SEAN CHAN

FUTURE-PROOF DOCTRINE OR RELIC OF AN EQUITABLE PAST? UNCONSCIONABLE CONDUCT IN THE FAIR TRADING AMENDMENT ACT 2021

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Abstract

The Fair Trading Amendment Act 2021 introduces a New Zealand prohibition on "unconscionable conduct" in trade. Previously, the law on unconscionable conduct was found in the equitable doctrine of unconscionable bargain. This paper describes how New Zealand law has moved away from equitable unconscionability with this new prohibition. This paper then critically analyses some of the legal, social and economic justifications for introducing the prohibition, finding that some of MBIE's justifications are not overly persuasive. The amended s 7 prohibition is based strongly on the equivalent s 21 in Australian Consumer Law. This paper reviews how s 21 in Australian Consumer Law has operated in practice. Finally, this paper analyses the long-standing doctrinal issues with Australia's prohibition and how this provides a strong basis for New Zealand to pursue a different standard than "unconscionable".

Key words: 'Fair Trading Act 1986', 'Fair Trading Amendment Act 2021', 'ASIC v Kobelt', 'Unconscionable conduct', 'Statutory unconscionability'

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I Introduction

In 2021, the Commerce Commission's market study of duopoly control in the retail grocery sector commanded national media attention. Many New Zealanders were unsurprised by the finding that competition was not working to constrain the market power of the big two supermarket chains in New Zealand.[2] The report provided a forum for suppliers to express grievances about perceived unfair conduct by supermarkets. One supplier described how supermarkets used their market power to "screw down their prices under an implied threat that their products will be pulled from the shelves".[3] Another described how suppliers "are too fearful to speak publicly themselves, lest they be bullied out of business by the supermarket chains".[4] In New Zealand, unfair conduct by supermarkets currently faces limited legal recourse under the existing regulatory framework.[5] By comparison, in Australia, similar practices by supermarkets have been successfully prosecuted by the Australian Competition and Consumer Commission ("ACCC") by applying the prohibition on "unconscionable conduct".

These unfair practices will be illegal under the Fair Trading Act ("FTA") from August 2022.[6] The Fair Trading Amendment Act 2021 introduces a New Zealand prohibition on "unconscionable conduct". The prohibition is based on an equivalent provision in Australian Consumer Law ("ACL") and gives the Commerce Commission wide powers to investigate and enforce cases of alleged unconscionable conduct.

The Ministry of Business, Innovation and Employment ("MBIE") recommended the prohibition because of survey data highlighting the prevalence of unfair commercial practices across the economy. While other legislative protections against unfair commercial practices exist, a 2018 MBIE report concluded these were insufficient and gaps in the protections

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2 Commerce Commission *Market study into the retail grocery sector Draft report - Executive Summary* (July 2021) at 4.

3 Jonathan Milne "Small muesli maker blows whistle on big supermarkets" (29 July 2021) Newsroom <www.newsroom.co.nz>.

4 Jonathan Milne, above n 3.

5 Ministry of Business, Innovation & Employment *Regulatory Impact Statement: Protecting business and consumers from unfair commercial practices* (20 June 2019) at 16.

6 Fair Trading Amendment Act 2021, cl 2.

remain.[7] As such, the new prohibition seeks to remedy gaps in consumer protection law by establishing a broad "safety-net" protection to sit alongside existing forms of redress.[8]

Section 7 of the FTA prohibits conduct *in trade* that is "unconscionable".[9] Section 8 contains a non-exhaustive list of factors to assess whether conduct is unconscionable. This includes:[10]

- relative bargaining power;
- the extent to which the trader and an affected person acted in good faith;
- whether unfair pressure or undue influence was used;
- whether an affected person was able to understand documents provided by the trader.

The Court can consider several additional factors when a *contract* exists between a trader and affected person, including:[11]

- any inducement to enter into the contract;
- whether the affected person obtained legal advice or other professional advice;
- the terms of the contract;
- whether the terms of the contract allow the affected person to reasonably meet their obligations;

In order to understand the new Act, a discussion of unconscionability principles and case law is needed. Part 2 of this paper sets out the current New Zealand law on equitable unconscionability and how the FTA prohibition differs from equitable unconscionability. Part 3 critically analyses the justifications for the new prohibition on unconscionable conduct. Part 4 sets out how the prohibition has operated in Australian Consumer Law.

Part 5 sets out how the development of Australian case law has encountered doctrinal inconsistency over several decades, using the case of *ASIC v Kobelt* to illustrate this. In particular, Australian case law has struggled to move away from the narrow *equitable* conception of unconscionability. Australia's difficult experience with "unconscionable

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7 Fair Trading Amendment Bill 2019 (213-1) (explanatory note) at 1.

8 Jeannie M Paterson and Gerard Brody ""Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models" (2014) 38 J.C.P. 331 at 332.

9 Fair Trading Amendment Act 2021, cl 6.

10 Clause 6.

11 Clause 6.

conduct" provides a strong basis for New Zealand to pursue a different standard than "unconscionable".

II New Zealand's position on unconscionable conduct

Presently, the *equitable* doctrine of unconscionable bargain ("equitable unconscionability") is invoked in contract law disputes. The doctrine is a defence against contractual performance by vitiating a contract formed in unconscionable circumstances. It allows the vulnerable party to obtain a remedy in circumstances where one party *unconscionably* takes advantage of another.[12] The focus in unconscionable bargain proceedings is on the conduct of the stronger party against the vulnerable or disadvantaged party.[13] Courts have some remedial discretion when an unconscionable bargain is found.[14] Often, the weaker party will be seeking the equitable remedy of rescission to put themselves in the position they would have been in had the contract not been formed.[15]

A Principles of equitable unconscionability

New Zealand's principles of unconscionable bargain have been authoritatively stated by Tipping J in *Bowkett v Action Finance Ltd*.[16] The following circumstances will normally be present when a court finds an unconscionable bargain:[17]

(1) The weaker party is under a significant disability ("special disadvantage").

(2) The stronger party knows or ought to know of that disability ("knowledge").

(3) The stronger party has victimised the weaker in the sense of taking advantage of the weaker's disability, either by active extortion of the bargain or passive acceptance of it

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[12] Ministry of Consumer Affairs *Consumer Law Reform Additional Paper - Unconscionability* (October 2010) at 3.

[13] *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, (2008) 2 NZLR 735 at [6].

[14] Allan Fels and Matthew Lees "Unconscionable conduct in the context of competition law with special reference to retailer/supplier relationships within Australia" in Fabiana Di Porto and Rupprecht Podszun (ed) Abusive Practices in Competition Law (Edward Elgar Publishing, 2018) 343 at 361

[15] At 361.

[16] *Gustav & Co Ltd v Macfield Ltd* CA168/05, 24 May 2007 at [30].

[17] *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449 (HC) at 460.

in circumstances where it is contrary to conscience that the bargain should be accepted ("victimisation").

(4) There is a marked inadequacy of consideration and the stronger party either knows or ought to know that to be so.

(5) There is some procedural impropriety either demonstrated or presumed from the circumstances.

The first three factors are "crucial" and must be present to find an unconscionable bargain.[18] The latter two factors will usually be present, but an unconscionable bargain can still be found in their absence.[19] Notably, unconscionable bargain takes into account substantive unconscionability, as in *terms* of the contract that favour the stronger party, as well as procedural unconscionability, as in pre-contractual matters that vitiated the weaker party's contractual capacity. If the *Bowkett* factors are established, the stronger party has an onus to show that the transaction was "fair, just and reasonable" to rebut a finding of unconscionable bargain.[20]

B Differences between statutory and equitable unconscionability

Statutory unconscionable conduct in s 7 of the FTA differs from equitable unconscionability in several important ways. Firstly, the statutory unconscionable conduct prohibition is "not limited by any rule of law or equity relating to unconscionable conduct".[21] Section 7(3) expresses Parliament's intention to interpret statutory unconscionability more broadly than equitable unconscionability.[22]

Secondly, there is no vulnerability or special disadvantage requirement. Equitable unconscionability only accounts for a "special disadvantage" that is personal to the vulnerable party (for example, advanced age) rather than a commercial or situational

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[18] At 460.

[19] At 460.

[20] *Gustav & Co Ltd v Macfield Ltd*, above n 16, at [30].

[21] Fair Trading Amendment Act 2021, cl 6.

[22] Clause 6; and Ministry of Business, Innovation & Employment *Fair Trading Amendment Bill Officials' Report to the Economic Development, Science and Innovation Committee* (30 July 2020) at 29.

disadvantage.[23] The removal of the special disadvantage requirement, therefore, allows unconscionability to be more readily applied in business-to-business contexts, where traditional "special disadvantages" like advanced age were unlikely to apply.[24] The focus of statutory unconscionability inquiries is on the nature of the impugned conduct, rather than the characteristics of the victim.[25]

Thirdly, corresponding with the removal of the special disadvantage requirement, there is no "victimisation" requirement for the stronger party to take advantage of the weaker party's disadvantage to find statutory unconscionability.

Fourthly, statutory unconscionability can be applied to a system or pattern of unconscionable conduct.[26] The "system of conduct" doctrine allows unconscionability to apply, for example, when the business design itself is unconscionable. Therefore, in "systems" cases, there is no requirement to prove the exploitation of particular individuals[27]. Instead, it must be established that the internal system of the business was set up to operate unconscionably.

For example, a telemarketing business actively acquired the names of potential customers' friends. They used this information to cold-call potential customers, claiming they were "referred by *X* friend" to gain the potential customer's trust.[28] Here, it did not matter whether particular individuals were harmed, but that the business "system" was intentionally designed to perform this fraud. Australia's experience with "systems" cases is discussed further in Part 4.

Fifthly, there is no requirement for actual or constructive knowledge of the weaker party or the unconscionable conduct itself. MBIE thought a knowledge requirement would create an

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[23] Ministry of Consumer Affairs, above n 12, at 2.

[24] MBIE *Fair Trading Amendment Bill Officials' Report*, above n 22, at 32.

[25] Australian Treasury *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct* (February 2010) at 34.

[26] Fair Trading Amendment Act 2021, cl 6.

[27] Thyme Burdon "When the company line is unlawful: an overview of systemic unconscionable conduct" (2018) 40 Bulletin (Law Society of South Australia) 22 at 22.

[28] *Unique International College Pty Ltd v Australian Competition and Consumer Commission (ACCC)* [2018] FCAFC 155, (2018) 362 ALR 66 at [123].

unnecessary evidential burden on the claimant to prove the defendant's "specific state of knowledge", reducing the effectiveness of the provision.[29] Instead, businesses should proactively avoid harmful conduct. Lack of awareness is not a sufficient defence.[30] Furthermore, a knowledge requirement would restrict the prohibition to circumstances where specific parties had been targeted, which "systems" cases do not require.[31] By removing the knowledge requirement, it creates a high burden on businesses to avoid unforeseeable harmful conduct.

Sixthly, the prohibition establishes a non-exhaustive list of factors to determine whether impugned conduct is unconscionable. This has been called the "sliding scale" of unconscionability where the court weighs the cumulative effect of s 7 factors.[32] These factors take the statutory prohibition beyond the narrow test at equity.[33] For example, s 7 allows the court to consider the "form of the contract", including how *transparent* the terms of the contract are.[34] This is a clear indication that substantive unconscionability can be considered by the courts.

Seventhly, the penalties for breaching s 7 of the FTA differ from common law remedies. Breaches of s 7 will attract the penalty clause of the FTA. The maximum fine for an individual is $200,000 per breach.[35] The maximum fine for a body corporate is $600,000 per breach.[36] As will be discussed, under ACL the maximum penalty is substantially higher, in one case exceeding the economic gain from the unconscionable conduct by a factor of fifty.[37]

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[29] MBIE *Fair Trading Amendment Bill Officials' Report*, above n 22, at 31.

[30] At 31.

[31] At 31.

[32] Paterson and Brody, above n 8, at 352.

[33] Jeannie M Paterson, Elise Bant and Matthew Clare "Doctrine, policy, culture and choice in assessing unconscionable conduct under statute: ASIC v Kobelt" (2019) J Eq 81 at 92.

[34] Fair Trading Amendment Act 2021, cl 6.

[35] Fair Trading Act 1986, s 40(1)(a).

[36] Section 40(1)(b).

[37] Jarrod Bayliss-McCulloch "Unconscionable conduct doesn't pay: what we can learn from Telstra's potential A$50 million fine under the Australian Consumer Law" (26 November 2020) Lexology <www.lexology.com>.

The comparatively low penalties under the FTA may have implications for deterrence and compliance under the provision.

In sum, statutory unconscionability significantly departs from equitable unconscionability. The next section analyses how persuasive the justifications are for departing from equity.

III Justifying unconscionable conduct in the Fair Trading Act

The statutory prohibition on unconscionable conduct can be justified for several reasons. Firstly, gaps in consumer protection law are not adequately filled by equitable unconscionability. Secondly, statutory unconscionability places a higher cost of operating on unscrupulous traders. Thirdly, MBIE's data shows that unfair commercial practices are widespread across the economy.

This section will establish that the former two justifications make a convincing case for the wider unconscionable conduct provision, but MBIE's data does not persuasively or conclusively demonstrate that *unconscionable* commercial practices are widespread. By contrast, Australia's justification for their equivalent prohibition was to broaden the range of remedies and empower the ACCC to take action.

A Weaknesses of equitable unconscionability

1 Lack of positive duty

Presently, equitable unconscionability only applies when invoked in court by claimants. The lack of legislative pronouncement means there is no positive duty for parties to comply with a high standard of business conscience.[38] Contractual rescission does not require or strongly deter the firm from not engaging in similar conduct again.[39] Therefore, equitable unconscionability has limited ability to influence future behaviour.[40] Instead, the doctrine's

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[38] MBIE *Regulatory Impact Statement: unfair commercial practices*, above n 5, at 10.

[39] Consumer Policy Research Centre *Unfair Trading Practices in Digital Markets: Evidence and Regulatory Gaps* (December 2020) at 14.

[40] Peter Applegarth "Credit and Unconscionability - The Rise and Fall of Statutes" (paper presented to WA Lee Equity Lecture, Supreme Court of Queensland, Brisbane, 19 November 2020) at 21.

equitable purpose is to achieve justice in a particular case, with little regard for consistency or articulating social values.[41]

For example, the Commerce Commission considered they could not prevent price gouging on consumer goods (for example, face-masks) during the 2020 COVID-19 pandemic because of this gap in consumer protection law.[42] By contrast, the ACCC's COVID-19 guidelines to Australian businesses stated that excessive prices would risk breaching the prohibition on unconscionable conduct.[43] This example illustrates the prospective nature of unconscionable conduct regulations, by guiding commercial behaviour *ex ante*, compared to the retrospective application of equitable unconscionable bargain principles.

2 Business-to-business contexts

Equitable unconscionability cannot apply in most business-to-business transactions because the special disadvantage, knowledge and victimisation elements are rarely applicable in business contexts. Regarding the stronger party, *ACCC v Jayco* established it is difficult to attribute an unconscionable state of mind to corporations comprised of many individual agents, each with different states of knowledge.[44] Regarding the weaker party, it is difficult to establish that a business was at a "special disadvantage". The paradigmatic "disadvantage" in unconscionable bargain cases, such as advanced age or ill-health, is unlikely to apply in business-to-business contexts.[45]

3 Special disadvantage requirement

The special disadvantage requirement has caused difficulty in business-to-consumer contexts. Equitable unconscionability does not protect "average" consumers who are not under a "special disadvantage", even when the circumstances are manifestly unfair. For example, an

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41 At 21.

42 MBIE *Fair Trading Amendment Bill Officials' Report*, above n 22, at 8.

43 Australian Competition & Consumer Commission "COVID-19 (coronavirus) information for business" <www.accc.gov.au>.

44 *Australian Competition and Consumer Commission (ACCC) v Jayco Corp Pty Ltd* FCA Victoria 1672, 20 November 2020 at [669].

45 MBIE *Fair Trading Amendment Bill Officials' Report*, above n 22, at 32.

"average" consumer might have the capacity to understand the unconscionable contract but, for example, might not have a real choice other than to enter the contract.[46] Edelman J has called these circumstances a "Hobson's Choice".[47] Australian law has not found unconscionability where the consumer consciously "chose" to enter the overtly unfair agreement, despite being faced with a "Hobson's Choice".[48]

B Economic justifications for statutory unconscionability

1 The libertarian argument

The counter-argument to a wider unconscionability prohibition comes from libertarian schools of thought. Freedom of contract principles suggests that parties should be free to contract and take advantage of available economic opportunities.[49] As such, giving courts wide authority to intervene in unconscionable agreements undermines freedom of contract by compromising the predictability of agreements.[50] This added transactional cost and risk would negatively affect honest and dishonest traders, and would ultimately be passed onto consumers through price increases. Fried describes the risk of unconscionability prohibitions becoming "ad hoc redistribution" against parties who contract with persons poorer than themselves.[51] Judges are not well-positioned to make redistributive decisions, lacking the resources, time and constitutional authority to be economic policymakers.[52] According to this view, the better option is to let competition principles "constrain and regulate that behaviour over time" when a dishonest supplier enters the marketplace that consumers disapprove of.[53]

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46 Consumer Policy Research Centre, above n 39, at 14.

47 *Australian Securities and Investments Commission (ASIC) v Kobelt* [2019] HCA 18, (2019) 368 ALR 1 at [266] per Edelman J.

48 Paterson, Bant and Clare, above n 33, at 120.

49 Applegarth, above n 40, at 12.

50 Brady Williams "Unconscionability as a Sword: The Case for an Affirmative Cause of Action" (2015) 107 CLR 2015 at 2055.

51 Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, Harvard, 1981) at 106.

52 Williams, above n 50, at 2064.

53 Ministry of Consumer Affairs, above n 12, at 2.

2 Freedom of contract

The freedom of contract argument can be challenged both in principle and by the operation of the provision in Australia. Historically, freedom of contract is not an absolute principle, but is tempered by equity's concern with fairness.[54] Correctly, freedom of contract does not protect parties who do not properly assess risk. But this assumes the party had the capacity to contract freely.[55] On this view, the unconscionable conduct prohibition actually upholds freedom of contract by providing "courts with means for checking whether contracts are truly products of contractual liberty".[56] The legal protection here takes a balanced approach, not protecting parties from mere inequality of bargaining power, but requiring circumstances of serious misconduct.[57] Limitations to contractual freedom can be also justified where efficiency is hindered, such as in cases of market failure.[58]

3 Competition principles and unconscionability

The argument that competition can regulate and constrain unconscionable businesses is not supported by Australia's experience where "competition has not been sufficient to regulate supplier behaviour" when the ACCC have taken action against unconscionable conduct.[59] Howell and Wilson argue that consumer protection law intervenes because of undesirable distributive consequences from competitive markets. According to them, "markets are not interested in social justice or equity, even though these matters might be important for

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54 Williams, above n 50, at 2066.

55 Applegarth, above n 40, at 34.

56 Williams, above n 50, at 2067.

57 Ministry of Business, Innovation & Employment *Initial briefing to the Economic Development, Science and Innovation Committee* (30 April 2020) at 10.

58 Elena D'Agostino *Contracts of Adhesion Between Law and Economics Rethinking the Unconscionability Doctrine* (1st ed, Springer, Messina (ITA), 2015) at 3.

59 Ministry of Consumer Affairs, above n 12, at 6.

consumers".[60] Competitive markets, for instance, do not require firms to provide unprofitable or less profitable products.[61]

Australia's consumer credit market illustrates this point. Consumer credit is generally considered a highly competitive market.[62] Despite this, aboriginal Australians have extremely low access to credit and banking because banks forgo unprofitable branches that serve lower-income areas.[63] This has led to an unregulated form of credit called "book-up" forming. "Book-up" is a form of credit where payment is deferred, subject to the customer giving the creditor their bank keycard and PIN until the debt is paid off.[64] "Book-up" is susceptible to unscrupulous traders taking advantage of the low regulatory oversight to exploit vulnerable consumers through "tying" conduct, high-interest rates and opaque terms.[65]

To conclude, firstly, competition does not constrain and regulate unconscionable behaviour in all circumstances. Secondly, an absence of choice and alternatives for lower socioeconomic consumers can still emerge in competitive markets, leaving them vulnerable to unscrupulous suppliers. Thirdly, markets with low barriers to entry might actually incentivise unscrupulous suppliers to establish.[66]

4 Misallocation of costs

In a market economy, opportunities for consumers to exercise free and informed consent when making purchasing decisions promotes competition in the market.[67] By its very nature,

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[60] Nicola Howell and Therese Wilson "The Limits of Competition: Reasserting a Role for Consumer Protection and Fair Trading Regulation in Competitive Markets" in Deborah Parry, Geraint Howells, Annette Nordhausen and Christian Twigg-Flesner (ed) The Yearbook of Consumer Law 2009 (Taylor & Francis, London, 2009) 147 at 153.

[61] At 157.

[62] At 158.

[63] At 159; and Rachel Yates And Sharmin Tania "The Place of Cultural Values, Norms and Practices: Assessing Unconscionability In Commercial Transactions" (2019) 45 Mon LR 232 at 271.

[64] At [21] per Kiefel CJ and Bell J.

[65] *ASIC v Kobelt*, above n 47, at [165]–[192] per Nettle and Gordon JJ.

[66] Howell and Wilson, above n 60, at 156.

[67] Paterson and Brody, above n 8, at 337.

unconscionable conduct restricts free and informed consumer consent by amplifying information asymmetries between businesses and consumers or allowing firms with market power to take advantage of states of consumer vulnerability. When market conditions are skewed in ways that favour firms that behave dishonestly, this can undermine competition and the efficient operation of the market.[68] This is one type of "market failure".

The costs and risks of unconscionable conduct are borne by consumers and honest traders under the current regulatory framework. Without effective redress, the current framework gives legally non-compliant traders an advantage over honest traders.[69] If unconscionable conduct is widespread enough within a market, this can make honest traders become inefficient relative to their unscrupulous rivals and create a barrier to entry.[70] This harms honest traders by restricting them from entering markets and competing.

Vulnerable consumers are also harmed under the current framework. For example, when vulnerable consumers receive a product unsuitable for their needs or which they cannot afford, and the unconscionable business model has contributed to their lack of understanding, the consumer is effectively allocated the cost for the trader's unconscionable conduct.[71]

According to Rosenbaum, firms are "more inclined to be honest in situations when (a) they stand to gain less monetarily from dishonest behavio[u]r and/or, (b) when the probability of being detected and the magnitude of punishment if apprehended, increase".[72] Therefore, the FTA remedies the misallocation of risks by placing a higher cost on unconscionable conduct and increasing the probability of detection by the Commerce Commission.

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68 MBIE *Regulatory Impact Statement: unfair commercial practices*, above n 5, at 11.

69 Gerard Brody and Katherine Temple "Unfair but Not Illegal: Are Australia's consumer protection laws allowing predatory businesses to flourish?" (2016) 4 Alt LJ 169 at 173.

70 Nick Feltovich "The interaction between competition and unethical behaviour" 22 Exp Econ 101 at 101.

71 Paterson and Brody, above n 8, at 333.

72 Stephen Mark Rosenbaum, Stephan Billinger and Nils Stieglitz "Let's be honest: A review of experimental evidence of honesty and truth-telling" (2014) 45 Journal of Economic Psychology 181 at 182.

C MBIE's survey data

MBIE's 2018 small business survey was the catalyst for a discussion paper about legal protections against unfair practices.[73] This discussion paper directly led to the adoption of unconscionability in the FTA. The data supposedly formed a picture of unfair commercial practices across the economy. Examples of unfair practices included:[74]

- 47 per cent of businesses indicated they were treated unfairly by a supplier or customer yearly.
- 34 per cent indicated this involved suppliers or customers not complying with the terms of a contract.
- 12 per cent considered they had been harassed, coerced, or otherwise subject to pressure.

MBIE's survey data has several issues meaning it does not sufficiently illustrate a legal problem. Firstly, there were several methodological shortcomings. The survey was "opt-in", involved a subjective self-assessment and had a low sample size.[75] Such a survey is conducive to participation bias and self-selection bias, where the subjects disproportionately possess attributes that influence the data. Here, MBIE's survey was attractive to participants with negative experiences regarding unfair business practices.

Secondly, the data does not indicate what proportion of unfair practices would have met the higher threshold of "unconscionable". As stated in Russell McVeagh's discussion paper submission, "asking whether a business feels it has been treated "unfairly" is inherently subjective and is not necessarily indicative of a legal problem".[76] MBIE was criticised by several other submissions for relying heavily on this data.[77]

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[73] Ministry of Business, Innovation & Employment *Discussion paper: protecting businesses and consumers from unfair commercial practices* (December 2018) at 6; and MBIE *Initial briefing to the Committee*, above n 57, at 3.

[74] MBIE *Regulatory Impact Statement: unfair commercial practices*, above n 5, at 16.

[75] At 11.

[76] Russell McVeagh "Submission on unfair commercial practices consultation" at [8].

[77] See for example Russell McVeagh, above n 76, at [8]; BusinessNZ "Submission to the Economic Development, Science and Innovation Committee on the Fair Trading Amendment Bill" at 3; Wellington Chamber of Commerce "Submission on unfair commercial practices consultations" at 3; New Zealand Bankers Association "Submission on unfair commercial practices consultations" at [8]; DLA Piper "Submission on unfair commercial practices consultations" at 3.

As shown here, MBIE's data-centric reports do not demonstrate a legal problem in their current form. The data does not demonstrate sufficiently *widespread* unfair practices. Additional data should have been sought to understand the nature of *unconscionable* commercial practices in New Zealand to properly justify regulatory intervention. The next section discusses how the ACCC's justifications for statutory unconscionability are significantly more persuasive.

D ACCC's justifications

1 Broader remedies

According to former ACCC chairman Allen Fels, the primary reason for the statutory unconscionability prohibition was to broaden the range of remedies. Under the ACL, potential remedies include injunctions, compensatory damages, corrective advertising, contractual variation and pecuniary penalties.[78] Remedies apply on a per breach basis, meaning that an accumulation of breaches can result in significant penalties for unconscionable conduct. To put this into perspective, in *ACCC v Telstra Corporation Limited* the Federal Court granted a $50 million AUD fine to Telstra for unconscionably signing up 108 aboriginal customers to contracts they could not afford and did not understand.[79] These penalties exceeded the direct economic benefit deriving from the unconscionable conduct, estimated at only $800,000 AUD.[80] Compared to rescission, which is a weak deterrent, the ACL's strong penalties impose a high cost on unconscionable firms and incentivises a high standard of business conduct.[81]

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[78] Allan Fels and Matthew Lees "Unconscionable conduct in the context of competition law with special reference to retailer/supplier relationships within Australia" in Fabiana Di Porto and Rupprecht Podszun (ed) Abusive Practices in Competition Law (Edward Elgar Publishing, 2018) 343 at 361; and Email from Rod Sims (Chairman of the ACCC) to MBIE regarding submission to MBIE Discussion Paper on Protecting businesses and consumers from unfair commercial practices (12 March 2019).

[79] *Australian Competition and Consumer Commission v Telstra Corporation Limited* FCA Victoria VID 754 of 2020, 13 May 2021 at [73].

[80] Bayliss-McCulloch, above n 37.

[81] Consumer Policy Research Centre, above n 39, at 14.

2 Giving the ACCC enforcement powers

Australia's other main justification was to empower the ACCC to investigate and prosecute unconscionable conduct for several parties simultaneously, rather than relying on individual claimants. The ACCC's enforcement powers are important because, in unconscionable conduct cases, the "weaker party is usually not in a position itself to take legal action against the stronger party".[82]

ACCC v Coles Supermarket shows how the ACCC's enforcement powers become significant when individual claimants are reluctant to litigate. For background, Coles Supermarket sought rebate payments from suppliers to compensate for "profit gaps", waste, markdowns and late deliveries.[83] These payments were not required by the contractual arrangements and "profit gaps" often arose due to Coles' own misconduct, completely outside of the suppliers' control.[84] The Court found Coles' had acted unconscionably because the suppliers were much smaller, hugely dependent on Coles' business and feared the impact of refusing to pay the rebate.[85]

Important to this discussion, despite the overt breach of contract, most suppliers did not pursue Coles for breach of contract in fear of commercial retaliation.[86] Therefore, *ACCC v Coles* demonstrates the utility of the unconscionable conduct prohibition when claimants are reluctant to litigate individually. The ACCC had no jurisdiction to pursue the breach of contract issue. Their *only* recourse was through the unconscionable conduct prohibition. Accordingly, a statutory unconscionability provision complements existing common law actions, rather than usurping and replacing them.

In New Zealand, MBIE's discussion paper found that "supermarkets [were often] penalising suppliers for promotions run with other retailers by demanding compensation for perceived

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82 Fels and Lees, above n 14, at 361.

83 *Australian Competition and Consumer Commission (ACCC) v Coles Supermarkets Australia Pty Ltd* FCA 1405, 22 December 2014 at [8], [92]–[108].

84 At [101]–[104]; and Fels and Lees, above n 14, at 365.

85 At [98].

86 Fels and Lees, above n 14, at 373.

losses caused by other retailers' promotions and deducting it from payments to suppliers".[87] This illustrates that practices similar to that in *ACCC v Coles* cannot be prosecuted by the Commerce Commission under the current regulatory framework. Therefore, the new prohibition gives the Commerce Commission the power to apply the unconscionability doctrine to a broader range of unfair economic and social circumstances than under the current legal framework.

The next section discusses how these unconscionability principles might apply in New Zealand based on legislative history and case law developments under the equivalent Australian provision.

IV Unconscionable conduct in Australia

Sections 21 and 22 in Schedule 2 of the Competition and Consumer Act 2010 (the "ACL") contains the Australian prohibition on unconscionable conduct. This is equivalent to the amended s 8 in the FTA. Section 21 contains the general prohibition against unconscionable conduct. Section 22 contains a list of non-exhaustive factors to determine unconscionable conduct.

The prohibition is a "safety-net" in Australia's consumer protection law. This means the prohibition gives immediate recourse in circumstances where more specific "bright-line rules" fail to remedy unforeseen practices and conduct.[88] In this regard, the prohibition is not intended to supersede existing consumer protection laws, but complement them by capturing "practices that somehow slipped through the consumer net".[89]

A study of how the ss 21 and 22 prohibitions have been applied in practice will provide a strong indication of how the prohibition is likely to apply in New Zealand.

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87 MBIE *Regulatory Impact Statement: unfair commercial practices*, above n 5, at 16.

88 Paterson and Brody, above n 8, at 332.

89 At 341.

A History of the statutory unconscionable conduct prohibition

This section will highlight two competing tensions. On one hand, the resistance of the courts to interpret statutory unconscionability beyond the narrow scope of equitable unconscionability. On the other hand, the response by the Australian legislature through several unsuccessful attempts to broaden the application of the prohibition.

In 1986, Australia's first statutory prohibition on unconscionable conduct was added in s 51 of the Trade Practices Act 1974 (TPA).[90] The prohibition was *built* upon the equitable doctrine.[91]

1 1998 Amendments

In 1998, s 51AC was inserted into the Trade Practices Act. Section 51AC added six new considerations to determine unconscionable conduct.[92] As stated in the Bill's Second Reading, it was intended to "*extend* the common law doctrine of unconscionability expressed in the existing section 51AA".[93]

2 2010 Amendments

In 2008, a Senate Standing Committee reported there was "no doubt that section 51AC of the Trade Practices Act has fallen *short* of its legislative intent".[94] This was because "the courts are not interpreting the section as broadly as was the legislative intent".[95] They recommended expressly clarifying that s 21AC is *wider* than the "special disadvantage" doctrine.[96]

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[90] Applegarth, above n 40, at 21.

[91] At 21.

[92] At 21.

[93] (30 September 1997) 216 CPD 8767.

[94] Australian Senate Standing Committee on Economics *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974* (3 December 2008) at [5.54].

[95] At [3.1].

[96] At [5.20].

In 2010, the ACL replaced the TPA. Some recommendations of the 2008 Committee were adopted, including expressly allowing substantive unconscionability to be considered (i.e terms of the contract).[97]

3 2012 Amendments

In 2012, following the recommendations of another expert panel, further amendments were made to the ACL. In the Second Reading for the Bill, the Minister gave the strongest expression that the prohibition was not limited to equitable unconscionability:[98]

> The bill amends the law to make it clear that the prohibition is *not limited* to the equitable or common-law doctrines of unconscionable conduct. The courts should not limit the application of the provisions by reference to ancient common-law doctrines…

The Bill inserted the s 21(4) interpretative principles which established that:[99]

(1) The section is not limited by the unwritten law relating to equitable unconscionability.

(2) A "special disadvantage" is not required.

(3) Unconscionable conduct can extend "beyond the formation of the contract to both its terms and the way in which it is carried out".

(4) A "system of conduct" can be unconscionable.

However, despite the clear legislative intention to widen the application of statutory unconscionability, Australian courts continue to interpret the provision narrowly in accordance with principles of equitable unconscionability. This will be discussed further in Part 5.

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[97] *ASIC v Kobelt*, above n 47, at [291] per Edelman J.

[98] (27 May 2010) 7 CPD 4361 [emphasis added].

[99] Competition and Consumer Act 2010 (Cth), sch 2 cl 21(4).

B Australian case law

1 Against community conscience

The most important feature of Australian case law is that the s 22 unconscionability factors are not applied mechanically or rigidly.[100] Instead, the factors form part of a wider holistic evaluation of whether the impugned conduct was "against conscience by reference to the norms of society".[101] In other words, a normative standard of unconscionability is applied alongside the s 22 factors. Since "unconscionability" is an open-textured term, it requires judicial exposition to a normative standard.[102] The values of the normative standard are derived from the case law, equity and community standards.[103]

Australia has not always followed the "against community conscience" normative standard. Early authorities held that the normative standard was "conduct showing a high level of moral obloquy". The "moral obloquy" standard was first applied in 2005 in the *Attorney-General (NSW) v World Best Holdings* decision.[104] More recently, in 2016, Gageler J in *Paciocco v ANZ Bank* approved the "moral obloquy" standard.[105] The "*high level* of moral obloquy" doctrine is a significantly higher normative standard to prove unconscionability than "against community conscience".[106]

However, according to the ACCC, Australian authority *now* supports "against community conscience" as the accepted normative standard.[107] The reference to community conscience

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[100] Nyuk Yin Nahan and Eileen Webb "Unconscionable Conduct in Consumer and Business Transactions" in Justin Malbon and Luke Nottage (ed) *Consumer Law & Policy in Australia and New Zealand* (Federation Press, Sydney, 2013) at 170.

[101] Brody and Temple, above n 69, at 171.

[102] Marcel Delany "Statutory unconscionable conduct: The search for rational criteria" (2020) 14 J Eq 206 at 227.

[103] Michelle Sharpe *Unconscionable Conduct in Australian Consumer and Commercial Contracts* (LexisNexis Australia, Melbourne, 2018) at [5.53].

[104] *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28, (2016) 333 ALR 569 at [188]; and *Attorney-General (NSW) v World Best Holdings Ltd* [2005] NSWCA 261, (2005) 223 ALR 346 [121].

[105] *Paciocco*, above n 104, at [188]; and *World Best Holdings Ltd*, above n 104, at [121].

[106] Brody and Temple, above n 69, at 171.

[107] Sims, above n 126.

first appeared in *ACCC v Lux*, where the court downplayed the "high level of moral obloquy" standard:[108]

> The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values.

The "against community conscience" standard of unconscionability views the prohibition as a general condemnation of conduct that is deemed to have violated community norms, rather than particular weight being given to any one s 22 factor.[109] Using "community conscience" as the normative standard gives sensitivity to the varied circumstances in which unconscionability can arise and gives effect to changes in normative societal values.[110] It places the *focus* of proceedings on the stronger party's conduct and whether that conduct was "against community conscience".

Examples of conduct violating the "against community conscience" normative standard includes:

- Retaining the security bonds of rental car customers because of unsubstantiated claims of speeding tickets and vehicle damage, with attempts to coerce customers through email (for example, threatening to sue for defamation).[111]
- Arranging to visit the homes of elderly women under the guise of a "free maintenance check" of their vacuum cleaner, when the purpose of the visit was to convince them to buy a new vacuum cleaner.[112]

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[108] *Australian Competition and Consumer Commission (ACCC) v Lux Distributors Pty Ltd* FCAFC Victoria 90, 15 August 2013 at [23].

[109] J.M Paterson and E. Bant "Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online" (2021) 44 J.C.P 1 at 5.

[110] *ACCC v Lux*, above n 108, at [23]; and Paterson and Brody, above n 8, at 344.

[111] *Australian Competition and Consumer Commission (ACCC) v Smart Corp Pty Ltd (No 3)* FCA Western Australia 347, 15 April 2021 at [141]–[183].

[112] *ACCC v Lux*, above n 108, at [25]–[30].

2 System of conduct

The other important feature of Australian case law is the judicial innovation of unconscionable "systems of conduct". The "system of conduct" doctrine allows the prohibition to apply when a business is intentionally designed to operate unconscionably. This does not require an individual to be identified who is disadvantaged by the unconscionable conduct.[113] Therefore, the focus in "systems" cases is *primarily* on the conduct in question, rather than claimants' personal characteristics or adverse effects on claimants.[114] The "system of conduct" principle was established in *ASIC v National Exchange*, which stated:[115]

> [If] the conduct is systematically and directly focused on vulnerable but unnamed members, some of whom… can be expected to accept the offers, such conduct can reasonably be described as being against good conscience.

Here, the word "system" denotes that the internal design of the business must be set up to operate unconscionably. Claimants must show the unconscionable conduct was a result of an intentionally adopted "internal method of working".[116] To prove an unconscionable "system of conduct" was intentionally adopted by the impugned firm, it must be shown that the unconscionable features were present *in combination* in a sufficient number of interactions so that it was "more likely than not that the respondent had designed and operated that combination as a system".[117]

"Systems" cases do not require a particular disadvantaged individual to be identified.[118] However, it must be shown that a hypothetical consumer class *might* have been vulnerable to the unconscionable business design. It must be possible to ascertain a group of "vulnerable but unnamed members" with some certainty and precision.[119] Claimants can do this by

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113 *Unique International College v ACCC*, above n 28, at [103].

114 At [103].

115 *Australian Securities and Investments Commission (ASIC) v National Exchange Pty Ltd* [2005] FCAFC 226, (2005) 56 ACSR 131 at [33].

116 *Unique International College v ACCC*, above n 28, at [104].

117 Burdon, above n 27, at 22.

118 Sharpe, above n 103, at [5.16].

119 At [5.16].

presenting evidence of "similar examples of unconscionable conduct in regard to particular individuals".[120]

Furthermore, members alleging the "system of conduct" must be sufficiently *representative* of the entire consumer class, and not dependent on their individual circumstances and vulnerabilities.[121] This was the principle from *Unique Education College v ACCC*:[122]

> The more generic the alleged conduct, and the less the unconscionability depends on the attributes of consumers, the more probative evidence about what happened to a number of consumers may be.

To demonstrate this principle, in *Unique Education*, evidence from six consumers from a class of 3,600, without accompanying evidence of why the experience of those six was representative of the group, was insufficient to establish an unconscionable "system of conduct".[123] In other words, they needed to establish that an internal process was deliberately adopted, rather than the conduct being merely circumstantial to these individual consumers.[124] Conversely, in *ACCC v EDirect,* the critical features of a telemarketing system were present in enough transactions *in combination* to establish a "system of conduct".[125] Here, the attributes of individual consumers were less important and the conduct was more generic, meaning evidence from fewer consumers was of greater probative value. These examples illustrate the highly fact-specific nature of the inquiry in "systems" cases.

V The case against unconscionable conduct

The widely criticised judgment in *ASIC v Kobelt* demonstrates several tensions in the development of the statutory unconscionability doctrine. This section will critically analyse how the Courts' struggle with special disadvantage, "moral obloquy" and equitable unconscionability demonstrates shortcomings in the ACL unconscionability prohibition. *Kobelt* places the rationale behind New Zealand adopting the Australian unconscionable

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120 At [5.16].

121 *Unique International College v ACCC*, above n 28, at [133].

122 At [135].

123 At [238].

124 Sharpe, above n 103, at [5.15].

125 *Unique International College v ACCC*, above n 28, at [124], [135].

conduct prohibition into contention, particularly when several voices from the judiciary, the ACCC, legal commentators and the High Court of Australia bench are calling for Parliament to amend the provision.[126]

For background, the 4–3 judgment in *Kobelt* was the third 4–3 decision under the unconscionable conduct prohibition. The high frequency of split judgments highlights how principles of statutory unconscionability are still unsettled.[127] Despite being a judgment from Australia's highest appellate court, *Kobelt* did not provide much useful guidance about the principles of unconscionability. Gageler J acknowledged the judgment was:[128]

> … [not a useful] elucidation of legal principle in a way that can be predicted to provide precedential guidance of the systemic usefulness generally to be expected from a decision of an ultimate court of appeal.

A ASIC v Kobelt

1 Factual background

Lindsay Kobelt ("Kobelt") operated a "book-up" credit system from his general store ("Nobbys") in Anangu, a region of Australia with a large aboriginal population.[129] He also was in the business of selling second-hand cars to his almost entirely rural customers.[130] Kobelt was authorised to immediately withdraw from the customers' accounts when they were paid, often from welfare payments.[131] He would withdraw 100 per cent of the customers' bank balance, putting 50 per cent towards debt repayment and 50 per cent to spend at Nobbys.[132]

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[126] See for example: Applegarth, above n 40, at 37–41; Chris Maxwell, President of the Victorian Court of Appeal "Equity And Good Conscience: The Judge As Moral Arbiter And The Regulation Of Modern Commerce" (speech to the Victoria Law Foundation Oration, Melbourne, 14 August 2019) at 52; Rob Sims, ACCC Chairman "Tackling market power in the COVID-19 era" (speech delivered to National Press Club, Canberra, 21 October 2020); and *ASIC v Kobelt*, above n 47, at [311] per Edelman J.

[127] Henry Materne-Smith "All Is Fair In Love And Remote Indigenous Communities? ASIC V Kobelt" (2019) 368 Adel L Rev 1 at 377.

[128] *ASIC v Kobelt*, above n 47, at [95] per Gageler J.

[129] At [20] per Kiefel CJ and Bell J.

[130] At [20] per Kiefel CJ and Bell J.

[131] At [22] per Kiefel CJ and Bell J.

[132] At [23] per Kiefel CJ and Bell J.

Several features of the book-up system and Kobelt's conduct are relevant for the unconscionable conduct issue:

1. His 117 customers were vulnerable. They were impoverished and had low levels of education and financial literacy, with less than half able to "add up".[133]

2. He did not provide terms and conditions or statements of accounts for his credit system, nor did he obtain information about the customer's ability to afford the debt.[134] His recordkeeping was unintelligible, unable to be understood by two accountants, and he often accompanied customers' names with derogatory comments.[135] Customers had no easy way to determine the extent of their indebtedness.

3. Effective credit rates for his second-hand cars were between 22 and 44 per cent annually.[136] Customers were probably not aware of this charge, which greatly exceeded commercial credit rates.[137]

4. He exploited a temporary glitch on the Commonwealth Bank of Australia's systems to withdraw funds in excess of the customer's bank balance, which he was not authorised to do.[138]

5. Since customers did not have access to their cards, debtors were only permitted to spend their 50 per cent balance at Nobbys.[139] He had wide discretion over their spending, often preventing them from buying non-essential groceries. If customers wished to shop elsewhere, they had to pay Kobelt to make a "purchase order".[140] This effectively tied debtors to Kobelt's shop.

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133 At [165]–[171] per Nettle and Gordon JJ.

134 At [172]–[174] per Nettle and Gordon JJ.

135 At [165]–[171], [194]–[197] per Nettle and Gordon JJ.

136 At [200] per Nettle and Gordon JJ.

137 At [179] per Nettle and Gordon JJ.

138 At [183] per Nettle and Gordon JJ.

139 At [185]–[193] per Nettle and Gordon JJ.

140 At [192] per Nettle and Gordon JJ.

2 Majority judgment

Kiefel CJ, Bell, Gageler and Keane JJ formed the majority and held that Kobelts' conduct was not unconscionable under the statutory prohibition. In sum, the judges decided that because the Anangu people used the "book-up" system *voluntarily*, Kobelts' book-up system was not unconscionable.[141]

Despite the judges recognising the special disadvantage of the customers, Kiefel CJ and Bell J found they understood the "basic elements" of the system.[142] Therefore, Kobelt did not take *unconscientious advantage* (i.e victimisation) of his customers in providing book-up credit.[143] Keane J agreed that victimisation was not satisfied because of the "unusual market" that existed and because of the countervailing market power of the Anangu customers to simply stop buying from Nobby's.[144] Gageler J concluded that participation in the book-up system reflected the "distinctive cultural practices" of the Anangu people.[145]

It was important that the system provided several advantages to the Anangu people, primarily that it provided access to credit despite their low incomes and few assets.[146] Because of this, the judges decided that the use of book-up credit was a "matter of choice" and was not unconscionable.

For context, the majority's emphasis on "choice" to use the book-up system reflects that "book-up" is a popular form of credit for aboriginal communities, with a long history in rural Australia.[147] Therefore, when applying the "against community conscience" normative standard, the judges accommodated the test to meet the "peculiar circumstances of the case", meaning the unusual form of credit common to aboriginal communities.[148]

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141 At [77]–[79], [107]–[110].

142 At [78] per Kiefel CJ and Bell J.

143 At [58]–[61] per Kiefel CJ and Bell J.

144 At [125]–[129] per Keane J.

145 At [110] per Gageler J.

146 At [64]–[69] per Kiefel CJ and Bell J.

147 Materne-Smith, above n 127, at 10.

148 *ASIC v Kobelt*, above n 47, at [107] per Gageler J.

The majority judges each applied slightly different principles of unconscionability. Keane J has the narrowest judgment, applying the "high level of moral obloquy" normative standard and narrowing the statutory doctrine to equitable unconscionability.[149] Kiefel CJ and Bell J narrow the statutory doctrine to equity, but do not adopt the "moral obloquy" principle.[150] In contrast to the other majority judgments, Gageler J's establishes a wider unconscionability doctrine. Gageler J thought statutory unconscionability was completely unconstrained by equitable unconscionability principles.[151]

3 Minority judgment

Nettle and Gordon JJ found Kobelt unconscionably took advantage of his vulnerable customers. Applying the s 22 factors, Nettle and Gordon JJ found that there was a power imbalance, a lack of consumer understanding and that it was not necessary to protect his legitimate interests.[152] The judges found that book-up credit was not inherently unconscionable and it was possible to run a legitimate book-up system, but Kobelt had not done this.[153]

Edelman J also applied the s 22 factors, agreeing with Nettle and Gordon JJ, but adding that there was a lack of good faith when he exploited the Commonwealth Bank glitch, the consumers did not understand the documents, they had little ability to negotiate the terms and the terms of the contract were unfair.[154] Edelman J was highly critical of statutory unconscionability authorities for narrowly *restricting* the doctrine to equitable unconscionability. He suggested the "unconscionable" standard should be replaced with "unfair" or "unjust":[155]

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149 At [119] per Keane J.

150 At [14], [60] per Kiefel CJ and Bell J.

151 At [83] per Gageler J.

152 At [241], [245], [264] per Nettle and Gordon JJ.

153 At [219]–[229] per Nettle and Gordon JJ.

154 At [303]–[309] per Edelman J.

155 At [311] per Edelman J.

> … the term "unconscionable" might continue stubbornly to resist any attempt by Parliament to decouple the statutory proscription from its modern, restrictive equitable conception. If so, any lowering of the bar… may only be possible if "unconscionable" is replaced with "unjust" or "unfair".

4 Criticisms of the judgment

The majority's approach has been heavily criticised by commentators. Firstly, *Kobelt* essentially decides that a credit system cannot be "against community conscience" simply because the consumers approve of it.[156] The emphasis on "customer approval" did not take into account the lack of information or alternatives presented to the vulnerable parties.[157] This was an example of a "Hobson's Choice" where the customers had few true alternatives for credit. Despite the credit system being unacceptable in any other context and falling well short of Australian credit regulations, the decision ostensibly sets a higher threshold before conduct is deemed "against community conscience" for aboriginal Australians. For a doctrine intended to protect vulnerable parties, this approach seems wide open to cultural stereotyping and judicial discrimination.

Secondly, the decision failed to take into account the wider structural context that informed the "cultural preferences" of the Anangu people. Book-up credit became common in aboriginal communities because of the absence of reputable creditors.[158] Aboriginal communities are among the most excluded from banking services in the developed world.[159] Therefore, Aboriginal "cultural preferences" can only be understood as a response to an absence of alternative credit options. As discussed earlier, preventing unscrupulous suppliers from establishing to exploit market failures was one of the very justifications for adopting statutory unconscionability.

Thirdly, "voluntary choice" cannot justify binding a party to a decision when the decision-makers ability to judge or protect their own best interests was compromised.[160]

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156 Paterson, Bant and Clare, above n 33, at 106.

157 At 120.

158 Yates And Tania, above n 63, at 272.

159 At 271.

160 Paterson, Bant and Clare, above n 33, at 101.

Statutory unconscionability was intended to check whether parties have the capacity to freely contract.[161] Therefore, "voluntary choice" should not have alleviated the conscience of Kobelt since "his customers were so disadvantaged as to regard Kobelt's offering as acceptable".[162]

In sum, the majority's approach has left unconscionability open to a defence that vulnerability is irrelevant when the vulnerable party made a "voluntary choice". The next section talks more broadly about the doctrinal problems from the majority's judgment.

B Wider doctrinal issues

The *Kobelt* decision can be criticised for the "voluntary choice" principle it established alone. Moreover, to help understand New Zealand's unconscionability prohibition, it is useful to analyse how the decision approached significant doctrinal tensions in the development of Australia's statutory unconscionability.

1 Special disadvantage

As discussed in Part 4, "special disadvantage" is not required to establish statutory unconscionability. This was Parliament's intention for s 21(4)(b), which states:[163]

> this section is capable of applying… whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour

To be clear, Courts' are permitted to consider both special disadvantage and victimisation under s 21, because the section allows the court to consider "any other matter it considers relevant", beyond the list of factors.[164] However, three of the majority judges considered it was *compulsory* that the weaker party was subject to a special disadvantage and for the

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[161] Williams, above n 50, at 2067.

[162] Materne-Smith, above n 127, at 335.

[163] Competition and Consumer Act 2010 (Cth), sch 2 cl 21(4)(b).

[164] Competition and Consumer Act 2010 (Cth), sch 2 cl 22(1).

stronger party to unconscionably take advantage of that special disadvantage ("victimisation").[165]

Later cases have treated *Kobelt* as authority for the special disadvantage requirement:[166]

> … Kiefel CJ, Bell and Keane JJ adopted an approach to, or framework for the analysis of, an allegation of statutory unconscionability [that requires]... a *special disadvantage* on the part of the weaker party

Subsequently, lower courts have had to grapple with *Kobelt* reintroducing the special disadvantage requirement. In 2021, the Supreme Court of South Australia in *Pitt v Commissioner for Consumer Affairs* formed a hodgepodge majority from the three dissenting judges and Gageler J to find that *Kobelt* did not establish a *requirement* for special disadvantage, but that it could be a valid analytical route in some cases.[167] *ACCC v Quantum Housing Group* also rejected the special disadvantage requirement, finding that:[168]

> The legislature has expressly stated that s 21 is not limited by the unwritten law: s 21(4)(a). That alone is sufficient to deny the proposition that a special disability or vulnerability… is an essential requirement of statutory unconscionability.

2 Moral obloquy

As discussed in Part 4, the normative standard for statutory unconscionability is conduct that goes "against community conscience". That discussion mentioned the back-and-forth development of two parallel lines of authority in Australian case law. An alternative line of cases established a higher normative standard, requiring conduct to show a "high level of moral obloquy". Prior to *Kobelt*, Australian law appeared to be settled on the "against community conscience" normative standard. At the very least, the ACCC viewed this aspect of the law as settled when they submitted to MBIE's discussion paper in early-2019.[169]

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165 *ASIC v Kobelt*, above n 47, at [15], [118] per Kiefel CJ and Bell and Keane JJ.

166 *Pitt v Commissioner for Consumer Affairs* SASCA CIV-20-000311, 30 April 2021 at [154].

167 At [155], [159].

168 *Australian Competition and Consumer Commission (ACCC) v Quantum Housing Group Pty Ltd* [2021] FCAFC 40, (2021) 388 ALR 577 at [83]

169 Sims, above n 126.

However, Keane J in *Kobelt* expressly considered the "moral obloquy" standard as settled law:[170]

> The legislative choice of "unconscionability" as the key statutory concept… confirms that the *moral obloquy* involved in the exploitation or victimisation… is characteristic of unconscionable conduct

But, also in the majority, Gageler J expressed regret over his previous use of "moral obloquy" in *Paciocco v ANZ Bank*:[171]

> "Moral obloquy" is arcane terminology… My adoption of it has been criticised judicially and academically. The criticism is justified. I regret having mentioned it.

Keane J's approval of the "moral obloquy" standard reintroduces a widely-condemned doctrine into Australian law. The doctrine has been criticised for replacing Parliament's chosen word of "unconscionable" with a different standard and implying that conscious wrongdoing is required to find unconscionable conduct.[172] In *Ipstar Australia v APS Satellite*, "moral obloquy" was thought to be an imprecise threshold that does not assist the legal meaning of "unconscionability".[173] Golding and Giancaspro argue that the development of the parallel "moral obloquy" standard has "set Australia back in terms of generating greater clarity around what it means for conduct to be unconscionable".[174]

3 Back to equitable unconscionability?

Despite repeated reform of the statutory unconscionability prohibition, Paterson argues it has "struggled to free itself from its equitable origins".[175] Delany describes the majority in *Kobelt* as taking the "complete anchoring option" by narrowing s 21 to equitable

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[170] *ASIC v Kobelt*, above n 47, at [119] per Keane J (emphasis added).

[171] At [91] per Gageler J.

[172] *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186, (2016) 341 ALR 572 at [56]; *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* [2017] FCAFC 75, (2017) 349 ALR 100 at [52]; *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15, (2018) 356 ALR 440. at [278]; and Gabrielle Golding and Mark Giancaspro "To moral obloquy or not to moral obloquy?: That is the judicial confusion surrounding statutory unconscionable conduct" (2020) 34 CLQ 3 at 12.

[173] *Ipstar v APS Satellite*, above n 172, at [278]

[174] Golding and Giancaspro, above n 172, at 3.

[175] Paterson and Bant, above n 109, at 3.

unconscionability.[176] Therefore, according to the majority, the intention of Parliament adopting the term "unconscionable" was to freeze the doctrine as it existed in equity and that it was "not to be 'glossed, expanded, modified, or explained by a court'".[177]

Kiefel CJ and Bell J narrowed the unconscionability doctrine to equitable unconscionability by stating that "the term "unconscionable"… is to be understood as bearing its ordinary meaning".[178] Keane J was even more forthcoming in his "anchoring" of the equitable doctrine, stating that:[179]

> … it must be acknowledged that the Parliament has deliberately chosen to use this expression as the focus of attention, and not a more open-textured or morally neutral expression that would be less certain in its scope.

Both judgments have the effect of giving "unconscionable" its equitable meaning. This is reinforced by the judges citing *Kavakas* and *Thorne* as authorities, which were both decided under the equitable doctrine.[180]

Additionally, as discussed earlier, the Court focused strongly upon the special disadvantage and victimisation equitable *requirements*, despite neither of these elements being required under s 21. None of the judges focused on the obvious exploitative business context which would have likely found an unconscionable "system of conduct".[181] As such, the judges ignored the stronger "system of conduct" analytical route, an innovation of the statutory prohibition, deciding the case purely on equitable unconscionability principles.

Subsequently, lower courts have treated *Kobelt* as authority for narrowing the scope of statutory unconscionability to equitable principles. The Supreme Court of South Australia in *Pitt* found that:[182]

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176 Delany, above n 102, at 217.

177 At 209.

178 *ASIC v Kobelt*, above n 47, at [14] per Kiefel CJ and Bell J.

179 At [119] per Keane J.

180 Paterson, Bant and Clare, above n 33, at 92.

181 Paterson and Bant, above n 109, at 9.

182 *Pitt v Commissioner for Consumer Affairs*, above n 166, [154] (emphasis added).

> … a majority of the [*Kobelt*] Court… emphasised the significance of the statutory appropriation of the *equitable terminology* of "unconscionability" in understanding the standard to be applied. 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.

C Should New Zealand adopt the unconscionability doctrine? Analysis

MBIE have ostensibly ignored the impact of *Kobelt* in Australian unconscionability jurisprudence, despite being the latest decision from Australia's highest court. None of MBIE's reports published subsequent to the *Kobelt* decision have referred to the case, with reports instead referring to *Lux* and *Coles* as Australia's "leading cases" despite being older, lower court and less controversial authorities.[183] This section argues that *Kobelt* challenges MBIE and Parliament's intention for the operation of s 7 of the FTA.

Firstly, Parliament clearly intends that a "special disadvantage" is not required for a claim under s 7 of the FTA. Section 7(2)(b) states: "This section applies whether or not a particular individual is identified as disadvantaged".[184] Despite this, *Kobelt* shows that Australian judges continue to place a high emphasis on the "special disadvantage" suffered by the claimant. Paterson argues that Australian judges have struggled to conceptualise principles innovated by the statutory prohibition, instead deferring to familiar equitable unconscionability concepts like "special disadvantage".[185]

Secondly, MBIE considers the Australian normative standard as "against community conscience".[186] While mostly correct, this understanding masks the frequent reappearance of the "high level of moral obloquy" doctrine which has unsettled Australian unconscionability principles. From *Kobelt*, Australia's normative standard for unconscionability is still not *fully* settled and MBIE needed to take this into account when considering whether statutory unconscionability is more legally certain than the alternatives proposed.

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183 MBIE *Fair Trading Amendment Bill Officials' Report*, above n 22, at 6.

184 Fair Trading Amendment Act 2021, cl 6.

185 Paterson and Bant, above n 109, at 8.

186 MBIE *Regulatory Impact Statement: unfair commercial practices*, above n 5, at 24; and MBIE *Discussion paper: unfair commercial practices*, above n 73, at 40.

Thirdly, Parliament intends that the FTA unconscionability prohibition will be interpreted wider than equitable unconscionability.[187] This has not been achieved in Australia despite repeated legislative reform prompting Courts' to interpret statutory unconscionability more broadly. Considering New Zealand Courts' equally extensive experience with equitable unconscionability, it is likely a similar outcome to Australia will follow.

One reason New Zealand courts are likely to follow Australia's lead has to be understood in the context of Closer Economic Relations (CER) and the creation of a common market with Australia. MBIE's consumer law review in 2019 aimed to align New Zealand and Australia's consumer laws.[188] They acknowledged that "[c]onsistency in laws… allows Australian case law to be relied on".[189]

However, Australia's unconscionability law has been tarnished with judicial resistance, contradicting authorities and unsettled principles. The perceived benefits of a statutory unconscionability prohibition will be greatly limited if the Courts' follow the narrow approach of Australia's judiciary. The question remains: why is New Zealand adopting a standard in 2022 that Australia is likely to depart from in the near future?

VI Conclusion

This paper has shown that New Zealand's adoption of Australia's unconscionable conduct prohibition is more contentious than it might initially appear. Certainly, there are gaps in New Zealand's consumer protection laws that make the prohibition on unconscionable conduct preferable to the current legal framework. However, Parliament is not faced with a "Hobson's Choice" and alternatives to the unconscionable conduct prohibition were not considered in sufficient depth. Australia's unconscionability jurisprudence has been characterised by the decades-long tension between narrow judicial interpretations and the wider Parliamentary intention. As forecast by Edelman J, the likely resolution to this back-and-forth struggle is to replace the standard of "unconscionability" entirely.[190]

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[187] MBIE *Fair Trading Amendment Bill Officials' Report*, above n 22, at 29.

[188] Ministry of Business, Innovation & Employment *Review of consumer law: Fair Trading Act evaluation report* (October 2019) at 14.

[189] At 14.

[190] *ASIC v Kobelt*, above n 47, at [311] per Edelman J.

This paper concludes by questioning whether the standard of "unfair commercial practices" should have been given greater consideration. MBIE ruled out the "unfair" standard, citing a lack of support.[191] The European Union prohibition on "unfair commercial practices" assesses the distortion on the average consumer's economic behaviour deriving from the *unfair* conduct.[192] This is arguably more appropriate than assessing the moral "conscience" of a firm's conduct in modern commercial contexts.[193] Furthermore, the term "unfair" might have compliance benefits over "unconscionable" because it is easier for businesses to understand and regulate their conduct.[194]

Adopting the "unfair practices" doctrine aligns New Zealand with European Union and United States consumer law, potentially provides greater economic and enforcement benefits than statutory unconscionability and is the likely next direction in Australian law given the recent push by the ACCC, backed by several legal commentators, for Parliament to adopt the standard.[195]

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,985 words.

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[191] MBIE *Regulatory Impact Statement: unfair commercial practices*, above n 5, at 30.

[192] See Consumer Policy Research Centre, above n 39, at 22; Golding and Giancaspro, above n 172, at 15; and Brody and Temple, above n 69, at 173.

[193] See Consumer Policy Research Centre, above n 39, at 22; Golding and Giancaspro, above n 172, at 15; and Brody and Temple, above n 69, at 173.

[194] See Golding and Giancaspro, above n 172, at 15; and Brody and Temple, above n 69, at 173.

[195] See for example: Applegarth, above n 40, at 37–41; Maxwell, above n 126, at 52; Sims, above n 126; and *ASIC v Kobelt*, above n 47, at [311] per Edelman J.

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