanding at the consumer level. If, as argued, ‘fairness’ is part of Australia’s moral vocabulary, consumers will more readily be able to assess whether business conduct meets the relevant threshold. Consumers will avoid the need to ‘consider the interplay between equity and statute law when determining whether they have a remedy against a dodgy trader’.¹³⁹ As noted by the Consumer Action Law Centre, it is important that consumers are empowered by the existing of plain English drafting that better communicates their ‘fundamental rights and protections under the consumer law’.¹⁴⁰ In an address to business leaders shortly after the release of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry’s Final Report, James Shipton declared that not only is fairness a well-understood concept in the abstract, but we are readily able to ‘recognise unfair outcomes’.¹⁴¹ Empowering and educating consumers about their rights will lead to more confident and well-informed decision-making. This will positively impact competition, as traders whose behaviour is currently slipping through the gap left by unconscionable conduct would no longer be able to gain an unfair advantage.¹⁴²

B Mending the Safety Net

Changing the statutory standard from ‘unconscionable’ to ‘unfair’ would go beyond empowering consumers and giving guidance to traders – it would serve a signalling function to the courts. The unwillingness of the courts to take a broader view of unconscionable conduct stands at odds with the clear intention of Parliament. Justice Edelman in *Kobelt* noted that the

legislative history [of statutory unconscionability] clearly demonstrates that although Parliament’s proscriptions against unconscionable conduct initially built upon the equitable foundations of that concept, over the last two decades Parliament has repeatedly amended the statutory proscription against unconscionable conduct in continued efforts *to require courts to take a less restrictive approach* shorn from either of the equitable preconditions imposed in the twentieth century, by which equity had raised the required bar of moral disapprobation. *In particular, statutory unconscionability permits consideration of, but no longer requires, (i) special disadvantage, or (ii) any taking advantage of that special disadvantage.*¹⁴³

138 Andrew Penn, ‘Responsible Business’ (Speech, American Chamber of Commerce in Australia Keynote, 6 February 2020) 3.

139 CALC Interim Report Submission (n 135) 15.

140 Ibid.

141 Shipton (n 10) (emphasis omitted). See also Paterson and Brody (n 4) 352, citing George A Akerlof and Robert J Shiller, *Animal Spirits: How Human Psychology Drives the Economy, and Why It Matters for Global Capitalism* (Princeton University Press, 2009) 19–25.

142 See Unfair Trading Discussion Paper (n 4) 21.

143 *Kobelt* (2019) 267 CLR 1, 102 [295] (emphasis added).

However, for the majority Justices in *Kobelt*, the language of unconscionability was seemingly too replete with the history of the equitable doctrine to follow Parliament's guidance.¹⁴⁴ It is contended that making the provision an *express* prohibition on unfair conduct will more precisely signal Parliament's intention to prohibit conduct which is offensive to the norms of fairness. Judges turn first to the language of the statute when determining whether conduct falls foul of section 21.¹⁴⁵ If the statutory provision prohibits 'unfair' conduct, it would be plainly wrong for judges to turn to the equitable doctrine of unconscionable dealing.

The ACCC's *Digital Platforms Inquiry* recommended that the *ACL* 'be amended to include a prohibition on certain unfair trading practices'.¹⁴⁶ In the context of digital platforms, such a prohibition is intended to respond to the problematic and harmful practices that result from the mass collection and analysis of consumer data.¹⁴⁷ In their response, the Consumer Action Law Centre posited a number of consumer-friendly outcomes that are likely to occur following reform. They argue that importing notions of fairness will encourage decision-makers (whether they be judges or traders) to consider the impact on consumers and whether those outcomes are unfair.¹⁴⁸ This would mark a departure from the approach in unconscionable conduct cases, where the focus is on measuring 'societal norms of accepted commercial behaviour'¹⁴⁹ and whether the defendant's conduct exhibits high levels of moral obloquy.¹⁵⁰ Traders engaging in the sort of conduct considered 'harsh' and 'unfair' but not 'unconscionable' by Beach J in *Medibank* would no longer escape liability. Submissions responding to the original CAANZ Issues Paper in 2016 highlighted a number of unfair practices which were falling through the gaps and not being picked up by the unconscionability safety net. These include, but are of course not limited to: subscription traps; 'dark pattern' product bundling; and business models that target behavioural biases through manipulative marketing.¹⁵¹ Many of these same practices were highlighted again by the Consumer Action Law Centre in 2019.¹⁵² Despite the insistence from those in commerce that existing

144 See *ibid* 17–18 [14]–[15] (Kiefel CJ and Bell J). See generally *Rochin v California*, 342 US 165, 169–70 (1952) (Frankfurter J), quoted in Justice John Middleton, 'Statutory Interpretation: Mostly Common Sense?' (2016) 40(2) *Melbourne University Law Review* 626, 632.

145 See *Ipstar Australia* (2018) 356 ALR 440, 478 [197] (Bathurst CJ), 495–6 [275]–[278] (Leeming JA). See also *Brennan v Comcare* (1994) 50 FCR 555, 572 (Gummow J); Michael Kirby, 'Statutory Interpretation: The Meaning of Meaning' (2011) 35(1) *Melbourne University Law Review* 113, 116; Philip Sales, 'In Defence of Legislative Intention' (2019) 48(1) *Australian Bar Review* 6.

146 Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 26, discussing recommendation 21.

147 *Ibid*. This recommendation is considered in JM Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading: Responding to Exploitative Business Systems in Person and Online' (2021) 44(1) *Journal of Consumer Policy* 1.

148 Consumer Action Law Centre, Submission to Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (2 September 2019) 9–11 ('CALC Digital Platforms Inquiry Submission').

149 *Kobelt* (2019) 267 CLR 1, 40 [92] (Gageler J).

150 *Ibid* 48 [118] (Keane J).

151 Legal Aid Queensland, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Issues Paper* (May 2016) 13–14.

152 CALC Digital Platforms Inquiry Submission (n 148) 3–4.

provisions should prevent such conduct,¹⁵³ this demonstrates that the practices are still occurring, and reform is necessary if section 21 is to perform its function as a safety net provision.

C Justified Uncertainty

It is a ‘constant catchcry’ of those opposed to reform that introducing a prohibition on unfair conduct will generate uncertainty and chill commercial activity.¹⁵⁴ President Bell, speaking extra-curially, commented that the concept of unconscionability is ‘unlikely to inspire confidence in commercial parties or supply the requisite certainty so as to make a choice of Australian law to go with a choice of Australian forum particularly attractive’.¹⁵⁵ Indeed, the Swanson Committee were hesitant to recommend a prohibition on ‘unfair’ or ‘harsh’ conduct due to the apparent uncertainty of the terms.¹⁵⁶ At its core, the business community propose that a prohibition on unfair conduct will chill commercial activity. It is a corollary of this proposition that commercial activity is driven, in part, by unfair conduct. This cannot be a just state of affairs. For the businesses that already act fairly, the change in language should have no impact on their operations.¹⁵⁷ Moreover, although unfairness may itself be capable of malleable meaning, it is often condemned by the business community in a vacuum. Its impact on certainty should be measured against unconscionability.

1 The Overstated Importance of Certainty

General, standard-based prohibitions attract criticism for hosting uncertain outcomes.¹⁵⁸ Before assessing the validity of this criticism, it is pertinent to consider the value of certainty. Aristotle warned against *universal* precision, writing ‘[o]ur account will be adequate if its degree of perspicuity is in accord with its subject matter ... we must not look for the same degree of exactness in all accounts’.¹⁵⁹

153 See, eg, Retail Council, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Issues Paper* (27 May 2016) 11; Insurance Council of Australia, Submission to Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Issues Paper* (May 2016) 8. See generally *CAANZ Final Report* (n 5) 51; *Productivity Commission Review 2008* (n 15) 139. But see CALC Digital Platforms Inquiry Submission (n 148) 5–7.

154 See, eg, *Finding a Balance* (n 131) 168 [6.34]. See generally Matthew Harding, ‘Equity and the Value of Certainty in Commercial Life’ in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2018) 147; Mark Leeming, ‘The Role of Equity in 21st Century Commercial Disputes: Meeting the Needs of Any Sophisticated and Successful Legal System’ (2019) 47(2) *Australian Bar Review* 137, 151–7.

155 Justice AS Bell, ‘An Australian International Commercial Court: Not a Bad Idea or What a Bad Idea?’ (Speech, ABA Biennial International Conference, 12 July 2019) [71].

156 *Swanson Committee Report* (n 20) 67 [9.60]–[9.62].

157 See *Unfair Trading Discussion Paper* (n 4) 21; Daniel Crennan, ‘The Future of the Corporation: The Regulator’s Perspective’ (Speech, Supreme Court of New South Wales Annual Corporate and Commercial Law Conference, 29 October 2019).

158 Paterson and Brody (n 4) 340, citing Anthony J Duggan, ‘Saying Nothing with Words’ (1997) 20(1) *Journal of Consumer Policy* 69, 73; Tyrone M Carlin, ‘The *Contracts Review Act 1980* (NSW): 20 Years On’ (2001) 23(1) *Sydney Law Review* 125, 136–7.

159 Aristotle, *Nicomachean Ethics*, tr CDC Reeve (Hackett Publishing, 2014) bk 1, [10]–[14]. See also HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 134–5; Lord Briggs, ‘Equity in

Similarly, Braithwaite commented that the ‘iterative pursuit of precision in single rules increases the imprecision of a complex system of rules’, and that when we seek to rely too heavily on bright-line regulation, we run the risk of ‘reduc[ing] the reliability of the law as a whole’.¹⁶⁰ The argument for certainty in commerce is overstated: it masks the impossibility of absolute precision,¹⁶¹ and undercuts the important role that general prohibitions have as a safety net for the existing specific prohibitions.

2 Does Unconscionability Meet the Demands of Certainty?

As discussed, a fundamental problem with the current law is the lack of community understanding on what is meant by unconscionability – it is an opaque term with no clear meaning.¹⁶² Power and uncertainty go ‘hand in hand’,¹⁶³ and the uncertainty inherent in the current law lends itself to imbalances of bargaining power as between trader and consumer. Lord Mansfield in *Hamilton v Mendes* stated that commercial dealings ‘ought not to depend upon subtleties and niceties; but upon rules, *easily learned and easily retained*, because they are the dictates of common sense’.¹⁶⁴ Similarly, Lord Diplock considered that ‘legal certainty demands that the rules by which [one] is to be bound should be ascertainable by [them]’.¹⁶⁵ A standard such as fairness, which is embedded in Australia’s moral vocabulary, must answer the call of being easily learned, easily retained and ascertainable more readily than unconscionability.

V ASSESSING FAIRNESS: A QUESTION OF CAPACITY AND COMPETENCY

Having addressed the question of whether we *ought* to introduce a prohibition on unfair conduct, the next question is whether we *can* introduce such a prohibition. The specific question is whether fairness is an assessable standard. As much as fairness is part of our moral vocabulary, it is still fundamentally a value judgment which imports moral reasoning into the determination of commercial behaviour.¹⁶⁶ The legitimacy of a judge sitting in moral judgment on the conduct of others is a ‘live question’.¹⁶⁷

Business’ (Denning Society Annual Lecture, Lincoln’s Inn, 8 November 2018) 32 [55].

160 John Braithwaite, ‘Rules and Principles: A Theory of Legal Certainty’ (2002) 27(1) *Australian Journal of Legal Philosophy* 47, 47. See also *Seaford Court Estates Ltd v Asher* [1949] 2 KB 481, 499 (Denning LJ); *Royal Commission Final Report* (n 9) vol 1, 16.

161 See MR Cohen, ‘The Process of Judicial Legislation’ in Morris R Cohen and Felix S Cohen (eds), *Readings in Jurisprudence and Legal Philosophy* (Prentice-Hall, 1951) 503, 508.

162 See above Part III(C).

163 Birks (n 101) 97.

164 (1761) 2 Burr 1198, 1214 (emphasis added). See also *Paciocco* (2015) 236 FCR 199, 267 [268] (Allsop CJ).

165 *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279. See also *Waterfront Place Pty Ltd v Minister for Planning* (2019) 59 VR 556, 560 [13] (Maxwell ACJ, T Forrest and Emerton JJA).

166 Sims (n 122); *World Best Holdings Ltd* (2005) 63 NSWLR 557, 583–4 [122] (Spigelman CJ).

167 Maxwell (n 121) 8.

This final substantive section will evaluate the debate around the capacity of judges to sit in moral judgment of others, concluding that they are so capable.

A Judges Can, and Do, Act as Moral Arbiters

Chief Justice Bathurst highlights that a common objection to this reform is that it would vest a ‘wide and unconfined power in the judiciary to proscribe conduct which *they* deem to be “unfair”’, which is contrary to constitutional principle.¹⁶⁸ Judges are unelected and do not purport to represent the values of those whose actions are to be scrutinised.¹⁶⁹ Birks considered that it is not ‘the business of interpreters to take the big decisions of social policy which draw the lines between that which the law shall insist upon and that which shall be left to private morality’.¹⁷⁰ However, if Parliament drafts open-textured prohibitions then it surely must fall on interpreters (judges) to draw that line in the sand. Moreover, Bathurst CJ advocates for greater specificity in the law and takes issue with the metaphor of law as a reflection of society’s moral conscience, as it presupposes that judges are privy to a ‘fully-formed “moral conscience” of society’.¹⁷¹ Interestingly, this debate has senior members of the judiciary advocating for either side, and Maxwell P’s stirring defence of the judge as moral arbiter warrants further consideration.

1 Judges Can Arbitrate Morality

Justice Scalia argued that because moral questions have no ‘scientifically “right” answers’, there is no reason to believe that judges are better equipped to search for a palatable answer than ‘the fabled Joe Six-Pack’.¹⁷² If the premise is accepted, then to whom can we turn to make such moral determinations – civil juries or philosopher kings? Justice Scalia’s assessment underestimates the capacity of judges. Judges may not be objectively perfect to fulfil this role, but they are relatively best suited to act as moral arbiter.

There are a number of qualities that judges develop in their role which tend towards this conclusion, and Samet argues that courts in a modern democracy are

168 Bathurst (n 50) [31]. See also Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 184; Murray Gleeson, ‘Judicial Discretion and the Rule of Law: Is There a Clash?’ [2015] (3) *Judicial College of Victoria Journal* 3; *Lawrence v Fen Tigers Ltd* [2014] AC 822, 862–3 [158] (Lord Sumption JSC).

169 See Murray Gleeson, ‘The Judiciary as the Third Arm of Government’ [2014] (1) *Judicial College of Victoria Online Journal* 15, 15. But see John Tasioulas, ‘Legal Relevance of Ethical Objectivity’ (2002) 47(1) *American Journal of Jurisprudence* 211, 233; Alexander Hamilton, ‘The Judiciary Department’ in Alexander Hamilton, John Jay and James Madison (eds), *The Federalist Papers* (Franklin Library, first published 1787, 1984 ed) 565.

170 Birks (n 101) 17. See also Lon L Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71(4) *Harvard Law Review* 630, 666.

171 Bathurst (n 50) [45]. See generally Waldron (n 168) 184; Terence Etherton, ‘Liberty, the Archetype and Diversity: A Philosophy of Judging’ [2010] *Public Law* 727, 741.

172 Antonin Scalia, ‘Mullahs of the West: Judges as Moral Arbiters’ (Speech, North Carolina Bar Association, 2009). See also Graham Virgo, ‘Whose Conscience? Unconscionability in the Common Law of Obligations’ in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart Publishing, 2016) 293.

designed to foster capacity for moral reasoning.¹⁷³ Judges are frequently tasked with making final determinations which may have sweeping impacts on lives, relationships and business activity.¹⁷⁴ In doing so, they both passively and actively grapple with moral thought experiments and engage in piecemeal and discursive decision-making which lends itself to considered moral reasoning.¹⁷⁵ While judges are not incapable of criticism and are not themselves held to be bastions of morality, their deep ‘immersion in a work environment that nurtures the skills and habits ... necessary for moral reasoning, make it very likely that judges will make successful moral arbiters’.¹⁷⁶

2 Judges Do Arbitrate Morality

Judges already act as moral standard-bearers in a variety of contexts.¹⁷⁷ President Maxwell highlighted the work of sentencing judges who are tasked with evaluating an offender’s ‘moral culpability’.¹⁷⁸ In doing so, judges must consider the ‘moral sense of the community’ and meet the community’s expectation that offences warrant punishment.¹⁷⁹ Further examples can be furnished from private law, notably the assessment of what a ‘reasonable person’ would have done in the circumstances before the court.¹⁸⁰ This is simply part of the judicial role and Maxwell P believes that the community depends on judges applying non-legal standards to work towards a just outcome.¹⁸¹ As fairness is intuitively ascertainable by laypeople, it is likely that a judge’s reasoning will be more open to public scrutiny. This will act as an important check on the judiciary’s deliberation of moral standards.

B How to Judge Fairness

The previous section demonstrated that judges are capable and competent to assess fairness. This leaves a final, subsequent question: how will fairness be judged?¹⁸² As discussed, the signalling function of the reform aims to deter judges

173 Samet (n 108) 206, citing Susan L Hurley, ‘Cognitivism in Political Philosophy’ in Roger Crisp and Brad Hooker (eds), *Well-being and Morality: Essays in Honour of James Griffin* (Oxford University Press, 2000) 177, 179.

174 Jonathan Crowe, ‘The Authentic Judge: French Existentialism and the Judicial Role’ (2019) 47(1) *Australian Bar Review* 41, 41; Sir Gerard Brennan, ‘The Selection of Judges for Commonwealth Courts’ (Papers on Parliament No 48, January 2008).

175 Tasioulas (n 169) 233; Michael S Moore, ‘Law as a Functional Kind’ in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Clarendon Press, 1992) 230. See generally FR Jordan, *Appreciations* (Ure Smith, 1950) 58–9, quoted in *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 598 [79]–[80] (Gageler J).

176 Samet (n 108) 207.

177 See generally Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965); Ronald Dworkin, ‘Lord Devlin and the Enforcement of Morals’ (1966) 75(6) *Yale Law Journal* 986.

178 Maxwell (n 121) 8.

179 *R v Williscroft* [1975] VR 292, 300–1; Judicial College of Victoria, *Victorian Sentencing Manual* (Judicial College of Victoria, 2020) 60.

180 See, eg, Bathurst (n 50) [10]; Maxwell (n 121) 8.

181 Maxwell (n 121) 8.

182 CALC Digital Platforms Inquiry Submission (n 148) 9.

from relying on equitable unconscionable dealing case law.¹⁸³ Norms of fairness already exist in a number of statutes which regulate commercial behaviour,¹⁸⁴ although this does not negate the need for a repaired safety net provision.¹⁸⁵ One relevant existing standard of fairness is found in the prohibition on unfair contract terms in the *ACL*. Part 2-3 makes void terms of consumer or small business contracts if they are (a) unfair and (b) contained within a standard form contract.¹⁸⁶ Section 24 provides a tripartite definition of ‘unfair’:

- (1) A term of a consumer contract or small business contract is *unfair* if:
 - (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
 - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.

Although the unfair contract terms regime is a form of specific prohibition, this definition could act as a starting point for when considering how to construct and interpret the supporting provisions to a new prohibition on unfair conduct.¹⁸⁷

Paterson, Bant and Clare stressed the importance of considering the relationship between standards of fairness in other statutory contexts, suggesting that the interpretation of one provision ‘may affect the interpretation given to others’.¹⁸⁸ The importance of reading across statutory contexts was recently emphasised by O’Byrne J in *Australian Securities and Investments Commission v Westpac* (*Westpac*).¹⁸⁹ His Honour was tasked with interpreting the use of ‘fair’ in section 912A(1)(a) of the *Corporations Act 2001* (Cth), which requires financial services licensees to do all things necessary to ensure that financial services are provided ‘efficiently, honestly and fairly’ and commented that

[t]he word ‘fair’ as used in s 912A(1)(a) has not received detailed judicial consideration. However, it seems to me that there is no reason why it cannot carry its ordinary meaning which includes an absence of injustice, even-handedness and reasonableness. As is the case with legislative requirements of a similar kind, such as provisions addressing unfair contract terms, the characterisation of conduct as unfair is evaluative and must be done with close attention to the applicable statutory provision ...¹⁹⁰

Here, it is clear that both the ordinary understanding and meaning derived from other statutory contexts are informing the particular meaning at issue in the case. Although in obiter, Allsop CJ questioned, and O’Byrne J firmly rejected, the

183 See above Part IV(B).

184 See, eg, *ACL* pts 2-3 (unfair contract terms), 3-1 (specific unfair practices), s 22(1)(d); *Corporations Act 2001* (Cth) s 912A(1)(a).

185 CALC Digital Platforms Inquiry Submission (n 148) 5–7. See also above n 85 and accompanying text.

186 *ACL* s 23(1).

187 Fairness is elsewhere enshrined in the Act: see the object found in section 2 of the *CCA 2010* (Cth), which is to ‘enhance the welfare of Australians through the promotion of competition and *fair* trading and provision for consumer protection’ (emphasis added).

188 Paterson, Bant and Clare (n 41) 110.

189 (2019) 272 FCR 170.

190 *Ibid* 267 [426].

enduring position that ‘efficiently, honestly and fairly’ is a compendious obligation.¹⁹¹ Following *Westpac*, the fairness obligation in section 912A(1)(a) may be considered as its own separate obligation.¹⁹² As section 912A(1)(a) is a heavily litigated provision, it is therefore likely that the judicial understanding of ‘fair’ will be fortified in due course.¹⁹³ This should in turn inform the meaning of the proposed prohibition on unfair conduct in the *ACL*. Although interpretations of similar concepts in different statutory contexts may be of assistance, a court interpreting a prohibition on unfair conduct found in the *ACL* must keep in mind the ‘text, context, and purpose, and the harmonious goals to which the *ACL* is directed’.¹⁹⁴

VI CONCLUSION

The statutory prohibition on unconscionable conduct was praised in the 2017 *ACL* review for evolving from its equitable origins. Following *Kobelt*, this development has been stifled and the statutory prohibition has been unnecessarily realigned with the more restrictive equitable doctrine. Reforming section 21 of the *ACL* to prohibit ‘unfair conduct’ is supported by senior members of the judiciary, regulators, commentators and business leaders. A simple shift in language can promote better community understanding and help influence business practices. Claims that the reform would chill commercial activity should be scrutinised, not taken as gospel. Despite concerns that ‘fairness’ is too vague to adjudicate, judges are well-equipped to determine whether conduct is, in all the circumstances, unfair. The calls for reform are growing and it is intended that this article has demonstrated why change is needed.

191 Ibid 209 [170] (Allsop CJ), 267–8 [424]–[427] (O’Byrne J). But see *AGM Markets* (2020) 275 FCR 57, 149 [516] (Beach J); *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790, [49]–[50] (Beach J).

192 Michael Vrisakis and Steven Rice, ‘Regulatory “Rinkles”: Efficiently, Honestly and Fairly (Part 2)’, *Financial Services Regulatory Notes* (Web Page, 18 June 2020) <<https://hsfnotes.com/fsaustralia/2020/06/18/regulatory-rinkles-efficiently-honestly-and-fairly-part-2/>>.

193 See Crennan (n 157); Michael Pelly, ‘Hayne’s Six Principles Become One Rule: Be Fair’, *Australian Financial Review* (online, 1 November 2019) <<https://www.afr.com/companies/financial-services/hail-the-new-duty-of-fairness-for-financial-services-20191030-p535yh>>.

194 *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672, [659] (Wheeler J).