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A "Quantum" leap for statutory unconscionability: The application of the prohibition following *Australian Competition and Consumer Commission v Quantum Housing Group*

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Abstract

The introduction of a statutory prohibition of unconscionable conduct in the Fair Trading Act 1986 marks an important step in harmonising New Zealand and Australian Law. This paper discusses the impact of the recent *Australian Competition and Consumer Commission v Quantum Housing Group* decision on the New Zealand courts' application of the prohibition. The paper argues that the anticipated reliance of New Zealand courts on Australia means that we are likely to find that New Zealand courts follow the decision in *Quantum Housing*. This means that while the standard of unconscionable conduct under the FTA is not constrained by what is necessary to find a breach of the equitable doctrine, 'unconscionability' has become what is ultimately a broad and vague standard. In an attempt to remove the uncertainties surrounding the prohibition, the paper proposes a statutory definition of unconscionable conduct. The definition is intended to guide the courts in applying the prohibition and seeks to formalise the principles derived from the established body of caselaw in Australia.

Keywords: 'unconscionable conduct', 'Fair Trading Act 1986', 'Australian Competition Consumer Commission v Quantum Housing Group', 'unfair commercial practices', 'equitable doctrine of unconscionable conduct'

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I *Introduction*

The statutory prohibition of unconscionable conduct in the Fair Trading Act 1986 (FTA) came into force in August 16, 2022, with the goal of harmonising New Zealand and Australian law.[1] The Fair Trading Amendment Bill was introduced in 2019 by Hon Dr David Clark[2] following a Ministry of Business, Innovation & Employment (MBIE) survey (the MBIE Survey) which found that almost 50% of business participants had either been offered unfair contract terms or had otherwise been treated unfairly.[3] While New Zealand already provides legislative protections against unfair commercial practices, the MBIE Survey highlighted gaps that existed within our existing laws.

While many suggested there was no need for such an amendment, others supported the amendment but recommended a tighter drafting of the prohibition. The recently decided case of *Australian Competition and Consumer Commission v Quantum Housing Group Ptd Ltd (Quantum Housing),* a 2021 decision of the Federal Court of Australia, decided that a pre-existing vulnerability or disadvantage is not required to make a finding of statutory unconscionability, though in most cases will be present.[4] This has led to a broader standard and is likely to widen the door for more allegations of unconscionable conduct. Following this case, there is now a reasonably well-established framework of principles from Australian caselaw sufficient to provide a workable definition of "unconscionable conduct". This is likely to guide the New Zealand courts in applying the new prohibition in the FTA.

The aim of this article is to examine the current protections against unfair commercial practices in New Zealand including the equitable doctrine of unconscionable bargain, the history of the statutory prohibition of unconscionable conduct in Australia, and the impact of

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1 Ministry of Business, Innovation & Employment *Impact Statement entitled Coversheet: Protecting business and consumers from unfair commercial practices* (August 2019) at 2.

2 New Zealand Parliament "Fair Trading Amendment Bill" (2021) <www.parliament.nz>.

3 Ministry of Business, Innovation & Employment *Discussion Paper: Protecting business and consumers from unfair commercial practices* (December 2018).

4 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40, (2021) 285 FCR 133 at [93].

the recent *Quantum Housing* decision. The paper suggests a set of principles to guide New Zealand courts (based on Australian caselaw) and also proposes the adoption of a statutory definition of unconscionable conduct.

II *Setting the Scene*

A The Fair Trading Amendment Act 2021

The Fair Trading Amendment Act 2021 (FTAA) introduced three key changes in the FTA. Firstly, it introduced a prohibition against unconscionable conduct in trade. This change will be the focus of this article. Secondly, it extended the existing unfair contract terms law to cover standard form small trade contracts. Lastly, it strengthened the ability of consumers to require uninvited sellers to leave or not enter their premises by allowing individuals to be able to direct uninvited direct sellers to leave or not enter their premises.[5]

B Policy objectives of the amendment

One of the Government's key motivations behind the FTAA was to build a "more productive, sustainable, and inclusive economy".[6] A hinderance on this goal is the presence of unfair commercial practices, specifically, unfair business-to-business conduct and unfair business-to-consumer conduct. Therefore, the prohibition on unconscionable conduct introduced by the FTAA seeks to prohibit unfair commercial transactions not yet captured by New Zealand's existing legislative protections against unfair commercial practices.[7] In drafting the prohibition, a key consideration was the wording and standard chosen. The form of prohibition chosen was intended to prevent the Government from overreaching and allow businesses to continue to operate confidently in the market.[8]

Another aim of this amendment was to bring New Zealand law in line with Australia. Parliament had considered including a prohibition against unconscionable conduct similar to

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5 Commerce Commission "Changes to the Fair Trading Act" (2022) Commerce Commission New Zealand <www.comcom.govt.nz>.

6 (12 February 2020) 744 NZPD 16183.

7 Ministry of Business, Innovation & Employment, above n 1, at 6.

8 Fair Trading Amendment Bill (213-1) (explanatory note), at 1.

Australia's back in 2015 but this was not pursued given there was not yet an established body of caselaw.[9] New Zealand courts will likely heavily rely on Australian caselaw in determining whether conduct is unconscionable in breach of the statutory prohibition. Indeed, this was expressly acknowledged by the Government when it decided to opt for a prohibition on unconscionable conduct as opposed to some other standard (such as oppression).[10] Recent caselaw will be particularly influential for New Zealand courts when applying the statute.

III *New Zealand's current protections against unfair commercial practices*

Below summarises the existing protections against unfair conduct, prior to the FTAA coming into force. An examination of the existing framework of protections will highlight the gaps filled by the new prohibition.

A Existing protections prior to the amendment

1 Fair Trading Act 1986

The FTA's purpose is to provide protection for consumers and to allow confident participation between consumers and businesses.[11] An intended consequence of this is that businesses are able to compete effectively and confidently within the market. The FTA currently prohibits:[12]

- Misleading and deceptive conduct,
- Unsubstantiated representations,
- False representations,
- Unfair practices such as harassment and coercion,
- Unfair contract terms, and
- Specific practices such as bait advertising and pyramid selling schemes.

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9 744 NZPD, above n 6, at 16185.

10 Ministry of Business, Innovation & Employment, above n 1, at 38.

11 Fair Trading Act 1986, s 1A.

12 Sections 9-26A.

2 Commerce Act 1986

The primary purpose of the Commerce Act 1986 is to promote competition within the market for the benefit of consumers.[13] Unlike the FTA, its primary purpose isn't to protect consumers against unfair practices but instead to target horizontal arrangements between competitors. It nonetheless provides indirect benefits to consumers and businesses by:[14]

- Prohibiting practices which lessen competition and take advantage of market power, including cartels,
- Prohibiting acquisitions which lessen competition, and
- Regulating the price and quality of goods in markets with little competition.

This is not an exhaustive list but gives a sufficient idea of the protections the Commerce Act effectively provides to consumers and businesses.

3 Credit Contracts and Consumer Finance Act 2003 (CCCFA)

The CCCFA's main purpose is to protect consumers in situations involving credit contracts, consumer leases, and buy-back transactions of land.[15] This article is concerned with the provisions relating to oppressive conduct. The CCCFA has defined oppression as conduct that is "oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice".[16] This suggests that unconscionable conduct is narrower than the term oppression, as it is just one type of conduct that can be found to be oppressive.

4 Equitable doctrine of unconscionability

Prior to the introduction of the statutory prohibition of unconscionable conduct, the equitable doctrine of unconscionability was the only protection targeted at 'unconscionability' in New Zealand. This doctrine sets aside a bargain where the courts considered it inequitable to allow one party to enforce their contractual rights against another party who was detrimentally

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13 Commerce Act 1986, s 1A.

14 Sections 27, 30, 47 and 52A.

15 Credit Contracts and Consumer Finance Act 2003, s 3.

16 Section 118.

affected by the first party's exploitative conduct.[17] This doctrine will be examined further below.

5 Other legislative protections

Other potentially relevant legislative protections in New Zealand include the Consumer Guarantees Act 1993 (CGA) and the Contracts and Commercial Law Act 2017 (CCLA). The CGA provides statutory guarantees in respect of goods and services being safe and fit for purpose, and associated rights of redress.[18] The CCLA contains provisions directed at contractual mistakes,[19] misrepresentations,[20] illegal contracts,[21] restraint of trade,[22] and the sale of goods.[23]

B Evaluation of the protections

The MBIE survey showed that almost half of the business participants felt that they had either been treated unfairly or had been provided with unfair terms.[24] Conduct not captured by the legislation was summarised in the MBIE Discussion Paper as:[25]

a) Exploitative business practices that rely upon taking advantage of a smaller business' vulnerabilities which arise from the business' lack of legal comprehension and the consumer's commercial inexperience.
b) Businesses taking advantage of a smaller business'/consumer's lack of bargaining power. For example, where a business knows that the other party has no alternatives.
c) Conduct that may be within a business' legal right, but goes well beyond what is 'commercially necessary or justifiable.'

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17 James Every-Palmer "Unconscionable Bargains" in Butler and Others *Equity and Trusts in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2009) at 717.

18 Consumer Guarantees Act 1993, s 1A.

19 Contracts and Commercial Law Act 2017, s 21.

20 Section 35.

21 Section 73.

22 Section 83.

23 Section 120.

24 Ministry of Business, Innovation & Employment, above n 3, at 6.

25 Ministry of Business, Innovation & Employment, above n 1, at 17.

The prohibition of unconscionable conduct acts as a broader and more flexible standard able to catch wrongful conduct not already captured by the existing legislation and those highlighted above.[26]

IV *The equitable doctrine of unconscionable bargain*

A Purpose of the doctrine and its origins

The equitable doctrine of unconscionable bargain sets aside a contract that has been procured where one party knows or ought to have known of a special advantage affecting the other party and has actively exploited or passively accepted it.[27] While this contract may normally be enforceable in common law, equity operates to allow the other party to avoid the contract. This is because allowing such a benefit would amount to equitable fraud.[28] In other words, whilst a contract may be legally valid under normal legal principles, a court, if it decides that it was procured in an unconscionable manner, could deem it void.

It is possible to confuse unconscionable bargain with undue influence; however, the two doctrines are distinct. Undue influence looks at "the quality of the consent or assent of the weaker party", whilst unconscionable bargain focuses on the idea of retaining the benefit of a bargain where a person is under a special disability.[29] That is, undue influence focuses on how the consent was obtained, whereas unconscionable bargain looks at the conduct of the stronger party.

B The test for equitable unconscionability

The equitable doctrine of unconscionable conduct presents a narrow test for setting aside a bargain where the court finds the threshold has been met. The recognised elements in an unconscionable bargain have been set out by Tipping J in *Bowkett v Action Finance:*[30]

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26 Jeannie Marie Paterson "Unconscionable bargains in equity and under statute" (2015) 9 Journal of Equity 188 at 190.

27 At 188.

28 Palmer, above n 17, at 718.

29 *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14, (1983) 151 CLR 447 at [74].

30 *Bowkett v Action Finance Ltd* [1991] 1 NZLR 449 (HC) at 460.

1. The weaker party is under a special disadvantage or disability; and
2. The stronger party knows or ought to know of the disability; and
3. The stronger party victimised the weaker party by taking advantage of their disability either by active extortion or passive acceptance.

In addition to these tests, the courts have established that further considerations need to be taken into account, including:[31]

4. Whether there is a marked inadequacy of consideration and the stronger party either knows or ought to know of this,
5. Has there been procedural unfairness, either demonstrated or presumed from the circumstances.

Once conditions 1 – 3 have been satisfied and proper considerations have been given to 4 – 5, the onus then shifts to the stronger party to show that the transaction was fair, just and reasonable.[32] However, the whole circumstance in which the conduct arose must be considered when assessing whether there has been unconscionability. While the initial test involves looking at whether the complainant was under a special disadvantage, it is the conduct of the stronger party that will be focused on by the court.[33]

1 Special disadvantage

To satisfy the unconscionability test, the claimant must have a significant disability or weakness which prevents them from exercising a rational and independent judgement or has prevented them from looking after their own interests.[34] Some examples of this can be illness, ignorance, impaired faculties, financial need, illiteracy, unsoundness of mind, and business inexperience.[35] There has been a suggestion that emotional dependence qualifies as a

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31 *Bowkett v Action Finance Ltd,* above n 30.

32 *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735.

33 *Bowkett v Action Finance Ltd,* above n 30.

34 *Gustav & Co Ltd v Macfield Ltd,* above n 32, at [30].

35 *Bowkett v Action Finance Ltd,* above n 30.

disadvantage,[36] however this was decided under a split court and has been criticised for overly widening the law.[37]

2 The stronger party knew or ought to have known about the disability

To satisfy that the stronger party knew or ought to have known of the disability, there are two types of knowledge that will suffice. Actual knowledge, which is where the stronger party actually knew of the disability.[38] The other is constructive knowledge which is where the stronger party should have known of that circumstance – the threshold being when a reasonable person would have adverted to the possibility of its existence.[39] This will often be evidenced by a marked imbalance or knowledge of the lack of independent advice. The knowledge of an agent may also be imputed to the principal.[40]

3 The stronger party victimised the weaker either by active extortion or passive acceptance

To satisfy that the stronger party victimised the weaker party, the stronger party must have actively extorted the weaker party through the "use of arts or overreaching".[41] This can also be met if the stronger party passively accepted the bargain in circumstances where it is contrary to the conscience that the bargain should be accepted.[42] For example, acceptance of a bargain knowing it was not fair by way of the benefits it presented or where one party benefits a significant amount over the weaker party.[43]

4 Marked inadequacy of consideration and the stronger party knew or ought to have known

There will often be a marked inadequacy in cases of unconscionable bargain, though it is not an essential element. The contract will be manifestly one-sided in favour of the stronger party, and they knew that there was a substantive unfairness in the contract.[44] This element involves a balancing scale where the greater the inadequacy of consideration, the less the

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36 *Bridgewater v Leahy* [1998] HCA 66, (1998) 194 CLR 457.

37 *Bridgewater v Leahy*, above n 36.

38 *O'Connor v Hart* [1984] 1 NZLR 754 (CA).

39 *Nichols v Jessup* [1986] 1 NZLR 226 (CA).

40 *Bowkett v Action Finance Ltd,* above n 30.

41 *Fry v Lane* (1888) 40 Ch D 312.

42 *Bowkett v Action Finance Ltd,* above n 30.

43 *Bowkett v Action Finance Ltd,* above n 30.

44 *Bowkett v Action Finance Ltd,* above n 30.

weakness needs to be. On the other hand, the greater the weakness, the less the inadequacy of consideration needs to be.[45] However, contractual imbalance alone will not be enough in and of itself to satisfy the unconscionability threshold.

5 Procedural unfairness either demonstrated or presumed from the circumstances

Procedural unfair, though often present in a finding of conscionable bargain, does not in itself render a bargain unconscionable. A stronger party having knowledge that the weaker party has no independent legal advice may signal procedural unfairness,[46] but this is not conclusive. A large contractual imbalance will often give rise to a presumption of procedural unfairness.[47]

6 Fair, just and reasonable

If the conditions for an unconscionable bargain are met, the onus shifts on the stronger party to show that the contract was fair, just and reasonable. If it can be shown that the contract is fair, just and reasonable, then the contract will not be rescinded. However, this is difficult to show as if the contract is prima facie unconscionable, then it is unlikely that it will be a fair, just and reasonable bargain.[48]

C Limits of the equitable doctrine of unconscionable bargain

While some have argued that no further protections were required,[49] and others having described the statutory prohibition as a "solution that is looking for a problem",[50] the equitable doctrine is restricted in its level of protection. The doctrine provides a narrow test which has seen very few successful actions in convincing a court to set aside a bargain; even when there were obvious inequities in the way the stronger party had acted towards their weaker counterpart.[51]

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45 *Bowkett v Action Finance Ltd,* above n 30.

46 *Bowkett v Action Finance Ltd,* above n 30.

47 *O'Connor v Hart,* above n 38.

48 *Bowkett v Action Finance Ltd,* above n 30.

49 Ministry of Business, Innovation & Employment *Fair Trading Amendment Bill: Officials' Report to the Economic Development, Science and Innovation Committee* (July 2020) at 5.

50 744 NZPD, above n 6, at 16179.

51 *O'Connor v Hart,* above n 38. See also *Gustav & Co Ltd v Macfield Ltd*, above n 32.

The Discussion Paper released by MBIE noted a number of limitations of the usefulness of equitable unconscionability as a protection and these have been summarised below:[52]

a) To operate as a protection, it must be invoked in court and does not impose a positive duty on parties to act in good conscience. This prevents the Commerce Commission from taking a case and seeking penalties against parties alleged to be engaging in unconscionable conduct.
b) The high costs involved in taking a case to court means that it will not usually be worthwhile litigating unless it involves high-value transactions. This ignores the fact that unconscionability occurs at any transaction value which may still prove to be significant to some consumers.
c) Not all consumers have legal advice readily available to them to inform them of the doctrine or their ability to take their case to the Disputes Tribunal.
d) There will be no finding of unconscionability where there has been no unfair conduct even if the terms of a contract are grossly unfair.
e) Courts have historically limited the doctrine to business-to-consumer transactions and have avoided making an order in respect of commercial transactions.

Furthermore, the equitable doctrine of unconscionable bargain will only set aside a bargain in limited situations where there has been a known exploitation of a special advantage. The statutory prohibition would appear to be capable to applying to situations beyond this, as will be discussed below. This means that the equitable doctrine will only need to be relied on in situation outside of 'trade' which will be in private dealings and in situations involving gifts.[53]

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52 Ministry of Business, Innovation & Employment, above n 3, at 15.

53 Paterson, above n 26, at 210.

V *The Fair Trading Act 1986 (as amended)*

A The statutory prohibition on unconscionable conduct

The statutory prohibition on unconscionable conduct has been inserted in ss 7 and 8 of the FTA. Section 7 prohibits unconscionable conduct in trade,[54] while section 8 lists factors that the court may have regard to when deciding whether conduct is unconscionable.[55]

Section 7 states that a person must not, in trade, engage in conduct that is unconscionable.[56] 'Trade' is defined in s 2 of the Act as:[57]

> any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land

The section applies whether or not there has been a system or pattern of unconscionable conduct[58] or whether a particular individual is disadvantaged or likely to be disadvantaged by the conduct.[59] The application of the prohibition is also not restricted to situations where a contract is present.[60] Parliament's intention is clear from this section that the focus must be on the conduct rather than the transactions or any characteristics of the victim, though this may be a relevant consideration in the assessment. Further, s 7 is not limited by any rule of law or equity relating to unconscionable conduct – a direct reference to the body of caselaw under the equitable doctrine.[61] The prohibition of unconscionable conduct can therefore be seen as a broader protection than equitable unconscionability and is able to capture a wider range of conduct than the equitable doctrine.

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54 Fair Trading Act, s 7.

55 Section 8.

56 Section 7.

57 Section 2.

58 Section 7(2)(a).

59 Section 7(2)(b).

60 Section 7(2)(c).

61 Section 7(3).

Section 8 sets out some factors which the courts may consider when determining if the conduct is unconscionable. Some considerations include: 'the relative bargaining power of the person engaging in the conduct', the extent of good faith of both parties, the ability to understand documents and the use of unfair pressure or undue influence.[62]

More importantly, in line with the Australian Consumer Law (ACL), the term 'unconscionable conduct' has not been defined in the legislation. This was fuelled by the legislative intent to keep the provision flexible and be able to adapt to new situations.[63] As this article will examine, this has been the subject of a number of critiques which calls for tighter drafting of the legislation to provide certainty to businesses.

These sections, unlike the equitable doctrine of unconscionable conduct, create a positive duty on businesses to refrain from engaging in conduct that is unconscionable.

B Competing views

Arguments against the new prohibition suggested that the protections within the old legislation were sufficient and saw no problem that required an amendment.[64] However, these arguments failed to consider the gaps already examined that exist within the current protections.

One of the main issues raised during the passage of the amendment was the lack of definition for the term 'unconscionable' in the legislation. Hon Dr David Clark suggested that providing the list of factors in s 8 meant there was sufficient guidance for the courts and ensured that the prohibition could apply flexibly to novel situations.[65] However, Select Committee

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62 Section 8.

63 (22 June 2021) 753 NZPD 3515.

64 Ministry of Business, Innovation & Employment, above n 1, at 28.

65 753 NZPD, above n 63, at 3515.

submissions.[66] and Parliamentary debates shared a similar sentiment that a definition was required to avoid the uncertainty that Australian courts have faced..[67]

It seems the Government took a strict approach in modelling the New Zealand prohibition on the equivalent Australian provision when drafting the FTAA by omitting to include a statutory unconscionability definition.

VI *Australia's statutory prohibition on unconscionable conduct*

Australia has had a statutory prohibition on unconscionable conduct in their consumer law since 1986..[68] Under the ACL, there are two provisions which prohibit unconscionable conduct. Section 20 prohibits conduct, in trade or commerce, that is unconscionable within the meaning of the unwritten law..[69] This is a direct reference to the equitable doctrine of unconscionable bargain and no equivalent prohibition was adopted in New Zealand. Section 21, on which s 7 of the FTA was modelled, prohibits a person from engaging in conduct 'that is, in all circumstances, unconscionable'..[70]

The statutory prohibition of unconscionable conduct in the ACL mirrors the corresponding section in the Australian Securities and Investments Commission Act 2001 (ASIC Act) to allow for similar treatment of financial products and services..[71]

The Australian provisions historically distinguished between business-to-consumer and business-to-small-business transactions but moved away from this in 2012 to capture all transactions in 'trade and commerce' regardless of the parties..[72] Other changes that occurred in 2012 included an insertion of interpretive principles in s 21(4), which s 7(2)(a) – (c) of the

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66 Ministry of Business, Innovation & Employment, above n 1, at 6.

67 744 NZPD, above n 6. See also 753 NZPD, above n 63.

68 Paterson, above n 26, at 190.

69 Competition and Consumer Act 2010, Australian Consumer Law, s 20.

70 Section 21.

71 Australian Consumer Law "The Australian Consumer Law" <consumer.gov.au>.

72 Competition and Consumer Legislation Amendment Act 2011 (Cth).

FTA closely replicates. Section 22 then lists out the factors which assist the courts in determining when conduct will be deemed unconscionable (this provision is very similar to the new s 8 of the FTA).

Given that the statutory prohibitions on unconscionable conduct in Australia and New Zealand are similarly worded, we can anticipate that New Zealand courts will draw on the principles arising from Australian caselaw in deciding the cases that come before them.

A The state of the Australian law prior to the Quantum Housing decision

Since the introduction of the statutory prohibition on unconscionable conduct into Australian law, the Australian courts have been establishing general principles which they have been able to apply to cases that come before them. While 'unconscionable conduct' is not defined in Australian Consumer Law (or the ASIC Act) the courts have not simply applied their full discretion in deciding whether a particular conduct meets the threshold of unconscionability. As cases have come to the courts, the judiciary have begun to develop a framework of principles to guide the application of the prohibition. These will be examined further in the following sections.

1 Equity's influence

Section 21 of the ACL and s 7 of the FTA makes it clear that statutory unconscionability will not be limited to the equitable doctrine.[73] However, the doctrine nevertheless provides a useful guide when deciding cases. The Australian courts have looked to the law on equitable unconscionability when determining the scope of the statutory prohibition. However, the statutory prohibition is ultimately less restrictive and captures a greater range of conduct.[74]

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73 Australian Consumer Law, above n 69, s 21.

74 *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, (2019) 267 CLR 1 at 279.

2 'in all circumstances'

In reading ss 12CB of ASIC Act[75] and 21 of ACL[76], it can be inferred that to contravene the sections, it is vital to consider whether the conduct in question was 'in all circumstances, unconscionable'. This specific wording is absent in the New Zealand prohibition, however Australian caselaw will nevertheless be persuasive in the way New Zealand judges approach cases that come before them. The Australian courts have made it clear that the evaluation of whether conduct is unconscionable will be highly factual[77] and will require close consideration of the facts in the context of the prohibition.[78] Where the court is faced with the question of whether the conduct is unconscionable under the legislation, the assessment will require an evaluative judgment of all the circumstances.[79]

3 The statutory norm

In assessing whether the 'conduct, is an all circumstances, unconscionable', the Australian courts have determined that the correct perspective is that the statute 'operates to prescribe a normative standard of conduct'.[80] That is, it is necessary to consider the conduct in light of the values embedded in the text, context and purpose of the relevant Act as well as in the circumstances it arose in.[81] Thus, in finding that conduct is unconscionable, it will not be because it is against the conscience of the community as a whole, as would be found in equity. Instead, it will be unconscionable because it has contravened the standard of conduct informed by the values underpinning the statute itself. Overall, statutory unconscionability must be tested against a normative standard of conscience. This has been explained by the Court in *Lux* in these words:[82]

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75 Australian Securities and Investments Commission Act 2001, s 12CB.

76 Australian Consumer Law, above n 69, s 21.

77 *Australian Securities and Investments Commission v Kobelt*, above n 74, at [150].

78 At [151].

79 At [47].

80 At [87].

81 *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672 at [365].

82 *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [23].

> That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers. The content of those values is not solely governed by the legislature, but the legislature may illuminate, elaborate and develop those norms and values by the act of legislating, and thus standard setting ... Values, norms and community expectations can develop and change over time. Customary morality develops 'silently and unconsciously from one age to another', shaping law and legal values ... the operative provisions of the ACL reinforce the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure. These considerations are central to the evaluation of the facts by reference to the operative norm of required conscionable conduct.

4 Evaluating unconscionability

While previously some Australian courts have found that unconscionable conduct is conduct that requires a 'high level of moral obloquy',[83] more recently, the courts have opted to steer clear of substituting other words for those chosen by Parliament.[84] Instead, the term "unconscionable" has been understood to bear its ordinary meaning[85] with moral obloquy acting as a mere consideration.[86] Unconscionability means something not done in good conscience.[87] To assess whether the conduct is unconscionable, the accepted evaluation has been to ask:

> whether it is to be characterised as a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience and so be characterised as unconscionable.[88]

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83 *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [291]. See also *Attorney-General (NSW) v World Best Holding* [2005] NSWCA 261 at [121], *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50 at 262.

84 *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50 at 262.

85 *Australian Securities and Investments Commission v Kobelt*, above n 74, at [14].

86 At [60].

87 *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*, above n 82, at [41].

88 *Australian Securities and Investments Commission v Kobelt*, above n 74, at [92].

5 The values underpinning the statutes

The values underpinning s 22(1) of the ACL and cognate provisions were identified by Allsop CJ in *Paccioco* as follows:[89]

a) Fairness and equality
b) Lack of understanding or ignorance of a party
c) The risk and worth of the bargain
d) Good faith and fair dealing

It is also important to note that while asymmetry of power contributes to the evaluation of whether the conduct has been unconscionable, it is not in and of itself enough to establish unconscionability and is simply one factor in the assessment.[90]

6 Honesty and fairness

Parliament's choice to use the word 'unconscionable' as opposed to 'unfair' as in European law signals that they intended to set a higher threshold for a contravention of the statute.[91] Therefore, unfair conduct by itself will not amount to unconscionable conduct. Honesty and fairness will still however be relevant in the assessment.[92] Unfair conduct can be considered unconscionable but only if it amounts to an "illegitimate exploitation of a person's vulnerability and therefore amounts to an unjustifiable pursuit of self interest".[93] However, as will be explained below, following the *Quantum Housing* decision we may see a blurring of the lines between unfair conduct and statutory unconscionable conduct.

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89 *Paciocco v Australia and New Zealand Banking Group Limited,* above n 84, at [285].

90 At [293].

91 Ministry of Business, Innovation & Employment, above n 1, at 30.

92 *Australian Securities and Investments Commissions (ASIC) v AGM Markets Pty Ltd (In Liq)* [2020] FCA 208 at [372].

93 At [372].

7 Objective assessment

While the subjective state of mind of the alleged contravener is a vital aspect of the assessment of statutory unconscionability, ultimately, the assessment will be an objective evaluation of the facts and the circumstances in which the conduct arose.[94]

8 Industry practice

The industry practice relevant in the circumstances the conduct arose in will be a relevant consideration in assessing whether conduct is unconscionable.[95] What is unconscionable will need to be examined within the norms and practices of the relevant industry and acting consistently with industry practice may points towards the conduct not being unconscionable, but it is by no means a determinative factor towards finding no unconscionability.[96]

9 Pre-existing vulnerability or disadvantage

As aforementioned, while the statutory prohibition is not limited by the unwritten law, the prohibition is deeply rooted in the equitable doctrine. Courts will naturally draw on equity in their assessments. While a special disadvantage as required by equity is no longer required by the statutory prohibition (as discussed below),[97] having a vulnerability or lack of understanding (and the unconscientious taking advantage of that) is often central to a finding of unconscionable conduct.

The Australian courts have commonly looked for a vulnerability as being one of the determinative factors in finding unconscionable conduct – often in the form of an inexperienced weaker party. Conduct could be considered unconscionable if it can be described as predatory and against good conscience. This often occurs where the weaker party is inexperienced, and the stronger party exploited this.[98]

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94 At [373].

95 At [374].

96 At [375].

97 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd*, above n 4, at [31].

98 *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 at [43].

While Kobelt was not found to have acted unconscionably in *Kobelt*[99], the case shows the courts' tendency to look first for a disadvantage. In this case, the Court pointed to the fact of living in remote communities and the lack of financial literacy as the relevant disadvantages.

Given a vulnerability has long been a requirement of equitable unconscionability, the Australian courts initially accepted this as a strict requirement to finding statutory unconscionability as demonstrated above. However, as will be examined further, this aspect of the statutory prohibition has evolved as the courts have instead based their decision not on the presence of a vulnerability but instead on the conduct of the person alleged to be engaging in unconscionable conduct.

For example, in *Lux*, the Court found that it was not the advanced age of the consumers that led to a finding that Lux engaged in unconscionable conduct, but instead it was the use of a 'deceptive ruse'[100] to manipulate the emotions of the elderly women as to make them vulnerable by the inability to put an end to the sales process once they are inside the house and create a sense of obligation to purchase.[101]

VII *Australian Competition Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40

The *Quantum Housing Group* case marks an important clarification in the Australian law on the statutory prohibition on unconscionable conduct. The findings of the Full Federal Court are likely to be influential for New Zealand courts in applying the New Zealand statutory prohibition on unconscionable conduct.

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99 *Australian Securities and Investments Commission v Kobelt*, above n 74.

100 *Australian Competition and Consumer Commission v Lux Distributors Pty*, above n 82, at [27].

101 At [39].

A Facts

The case involved the National Rental Affordability Scheme of which the respondents, Quantum Housing Group Pty Ltd (QHG), were Approved Participants under the scheme. Approved Participants were offered financial incentives to build and offer rental accommodation to low and middle income earners by way of subsidy. Through this business of arranging investment in properties that qualified for incentives under the scheme, QHG entered into agreement with investors.

Further down the business' life, QHG implemented the 'Roll Up Plan' which involved requiring the investors to switch to a property manager that was approved by QHG. QHG required the investors to lodge a statement of compliance which if they failed to do so would mean they were in breach of their NRA and would stop receiving incentives. QHG also used their superior bargaining power to apply unduly pressure on the investors. This was further amplified by the subsequent introduction of the Accreditation Guidelines which required property managers to pay a security deposit of $10,000 if they were not approved by QHG and if the investor did not transfer to a QHG approved property manager. The investors who were subject to this conduct had no proven vulnerability.

The execution of the 'Roll Up Plan' by QHG was what was considered to be the unconscionable conduct. Specifically, the misuse of superior bargaining power, dishonestly misleading the investors and applying pressure through unjustified requirements. QHG engaged in these actions to obtain financial benefits of which were concealed to the investors. The actions were described as "[reflecting] a dishonest lack of good faith".[102]

B The primary judgment

The primary judge concluded that there was no unconscionable conduct under s 21 of the ACL. His findings were largely based on the case of *Kobelt,* holding that it was necessary to

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102 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd*, above n 4, at [96].

find both vulnerability and exploitation of that vulnerability, as that was a requirement of unconscionable conduct under s 21.[103]

The primary judge's reasoning in denying relief based on unconscionable conduct is summarised below:

a) The investors could not be characterised as vulnerable or in a position of disadvantage that would expose them to being exploited or victimised.[104]
b) There was no financial disadvantage suffered by the investors as a result of switching to a QHG approved property manager.[105]
c) The operative conduct by which the Roll Up Plan was implemented was not based on taking advantage of the vulnerability of the investors but by the leveraging the degree of power they have in its dealings over the investors.[106]

The primary reasoning that this article is concerned with is the finding that there was no breach of the prohibition based on the premise that the investors had no vulnerability. The primary judge found the investors could reasonably understand the terms of the arrangement they were entering.[107] This highlights the courts' sensitivity towards the inability of an individual to look after their own interests and will often look for this factor in assessing whether there has been unconscionable conduct.

C The ACCC appealed to the Full Federal Court.

The main issue before the appellate court was:[108]

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103 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2020] FCA 802.

104 At [29].

105 At [33].

106 At [35].

107 At [32].

108 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd*, above n 4, at [36].

> whether pre-existing vulnerability, disability or disadvantage (of some kind, and if so what kind) and the exploitation or taking advantage of such is a necessary element of statutory unconscionability in s 21 of the ACL and cognate provisions such as s 12CB of the Australian Securities and Investments Commission Act 2001 (Cth)

In other words, whether, for conduct to be unconscionable, there is required to be a pre-existing vulnerability or disadvantage in the person or persons to whom the conduct can be seen as directed and that such was exploited or taken advantage of. The Court answered this question in the negative, saying:[109]

> Whilst some form of exploitation of or predation upon some vulnerability or disadvantage of people will often be a feature of conduct which satisfies the characterisation of unconscionable conduct under s 21, such is not a necessary feature of the conception or a necessary essence in the embodied meaning of the statutory phrase.

This finding required a close consideration of the previous cases, in particular *Kobelt*. The Australian Securities and Investments Commission (ASIC) case was that Kobelt took unconscionable advantage of the special disadvantages of the members of the community.[110] The judgments in *Kobelt* were referred to by the contradictor to support his arguments that exploitation of a vulnerability was necessary to a finding of statutory unconscionability. The case was also relied on by the primary judge in finding a lack of unconscionability.[111]

D Kobelt

Mr Kobelt was a storekeeper who sold food, groceries, fuel and used cars to the residents of Mintabie. The system used by Mr Kobelt was a "book-up" system where individuals could purchase the goods on credit. They would provide Mr Kobelt with their debit cards where the customers' wages were credited into along with the PIN to access the funds. When wages were credited into the accounts, Mr Kobelt would take all or nearly all the funds to pay what was owing to him as well as for future purchases.

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109 At [4].

110 At [39].

111 At [37].

The record keeping was characterised as 'rudimentary' and difficult to understand.[112] There was evidence that the customers understood the system and there were rarely any complaints about the system. The residents of Mintabie were described as having the disadvantages or vulnerabilities of "poverty, low levels of literacy, of numeracy, and of financial literacy."[113]

In short, the Court in *Quantum Housing* rejected the proposition put forward by the contradictor that any of the justices in *Kobelt* apart from Keane J required a vulnerability or exploitation of a disadvantage for a finding of statutory unconscionability.[114] What was considered unconscionable in the case was not the mere fact that the book-up system was offered and voluntarily accepted, but the manner in which it was offered and administered.[115]

Given ASIC's case was predicated on Mr Kobelt taking unconscionable advantage of the 'special advantages' of the Mintabie residents,[116] it would follow, and as stated by the Court in *Quantum Housing*, that the justices in *Kobelt* did not lay down general principles applicable to all cases regarding a requirement of a pre-existing vulnerability or disadvantage.[117] Section 21(4)(a) makes it clear that the section is not limited to the unwritten law and therefore does not import a requirement of a special disadvantage as would be necessary for a finding of equitable unconscionability. The justices in evaluating at no point suggested that a pre-existing disadvantage or vulnerability of which advantage is taken is a requirement of statutory unconscionability.[118] To do so would have been to fail to address ASIC's submission which was formed on requiring a 'special disadvantage' to be taken advantage of.

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112 At [38].

113 At [38].

114 At [78].

115 At [264].

116 At [39].

117 At [43], [45], [50] and [79].

118 At [62]. See also [50], [65], [73] and [77].

While the judges found no support in the judgments in *Kobelt* for such proposition, they did confirm that a vulnerability or disadvantage will often exist in cases of unconscionability.[119] However, as discussed above, a finding of statutory unconscionability will involve an evaluation of the conduct in light of all the circumstances and facts of a case and a vulnerability is simply one of those considerations.

E Decision

The Court in *Quantum Housing* found that under s 21, QHG engaged in conduct that was unconscionable on the basis that QHG had deliberately misused their superior bargaining power by misleading and dishonestly pressuring the investors by imposing unjustified requirements and extracting undisclosed financial benefits.[120]

The assessment the Court used was "whether [the impugned conduct] is to be characterised as a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience".[121] This shifted the focus of the assessment to QHG's conduct as opposed to any vulnerability possessed by the investors. This led to the finding that QHG's conduct, as discussed in the facts, was a sufficient departure as to be against business conscience.

The Court drew on earlier cases to find that what will inform whether the conduct is against business conscience will hinge on the purpose and context of the relevant statute.[122] The ACL's main purpose is to protect consumers[123] therefore, as noted by the Court, it would be of no sense if the finding of statutory unconscionability hinged on whether the consumer has a particular vulnerability even if the business is engaging in, for example, commercial bullying and pressure, dishonesty and misuse of superior bargaining power.[124]

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119 At [79].

120 At [96].

121 At [92].

122 At [89].

123 Australian Government "Australian Consumer Law" (1 December 2021) Business <business.gov.au>.

124 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd*, above n 4, at [91].

Therefore, as found by the Court, QHG's conduct amounted to conduct which would offend business conscience and therefore breached s 21 of the ACL even though the investors were under no pre-existing vulnerability or disadvantage. Contrary to the primary judge's findings, a pre-existing vulnerability or disadvantage is not a necessary condition to a finding of unconscionable conduct.

VIII *New Zealand's approach to the statutory prohibition on unconscionable conduct*

Following the Australian decisions and in particular *Quantum Housing*, New Zealand courts have an established framework of principles to draw from in deciding cases that come before them alleging breach of the statutory prohibition in section 7 of the FTA. These principles may be summarised as follows:

a) Statutory unconscionability will not be confined to the requirements of equitable unconscionability (though will be a helpful starting point) and the standard is capable to applying to fact situations which may not amount to unconscionable conduct under the equitable doctrine.[125]
b) The conduct must be evaluated in light of the circumstances in which it arose in[126] and in the context of the applicable statute.[127]
c) In deciding whether conduct is against conscience, the relevant industry practices in which the conduct arose in will be a relevant consideration.[128]
d) The assessment is whether the conduct was a "sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience."[129]

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125 *Australian Securities and Investments Commission v Kobelt*, above n 74, at [88] per Gageler J.

126 At [150].

127 At [151].

128 *Australian Securities and Investments Commissions (ASIC) v AGM Markets Pty Ltd (In Liq)*, above n 92, at [374].

129 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd*, above n 4, at [92].

e) A pre-existing vulnerability or disadvantage is not required in order to make a finding of statutory unconscionability, though in most cases will be present.[130]

A A comparison of statutory unconscionability to oppression

In considering the appropriate standard to address the problems highlighted by the MBIE survey, two options were suggested to combat unfair conduct: prohibit oppressive conduct or prohibit unconscionable conduct.[131] As discussed above, the Government opted for the latter. A key consideration in making this decision was alignment with Australia which, consequently, allows New Zealand courts to draw from Australian jurisprudence.[132]

Prohibiting unconscionable conduct was considered the more desirable standard as it broadened the protections provided by the equitable doctrine without excessively interfering with the everyday commercial transactions.[133] The standard was still considered to import a high threshold and still overlapped significantly with the narrow equitable doctrine.[134]

What is clear is that following the decision of *Quantum Housing* decision there is a further move away from the equitable doctrine of unconscionability and an increased willingness from Australian courts to broaden the scope of the prohibition. The anticipated reliance of New Zealand courts on Australia means that New Zealand courts are likely to find similarly as the Court did in *Quantum Housing*. The standard of unconscionable conduct under the FTA is not constrained by what is necessary to find a breach of the equitable doctrine and would appear to be what is ultimately a broad and vague standard.

Perhaps an unintended consequence of this was a further broadening of the scope of the prohibition, introducing more subjectivity and uncertainty in the law. Courts may instead find themselves looking to the principles of oppression to inform themselves of what may be

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130 At [93].

131 Ministry of Business, Innovation & Employment, above n 1, at 2.

132 At 2.

133 At 24.

134 At 24.

unconscionable conduct. As aforementioned, New Zealand already has an established body of caselaw around oppression in the context of credit contracts and a prohibition on oppressive conduct would have ultimately been reflective of the rules around oppression in the CCCFA. Arguably, this goes against the intention and motivations of the Government in choosing the unconscionable conduct standard over oppression.

Oppression is defined in the CCCFA as "oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice".[135] Both oppression and unconscionable conduct address similar types of conducts i.e. conduct that goes beyond what is commercial necessary and justifiable.[136] It was found in *GE Custodians v Bartle* that the main test for determining whether something is oppressive is the "reasonable standards of commercial practice" component of the definition.[137] In determining whether the conduct is oppressive, courts will need to consider the evidence before them to establish what the normal standards of commercial practice are.[138]

While oppression and unconscionable conduct by no means import the same threshold, the similarities in considerations and factors to be taken into account may further blur the lines between the two standards. For example, in the case of *Xiao v Sun*[139] the Court found oppression based on the fact that the lender (Xiao) took advantage of the borrower's (Sun) gambling problem and applied unfair pressure by threatening the borrower of severe consequences if they did not meet the interest payments.[140] The interest rate attached to the loan was also unjustifiably high. Xiao relied on Sun to fund her gambling and Sun took advantage of this by offering her a loan contract knowing of her gambling problem. Similarly in *Quantum Housing*, QHG took advantage of their superior bargaining position arising from the investors' reliance on them. QHG also threatened the investors of defaulting under their agreement.

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135 Credit Contracts and Consumer Finance Act 2003, s 118.

136 Ministry of Business, Innovation & Employment, above n 1, at 2.

137 *GE Custodians v Bartle* [2010] NZSC 146, [2011] 2 NZLR 31.

138 *Greenback New Zealand Limited v Haas* [2000] 3 NZLR 341 (CA).

139 *Xiao v Sun* [2018] NZHC 536.

140 At [28].

In considering the facts which the Court in *Quantum Housing* relied on to find unconscionable conduct, being that QHG had deliberately misused their superior bargaining power by misleading and dishonestly pressuring the investors by imposing unjustified requirements and extracting undisclosed financial benefits,[141] we see how the facts in *Xiao v Sun* may come within the ambits of unconscionable conduct.

If a court finds that a party has engaged in oppressive conduct, the remedy available to an individual is the reopening of the contract to fix any oppressive elements of the transaction.[142] In finding unconscionable conduct on the other hand, businesses can be fined up to $600,000 while individuals can be liable for fines of up to $200,000.[143]

Australian courts have also confirmed that it is an objective assessment,[144] however, there is now a level of subjectivity imported in the standard in determining what may be considered bad faith, dishonest or going beyond acceptable commercial behaviour as to offend conscience. While the difference in punishment demonstrates the high threshold imposed on statutory unconscionability, this poses a risk to businesses or individuals who may interpret 'bad faith' or 'dishonesty' differently to how a court would. It would also open up the number of allegations possible under the prohibition – a corollary of this being that compliance costs for businesses would increase in the attempt to understand what it means to engage in unconscionable conduct. These could also include incurring costs in having to train employees on acceptable industry standards and in drawing up comprehensive procedures and policies.

This evidently goes against one of the intentions behind using the unconscionable conduct standard, which was to prevent the Government from overreaching and allowing businesses

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141 At [97].

142 Credit Contracts and Consumer Finance Act 2003, s 120.

143 Fair Trading Act, above n 11, s 40(1).

144 *Australian Securities and Investments Commissions (ASIC) v AGM Markets Pty Ltd (In Liq)*, above n 92, at [373].

to operate confidently in the market.[145] Perhaps more is required from New Zealand's legislature in order to remove the uncertainty surrounding the prohibition.

IX *An unconscionable conduct definition*

As aforementioned, a statutory definition of unconscionable conduct in the FTA seems to be the correct step towards removing the uncertainties in what is now a broad and vague standard. A proposed definition is:

(1) A person engages in unconscionable conduct if the court is satisfied that in the circumstances and in light of the purposes of the Act, the conduct is a serious misconduct that goes beyond the standards of acceptable commercial behaviour so as to be against conscience or to offend conscience.

Alike to the definition of oppression, this provides courts guidance in regard to the standard required in determining whether conduct is unconscionable. In determining what the standard of acceptable commercial behaviour is, the conduct must be egregious and values such as honesty and fairness must be given regard to.[146] In assessing whether the conduct is considered "*a serious misconduct that goes beyond the standards of acceptable commercial behaviour"* the court must undertake a factual assessment and give regard to all the circumstances in which the conduct arose in.

What is serious misconduct will be evaluated in light of factors such as the industry practice, what may be considered as acceptable standards within the industry, as well as what an ordinary consumer or business in trade would consider going beyond commercially necessary or appropriate. The definition is not intended to give one concrete answer to what unconscionable conduct is but instead acts as a check list for courts when undertaking an assessment of statutory unconscionability.

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145 Fair Trading Amendment Bill, above n 8, at 1.

146 Ministry of Business, Innovation & Employment, above n 1, at 24.

The purposes of the FTA include protecting the interests of consumers, allowing businesses to compete effectively and the confident participation of consumers and businesses.[147] What this may look like in practice is that consumers and businesses expect to be treated honestly, fairly and without deception or unfair pressure. *"in light of the purposes of the Act"* imposes an evaluation of the conduct against the purposes of the Act. It prevents too broad of an evaluation of the conscience of the community as a whole and narrows it down to a consideration of the conduct that is targeted by the statute.

While some have argued that a definition will create an inflexible standard unable to apply to novel situations,[148] a normative standard recognises that values and norms within a community develop and change over time.[149] The definition will continue to apply as how the courts will interpret acceptable commercial behaviour will also shift as values within the community evolve.

Along with the principles laid out in s 7(2) of the FTA, an additional section may also be useful in further clarifying the section:

…

> *(d) a particular individual is under a pre-existing disability, vulnerability or disadvantage*

Doing so will formalise the decision in *Quantum Housing* and further remove the uncertainties around the prohibition.

X *Conclusion*

The introduction of the statutory prohibition of unconscionable conduct while subject to much debate at its introduction has been a necessary move for strengthening protections around unfair commercial practices in New Zealand. New Zealand judges will look closely

147 Fair Trading Act 1986, at 1A.

148 (10 August 2021) 754 NZPD 4417.

149 *Australian Competition and Consumer Commission v Lux Distributors Pty*, above n 82, at [23].

at the established body of caselaw in Australia to guide their assessment in evaluation whether conduct is unconscionable.

The *Quantum Housing* decision marks an important step in the assessment of unconscionable conduct. The possibility of finding unconscionable conduct without the need for a pre-existing vulnerability or disadvantage means uncertainty for businesses as to when they may cross the threshold of unconscionability. In addition, this change further disconnects the statutory prohibition from the equitable doctrine and risks conflation with oppression.

While the Australian jurisprudence may provide a sufficient guide for New Zealand courts, the lack of certainty in the legislation could lead to increases in compliance costs for businesses. A prominent sentiment during Parliamentary debates[150] and Select Committee submissions[151] during the passing of the Bill was the lack of definition for the term 'unconscionable'. The introduction of a definition may work to provide not only certainty for the courts but also businesses within New Zealand. The established set of principles, especially following the *Quantum* Housing decision, means there is sufficient guidance for the legislature to make this change. These benefits present an attractive option for New Zealand legislature and may sufficiently justify the introduction of a definition.

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150 744 NZPD, above n 6.

151 Ministry of Business, Innovation & Employment, above n 49, at 28.

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