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Unconscionability in Trade: Definitions Matter

An Analysis of Clause 6 of the Fair Trading (Amendment) Bill 2019

Submitted for the LLB (Honours) Degree

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2020

Abstract

Clause 6 of the Fair Trading (Amendment) Bill 2019 proposes the introduction of a general prohibition on unconscionable conduct in trade into the Fair Trading Act 1986. This paper critically examines whether such a prohibition is necessary given the substantial existing scheme, and, if so, whether the prohibition as proposed is appropriate for the New Zealand context. This paper discusses the first of these points in Part A, where it argues that there is sufficient evidence of 'unfair' conduct causing harm to justify the introduction of a general prohibition. Part B of this paper then investigates what the appropriate scope of the prohibition ought to be, arguing that the 'extremes' of 'mere unfairness' and 'equitable unconscionability' are problematic, demanding a 'mid-ground' represented by either 'statutory unconscionability' or 'oppressive'. To support this position, the recent Australian case of ASIC v Kobelt [2019] is discussed. This case illustrates both the uncertainty inherent in the concept of 'unconscionability' as well as the high threshold required under the equivalent Australian provision, which has been continually criticised. Finally, this paper considers what the appropriate term for this prohibition is, concluding that 'oppressive' as defined in the Credit Contracts and Consumer Finance Act 2003 is preferable to the elusive concept of 'statutory unconscionability'.

Key words: *"unconscionability", "oppressive", "Fair Trading (Amendment) Bill 2019", "Fair Trading Act 1986", "Credit Contracts and Consumer Finance Act 2003"*

Table of Contents

I Introduction

The Fair Trading (Amendment) Bill 2019 (the Bill) may represent "one of the most significant changes to New Zealand's commercial law framework in recent memory."[1] It is an opportunity to strengthen protections against 'unfair' conduct[2] for both businesses and consumers. This paper will focus on Clause 6 of the Bill, which introduces new sections 7 and 8 into the Fair Trading Act 1986 (FTA). Section 7 introduces a prohibition on unconscionable conduct in trade. Section 8 provides guiding considerations for the court to assess if that prohibition has been breached.

This paper will first investigate whether there is unfair conduct occurring which justifies the introduction of a general prohibition. It finds that a new prohibition is required, moving on to analyse what the scope of this prohibition ought to be. Having established the scope, the paper finally considers what the appropriate descriptor of this normative standard is. It ultimately concludes that the appropriate proscription in a New Zealand context is a prohibition on oppressive conduct in trade.

II Background/Context

Support for the introduction of a general prohibition built following an MBIE small business survey in 2018. It found that 47% of participant businesses were treated unfairly in the preceding year.[3] A subsequent discussion paper prepared by MBIE[4] (the 2018 Discussion Paper) received a mix of submissions, with some concerned about a lack of evidence of a problem and others suggesting a range of alternate methods of prohibition. In the 2018 Discussion Paper, MBIE recommended an 'oppressive conduct' standard, although noting that "either option [unconscionable or oppressive] would provide net benefits relative to the status quo."[5]

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[1] Russell McVeagh "Submission to the Ministry of Business, Innovation and Employment" (25th February 2019) at [2].

[2] The term 'unfair conduct' will be used to describe the conduct intended to be captured by the prohibition until Part B of this paper. It is not intended to suggest the conduct which is occurring is only limited to mere unfairness.

[3] Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Protecting business and consumers from unfair commercial practices* (20 June 2018) at page 16.

[4] Ministry of Business, Innovation and Employment *Discussion Paper: Protecting businesses and consumers from unfair commercial practices* (December 2018).

[5] Ministry of Business, Innovation and Employment, above n 3, at page 2.

A prohibition on unconscionable conduct in trade is not a new concept. There have been failed past attempts. A 2010 Ministry of Consumer Affairs discussion paper proposed the introduction of similar unconscionable conduct provisions into the FTA.[6] However, following submissions to the Commerce Committee that had considered the resulting Consumer Law Reform Bill in 2012, these proposals were deferred.[7] The Commerce Committee's report stated:[8]

> …the Committee considers that it is desirable in principle to address this issue. We recommend that the position is reviewed once the Australian courts have had the chance to consider the Australian provisions.

The Australian provisions referred to are found in the Australian Competition and Consumer Act 2010 (CCA),[9] although a cognate provision first appeared in the Trade Practices Act 1974 (Cth).[10]

The attempt to introduce a similar prohibition in New Zealand continued with the Consumer Law Reform Bill in 2013. However, these proposals were ultimately unsuccessful; it being the viewpoint of Cabinet that the uncertainty introduced, and the increased compliance costs outweighed the need to legislate.[11]

New Zealand law currently regulates unfair conduct in trade through various statutes and rules of equity. The FTA is the main part of this protective scheme. Part One of that Act focuses on prohibiting unfair conduct, including harassment and coercion (under section 23) and misleading and deceptive conduct in trade (under section 9). The Commerce Act 1986 supplements these prohibitions, with Part Two of that Act focused on restrictive

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[6] Ministry of Consumer Affairs *Discussion Paper: Consumer Law Reform* (June 2010).
[7] New Zealand Law Society "Unconscionable conduct" (05 August 2013) New Zealand Law Society <https://www.lawsociety.org.nz> notes that this included "a submission dated 6 August 2010 by the NZLS Commercial and Business Law Committee whose members opposed the introduction of the proposed change, saying that it would be of limited usefulness."
[8] Commerce Committee *Consumer Law Reform Bill* (2 October 2012) at page 14.
[9] Sections 20 and 21 of the ACL, which is in Schedule Two of the CCA. The Australian Securities and Investment Commission (ASIC) Act 2001 also contains cognate provisions in sections 12CB and 12CC.
[10] Trade Practices Act 1974 (Cth) section 51AC.
[11] Cabinet Economic Growth and Infrastructure Committee *Consumer Law Reform* (8 December 2010) page 2 generally, at [14] specifically.

trade practices. These provisions intend to maintain competitive market forces.[12] For example, there are prohibitions on cartel provisions or formations[13], resale price maintenance[14] and taking advantage of market power.[15] The Credit Contracts and Consumer Finance Act 2003 (CCCFA) must also be noted here. This Act generally regulates unfair business-to-consumer practices (in the context of the provision of consumer credit). However, under Part 5 of the CCCFA, oppressive credit contracts, regardless of whether a consumer is a party, may be re-opened by a court through section 120. The CCCFA is also of interest as it provides a definition for 'oppressive' in section 118 which includes (but is not limited to) conduct that is 'unconscionable'.[16] The importance of this definition is discussed in Part B of this paper.

The equitable doctrine of unconscionability is another component of this protection scheme. It was developed in order to protect the vulnerable from the predatory conduct of another which is against good conscience.[17] This doctrine is also discussed in further depth in Part B. For now, it is sufficient to say that for this doctrine to apply a very high threshold must be met. Notably, the Bill's current use of the term 'unconscionable' is unrestricted by the high threshold required under this equitable doctrine.[18]

This new prohibition is being built onto a substantial, although complex, existing protection scheme. A crucial preliminary task therefore is to identify what harm the proposed prohibition on unconscionable conduct in trade is actually seeking to address.

[12] Commerce Act 1986 section 1A states "The purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand."
[13] Sections 30 to 34 of the Commerce Act 1986.
[14] Sections 37 to 42 of the Commerce Act 1986.
[15] Section 36 of the Commerce Act 1986.
[16] The CCCFA 2003 at section 118 defines oppressive as "oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice."
[17] The vulnerable individual must be a natural person.
[18] Section 7(3), within Clause 6, of the Fair Trading (Amendment) Bill 2019.

III Part A – Is There Harm to be Addressed?

A Unfair Business-to-Consumer Conduct

The proscription would capture a range of 'unfair' business-to-consumer (B2C) behaviour as it is intentionally not limited to a specific form of conduct. Nonetheless, the majority of the types of B2C conduct which were identified by the preceding official papers as 'unfair' would appear to be already caught by the existing legislative protections.

This is illustrated by reference to the 2018 Discussion Paper and Russell McVeagh's submission in response.[19] Box 3 of the 2018 Discussion Paper describes three examples of unfair conduct provided by the Commerce Commission.[20] This included using aggressive sales tactics to prey on the vulnerable within shopping centres, undisclosed photography prices with accompanying contracts containing substantial cancelation fees, and predatory lending practices occurring in mental health units.[21] Russell McVeagh's Select Committee submission considered that "there is existing legal recourse for all the conduct listed at… Box 3".[22] For example, it is likely that the preying upon vulnerable consumers is already captured by the equitable doctrine of unconscionability, the substantial cancellation fees are likely unenforceable as disproportionate penalty clauses and the predatory lending is oppressive conduct under the CCCFA.

Nonetheless, in respect of the first example, the Commerce Commission stated it considered itself unable to take enforcement action under existing protections. This may be because a claim under equity would need to be brought by or with the authority of the victim, and the Commission does not have the power to bring such a claim. Relevantly, under the Bill, this is the power the Commission could have.

The second and third example may indicate that, although protections are already available, the Commission is still unable to take action against some conduct in practice. This is largely because the Commission needs to be confident in a prosecution in order to take action. For the second example, the Commission considered there was no clear

[19] Russell McVeagh, above n 1.
[20] Ministry of Business, Innovation and Employment, above n 4, at Box 3, page 25.
[21] Ministry of Business, Innovation and Employment, above n 4, at Box 3, page 25.
[22] Russell McVeagh, above n 1, at [15].

breach of existing legislation, although as stated above the disproportionate clause may be unenforceable. The offender may therefore escape penalty, beyond having an unenforceable contractual term. The final example was considered to be in breach of existing legislation, although those prohibitions "may not necessarily directly address the conduct in question."[23] A general prohibition on unconscionable conduct may therefore be seen as warranted to not only provide a remedy where consumers are subjected to uncaptured 'unfair' conduct, but also to ensure efficient and accurate enforcement action can be taken.

Further support for a prohibition against unfair B2C conduct can be found in Australian case law. Clause 6 of the Bill has drawn from sections 20 and 21 of the Australian Consumer Law (ACL).[24] Under this law, there have been numerous prosecutions in respect of B2C conduct.[25] Although not detailed here, the wide range of facts successfully prosecuted under the comparative prohibition in Australia would indicate such a prohibition could also be helpful in a New Zealand context.

[23] Ministry of Business, Innovation and Employment, above n 4, at Box 3, page 25.

[24] The ACL is Schedule Two of the Competition and Consumer Act 2010 (CCA). Note that the ACL and ASIC Act 2001 both separate conduct which is unconscionable in terms of the 'unwritten law' and other unconscionable conduct ('statutory unconscionability'). These prohibitions are provided in separate provisions. The Bill does not replicate this structure.

[25] See generally: *Australian Competition and Consumer Commission (ACCC) v Lux Distributors Pty Ltd* [2013] FCAFC 90; BC201311903; *Australian Competition and Consumer Commission (ACCC) v Ford Motor Company of Australia Ltd* [2018] 360 ALR 124; [2018] FCA 703; BC201804093; *Australian Competition and Consumer Commission (ACCC) v ACN 117 372 915 PTY LTD (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368; BC201502903; *Australian Competition and Consumer Commission (ACCC) v Get Qualified Australia Pty Ltd (in liq) (No 3)* [2017] FCA 1018; BC201708309; *Australian Competition and Consumer Commission (ACCC) v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982; BC201910946; *Director Of Consumer Affairs Victoria v Gibson* [2017] FCA 240; BC201701557; *Australian Competition and Consumer Commission (ACCC) v Equifax Australia Information Services and Solutions Pty Ltd* [2018] FCA 1637; BC201810163; *Australian Competition and Consumer Commission (ACCC) v Harrison* [2016] FCA 1543; BC201611085; *Australian Competition and Consumer Commission (ACCC) v Titan Marketing Pty Ltd* [2014] FCA 913; BC201406907; *NRM Corp Pty Ltd v Australian Competition and Consumer Commission (ACCC)* [2016] FCAFC 98; BC201605950; *Australian Competition and Consumer Commission (ACCC) v ACM Group Ltd (No 2)* [2018] FCA 1115; BC201806544; and *Australian Competition and Consumer Commission (ACCC) v Bajv Pty Ltd* [2014] FCAFC 52; BC201403136.

B Unfair Business-to-Business Conduct

There is a range of conduct which appears to be occurring between businesses within New Zealand which would be captured by the proposed prohibition. However, like the unfair B2C conduct, much of this unfair business-to-business (B2B) conduct is likely captured by existing law. The 2018 Discussion Paper again helps to illustrate this.[26] As aforementioned, it noted 47% of survey participants had experienced unfair B2B conduct. Of these, 34% indicated unfairness arising from contract compliance issues, 32% felt they had been misled or deceived, and 28% stated they had faced demands beyond their contractual obligations.[27] Each of these issues has existing options for remedies and, even with a new general prohibition, the existing causes of action remain the best suited. For example, 'misleading and deceptive conduct' is already prohibited via section 9 of the FTA, and issues surrounding breach of contract are already subject to statutory and common law remedies.

Additionally, "asking whether a business feels it has been treated 'unfairly' is inherently subjective".[28] While pressure from (business) customers to lower prices or increase production in order to maintain a business relationship may feel unfair, if it results from competitor influence or benefits the final consumer then this unfairness is likely justified. It has added to, rather than degraded from, market competition.

Russell McVeagh also argued there was insufficient evidence to introduce a general prohibition.[29] Both this submission and the 2018 Discussion Paper itself recognised the limitations of MBIE's 2018 Business Survey. In their Regulatory Impact Statement, MBIE explained these limitations stating:[30]

> The survey of small businesses was opt-in, involved a subjective self-assessment as to experiences of unfair practices, and had a relatively low sample size. This means that, while there were attempts to frame the business survey neutrally, there may be some bias towards over-reporting of unfair practices, and in general the survey may not present a statistically robust picture of the prevalence of unfair practices across the New Zealand

[26] Ministry of Business, Innovation and Employment, above n 4, at page 6.
[27] Ministry of Business, Innovation and Employment, above n 4, at [75].
[28] Russell McVeagh, above n 1, at [8].
[29] Russell McVeagh, above n 1, at [7].
[30] Ministry of Business, Innovation and Employment, above n 3, at page 4.

> economy. Evidence of the problem was also limited by the unwillingness of some businesses to submit for fear of retribution. The evidence we do hold is, in any case, largely anecdotal.

Nonetheless, MBIE considered "there is enough evidence to suggest that there are a range of business practices taking place that are at least potentially unfair."[31] Russell McVeagh submitted that there needed to be a more "comprehensive and analytical study of whether there is, in fact, an issue of widespread 'unfair commercial practices occurring in New Zealand".[32] Such a study would help highlight more specific forms of conduct, allowing more targeted reform.[33] It appears that the legislation was perhaps introduced before sufficient evidence was found. However, there has subsequently been numerous examples of unfair conduct provided by groups representing significant numbers of organisations and consumers.[34] The support of these groups for a new prohibition would indicate there is harm to be addressed by the proscription; even in the absence of evidence from a central comprehensive study.

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[31] Ministry of Business, Innovation and Employment, above n 3, at page 4.

[32] Russell McVeagh, above n 1, at [7].

[33] Russell McVeagh, above n 1, at [10].

[34] See generally the submissions to the Economic Development, Science, and Innovation Select Committee on the Fair Trading (Amendment) Bill 2019 of Horticulture New Zealand ("represents 4000 commercial growers of fruit and vegetables") <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3029/28edb242eb0e568cb4793c1cbc7b8113bc9e0d5f>; Motor Trade Association ("represents approximately 3,600 businesses within the New Zealand automotive industry and its allied services.") <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3072/9f6a3572f02b5f361695a48088cf753a81334187>; New Zealand Council of Trade Unions ("With over 320,000 members, the CTU is one of the largest democratic organisations in New Zealand.") <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3028/8461a1c44561d5e6b26a5c31302d92e5bb8067f9>; New Zealand Telecommunications Forum ("TCF member companies represent 95 percent of New Zealand telecommunications customers.") <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3044/173db0b75ecdb476d2f5da13433b4e06a420cf7d>; New Zealand Food and Grocery Council ("Our members directly or indirectly employ more than 493,000 people – one in five of the workforce.") <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3078/0415bbbe554a7a491711c82cd4d954f94e258f82>; Insurance Council of New Zealand ("ICNZ represents general insurers that insure about 95 percent of the New Zealand general insurance market, including about a trillion dollars' worth of New Zealand property and liabilities.") <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3073/71d4ec052b5ab18f94d4a0c3bd17ac4b08cb6ba2>; and Financial Services Council ("The FSC is a non-profit member organisation and the voice of the financial services sector in New Zealand. Our 64 members comprise 95% of the life insurance market in New Zealand and manage funds of more than $89bn.") <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3087/156c0f4c718ab70f5717769ebc418ca74558f622>.

While the earlier example of unfair conduct in trade which is also misleading or deceptive is undoubtedly captured through section 9 of the FTA, many other instances of unfair conduct are not so easily captured within existing prohibitions. For example, at the First Reading of the Bill, MP Kieran McAnulty suggested incidents of "photographers… being threatened, verbally abused, and blacklisted after asking for payments that were due" as well as "supermarkets penalising suppliers for promotion runs with other retailers by demanding compensation for perceived losses caused by other retailers' promotions, and deducting it from the payments to suppliers."[35] Additionally, MP Clayton Mitchell claimed to:[36]

> …know a farmer who was growing a crop who signed a contract with a large supplier who then invested into their farm to get plant and equipment to ensure that they could keep up with demand. They got more land to produce more product. The moment they were locked in, they changed the terms of the contract and there was nothing that that farmer could do but slowly but surely go backwards.

Again, some issues here may be addressed through existing cause of actions, such as in breach of contract for refusal of payment, and threats and abuse would be best addressed through criminal law. Nonetheless the prohibition of more 'niche' forms of unfair conduct, such as in the supermarket example and lock-in contracts, would benefit the 'victims' of that conduct. Such situations are less easily captured by existing protections. Neither form of conduct is misleading or deceptive and neither is likely to be covered through section 36 of the Commerce Act 1986, which regulates the use of advantageous market power. It is likely that forms of conduct such as these examples have resulted in continued business detriment despite the existing protections. The 2018 Discussion Paper noted that such continued detriment included "reputational damage, disrupted supply of goods and services, and wasted time, inconvenience, and increased stress" as well as "cash flow issues and reduced profitability."[37]

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[35] (12 February 2020) 744 NZPD (Fair Trading (Amendment) Bill – First Reading, Kieran McAnulty). The examples appear to have originally been submitted to the 2018 Ministry of Business, Innovation and Employment discussion paper, above n 4, and are also referenced in the Ministry of Business, Innovation and Employment regulatory impact statement, above n 3, at page 16.

[36] (12 February 2020) 744 NZPD (Fair Trading (Amendment) Bill – First Reading, Clayton Mitchell).

[37] Ministry of Business, Innovation and Employment, above n 4, at [83].

It is notable that the prohibitions on price maintenance in the Commerce Act 1986, specifically designed to address disruption to the supply of goods and services, would also likely fail to capture either example. Section 37 applies to suppliers, and so will not apply to a purchaser exerting the power. Section 38 also fails to capture the supermarket's conduct. The supermarket prevent their own acquisition of goods in terms of section 41(b)(i) by refusing to accept the goods except on terms disadvantageous to the supplier, namely the demand of accompanying compensation. However, it is not preventing other competitors from acquiring those goods, nor are they preventing the supplier from supplying their competitors. Therefore, this conduct would not easily fit within the prohibition on price maintenance.

The farmer example may be captured by section 38 or section 27 (lessening market competition) of the Commerce Act 1986, but this depends on the contractual terms. If the contract nonetheless allows the farmer to supply their crops to other purchasers, then it would not be covered by section 38. If the contract hindered or prevented this supply except at a price less than that specified by the supplier, then it is likely to be covered through this section. Again, if the farmer is prevented from selling to alternative buyers, then that will lower that crops market supply; concomitantly increasing market prices if demand remains stable, possibly breaching section 27. However, the section requires a *substantial* lessening of market competition, which would be unlikely to occur simply because of the small relative impact of the conduct on such a large market.

The inapplicability of these existing prohibitions to the examples suggests that a general prohibition would provide a more suitable avenue for relief. The supplier knowingly placed the farmer in a vulnerable situation which they have taken advantage of, to the farmer's detriment. As such, the harm present in this example could be more accurately addressed through a prohibition such as on unconscionable conduct.

One submission to the Discussion Paper, made by Horticulture New Zealand (HortNZ), may illustrate how certain market structures are conducive to unfair conduct.[38] HortNZ suggested that the conduct experienced by their members is "not at the extreme end of

[38] Horticulture New Zealand "Submission to the Ministry of Business, Innovation and Employment: Protecting businesses and consumers from unfair commercial practices" (25th February 2019).

offending, but at the everyday transaction end of the spectrum."[39] They believe this to be a result of the market structure, wherein "there are either one or two major suppliers and one or two major purchasers of goods and services" which has led to a power imbalance.[40] This indicates a situation where individual instances of unfair conduct may be insufficient to breach existing thresholds, but viewing the conduct collectively may evidence a system of unconscionable conduct. Clause 6 of the Bill may therefore provide an avenue for recovery in these situations. Notably, HortNZ considered that the "proposed offences [in the Bill] do not achieve this end", and suggested a model based on codes of conduct may be better.[41]

Importantly, opposition to the Bill at First Reading generally did not dispute the existence of unfair conduct, instead taking issue with the prohibition's approach. For example, MP Brett Hudson stated, "we acknowledge there are some issues of power imbalances that are extraordinarily serious for some small business owners…".[42] It was however suggested by MP Ian McKelvie that although unfair conduct may be occurring, the rate of its occurrence may not justify the new prohibition. McKelvie stated that "the reason I think that… is that in 10 years and in an economy 10 times the size of ours, there have been two successful prosecutions under the Australian piece of law."[43]

As noted earlier, the majority of claims under the Australian law were based on B2C misconduct. There have, however, also been several successful prosecutions of unconscionable B2B conduct as well. For example, *Parker v Switchee Pty Ltd [2018]*[44] concerned a situation wherein Parker had contracted Switchee (trading as Australian Solar Quotes (ASQ)) to provide marketing services for Parker's business on the ASQ website. Following termination of this agreement, ASQ: 1) removed Parker's access to

[39] Horticulture New Zealand, above n 38, at [9].
[40] At [6].
[41] At [10].
[42] (12 February 2020) 744 NZPD (Fair Trading (Amendment) Bill – First Reading, Brett Hudson).
[43] (12 February 2020) 744 NZPD (Fair Trading (Amendment) Bill – First Reading, Ian McKelvie). This is possibly relying on: Australia, Senate, Standing Committee on Economics *The need, scope and content of a definition of unconscionable conduct for the purposes of Pt IVA of the Trade Practices Act 1974* (2008). The report states "…the committee believes the fact there have only been two successful findings under section 51AC over the past decade primarily reflects the courts' narrow interpretation of this section, rather than any great adjustment in business behaviour." at [5.4], page 31.
[44] *Parker (t/as On Grid Off Grid Solar) v Switchee Pty Ltd (t/as Australian Solar Quotes)* [2018] FCA 479; BC201802649.

the website listing; 2) did not remove the listing upon request; 3) advised Parker that he could only change it by purchasing further ASQ services; 4) published inaccurate information on the listing and prevented Parker from correcting it; and 5) removed a positive review from the listing.[45] Gleeson J found that:[46]

> ASQ has acted unconscionably within the meaning of s 21 [of the ACL] because ASQ has taken advantage of its control over the ASQ webpage to publish the misleading listing without Mr Parker's consent, and over his objection, for ASQ's benefit and to the likely detriment of the commercial reputation of [Parker's business].

Contravention of the same section was also found to have occurred in *Australian Competition and Consumer Commission v Multimedia International Services Pty Ltd* [2016].[47] This case concerned a series of contraventions of the ACL by Multimedia because of its conduct in dealing with small businesses seeking to use its advertising services. One such business, Bethanie's Jumping Castles (Bethanie's), had contracted with Multimedia for these services. Multimedia was found to have: 1) made representations that the advertising would be displayed within four weeks (which did not occur for seven months); 2) failed to draw attention to particular terms of the contract (including prohibiting termination and recourse exemptions); 3) had an agent fill out the front page of the contract and related direct debit form with Bethanie's details; 4) failed to provide advertising services, whist still deducting payments from Bethanie's account; 5) failed to release Bethanie's; and 6) used a debt collector that made statements indicating Bethanie's would face legal proceedings to recover the amounts if unpaid.[48] The totality of these circumstances meant "it was unconscionable conduct in contravention of s 21 [of the ACL]."[49]

Ipstar Australia Pty Ltd v APS Satellite Pty Ltd [2018][50] provides a further example. Ipstar supplied proprietary user terminals (UT) and additional broadband services to APS. Following UT defect issues, which Ipstar refused to indemnify APS for, the parties

[45] At [80] – [81].
[46] At [87].
[47] *Australian Competition and Consumer Commission (ACCC) v Multimedia International Services Pty Ltd* [2016] FCA 439; BC201603124.
[48] At [31].
[49] At [32].
[50] *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] 356 ALR 440.

subsequently entered into negotiations regarding the price of bandwidth for the following 12-month period. Ipstar's final offer represented a 15% increase on the price it charged at the time, calculating in the cost of meeting the warranty claims for the defective UT's. Ipstar never informed APS of this price inclusion, nor did they make any payment to APS for the warranty claims. The Court found that the price increase itself, in order to recoup an accrued liability, would not be unconscionable.[51] It also found that the "existence of disparity in bargaining power… does not of itself establish that the conduct was unconscionable."[52] However, it found that, in considering *all* of the circumstances, the conduct was unconscionable.[53] The conduct had "essentially involved imposing a price increase based on an estimated accrued liability whilst taking steps to avoid payment of that liability."[54]

These three cases demonstrate that the ACL sections prohibiting unconscionable conduct, which Clause 6 of the Bill has drawn from, have been successful in addressing unfair B2B conduct in Australia. The difference in facts of the cases also demonstrates the ability of such a prohibition to be able to effectively capture a range of conduct. There have been numerous other successful prosecutions under the ACL, including in regard of franchising agreements[55], joint venture arrangements[56] and even against market stall authorities.[57]

Summarising, there appears to be evidence of unfair conduct continuing to occur which is not clearly captured by existing protections. To the extent that unfair conduct is captured by these existing protections, that often requires an awkward application of the current scheme. Evidence provided in response to the 2018 Discussion Paper and at Select Committee supports this position, as does the number of successful prosecutions under the similar Australian prohibition. Further, the inability of the Commerce Commission to be able to effectively prosecute harmful forms of unfair conduct provides a strong

[51] At [208].
[52] At [207].
[53] At [200].
[54] At [210].
[55] See, for example, *Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Ltd* [2015] FCA 25; BC201500239; and *Australian Competition and Consumer Commission v Geowash Pty Ltd and Others (No 3)* [2019] 368 ALR 441.
[56] For example, *Henderson v McSharer* [2015] FCA 396; BC201503156.
[57] See *Perfection Fresh Australia Pty Ltd v Melbourne Market Authority* [2013] VSC 287; BC201302813.

justification for such a prohibition to be enacted. Significantly, the ultimate viewpoint expressed by the 2018 Discussion Paper was that "it is worthwhile testing whether the protections against unfair B2B conduct should be extended."[58]

Therefore, the question which must now be addressed is whether the proposed prohibition on unconscionable conduct will address this harm, or if there is a more effective method available.

IV Part B – Defining the Appropriate Normative Standard

The use of 'unconscionable' to describe the normative standard outlined by Clause 6 has been a point of substantial debate, and the lack of a definition has been a shared concern.[59] This debate breaks down into an argument over how high the proscription threshold should be (the scope of the prohibition), and an argument over which term is best to denote that threshold (the naming of the prohibition). This Part B will analyse these arguments in turn. It finds that the appropriate threshold should be much higher than 'unfairness' yet should be set lower than the standard of equitable unconscionability. Further, it finds that the standard denoted by 'oppressive' within section 118 of the CCCFA or a threshold of 'statutory unconscionability' would set the appropriate scope. Finally, it finds 'oppressive' to be preferable to 'statutory unconscionability' in naming the prohibition.

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[58] Ministry of Business, Innovation and Employment, above n 4, at [87].

[59] See, for example, the submissions to the Economic Development, Science, and Innovation Select Committee on the Fair Trading (Amendment) Bill 2019 of ConsumerNZ <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3011/0393edfea0ae7c0f4ac53ad833025f9b8251bd0d>; Prospa <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3069/58302a72398077d4ea94970ad2d48126083534d6>; New Zealand Council of Trade Unions <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3028/8461a1c44561d5e6b26a5c31302d92e5bb8067f9>; WEL Networks Ltd <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3047/f182519ef980e0983b12f170982ae029e29a1266>; Xero <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3024/0d4f0b89cee73456a73c574901f82bd241718117>; Franchise Association of New Zealand <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3021/38185e70a1ae150f78c32d08309c7275aef35611>; and Financial Services Federation <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3022/411a71d3c3960c117887869e61aef4a5331fc383>.

A The Scope of the Prohibition

As presently drafted (September 2020), the prohibition is against 'unconscionable conduct in trade'. Importantly, section 7(3) regulates the scope of that prohibition, stating "this section is not limited by any rule of law or equity relating to unconscionable conduct." Therefore, there is potential for a much wider prohibition than available under the equitable doctrine of unconscionability. Some Select Committee submissions argued that the equitable standard is instead preferable. Russell McVeagh, citing *Gustav v Macfield,*[60] argued the Bill would allow a court to "relieve parties from 'hard' bargains or to save the foolish from their foolishness."[61] They submitted the equitable standard is needed to distinguish unconscionable conduct from simply unfair conduct, as well as to maintain consistency with the Bill's General Policy Statement[62].[63]

It would be prudent to describe here the restricted scope represented by the equitable doctrine of unconscionability. The doctrine developed to allow the courts to rescind a contract (although other remedies may be available) wherein one party had knowingly taken advantage of another party's weakness or vulnerability.[64] These three elements: vulnerability, knowledge (including constructive knowledge) on the part of the 'stronger party', and victimisation are required for there to be a finding of an unconscionable bargain under equity. Fundamentally, a finding of unconscionability meant the offender had acted contrary to good conscience.[65] As such, even given these factors, the contract may still not be unconscionable if the stronger party can nonetheless demonstrate it was 'fair, just and reasonable'.[66] The threshold of unconscionability in equity is evidently high, with stringent requirements limiting it to instances of seriously offensive conduct.

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[60] *Gustav & Co Limited v Macfield Limited* [2007] NZCA 205.
[61] Russell McVeagh "Submission to the Economic Development, Science, and Innovation Select Committee on the Fair Trading (Amendment) Bill 2019" (24th April 2020) at [12], citing *Gustav & Co Limited v Macfield Limited* [2007] NZCA 205, at [30].
[62] The General Policy Statement within the Explanatory Note to the Fair Trading (Amendment) Bill 2019 (213-1) states "Unconscionable conduct is serious misconduct that goes far beyond being commercially necessary or appropriate."
[63] Russell McVeagh, above n 61, at [13].
[64] *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449 per Tipping J at 460.
[65] At 460.
[66] At 459.

A number of submitters supported and/or adopted the submission made by Russell McVeagh in this regard.[67] For example, The Real Estate Institute of New Zealand (REINZ) suggested that "over time an improperly scoped prohibition on unconscionable conduct would inevitably risk morphing into a de facto prohibition on unfair conduct", citing Australian experience.[68] This point is discussed below along with the Australian approach and its associated criticisms. It is worth noting, however, the counterargument that the Australian prohibition has recently been interpreted restrictively in the decision of *ASIC v Kobelt* [2019] HCA[69], setting a high threshold which would certainly fail to capture merely unfair conduct.[70]

Restricting statutory unconscionability to the equitable scope may be desirable. Doing so provides greater certainty as to how the prohibition will apply. This is a significant advantage because an uncertain prohibition could have unintended consequences. It was argued this may include undermining efficient negotiation (as parties are uncertain which conduct exactly is captured) and an inefficient allocation of costs and risks within relationships.[71] It also removes any confusion between an 'equitable' and 'statutory' definition of unconscionability, maintaining consistency in the law. However, the high threshold limits the prohibition significantly, meaning it may be unable to capture much of the conduct outlined in Part A of this paper. This has been a recurring issue identified in Australian experience, wherein 'unconscionable' has arguably been interpreted too narrowly, limiting its success in prosecuting conduct.

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[67] For example, see the submissions to the Economic Development, Science, and Innovation Select Committee on the Fair Trading (Amendment) Bill 2019 of ANZ <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3077/1c97c7349bff58b95db47e4c9e5ff140905ba715>; T&G <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3064/8e7c16e657cfa7e119688bdc53fa69e8fabde377>; Woolworths NZ <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3061/3c7bf0d4fadaef335ae2f66dfd4ae018619fd24c>; and REINZ <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3068/30c37cfbf2e554d1ebea3ce4cd0e0f1f969e4b35>.

[68] Real Estate Institute of New Zealand "Submission to the Economic Development, Science, and Innovation Select Committee: Fair Trading (Amendment) Bill 2019: REINZ Submission" (25th April 2020) at [1].

[69] *Australian Securities and Investments Commission (ASIC) v Kobelt* (2019) 368 ALR 1; [2019] HCA 18; BC201904955.

[70] The conduct analysed in *ASIC v Kobelt* was not considered unconscionable by the majority of the HCA. This is discussed from page 21 of this paper.

[71] Russell McVeagh, above n 1, at page 6.

Australian case law has developed around both the ACL and ASIC Act, with significant decisions on unconscionable conduct in *ACCC Commission v Lux Distributors* [2013][72] and, most recently, *ASIC v Kobelt* [2019] HCA.[73] Both cases have been important in establishing the type of analysis undertaken in making a finding of unconscionability and illustrate the high threshold under Australian law. Critically, the standard set by these cases has also been the subject of substantial criticism.

Lux Distributors has been widely referenced for the statement regarding section 21 of the ACL (comparative to s 7 of the Bill) at [41], that:[74]

> Notions of moral tainting have been said to be relevant, as often they no doubt are, as long as one recognises that *it is conduct against conscience by reference to the norms of society that is in question*. (emphasis added).

The case itself concerned the deceptive sales strategy used by Lux wherein an offer for a free vacuum cleaner check was made over a phone call, which, if accepted, would lead to a salesperson attending the house.[75] Once there, the salesperson avoided stating their primary intention (being to sell a new vacuum cleaner) before entering the home, checking the existing vacuum cleaner and using an "efficiency check" to compare it to a new model.[76] This maintenance and demonstration often exceeded an hour.[77] The specific victims evidence used in the case was that of three elderly women who lived alone. One had expressly told the caller that she would "not… buy a new one"[78], and all three considered their existing vacuum cleaner to be adequate. Each of the victims expressed regret at making the purchase very soon after the visit[79], and indicated they thought they had been "talked into buying" something they did not need.[80]

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[72] *Australian Competition and Consumer Commission (ACCC) v Lux Distributors Pty Ltd* [2013] FCAFC 90; BC201311903.
[73] *ASIC v Kobelt*, above n 69.
[74] *Lux Distributors,* above n 72, at [41].
[75] At [25] – [26].
[76] At [28].
[77] At [47].
[78] At [32].
[79] At [37], [47] and [57].
[80] At [60].

The Full Court of the Federal Court of Australia found that the conduct was unconscionable.[81] In addition to the aforementioned passage, the Court considered that:[82]

> 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*. (emphasis added).

It considered that "such values are contestable", and identifying those values, as in this case, may require reference to existing consumer protection laws.[83] It also described unconscionable simply as "something not done in good conscience", citing a number of Australian cases.[84]

These statements unambiguously illustrate that the investigation in Australia requires an assessment of societal norms and values (which may be inferred at least in part from surrounding legislation) to determine the 'societal conscience' standard. The conduct is then to be assessed against this standard, remembering that merely unfair or unjust conduct is insufficient. It appears that the conduct must offend that societal conscience, rather than merely depart from the standard expected.

The approach adopted by the Court in *Lux* may be appropriate for forming a basis for the definition of 'unconscionable' within the Bill.[85] This approach is helpful in at least indicating that the requirement remains a finding of conduct which is contrary to good conscience, which is ultimately the same as under equity. Further, it could be suggested that it gives the court a clear direction to assess surrounding societal norms and values, with the associated (arguable) benefit that this standard could therefore shift as society does. However, it is also crucial that this case did not have to grapple with whether vulnerability or victimisation were necessary under the provision. These elements were relatively easily found to be established in *Lux*.[86] This is important because without addressing the necessity of these elements it is arguable that 'statutory unconscionability'

[81] At [42], [52] and [60].
[82] At [23].
[83] At [23].
[84] At [41].
[85] This possibility was discussed at the First Reading of the Bill. See generally (12 February 2020) 744 NZPD (Fair Trading (Amendment) Bill – First Reading).
[86] *Lux Distributors*, above n 72, at [39].

will require them – indicating a threshold more comparable to unconscionability in equity than to 'oppressive' under the CCCFA.

This question was, unfortunately, not directly discussed within the more recent High Court of Australia decision of *Kobelt*. This is because the appellant, ASIC, had accepted in its submissions that "unconscionable conduct involves 'the existence of a special [dis]advantage of which someone takes ... [u]nconscientious advantage'".[87] Nonetheless, this case is important as it is seen as establishing a high threshold for breach of section 12CB of the ASIC Act. This is because the Court found by a 4-3 majority[88] that the conduct of Mr Kobelt was not unconscionable. The majority focused on the high threshold which the term 'unconscionable' itself introduces into section 12CB. For example, Kiefel CJ and Bell J considered that:[89]

> …if the legislative intention were to fix a standard for the supply of financial services in trade or commerce lower than that of conduct that answers the description of being against conscience, *it is to be expected that the draftsperson would have employed another term.* (emphasis added).

Additionally, Gageler J suggested that:[90]

> …conduct proscribed by the section as unconscionable is conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience.

Such statements as these indicate that even given a meaning unconstrained by equity, the term 'unconscionable' will likely be interpreted as only applying to serious, morally offensive conduct.

The minority judgments also contain significant discussion on defining 'statutory unconscionability'. In many respects, this discussion aligned with the majority. For

[87] *ASIC v Kobelt*, above n 69, at [48].
[88] The majority was comprised of Kiefel CJ, Bell, Gageler and Keane JJ and the minority was Nettle, Gordon and Edelman JJ.
[89] *ASIC v Kobelt*, above n 69, at [49].
[90] At [92].

example, both recognised that while not limited to the meaning of the unwritten law, the unwritten law has a "significant part to play in ascribing meaning" to 'statutory unconscionability'.[91] As such, both had recognised that the prohibition was clearly not limited to the 'equitable paradigm', but rather has "potential application within a range of factual scenarios not all of which would be recognised in equity as giving rise to relief on the basis of unconscionable conduct."[92] Both also recognised that the term did not encompass "mere 'unfairness' or 'unreasonableness'", but denoted a higher level of misconduct.[93]

Nonetheless, there were still substantial differences between the approach of the majority and the minority. For example, Nettle and Gordon JJ placed emphasis on looking to the conduct of the stronger party, as required under equity. It was argued that the statutory context favoured this approach, because a victim does not need to be identified under section 12CB (section 7(2)(b) of the Bill) for a finding of unconscionability to be made. This emphasised a focus on the offending parties conduct, rather than potential characteristics of a 'victim'.[94] This approach contributed to a different weighting of the facts between the judgments.

The judgment of Edelman J was the most comprehensive in its review of the intention and history behind the prohibition and use of the term 'unconscionable'. Beginning with the Trade Practices Act 1974, his Honour detailed a 1997 Standing Committee report which recommended "a significantly strengthened provision to deal with the general problem of unfair conduct" through proscription against engaging in conduct that is "unfair."[95] The intention of such a proscription was explained in a latter Explanatory Memorandum which:[96]

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[91] At [144].
[92] At [83] and [90].
[93] At [282].
[94] At [232].
[95] Australia, House of Representatives, Standing Committee on Industry, Science and Technology, *Finding a balance: towards fair trading in Australia* (1997) at 11 [1.42], 181 [6.73] (Recommendation 6.1).
[96] *ASIC v Kobelt*, above n 69, at [287] citing Australia, House of Representatives *Trade Practices Amendment (Fair Trading) Bill 1997* Explanatory Memorandum at 22.

> …envisaged that [s 51AC][97] would prohibit [undue influence and unconscionable conduct as understood in equity] but would, in addition, extend to other conduct that is, in all the circumstances, unconscionable.

Such statements indicated a wide meaning was to be attributed to 'unconscionable', and a latter 2008 Standing Committee report accepted there was "no doubt that section 51AC of the Trade Practices Act [had] fallen short of its legislative intent", with the limited successful prosecutions "primarily reflect[ing] the courts' narrow interpretation of this section, rather than any great adjustment in business behaviour."[98] The final Second Reading Speech considered by his Honour, concerning further amendments to the Trade Practices Act, stated:[99]

> The present statutory prohibitions on unconscionable conduct sought to remove limitations such as [the need to establish a 'special disadvantage' when seeking] redress when subjected to unconscionable conduct… The courts should not limit the application of the provisions by reference to ancient common-law doctrines that are not part of the statute book.

After canvassing these developments, Edelman J considered that they conveyed a clear Parliamentary intention that courts "take a less restrictive approach shorn from either of the equitable preconditions imposed in the twentieth century."[100] As noted, it had not been argued at trial that 'statutory unconscionability' did not require these elements. Nonetheless, this line of argument has strength as a result of being derived from an analysis of Parliament's intention. In concluding, his Honour expressed concern that the inability of 'unconscionable' to be given a wide meaning, as intended by Parliament, may necessitate replacing the term with 'unjust' or 'unreasonable'.[101]

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[97] Section 51AC of the Trade Practices Act 1974 (Cth) is the basis for the latter ASIC Act 2001 section 12CB and ACL section 21.
[98] *ASIC v Kobelt*, above n 69, at [289] citing Australia, Senate, Standing Committee on Economics *The need, scope and content of a definition of unconscionable conduct for the purposes of Pt IVA of the Trade Practices Act 1974* (2008) at [5.4].
[99] *ASIC v Kobelt*, above n 69, at [292] citing Australia, House of Representatives, *Parliamentary Debates*, Hansard (27 May 2010) at page 4361 - 4362.
[100] At [295].
[101] At [311].

The decision of *Kobelt* and the high threshold the majority decisions establish, as well as the continuing uncertainty of the scope of the prohibition, has led to criticism of both the judgment and the use of the term 'unconscionable'. During the discussion on this criticism, it will be relevant to concurrently discuss the possibility of New Zealand's Bill using a term such as 'unfair' or 'unjust' as these have been suggested replacements in Australia. The reasons why such a standard is inappropriate for the proscription will also be detailed.

In *Doctrine, policy, culture and choice in assessing unconscionable conduct under statute: ASIC v Kobelt*[102], Paterson, Bant and Clare considered the majority took an unduly narrow view of 'unconscionable'.[103] They criticised the majority's use of *Kakavas v Crown Melbourne Ltd* and *Thorne v Kennedy* as authorities for 'statutory unconscionability' requiring victimisation and vulnerability as under equity. They stated that:[104]

> …neither of these cases involved the statutory prohibition in section 12CB of the ASIC Act or its equivalent under section 21 [of the ACL]. They involved, respectively, the statutory prohibition on unconscionable conduct under the unwritten law[105] and the equitable doctrine granting relief from unconscionable dealing.

Comparatively, they argue section 12CB of the ASIC Act 2001 makes no reference to either of these requirements.[106] They have simply been read-in by judges as a result of the term itself.

Other criticisers of the decision include the Consumer Action Law Centre and former ASIC Deputy Chairman Peter Kell. After *Kobelt*, Mr Kell considered that "we now have enough cases on the books that we can safely say the unconscionable conduct provision

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[102] Jeannie Marie Paterson, Elise Bant and Matthew Clare "Doctrine, policy, culture and choice in assessing unconscionable conduct under statute: *ASIC v Kobelt*" (2019) 13 J Eq 81.
[103] At page 2.
[104] At page 7.
[105] Note that the ASIC Act 2001 and CCA 2010 both contain a section prohibiting unconscionable conduct in terms of equity, and a separate section prohibiting unconscionable conduct *not limited to the terms of equity*. *Kakavas* concerned the former. The Bill does not replicate this structure; containing only the latter.
[106] Paterson, Bant and Clare, above n 102, at page 7.

sets the bar too high when it comes to bad market conduct."[107] The Consumer Action Law Centre was of a similar view, and in a 2019 submission to the Digital Platforms Inquiry in Australia they argued the term should be replaced with a proscription on 'unfair' practices.[108]

Further, the inconsistent use of various terms for 'measuring' unconscionability has been given as an example of the proscription's uncertainty.[109] The use of 'moral obloquy' has been particularly criticised.[110] Notably, in *Kobelt,* Gageler J (who had earlier used the term in *Paciocco v Australia and New Zealand Banking Group Ltd*[111]) reversed his earlier position, and considered it to now be "arcane terminology".[112] In contrast, Keane J had "reaffirmed the position that unconscionability imports the 'high level of moral obloquy' associated with the victimisation of the vulnerable".[113] Issues such as this demonstrate the continuing uncertainty of 'unconscionability'.

In their 2016 paper *Unfair but not Illegal*[114] Brody and Temple called for a change to 'unfair'.[115] The points made by this paper seem to support either an adoption of 'unfair' or 'oppressive' in preference to 'unconscionable'. Firstly, Brody and Temple consider that unconscionable is an unnecessarily complex term for describing the conduct; it is not commonly understood by the community.[116] 'Oppressive', while perhaps more uncertain than mere unfairness, does have a well-understood meaning, both within business communities and within legislation. Another point raised was the comparative provisions overseas. These provisions are not detailed in full as they are beyond the scope of this paper. However, it should be noted that in America section 5 of the Federal Trade Commission Act prohibits "unfair or deceptive acts or practices in or affecting

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[107] Ben Butler "Not fair? Why judges have been accused of failing Australian consumers" *The Guardian* (Australia, 7 September 2019).
[108] Consumer Action Law Centre "Submission to the Australian Competition and Consumer Commission: Digital Platforms Inquiry – Preliminary Report" (15th February 2019) at page 1.
[109] At page 2.
[110] See, for example, Sarida McLeod "Statutory Unconscionable Conduct under the ACL: The Case Against a Requirement for 'Moral Obloquy'" (2015) 23 CCLJ 123.
[111] *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] 333 ALR 569.
[112] *ASIC v Kobelt*, above n 69, at [91].
[113] Paterson, Bant and Clare, above n 102, at page 8. See also, *ASIC v Kobelt*, above n 69, at [118] per Keane J.
[114] Gerard Brody and Katherine Temple "Unfair but not Illegal" (2016) AltLJ Vol 41:3 2016.
[115] At page 161.
[116] At page 163.

commerce."[117] Additionally, the EU takes a 'three-tiered' approach with a general prohibition on unfair conduct, a prohibition on misleading or aggressive conduct and a list of specific practices which are always prohibited.[118]

There are stronger opposing points to describing the normative standard as 'unfair' than there are for describing it 'unconscionable', let alone in comparison to a standard based on 'oppressive'. Firstly, as aforementioned, both the minority and majority in *Kobelt* considered that mere unfairness was not intended to be captured by the section. This was not only because 'unconscionable' was used to prescribe the normative standard, but the legislative intention was also apparent from the documents analysed by Edelman J. These documents indicated that 'unfairness' was considered during the Australian legislative process, and was ultimately not selected. One argument was that the use of 'unfair' would "result in a harsher test than that which was recommended"[119], while another supposed it may impact the "architecture of the statute" and would create further "uncertainty and confusion."[120] The unwillingness of these official reports to recommend a reduction in their existing threshold to a standard of 'unfairness' should tell against New Zealand moving from no prohibition to an immediate proscription on 'unfair' conduct.

It does not appear that the existence of the prohibition in European law is influential either. European law considers conduct 'unfair' if contrary to the requirements of professional diligence, and it either actually, or likely, materially distorts the economic behaviour of an average consumer. MBIE considered that this option was "arguably the most complex, uncertain and far-reaching approach to addressing unfair conduct".[121] These issues – complexity and uncertainty – are already the commonly used arguments against terming the proscription 'unconscionable', indicating no benefit from this change.

A proscription on 'unfair' conduct had relatively little support in New Zealand.[122] A number of Select Committee submissions, including most of those who supported some

[117] Section 5(a) of the Federal Trade Commission Act (FTC Act) (15 USC section 45).
[118] See Jeannie Paterson and Gerard Brody "Safety Net Consumer Protections" (2015) *Journal of Consumer Policy* 38(3) at 331.
[119] *ASIC v Kobelt*, above n 69, at [288].
[120] *ASIC v Kobelt*, above n 69, at [290].
[121] Ministry of Business, Innovation and Employment, above n 3, at page 30.
[122] Ministry of Business, Innovation and Employment, above n 3, at page 30.

form of prohibition, were opposed to such a low threshold.[123] Notably, the few in support were primarily consumer protection groups, concerned with vulnerable consumers.[124] It therefore appears that in a New Zealand context, where the move would represent a significant shift from the status quo, a reduction of the threshold to 'unfair' is inappropriate.

Having analysed the arguments for and against a proscription with a high threshold equivalent to equity and a low threshold under unfairness, it is apparent that neither 'extreme' is ideal. The conduct which is sought to be addressed requires a 'mid-ground'. By also analysing the comparative Australian standard, some of the limitations on using 'unconscionable' to describe this normative standard, even expressly unlimited by its equitable meaning, have already been addressed. The following section will investigate whether 'unconscionable' or 'oppressive' most accurately describes this normative standard, ultimately deciding the latter to be preferable.

B The Naming of the Prohibition

The lack of a definition for 'unconscionable' in the Bill was cause for concern in both the House of Representatives and at Select Committee.[125] This is because it has a substantial

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[123] See, for example, the submissions to the Economic Development, Science, and Innovation Select Committee on the Fair Trading (Amendment) Bill 2019 of NZ Food and Grocery Council <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3078/0415bbbe554a7a491711c82cd4d954f94e258f82>; Financial Services Council <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3087/156c0f4c718ab70f5717769ebc418ca74558f622>; and Financial Services Federation <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3022/411a71d3c3960c117887869e61aef4a5331fc383>.

[124] See, for example, FinCap "Submission to: The Economic Development, Science, and Innovation Select Committee Fair Trading (Amendment) Bill" (30th March 2020).

[125] See generally (12 February 2020) 744 NZPD (Fair Trading (Amendment) Bill – First Reading). See also the submissions to the Economic Development, Science, and Innovation Select Committee on the Fair Trading (Amendment) Bill 2019 of ConsumerNZ <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3011/0393edfea0ae7c0f4ac53ad833025f9b8251bd0d>; Financial Services Council <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3087/156c0f4c718ab70f5717769ebc418ca74558f622>; Financial Services Federation <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3022/411a71d3c3960c117887869e61aef4a5331fc383>; Franchise Association of New Zealand <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3021/38185e70a1ae150f78c32d08309c7275aef35611>; National Council for Women of New Zealand <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3060/52da4c67e4bab91cffbdd40ecb92cfb86df8abf5>; New Zealand Council of Trade Unions <https://www.parliament.nz/resource/en-

impact on the uncertainty of the scope of the prohibition, even given the section 8 considerations. As will be discussed, 'unconscionable' as a standard is a difficult concept to provide an accurate definition for, and this is only compounded when the term is used expressly unrestricted by its equitable meaning. This paper considers this definitional difficulty to be the primary reason why 'oppressive' should be considered the preferable term.

Firstly, divorced from its equitable meaning, it is not immediately apparent how unconscionable should be defined. This is again demonstrable with reference to *Kobelt*, as the HCA was split as to whether 'statutory unconscionability' still required victimisation and vulnerability. Thus, deriving a definition from Australian case law, as suggested by some Select Committee submissions, appears problematic.[126] This is mainly because future Australian cases dealing directly with this threshold issue may yet substantially lower this standard, especially considering the strength of Edelman J's analysis and the academic criticism of *Kobelt*'s majority.

Further, there has been argument that it would be unnecessarily burdensome on businesses seeking to ensure compliance. For example, Andrew Fallon at the First Reading of the Bill considered that businesses having to look to Australia to see how they define 'unconscionable' to ensure compliance was a "pretty extraordinary situation."[127] It should be noted that the Australian law would at least be beneficial in providing some

NZ/52SCED_EVI_93552_ED3028/8461a1c44561d5e6b26a5c31302d92e5bb8067f9>; NZ Food and Grocery Council <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3078/0415bbbe554a7a491711c82cd4d954f94e258f82>; Prospa <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3069/58302a72398077d4ea94970ad2d48126083534d6>; and WEL Networks Ltd <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3047/f182519ef980e0983b12f170982ae029e29a1266>.

[126] See the submissions to the Economic Development, Science, and Innovation Select Committee on the Fair Trading (Amendment) Bill 2019 of the Commerce Commission <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3071/08d080ff43c898bded6a43a2d8f288ff78fca582>; National Council for Women of New Zealand <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3060/52da4c67e4bab91cffbdd40ecb92cfb86df8abf5>; and New Zealand Council of Trade Unions <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3028/8461a1c44561d5e6b26a5c31302d92e5bb8067f9>.

[127] (12 February 2020) 744 NZPD (Fair Trading (Amendment) Bill – First Reading, Andrew Fallon).

indication of how the prohibition works. However this provides no advantage over 'oppressive'.

The term 'oppressive' has both an existing legislative definition and a body of New Zealand case law concerning its meaning. It already prohibits 'unfair' conduct within the CCCFA, where it is defined as "oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice."[128] In *GE Custodians v Bartle*[129], the Supreme Court considered that the earlier Court of Appeal decision of *GreenBank NZ Ltd v Haas*[130] was correct in finding that:[131]

> …the various words which together form the definition of the term "oppressive" all contain different shades of meaning but they all contain the underlying idea that the transaction or some term of it is in contravention of reasonable standards of commercial practice. That sets an objective standard… Where [industry] practice is in breach of reasonable standards, compliance with it will not immunise a lender.

Such an objective standard has been sought after to bring certainty to the prohibition in the Bill and is unlikely to be achievable using 'unconscionable'. This certainty was the main reason for MBIE's recommendation to use 'oppressive'.[132] It is also telling that a 2009 Ministry of Consumer Affairs discussion paper reviewing the operation of the CCCFA did not recommend any changes to the provisions.[133] It found "the rulings that have been made by the Courts indicate that oppression is a relatively high test and that unfair or unjust terms are not necessarily oppressive."[134] In combination with the recognition that 'oppressive' also denotes a threshold lower than equitable unconscionability[135], this brings it in line with the conduct intended to be prohibited by the Bill. Conclusively, the 2009 paper stated the "oppression provisions in the CCCFA are functioning as intended."[136]

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[128] Section 118 of the CCCFA 2003.
[129] *GE Custodians v Bartle* [2011] 2 NZLR 31.
[130] *GreenBank NZ Ltd v Haas* [2000] CA306/99.
[131] *GE Custodians v Bartle*, above n 129, at [46].
[132] Ministry of Business, Innovation and Employment, above n 3, at page 2.
[133] Ministry of Consumer Affairs *Discussion Paper: Review of the Operation of the Credit Contracts and Consumer Finance Act 2003* (September 2019) at page 44.
[134] At page 43.
[135] *GE Custodians v Bartle,* above n 129, at [46].
[136] Ministry of Consumer Affairs, above n 133, at page 44.

There are further, less weighty, arguments for the use of 'oppressive' over 'unconscionable'. Firstly, it prevents the erosion of the equitable doctrine of unconscionability, with this doctrine remaining a tool of the courts and removing potential for misunderstandings between 'statutory' and 'equitable' unconscionability. In addition, the terminology used is more relevant. For example, MBIE considered:[137]

> …the reference to factors such as 'reasonable standards of commercial practice' under an oppressive conduct prohibition offers more guidance to businesses than reference to factors such as 'conscience' and the 'norms of society' that could be referenced under an unconscionable conduct prohibition.

Ultimately, using 'oppressive' is preferable in the New Zealand context. The main reason for this is the reduction in uncertainty. This factor alone is substantially persuasive. Further, it would mean that direct reliance on Australian law is unnecessary; which is an advantage given the potential for their threshold to develop differently (and possibly inappropriately for New Zealand). 'Oppressive' denotes a standard higher than mere unfairness or unreasonableness yet does not import a threshold comparative to equitable unconscionability. Finally, 'oppressive' is more commonly used and understood in New Zealand, and its terminology appears to be more consistent with the aims of the Bill. Critically, 'oppressive' appears to establish a suitable 'mid-ground' between simply unfair and equitably unconscionable conduct, which continues to be sought in Australia. Rather than modifying the notion of unconscionability, its ordinary meaning already defines the prohibition.

It is also relevant that using 'oppressive' in place of 'unconscionable' does not require substantial amendment to proposed section 8. This section outlines the considerations a court may have regard to in making a finding of unconscionability. All remain relevant to an inquiry into whether conduct is 'oppressive'. A particular focus of submissions was proposed paragraph 8(1)(h), which provides a court may have regard to "any other circumstance that the court considers relevant." In their Select Committee submission, Russell McVeagh considered that "…this factor negates the need for any other factor to

[137] Ministry of Business, Innovation and Employment, above n 3, at page 33.

be specified, and increases… uncertainty"[138] whilst also having an unclear impact on the right of appeal, as a decision based on 8(1)(h) may not be a matter of law, but an open finding.[139] They submitted this paragraph be removed[140], and it be clarified that *only* matters in 1(a) – (g) need be considered. This paragraph should be removed, however, the court's ability to consider all the circumstances should not be limited as suggested.

Firstly, this is because the proscription is intended to be a general prohibition unlimited to a certain form of conduct. In applying the prohibition to a range of conduct as intended, it is likely that different circumstantial factors will be important. Limiting the court's considerations to a fixed list prevents this full and proper analysis.

Additionally, such a change would bring New Zealand law out of line with Australian law. Section 22(1) of the ACL states "*Without limiting the matters* to which the court may have regard for the purpose of determining whether a person… has contravened section 21…" (emphasis added).[141] Furthermore, section 21(1) provides "[must not] engage in conduct that is, *in all the circumstances,* unconscionable" (emphasis added), reinforcing the idea that the inquiry is not limited. Clause 6 of the Bill does not contain an equivalent direction, yet only the substance of paragraphs 8(1)(c) and (h) are not present in both pieces of legislation.[142] This could lead to a suggestion that the inquiry under the Bill is intended to be more limited than under the ACL. However, the better

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[138] Russell McVeagh, above n 61, at [19].
[139] Russell McVeagh, above n 61, at [20].
[140] This was supported by a number of other submitters. For example, see the submissions of ANZ <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3077/1c97c7349bff58b95db47e4c9e5ff140905ba715>; T&G <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3064/8e7c16e657cfa7e119688bdc53fa69e8fabde377>; Woolworths NZ <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3061/3c7bf0d4fadaef335ae2f66dfd4ae018619fd24c>; REINZ <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3068/30c37cfbf2e554d1ebea3ce4cd0e0f1f969e4b35>; and the NZ Telecommunications Forum <https://www.parliament.nz/resource/en-NZ/52SCED_EVI_93552_ED3044/173db0b75ecdb476d2f5da13433b4e06a420cf7d> to the Economic Development, Science, and Innovation Select Committee on the Fair Trading (Amendment) Bill 2019.
[141] Australian Consumer Law section 22(1), which is Schedule 2 of the CCA 2010.
[142] Although the Australian legislation contains additional considerations (in section 22(1)(b), (e) – (h) and (k)). 22(1)(b), (e) and (f) relate to an analysis of whether the conduct was a commercial necessity/normality which is not present in section 7 of the Bill. Further, (g) and (h) relate to the applicability of industry codes. Finally, (k) directly concerns unilateral variation abilities in contracts.

view is that paragraph 8(1)(h) is intended to give the court the same investigative freedom as the Australian courts have. Thus, removal of paragraph 8(1)(h) would differ the investigation from that in Australia.

The key reason for wanting the removal of this paragraph is to reduce uncertainty. There are, however, strong arguments for giving the courts the freedom to investigate in this context. For example, one circumstance that the court should be able to take into account is whether there is an industry code that regulates conduct. In Australia there is a Horticulture Code of Conduct that relates to transactions between growers and wholesalers. This code (and others) can be taken into account by Australian courts under paragraphs 22(1)(g) and (h) of the ACL. Codes such as this have an important role to play in setting standards through soft law and should be part of the matrix of circumstances that the court should be able to consider in assessing if conduct has breached a statutory standard. The removal of paragraph 8(1)(h) could restrict the courts ability to do this.

The competing interests here may be reconcilable if paragraph 8(1)(h) was removed, and the words "a person must not, in trade, engage in conduct that is, *in all the circumstances,* unconscionable (or preferably 'oppressive')" be included into section 7(1). This draws from Australian legislation and directs the court to *always* consider *all* the relevant circumstances, rather than give them the *ability to consider* any circumstance. This distinction is important because it limits the subjective ability of a court to only consider what it deems relevant (reducing uncertainty) and ensures that a failure to consider relevant circumstances would be appealable as a matter of law.

V Conclusion

This essay has researched and critically analysed Clause 6 of the Fair Trading (Amendment) Bill 2019 and its prohibition on unconscionable conduct in trade. It did this by firstly looking to whether conduct exists which requires such a prohibition. It found it did, requiring an investigation of the proscription's scope and naming. Establishing this scope between 'unfairness' and 'equitable unconscionability', it then argued that 'oppressive' was the preferable term in a New Zealand context. Ultimately, this is intended to achieve a higher degree of certainty around the scope of the prohibited conduct, whist still allowing conduct outlined in Part A to be captured.

Word Count: **8000** (excluding the abstract, table of contents, footnotes, appendix and bibliography).

VI Appendix

A Clause 6 of the Fair Trading (Amendment) Bill 2019 (213 – 1)

7 Unconscionable conduct

(1) A person must not, in trade, engage in conduct that is unconscionable.

(2) This section applies whether or not—

(a) there is a system or pattern of unconscionable conduct; or

(b) a particular individual is identified as disadvantaged, or likely to be disadvantaged, by the conduct; or

(c) a contract is entered into.

(3) This section is not limited by any rule of law or equity relating to unconscionable conduct.

8 Court may have regard to certain matters

(1) When assessing under **section 7** whether a person's conduct is unconscionable, a court may have regard to 1 or more of the following:

(a) the relative bargaining power of the person engaging in the conduct (the **trader**) and any person (whether or not an identified individual) who is disadvantaged, or likely to be disadvantaged, by the conduct (an **affected person**):

(b) the extent to which the trader and an affected person acted in good faith:

(c) whether, taking account of the particular characteristics and circumstances of an affected person, the affected person or the affected person's representative was reasonably able to protect the affected person's interests:

(d) whether an affected person was able to understand any documents provided by the trader:

(e) whether the trader subjected an affected person to unfair pressure or tactics or otherwise unduly influenced an affected person:

(f) whether the trader unreasonably failed to disclose to an affected person—

(i) any intended conduct of the trader that might adversely affect the affected person's interests:

(ii) any risk to the affected person's interests arising from the trader's intended conduct, if the trader should have foreseen that the risk would not be apparent to the affected person:

(g) if there is a contract to which the conduct relates, anything listed in **subsection (2)**:

(h) any other circumstance that the court considers relevant.

(2) If the conduct involves a contract between the trader and an affected person, the court may also have regard to—

(a) the circumstances in which the contract was entered into, including—

(i) any inducement to enter into it:

(ii) the extent to which the affected person had an effective opportunity to negotiate the terms:

(b) whether the affected person obtained independent legal advice, or other independent professional advice, about the contract before entering into it:

(c) the terms of the contract:

(d) the form of the contract, including, in the case of a written contract, whether its terms are transparent:

(e) whether the terms of the contract allow the affected person to be reasonably able to meet their obligations under it:

(f) whether the affected person's obligations under the contract are reasonably necessary for the protection of the trader's legitimate interests:

(g) the conduct of the trader and affected person in complying with the terms of the contract:

(h) the length of time the affected person has to remedy any breach:

(i) whether any action by the trader in relation to enforcement of the contract was lawful:

(j) any other conduct of the trader or affected person, after the contract was entered into, in connection with their relationship.

(3) To the extent (if any) that no particular individual is identified as disadvantaged or likely to be disadvantaged by the conduct, this section applies with all necessary modifications as if—

(a) references to an affected person were references to the type of person likely to be disadvantaged by the conduct; and

(b) references to the existence of a particular circumstance were references to the likely existence of that circumstance in relation to that type of person.

B This Paper's Proposed Changes to Clause 6 of the Fair Trading (Amendment) Bill 2019 (213 – 1)

7 Oppressive conduct

(1) A person must not, in trade, engage in conduct that is, in all the circumstances, oppressive.

(2) This section applies whether or not—

(a) there is a system or pattern of oppressive conduct; or

(b) a particular individual is identified as disadvantaged, or likely to be disadvantaged, by the conduct; or

(c) a contract is entered into.

(3) In section 7(1), 'oppressive' is to have the meaning attributed to it in section 118 of the Credit Contracts and Consumer Finance Act 2003, that is, it means oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice.

8 Court may have regard to certain matters

(1) When assessing under **section 7** whether a person's conduct is oppressive, a court may have regard to 1 or more of the following:

(a) the relative bargaining power of the person engaging in the conduct (the **trader**) and any person (whether or not an identified individual) who is disadvantaged, or likely to be disadvantaged, by the conduct (an **affected person**):

(b) the extent to which the trader and an affected person acted in good faith:

(c) whether, taking account of the particular characteristics and circumstances of an affected person, the affected person or the affected person's representative was reasonably able to protect the affected person's interests:

(d) whether an affected person was able to understand any documents provided by the trader:

(e) whether the trader subjected an affected person to unfair pressure or tactics or otherwise unduly influenced an affected person:

(f) whether the trader unreasonably failed to disclose to an affected person—

(i) any intended conduct of the trader that might adversely affect the affected person's interests:

(ii) any risk to the affected person's interests arising from the trader's intended conduct, if the trader should have foreseen that the risk would not be apparent to the affected person:

(g) if there is a contract to which the conduct relates, anything listed in **subsection (2)**.

(2) If the conduct involves a contract between the trader and an affected person, the court may also have regard to—

(a) the circumstances in which the contract was entered into, including—

(i) any inducement to enter into it:

(ii) the extent to which the affected person had an effective opportunity to negotiate the terms:

(b) whether the affected person obtained independent legal advice, or other independent professional advice, about the contract before entering into it:

(c) the terms of the contract:

(d) the form of the contract, including, in the case of a written contract, whether its terms are transparent:

(e) whether the terms of the contract allow the affected person to be reasonably able to meet their obligations under it:

(f) whether the affected person's obligations under the contract are reasonably necessary for the protection of the trader's legitimate interests:

(g) the conduct of the trader and affected person in complying with the terms of the contract:

(h) the length of time the affected person has to remedy any breach:

(i) whether any action by the trader in relation to enforcement of the contract was lawful:

(j) any other conduct of the trader or affected person, after the contract was entered into, in connection with their relationship.

(3) To the extent (if any) that no particular individual is identified as disadvantaged or likely to be disadvantaged by the conduct, this section applies with all necessary modifications as if—

(a) references to an affected person were references to the type of person likely to be disadvantaged by the conduct; and

(b) references to the existence of a particular circumstance were references to the likely existence of that circumstance in relation to that type of person.

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