PUSHING EQUITY'S ENVELOPE: PROBING THE ARBITRARY DISTINCTION BETWEEN IMMORAL AND UNCONSCIONABLE COMMERCIAL BEHAVIOUR

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Some forms of commercial conduct, such as price gouging, are technically 'legal' but nevertheless condemned by most as reprehensible. This article pushes equity's envelope and explores the opaque line separating immoral commercial conduct from legally unconscionable commercial conduct. It explores the cases in which unconscionability has been alleged but not proven, analysing the evaluative method in each to extrapolate those features or qualities of the conduct involved to determine how the courts delineate the merely unreasonable from the unlawful. This informs the posited 'spectrum' of commercial behaviour, identifying what appears to be the 'default' judicial perception of the gravity of various forms of business conduct. Such a spectrum not only serves to guide and inform the behaviours and strategies of market players and their counsel but helps us better understand how equity gauges the lawfulness of commercial behaviour, and the role conscience and morality play in this normative process.

I INTRODUCTION

During the 'Black Summer' bushfires of 2019–20, in which 10 million hectares were scorched and 10,000 homes and other buildings were destroyed throughout the nation's southeast, some retailers in affected regions doubled the price of bottled water and tripled the price of loaves of bread.[1] At the height of the COVID-19 pandemic (circa 2020–21), retail prices for toilet paper and hand sanitiser, as well as medical supplies such as surgical face masks – the demand for which increased dramatically through mass panic – skyrocketed.[2] These are

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1 Kelsey Wilkie, 'Service Station in Bushfire-Ravaged Town is Blasted for Doubling the Price of Bottled Water', *Daily Mail Australia* (online, 2 January 2020) <https://www.dailymail.co.uk/news/article-7843399/Service-station-bushfire-ravaged-region-DOUBLES-price-bottled-water-48.html>.

2 Kelly Burke, 'Coronavirus Price Gouging Out of Control Says CHOICE', *7News* (online, 14 April 2020) <https://7news.com.au/lifestyle/health-wellbeing/coronavirus-price-gouging-out-of-control-says-choice-c-974544>; Pippa Bradshaw, 'Pharmacies Caught Price Gouging, Capitalising on Coronavirus Panic', *9Now* (online, 6 February 2020) <https://9now.nine.com.au/a-current-affair/coronavirus-sparks-face-mask-price-gouging-in-australia/c442730e-efaf-46e3-8f51-c2f338ece091>.

obvious instances of the common commercial practice known as 'price gouging', whereby sellers price goods or services at a level significantly higher than what is objectively considered acceptable, reasonable or fair.[3] The practice is not illegal in Australia. The Australian Competition and Consumer Commission ('ACCC'), the nation's consumer law regulatory authority, also lacks any statutory power to regulate pricing and has frequently stressed the importance of a largely free market. Price gouging is, however, condemned by most factions of society as grossly immoral, even if it is technically legal.[4]

Price gouging as a practice highlights an established truth in commerce: parties will at times act immorally and unfairly without necessarily acting *unconscionably* in the sense proscribed by law.[5] The latter requires proof of violation of established equitable principles abhorring the unconscientious exploitation of the weak or vulnerable for some commercial or economic advantage or gain. Those principles are narrow and opaque, and as will be explained in this article, merely pushing equity's envelope is not sufficient to invoke its protection. Various commercial behaviours, though unfair, will not, without more, become unlawful. Some common examples include exercising contractual rights at a time or in a manner that is detrimental to the other party, taking advantage of a stronger bargaining position vis-à-vis a situationally disadvantaged counterpart, and intentionally breaching a contract and assuming liability to pay damages so as to pursue or protect commercial interests. Clearly, conscience and related notions such as morality have over the centuries become the theoretical touchstones for the doctrine of unconscionability in its equitable and statutory forms.[6] But how the courts distinguish the merely unfair from the legally unconscionable remains shrouded in mystery. This article endeavours for greater clarity.

Part II of this article traces the emergence of equity and highlights the prominence of morality as a guiding precept within this body of law. Part III outlines the contemporary doctrine of unconscionable dealings, providing essential footing for analysis of the case law considered in Part IV. This case law considers various forms of commercial behaviour which, though objectively immoral and unfair,

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3 Mark Giancaspro, 'Perilous Fires, Pandemics and Price Gouging: The Need to Protect Consumers from Unfair Pricing Practices during Times of Crisis' (2021) 44(4) *University of New South Wales Law Journal* 1458, 1459 <https://doi.org/10.53637/DKYF4495>, citing Federick F Wherry and Juliet B Schor, *The SAGE Encyclopedia of Economics and Society* (SAGE, 1st ed, 2015) 1310.

4 See, eg, Dreda Culpepper and Walter Block, 'Price Gouging in the Katrina Aftermath: Free Markets at Work' (2008) 35(7) *International Journal of Social Economics* 512 <https://doi.org/10.1108/03068290810886911>; Emily Bae, 'Are Anti-Price Gouging Legislations Effective against Sellers during Disasters?' (2009) 4(1) *Entrepreneurial Business Law Journal* 79, 79, 82–3; Dwight R Lee, 'Making the Case Against "Price Gouging" Laws: A Challenge and an Opportunity' (2015) 19(4) *Independent Review* 583.

5 The ACCC has previously suggested that it may, in limited circumstances, amount to unconscionable conduct within the meaning of the Australian Consumer Law: Rod Sims, 'Managing the Impacts of COVID-19 Disruption on Consumers and Business' (Speech, Gartner CEO Forum, 8 April 2020) <https://www.accc.gov.au/about-us/news/speeches/managing-the-impacts-of-covid-19-disruption-on-consumers-and-business-speech>.

6 See Irit Samet, 'What Conscience Can Do for Equity' (2012) 3(1) *Jurisprudence* 13 <https://doi.org/10.1080/20403313.2012.11423534>; Alastair Hudson, 'Conscience as the Organising Concept of Equity' (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 261.

have been deemed to fall short of the threshold for unconscionability. From this, Part V probes the evaluative method in each case and extrapolates those features or qualities of the conduct involved in each to determine how the courts delineate the merely unreasonable from the unconscionable (unlawful). A tentative spectrum of commercial behaviour is proposed as a means of identifying what appears to be the 'default' judicial perception of the gravity of various forms of business conduct. This not only serves to guide and inform the behaviours and strategies of market players and their lawyers but helps us better understand how equity gauges the lawfulness of commercial conduct, as well as the role of conscience and morality in this normative process. Part VI concludes with a plea not to reflexively dismiss the cases in which unconscionability has not been found. Owing to the normative nature of the doctrine, and the fact (as Plato contends)[7] that comprehending what is 'right' naturally aids in comprehending what is 'wrong', these cases are as essential to developing our understanding of unconscionability as are the cases in which it has been proven.

II THE EMERGENCE OF EQUITY AND THE ROLE OF MORALITY

Equity's roots lie in the establishment of the common law. One of the first priorities for William I following the Norman conquest of England in 1066 was to implement a more organised legal framework. To that point in time, justice was administered haphazardly throughout England, with different laws, customs and processes operating within each fiefdom or province.[8] The Duke of Normandy rapidly imposed feudalism throughout the land[9] and centralised the government and exchequer in London.[10] In contrast to the Anglo-Saxon kings before them, the Norman kings toured the land dispensing justice on a national scale.[11] In time, designated 'judges' were appointed and dispatched on 'circuits' to give the people access to the King's justice. Numerous courts emerged, notably the Curia Regis ('King's Court'), which eventually divided into the Court of Exchequer (administering disputes involving revenue), the Court of Common Pleas (entertaining pleas from commoners) and the King's Bench (administering disputes concerning the interests of the Crown, including criminal matters and prosecutions). As the common law evolved, the practice of deciding similar cases in similar fashion matured into the doctrine of

7 See further Part V.

8 Mark Giancaspro and Colette Langos, *Contract Law: Principles and Practice* (LexisNexis, 2022) 6. This was a consequence of centuries of Scandinavian, Germanic and other invasions following the withdrawal of the Romans in the fifth century AD. Oleck notes that '[t]he first suggestion of a legal concept faintly resembling modern equity also appears in Hammurabi's code', dating back almost 4000 years. Many of the Code's provisions are said to 'suggest a groping toward a righteousness which is more than arbitrary statute law': Howard L Oleck, 'Historical Nature of Equity Jurisprudence' (1951) 20(1) *Fordham Law Review* 23, 27.

9 R Allen Brown, *The Normans and the Norman Conquest* (Boydell Press, 2nd ed, 1985) 32.

10 Christopher Daniell, *From Norman Conquest to Magna Carta: England 1066–1215* (Routledge, 2003) 108.

11 Ibid 109.

precedent.[12] Case reporting became routine and the writs of process emerged. These writs, or court orders, were special forms that the petitioner purchased, completed, and filed to commence a legal action.[13]

Though originally successful, problems with the common law system soon emerged. Causes of action were limited to the writs available and, being so narrow, these tended to filter out a great number of legitimate disputes. Moreover, the courts dogmatically applied precedent and hesitated to reform legal principle. Even successful litigants were not always able to attain appropriate remedies outside of damages, such as specific performance orders, for the common law did not recognise such remedies. Thus, despite its initial design for simple, efficient, and uniform procedure and access to justice, the common law had (ironically) become markedly inflexible. In desperation, frustrated citizens turned to directly petitioning the King, who eventually delegated responsibility for this growing corpus of matters to the Chancellor as head of the King's secretariat and the 'keeper of the King's conscience'.[14] The body of principle subsequently developed by the Chancellor became 'equity'.[15]

Edward III's decree of 1349 empowered the Chancellor to provide authoritative determinations in equitable matters on the King's behalf and without royal authority. Such was the demand that a specialised judicial body, the Court of Chancery, was established in 1474 to exclusively administer the equitable jurisdiction of the Crown. It is here that the notion of morality as a guiding principle of law finds its true genesis. The chancellors were generally ecclesiastics who drew upon canonical principles when deciding cases.[16] Among these core principles were ensuring the blameworthy did not profit from their wrongdoing, aiding the vulnerable or innocent where the common law would not, ensuring fair outcomes in formal disputes, demonstrating conscience and kindness in adjudication, and above all, administering God's morality and justice.[17]

The birth of the specific performance order, one of the most prominent remedies in equity, owes itself to this moral footing. The English ecclesiastical courts routinely enforced the action of *fidei laesio*, which served to redress the breach of solemn promises clothed by an oath (most often unpaid debts).[18] Not only could a contractual promise not, in conscience, be broken, but should it be broken, this wrong was required to be put right for God's forgiveness to follow and to allay the innocent party's harm in altering their position on the faith of

12 Reflecting the principle of *stare decisis* ('let the decision stand'). The idea was to promote consistency, predictability and, in turn, fairness in judicial decision-making.

13 The writs were essentially the predecessors to the 'standard forms' utilised today.

14 Robert H Rogers, 'A Lesson in Equity' (1915) 49(4) *American Law Review* 510, 525.

15 Sarah McKibbin, Libby Connors and Marcus Harmes, *A Legal History for Australia* (Hart Publishing, 2021) 70.

16 John McGhee, *Snell's Equity* (Sweet & Maxwell, 31st ed, 2005) 7 [1-09].

17 Jack Moser, 'The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies' (1997) 26(3) *Capital University Law Review* 483, 489, 509–14; Eugene E Siegel, 'Equity: Where Did You Come From? Are You Long for This Life?' (1976) 1(2) *Glendale Law Review* 227, 229, 233.

18 RH Helmholz, 'Assumpsit and *Fidei Laesio*' (1975) 91 (July) *Law Quarterly Review* 406, 406–9.

the promise.[19] As the common law writs developed, the chancellors retained their belief in the aptness, in appropriate cases, to compel parties to perform their assumed obligations. They saw specific relief such as this to be commensurate with good conscience.[20] Another leading example of the moralistic foundation of equity and its translation into legal principle is the doctrine of estoppel.[21] The core premise of this doctrine is that promises, if made and reasonably relied upon to the extent that detriment would be suffered if the promise were not honoured, should be enforced. Contract, of course, provides no assistance for want of consideration from the promisee.[22] But equity appreciates and tries to remedy the unfairness and immorality of breaking a promise seriously made and relied upon, even where the promisee has given nothing in return to create a bargain enforceable in contract. Denning LJ in *Combe v Combe* explained:

> [W]here one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.[23]

Thus, equity appreciates the gross injustice of permitting a promisor to rashly make and then renege upon a promise affecting commercial behaviour.

The equitable jurisdiction underwent significant development during the Middle Ages. The Chancellor's caseload dramatically increased (at least threefold), processes were streamlined, and a distinct tension arose between the common law courts and those of equity.[24] By the 18th century, equity became notably concerned with the nullification of unconscientious and improvident dealings, especially those 'involving expectant heirs who were being swindled out of fair deals for their property interests, and those who laboured under some kind of unique disadvantage such as ignorance or poverty'.[25] Some early English decisions supported a broad equitable principle invalidating transactions in which the weak

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19 Alison Dunn, 'Equity is Dead. Long Live Equity!' (1999) 62(1) *Modern Law Review* 140, 147 <https://doi.org/10.1111/1468-2230.00197>.

20 Gareth Jones and William Goodhart, *Specific Performance* (Butterworths, 1986) 4. 'The purpose of equity has always been to control unconscionable behaviour, and so to compel people to honour their obligations': Donovan WM Waters, 'Where Is Equity Going? Remedying Unconscionable Conduct' (1988) 18(1) *University of Western Australia Law Review* 3, 5.

21 Dunn (n 19) 147.

22 A notable exception is where the promise has been incorporated into a deed, in which case it will still be enforced through contract despite the absence of consideration and entitle the aggrieved party (promisee) to damages for the promisor's failure to honour their obligation: see, eg, *Cannon v Hartley* [1949] Ch 213.

23 [1951] 2 KB 215, 220. See also *Hughes v Metropolitan Railway Company* (1877) 2 App Cas 439, 448 (Lord Cairns LC); *Birmingham & District Land Co v London & North Western Railway C*o (1888) 40 Ch D 268.

24 Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Thomson Reuters, 2009) ch 1.

25 Mark Giancaspro, 'Still Jammed! Lingering Questions About the Statutory Unconscionability Doctrine Post *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409' (2023) 35(1) *Bond Law Review* 1, 3 <https://doi.org/10.53300/001c.71305>. See also Samantha Hepburn, *Principles of Equity and Trusts* (Federation Press, 5th ed, 2016) 227.

or disadvantaged had been exploited by their stronger counterpart,[26] though the bulk of decisions concerning such 'catching bargains' arose within and from the 19th century.[27] The common thread in each case was the recognition of the gross injustice (and immorality) of enforcement in such situations and the desirability of providing recourse from outside the realm of contract. Initial attempts by the English courts to consolidate this ideal into principle were unsuccessful.[28] This may in part be explained by historical modifications to property laws, judicial assault upon penalty and forfeiture clauses, statutory proscription of unfair contract terms, and the application of other statutes and common law principles, all of which cumulatively obviated the need for a separate doctrine of unconscionability.[29]

Nonetheless, a series of decisions from the late 20th century confirm the emergence and present existence of a doctrine premised upon the vitiation of bargains in which a weaker party's disadvantage has been exploited by a stronger party in a morally culpable, unconscientious and oppressive manner.[30] Complicating matters is the fact that the expressions of this doctrine by English judges have been inconsistent.[31] The English courts appear to more readily apply the doctrine to concluded contracts where the parties are in more precisely defined relationships of influence.[32] This contrasts starkly with the approach of the Australian courts, which are far more enthusiastic and liberal when applying this and other equitable principles to invalidate contracts in which a weaker party has been unconscientiously exploited by their stronger counterpart.[33] This is especially so since the High Court of Australia's seminal decision in *Commercial Bank of Australia Ltd v Amadio* ('*Amadio*').[34] Deane J in that case famously summarised the three core elements of unconscionability: (1) the weaker party was affected by a special disadvantage; (2) the stronger party was aware, or should have been aware, of this disadvantage; and (3) the stronger party took advantage of the weaker

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26 See, eg, *Berney v Pitt* (1686) 2 Vern 14; 23 ER 620; *Earl of Chesterfield v Janssen* (1750) 2 Ves Sen 125; 28 ER 82; *Evans v Llewellin* (1787) 1 Cox Eq Cas 333; 29 ER 1191.

27 See, eg, *Fry v Lane* (1888) 40 Ch D 312; *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87.

28 See, eg, *National Westminster Bank plc v Morgan* [1985] AC 686, 708–9 (Lord Scarman), where Lord Denning's famous effort to do so in *Lloyds Bank Ltd v Bundy* [1975] QB 326 was rejected.

29 AH Angelo and EP Ellinger, 'Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States' (1992) 14(3) *Loyola of Los Angeles International and Comparative Law Journal* 455, 460–72. See also SM Waddams, 'Unconscionability in Contracts' (1976) 39(4) *Modern Law Review* 369 <https://doi.org/10.1111/j.1468-2230.1976.tb01462.x>.

30 See, eg, *Humphreys v Humphreys* [2004] EWHC 2201 (Ch), [106] (Rimer J); *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB), [34]–[36] (Blair J); *Adare Finance DAC v Yellowstone Capital Management SA* [2020] EWHC 2760, [69] (Eggers QC); *Al-Subaihi v Al-Sanea* [2021] EWHC 2609, [166] (Sir Cranston); *Times Travel (UK) Ltd v Pakistan International Airline Corporation* [2023] AC 101, 117–18 [24] (Lord Hodge) ('*Times Travel (UK)*').

31 See Nelson Enonchong, 'The Modern English Doctrine of Unconscionability' (2018) 34(3) *Journal of Contract Law* 211.

32 Ying Khai Liew and Debbie Yu, 'The Unconscionable Bargains Doctrine in England and Australia: Cousins or Siblings?' (2021) 45(1) *Melbourne University Law Review* 206, 236–7.

33 Andrew Stewart, Warren Swain and Karen Fairweather, *Contract Law: Principles and Context* (Cambridge University Press, 2019) 380 <https://doi.org/10.1017/9781107445703>.

34 (1983) 151 CLR 447.

party's disadvantage in circumstances where the transaction was not fair, just and reasonable.[35] The relevant disadvantage must be something seriously affecting the innocent party's ability to make a judgement in their own best interests[36] and may be in the nature of physical or mental attributes or afflictions, such as age, illiteracy, lack of education, or infirmity of mind.[37] The Australian doctrine clearly reflects its English heritage, with its elemental framework being fundamentally analogous.[38] Let us now consider the doctrine's transition into statute.

III THE MODERN (STATUTORY) DOCTRINE OF UNCONSCIONABLE DEALINGS

Australia's first comprehensive trade practices legislation was introduced in 1965. The *Trade Practices Act 1965* (Cth) addressed a narrow selection of specific anti-competitive practices and was ultimately short-lived. A successful challenge to its constitutional validity saw it be replaced by the *Restrictive Trade Practices Act 1971* (Cth). This replacement legislation was then supplanted by the *Trade Practices Act 1974* (Cth) ('*TPA*'). None of these Acts contained provisions concerning unconscionability. It was only following recommendation from the Swanson Committee in 1976 that the notion of a statutory proscription against unconscionability was entertained.[39] Such a proscription was finally inserted into the *TPA* in 1986. The original section 52A(1) of the *TPA* read: 'A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.' Factors relevant to this assessment were listed in section 52A(2).

In 1992, section 52A of the *TPA* was renumbered and relocated to section 51AB, and the new section 51AA was introduced. Section 51AA(1) provided: 'A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.' This marked the initial demarcation between unconscionability as understood within 'the unwritten law' and unconscionable conduct occurring in the specific context of the supply or acquisition of goods or services. In 1997, section 51AC was introduced to provide small businesses with equivalent protection from unconscionable conduct.[40] The statutory regime remained this way until the

35 Ibid 474. These elements should be addressed cumulatively in the context of 'every connected circumstance': *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 118–19 (Dixon CJ, McTiernan and Kitto JJ), quoted in *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1, 20–1 [39] (Kiefel CJ, Keane and Gleeson JJ).

36 *Thorne v Kennedy* (2017) 263 CLR 85, 126 (Gordon J).

37 See *Blomley v Ryan* (1956) 99 CLR 362.

38 See *Times Travel (UK)* (n 30) 117–18 [24] (Lord Hodge).

39 Trade Practices Act Review Committee, Parliament of Australia, *Report to the Minister for Business and Consumer Affairs* (Report, August 1976) 67 [9.59].

40 This followed recommendations in the Reid Report: see House of Representatives Standing Committee on Industry, Science and Technology, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia* (Report, May 1997) ch 6.

Productivity Commission's largescale review of the national consumer policy framework, commencing in 2006 and concluding two years later.[41] This resulted in the replacement of the *TPA* with the *Competition and Consumer Act 2010* (Cth) ('*CCA*'), which applies uniformly across all states and territories pursuant to the Fair Trading Acts and equivalents in each jurisdiction. Schedule 2 to the *CCA* contains the Australian Consumer Law ('*ACL*'), housing the comprehensive suite of consumer protection provisions incorporating the modern proscriptions against unconscionable conduct.

As introduced, *ACL* sections 20, 21 and 22 largely replaced *TPA* sections 51AA, 51AB and 51AC respectively, with minor amendments.[42] Subsequent amendments, however, resulted in *ACL* sections 20 and 21 becoming the sole proscriptions against unconscionability. Section 20(1) reads: 'A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.' It does not apply to conduct prohibited by section 21.[43] The 'unwritten law' refers to the body of common law and equitable principles emerging from the courts of England prior to the establishment of Australia's judicial system and from the Australian courts since that time.[44] Section 20 applies to the many equitable classifications or categories of 'unconscionable conduct',[45] the most prominent being the doctrine expressed in *Amadio*. Contrastingly, section 21(1) of the *ACL* reads: 'A person must not, in trade or commerce, in connection with: (a) the supply or possible supply of goods or services to a person; or (b) the acquisition or possible acquisition of goods or services from a person; engage in conduct that is, in all the circumstances, unconscionable.' Section 22 then provides a non-exhaustive list of factors to which the court may have regard in determining whether a party has breached section 21. The factors include the relative bargaining strengths of the parties,[46] the plaintiff's understanding of any documents relating to the transaction[47] and the extent to which the parties acted in good faith.[48]

The statutory proscriptions against unconscionability reflect Parliament's recognition of the 'moral shortcomings of the marketplace' and the critical importance of ethical practice in commercial transactions.[49] The broad language

41 Productivity Commission, Parliament of Australia, *Review of Australia's Consumer Policy Framework* (Final Report No 45, 30 April 2008) vol 1, iii.

42 *Competition and Consumer Act 2010* (Cth) sch 2 ss 20–2 ('*ACL*') are mirrored in sections 12CA–12CC of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'). The latter apply in respect of the supply or acquisition of *financial* products or services.

43 *ACL* (n 42) s 20(2).

44 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) 48 [4.21].

45 See *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 ('*Berbatis*'); *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 ('*Kobelt*').

46 *ACL* (n 42) s 22(1)(a).

47 Ibid s 22(1)(c).

48 Ibid s 22(1)(l).

49 See George D Cameron III, 'Ethics and Equity: Enforcing Ethical Standards in Commercial Relationships' (2000) 23 *Journal of Business Ethics* 161 <https://doi.org/10.1023/A:1006025226355>, speaking of the *Uniform Commercial Code* (US) unconscionability provision, section 2-302, which is limited to contracts and their terms: at 171.

utilised within these proscriptions makes their application somewhat difficult (more so for *ACL* section 20 given it is confined to the narrower equitable doctrine).[50] One advantage, however, is that courts are equipped to account for evolving commercial practices and determine the reprehensibility of conduct occurring in the market.[51] We turn now to examining the cases in which the courts have undertaken this complex evaluative exercise and given meaning to the nebulous concept of 'unconscionability'.

IV IMMORAL, UNFAIR, BUT NOT UNCONSCIONABLE: THE CASE LAW

A suite of cases from the last two decades aptly demonstrates the somewhat arbitrary nature of the distinction between *immoral* commercial conduct and *unconscionable* commercial conduct. While the cases in which unconscionability was found clearly help to define the equitable doctrine and indicate what sorts of behaviours will 'cross the line', the cases in which unconscionability was *not* found to have occurred are equally important. Despite this, with some notable exceptions (such as *Australian Securities and Investments Commission v Kobelt* ('*Kobelt*')), little is written about these cases, perhaps because they are seen as being of lesser significance. This is regrettable. There is no dichotomous divide between conscionable and unconscionable conduct; rather, there is a spectrum of commercial behaviour ranging from merely objectionable or immoral at the lowest end to unconscionable at the highest.[52] One will find in the middle many forms of conduct that are unquestionably unsavoury, perhaps even unreasonable, but not necessarily illegitimate under the equitable and statutory doctrines of unconscionability. As Melvin Eisenberg notes, moral fault is implicit in the concept of unconscionability, and such fault 'comes in different degrees' with the term 'unconscionable' suggesting a 'significant degree of moral fault'.[53]

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50 'Section 20 of the *ACL* is narrower in its application than s 21. It focusses on unconscionable conduct in equity': *The Good Living Company Pty Ltd (as trustee for the Warren Duncan Trust No 3) v Kingsmede Pty Ltd* (2019) 142 ACSR 221, 271 [197] (Markovic J).

51 Hazel Glenn Beh, 'Curing the Infirmities of the Unconscionability Doctrine' (2015) 66 *Hastings Law Journal* 1011, 1016.

52 Paul Finn has similarly posited a spectrum ranging from 'self-interested behaviour (which nonetheless disallows exploitative conduct) to good faith and finally completely selfless behaviour encompassed by the fiduciary standard': Jenny Buchan and Gehan Gunasekara, 'Administrative Law Parallels with Private Law Concepts: Unconscionable Conduct, Good Faith and Fairness in Franchise Relationships' (2015) 36(2) *Adelaide Law Review* 542, 547, citing Paul D Finn, 'The Fiduciary Principle' in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1, 4. Terry and Di Lernia lament the lack of 'clear dividing lines' along this spectrum: Andrew Terry and Cary Di Lernia, 'Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?' (2009) 33(2) *Melbourne University Law Review* 542, 555. Other scholars similarly endorse the view of a spectrum of commercial behaviour: see, eg, Nick Sage, 'Reconciling Contract Law's Objective and Subjective Standards' (2023) 86(6) *Modern Law Review* 1422 <https://doi.org/10.1111/1468-2230.12819>.

53 Melvin A Eisenberg, *Foundational Principles of Contract Law* (Oxford University Press, 2018) 73 <https://doi.org/10.1093/oso/9780199731404.001.0001>.

Evidence for such a spectrum is abundant. In the Treasury's 2023 *Consultation Regulation Impact Statement* contemplating reforms to address unfair trading practices, for example, it was acknowledged that the statutory unconscionability provisions are limited in scope and that, resultantly, a great many forms of commercial conduct, which 'would be considered by many as unfair' and which would likely 'result in significant consumer detriment' have been determined to fall short of the 'high threshold of misconduct' necessary to amount to unconscionability.[54] Similarly, the ACCC in its fifth interim report as part of the Digital Platform Services Inquiry observed that many unfair commercial practices in the context of digital platforms would similarly fail to be caught by the statutory unconscionability provisions given they were clearly 'harmful, but not sufficiently severe to constitute unconscionable conduct'.[55] Gary Watt acknowledges the spectrum and explains how various features must be present to convert immoral conduct to unconscionable conduct against which equity will intervene:

> It might be, morally speaking, 'in bad conscience' to assert legal title against a party, or to rely on a party's (or one's own) failure to comply with legal formality or to leave a party to their general remedy at law – but unconscionable conduct will only be actionable in court where there are additional factors which call for equity's relief. Relevant factors will often include a particular relationship to, or particular behaviour towards, the other party. To repeat a simple example: it is not unconscionable, juridically speaking, for the legal owner of land to assert a general common law right to evict a non-owner from his land, but all other factors being equal it is unconscionable to evict a non-owner who has built a house on the legal owner's land in reliance on the legal owner's informal promise to allow the builder to occupy the house for life.[56]

In *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd*,[57] the Full Court of the Federal Court of Australia observed that both businesspeople and ordinary people appreciate that 'unconscionable' conduct is a normative concept and that the term 'is *not limited to one kind of conduct* that is against or offends conscience'.[58] The conduct in question must be evaluated against the provisions of the *ACL* and in light of the values and norms recognised by the statute. The evaluation is not, however, mechanical. It is not 'a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules'.[59] Thus, in suggesting there exists a spectrum of commercial behaviour ranging from merely objectionable or immoral at the lowest end to unconscionable at the highest,[60] it is acknowledged that the presence or absence of a certain number or type of features in the defendant's conduct (such as those extrapolated in this

54 Treasury, Australian Government, *Protecting Consumers from Unfair Trading Practices: Consultation Regulation Impact Statement* (August 2023) 14.

55 Australian Competition and Consumer Commission, *Digital Platform Services Inquiry: Regulatory Reform* (Interim Report No 5, September 2022) 66.

56 Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Hart Publishing, 2009) 108.

57 (2021) 285 FCR 133.

58 Ibid 155 [91] (Allsop CJ, Besanko and McKerracher JJ) (emphasis added).

59 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 276 [304] (Allsop CJ) ('*Paciocco*').

60 Of course, there is behaviour which can be seen as going beyond even the limits of unconscionability and being flagrantly repugnant. However, for the purposes of this article, it is argued that such behaviour

article) is not in itself conclusive to establishing unconscionable conduct. Instead, such features viewed contextually against the judicial standards imposed help to place the impugned behaviour along the spectrum.

As explained in Part II, equity appreciates that the spectrum, and the point at which conduct falls upon its highest end, are informed by the accepted community values and morals of the relevant time. The cases in which unconscionability was alleged but not proven helps to further elucidate how the relevant principles apply and where upon the spectrum certain commercial behaviours lie. This, in turn, provides lawyers, the courts and especially commercial parties with greater guidance as to when the line is crossed.

Turning, then, to the case law. A pertinent case highlighting the immense difficulty of appraising the conscionability of cunning commercial conduct is *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* ('*Berbatis*').[61] The defendant co-owned a shopping centre in Perth, Western Australia. The complainants, Mr and Mrs Roberts, leased premises in the centre out of which they operated a fish and chip shop. They joined several other tenants in legal proceedings against the defendant in respect of certain charges levied under the terms of their leases, arguing these were in fact overpayments. Sadly, the Roberts' daughter was seriously ill with encephalitis and her treatment was not only difficult but expensive. Accordingly, they sought to sell their business and figured that successfully negotiating a new assignable lease term would increase their prospects. When a potential buyer indicated interest, the Roberts requested renewal of their lease and permission to assign. The defendant agreed to the renewal and assignment provided the proposed deed for the arrangement contained a clause requiring the complainants to dismiss their legal action against them. The clause also discharged the defendant from any claims arising out of any act or omission by the defendant prior to the proposed assignment date. The Roberts hesitantly agreed. The ACCC subsequently commenced proceedings of its own accord seeking both injunctive relief and a declaration that the defendant had contravened section 51AA of the *TPA* (now *ACL* section 20).

The ACCC was initially successful in the Federal Court[62] but the finding was overturned by the Full Court of the Federal Court.[63] The ACCC then appealed to the High Court. The High Court, by a majority of four to one, dismissed the ACCC's appeal.[64] Gleeson CJ noted French J's conclusion in the trial case that the lessees laboured under a 'situational' as opposed to a constitutional disadvantage in that it did not derive from any inherent weakness or infirmity.[65] His Honour then disagreed with this finding, cautioning that one must not confuse unconscientiously exploiting another's inability or diminished ability with taking advantage of a

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would clearly meet the threshold of unconscionability and thus this term operates as an appropriate upper pole of the spectrum.

61 *Berbatis* (n 45).

62 *Australian Competition and Consumer Commission* v *C G Berbatis Holdings Pty Ltd* [2000] ATPR ¶41-778 ('*Berbatis Trial*').

63 *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555.

64 *Berbatis* (n 45).

65 Ibid 63 [9].

superior bargaining position.[66] The former conduct is of legal consequence, the latter is not. The Chief Justice continued:

> A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests.[67]

The parties were all businesspeople concerned to advance or protect their own financial interests. The Roberts made a rational decision to pursue the sale of their business ahead of pursuance of their claims against their lessor. They were not under special disadvantage and were not exploited. 'Good conscience', Gleeson CJ observed, 'did not require the lessors to permit the lessees to isolate the issue of the lease from the issue of the claims'.[68] Requiring a party to abandon a claim, whether relating to the principal matter in issue or otherwise, as a term of settlement of legal disputes is an 'everyday occurrence' and 'the stuff of ordinary commercial dealing'.[69] His Honour also queried French J's reasoning in the trial case, suggesting that it appeared to involve 'a judgment that it was wrong for the lessors to relate the matter of the lessees' claims to the matter of their request for a renewal of the lease' without properly explaining *why*.[70] French J saw the Roberts' situational disadvantage as being 'special' given it went beyond the 'normal run of bargaining inequality between large landlords and small tenants'.[71] His Honour felt the lessor acted unconscionably by using its bargaining strength to extract a concession from the lessees which was commercially irrelevant to the terms of the proposed new lease.[72] Of course, the lessor could have refused to renew the Roberts' lease because of the claims or for any other reason. But their knowledge and use of the Roberts' situation as a bargaining chip is what appears to have swayed French J. In Gleeson CJ's view, however, this conduct was merely opportunistic (and perhaps morally objectionable), but not unconscionable. The Roberts did not lack the capacity to make a sound business judgment; they lacked the ability to get their own way and the law does not ordinarily provide relief in such situations.[73]

Gummow and Hayne JJ similarly did not view the Roberts as being under a disabling condition that affected their ability to make a judgment as to their own best interests in agreeing to the lessor's stipulation for lease renewal.[74] Their Honours noted that the Roberts lacked a legal right to renewal under their existing lease and were therefore in a disadvantageous bargaining position. They did not regard the lessor's conduct as amounting to unconscientious exploitation. Accordingly, the unconscionability case '[fell] away'.[75] Callinan J, rounding out the majority, agreed

66 Ibid 64 [14].
67 Ibid 64 [11].
68 Ibid 65 [16].
69 Ibid.
70 Ibid.
71 *Berbatis Trial* (n 62) 41,197 [123].
72 Ibid 41,197.
73 *Berbatis* (n 45) 65 [17].
74 Ibid 77 [56].
75 Ibid 78 [58].

that the lessor had not acted unconscionably but rather shrewdly. His Honour opined that 'the withdrawal from litigation as part of the price of the grant of a new lease which an owner was in no way obliged to grant' was a 'not unreasonable quid pro quo'.[76] Further:

> Whenever parties are in a business relationship with each other and they fall out over an aspect of that relationship, it will generally not be unreasonable or indeed unconscionable for them to seek to insist upon their legal rights, or to require that one party give up some right in exchange for the conferral of a new right upon that party. … [T]here is nothing special about a situation in which a tenant without an option is anxious to obtain a fresh lease, and the landlord, conscious of that anxiety, utilises it to obtain a business advantage, whether by way of a higher rent or otherwise.[77]

The Roberts recognised and understood what was in their best interests and acted accordingly by withdrawing from the proceedings against the lessor and accepting the opportunity to attain a fresh lease. Their daughter's illness was relevant and may have coloured this decision, but the decision was the most prudent open to the Roberts and was not the product of exploitation.[78]

Justice Kirby in dissent felt that the lessor had acted unconscionably and agreed with French J's conclusion on points of fact and law in the trial case. The Roberts were in a unique position which rendered them vulnerable to economic exploitation, and the lessor acted swiftly and strategically to take advantage of their desperation.[79] The fact that the lessor was not obliged to extend the Roberts' lease masked 'the realities of the economic and litigious positions in which the Roberts and the owners respectively found themselves'.[80]

Berbatis highlights a subtle but critical judicial distinction between *immoral* and *unconscionable* conduct. The High Court was influenced by the customary practice in legal proceedings of negotiating the abandonment of claims and the settlement of matters in return for other commercial benefits. Such a practice is indeed quite common and often leads to fruitful outcomes.[81] The courts have forever encouraged settlement of legal proceedings in the public interest and recognised that this often involves the parties compromising their positions.[82] Conversely, a party threatening to continue proceedings or even initiate further proceedings if a settlement favourable and suitable to them is not reached will not constitute a bona

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76 Ibid 113 [176].

77 Ibid 113–14 [177], [179]. 'There is broad support for the proposition that an inadvisable arrangement is not unconscionable without something more. That "something more" is what converts the imprudent to the unconscionable': Paul Bennett Marrow, 'Squeezing Subjectivity from the Doctrine of Unconscionability' (2005) 53(2) *Cleveland State Law Review* 187, 194.

78 *Berbatis* (n 45) 115–16 [185].

79 Ibid 93–4 [105].

80 Ibid 88 [88].

81 See *Australian Performing Rights Association Ltd v Monster Communications Pty Ltd* (2006) 71 IPR 212, 243–5 ('*Monster Communications*'); Robert H Mnookin, Scott R Peppet and Andrew S Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Harvard University Press, 2000) 1–2.

82 *Kong v Kang* [2014] VSC 28, 19 [58]–[59] (Derham AsJ). See also *Wigan v Edwards* (1973) 1 ALR 497, where the High Court recognised bona fide compromise of a disputed claim as valid consideration and an exception to the existing legal duty rule under contract law.

fide attempt to settle.[83] Gleeson CJ in *Berbatis* went as far as saying that it was not unconscientious for the defendant to have conflated the lease issue with the claims issue. Put differently, the defendant's conduct was neither dubious nor inconsistent with general standards of reasonableness in commercial bargaining. Any positive obligation to act conscionably did not compel the defendants to subvert their own interests and certainly did not preclude them from using their position of bargaining strength to their advantage. Thus, *Berbatis* and other cases appraising negotiation tactics would suggest that conduct which aligns with orthodox commercial practice and which is tactical more than exploitative will fall short of the threshold for unconscionability.[84]

Another helpful case speaking to the alleged exploitation of unequal bargaining power and the supposed unconscionability of such conduct is *Pitt v Commissioner for Consumer Affairs (SA)* ('*Pitt*').[85] The Commissioner brought proceedings against Mr Pitt, a real estate agent, alleging (among other things) that he had acted unconscionably towards a Mr Hartwig, a retired pensioner, in respect of a property Mr Pitt purchased from Mr Hartwig. In May 2012, Mr Hartwig saw one of Mr Pitt's advertisements and called him to discuss selling his property in Taperoo, South Australia. The property was dilapidated, and Mr Hartwig (aged 70 at the time) sought to use any sale proceeds to fund his entry into a nearby retirement village. Unbeknownst to Mr Pitt, Mr Hartwig had a gambling problem and was in general financial difficulty. The parties met and agreed a 'sale' price of $200,000. In June 2012, the parties signed an 'option agreement' under which Mr Hartwig would be entitled to sell the property to Mr Pitt for the agreed price at any time until June 2016. The agreement also permitted Mr Pitt to undertake restorative works at the premises, and Mr Hartwig, with Mr Pitt's assistance, moved into a rental property owned by Mr Pitt to enable this. Mr Pitt advertised Mr Hartwig's property and had some interest but later withdrew the property when an adverse building inspection report recommended demolition owing to significant defects. The parties subsequently agreed to reduce the sale price under the option agreement to $175,000. Given Mr Hartwig's haste for sale, and the low prospects of a better deal in light of the property's condition, the parties agreed to exercise the option. The property was then transferred to Mr Pitt in August 2012. Mr Hartwig moved into his desired retirement village and Mr Pitt subsequently demolished the property, subdivided the land, and constructed and sold two new houses upon the land for a profit of around $53,000. The Commissioner then commenced proceedings against Mr Pitt, alleging violation of *ACL* section 21.

The trial judge dismissed the Commissioner's claim[86] but a single judge of the Supreme Court of South Australia upheld the Commissioner's appeal.[87] Mr Pitt then appealed to the Full Court of the Supreme Court. The Full Court allowed the appeal. It was acknowledged, as it was by the trial judge, that the parties at times conflated

83 *Gibbs v Spautz* (Supreme Court of New South Wales, Smart J, 2 October 1987) [32].
84 See, eg, *Monster Communications* (n 81).
85 [2021] SASCA 24 ('*Pitt*').
86 Ibid 23 [101] (Doyle, Livesey and Bleby JJ).
87 Ibid 24 [106].

statutory and equitable concepts of unconscionability in their submissions.[88] It consequently considered Mr Hartwig's alleged 'special disadvantage', noting that he was an elderly retired pensioner experiencing financial difficulties and lacking business acumen. While he was not denied the opportunity of seeking professional assistance, he did not in fact have the benefit of any such assistance. Mr Pitt, on the other hand, was an experienced real estate agent who had a significant level of knowledge and expertise in relation to the residential property market.

Mr Hartwig was largely dependent upon Mr Pitt by reason of his urgent desire to sell his property and move into a retirement home, the mutual leasing arrangements between the parties, and the nature of the option agreement.[89] However, the Court was not persuaded that Mr Hartwig's vulnerability and disadvantage 'was such as to have seriously compromised or affected his ability to exercise an effective judgment as to his own best interests, and hence to protect those interests, in the sense necessary to establish special disadvantage'.[90] Mr Hartwig fully understood the nature of the agreement and declined the invitation to obtain independent legal advice. He also appreciated the dilapidated nature of his home and the low prospects of attaining a good price on the open market. While the option arrangement was unusually long, it was not engineered to manipulate Mr Hartwig and, in some ways, benefited him given his haste to sell. Mr Pitt therefore did not take unconscientious advantage of Mr Hartwig but rather smartly seized upon a business opportunity that returned a profit for him and also facilitated Mr Hartwig's wishes to promptly sell his home and relocate.[91]

As in *Berbatis*, the Court stated emphatically that 'equity's concern to relieve against unconscionability is not a concern to relieve against mere inequality between the parties'.[92] Such inequality naturally tends to imply that an adverse outcome for the 'weaker' party must have been the product of exploitation. The 'Underdog Effect' manifests as a natural inclination for equity and fairness, both of which are seen as being served when the weaker party wins.[93] We therefore *assume* that the stronger party has acted immorally in attaining the advantage they have enjoyed and may even feel that the immorality was so powerful that it should vitiate the bargain. The agent in *Pitt* was certainly cunning, but he did not act unconscionably. Many quickly forget that morality goes both ways: Mr Hartwig needed a buyer and was guaranteed a sale through Mr Pitt's option offer.[94] What is so immoral about a homeowner, desperate to relocate and cover the expense of doing so, being given the means to achieve their dream?

This dualistic nature of morality is reflected in other principles of contract law. The mitigation doctrine, for example, appreciates the need to compensate a plaintiff for wrongs committed by the defendant while also appreciating that the

88 Ibid 18 [81].
89 Ibid 47–8 [190]–[194].
90 Ibid 50 [202].
91 Ibid 61–2 [252]–[255].
92 Ibid 47 [187].
93 Jimmy A Frazier and Eldon E Snyder, 'The Underdog Concept in Sport' (1991) 8(4) *Sociology of Sport Journal* 380 <https://doi.org/10.1123/ssj.8.4.380>.
94 *Pitt* (n 85) 60 [247] (Doyle, Livesey and Bleby JJ).

plaintiff might in some cases either benefit from the wrong or otherwise avoid some or all of the losses associated with the wrong. The same can be said for the doctrine of restitution, which is chiefly concerned with gains made at the expense of others and reversing a transfer of value from the plaintiff to the defendant. A final example is promissory estoppel, an equitable doctrine which requires reliance on the defendant's assumption to be *reasonable* and therefore appreciates that not all non-contractual promises should be enforced where the plaintiff has relied upon them to their detriment.[95] Many of the other forms of estoppel, such as estoppel by convention, estoppel by representation, and proprietary estoppel, also impose a normative threshold of reasonableness when assessing the plaintiff's reliance upon an assumption induced by the defendant.[96]

Another series of cases in which a claim of unconscionability was unsuccessful and which colours the present discussion concerns intentional breaches of contract. *Macdonald v Australian Wool Innovation Ltd* ('*Macdonald*') was a case where two long-serving senior employees (the applicants) were offered a risky but potentially lucrative business opportunity with another company, Australian Wool Innovation ('AWI').[97] After resigning from their jobs, negotiations with AWI ensued, after which AWI indicated that it would not be proceeding with the arrangement. The applicants contended, among other things, that a binding agreement had been concluded and that AWI acted unconscionably in reneging on their alleged promise of employment, contrary to section 51AC (now section 21 of the *ACL*).[98] Weinberg J, sitting as a single judge of the Federal Court, agreed that a legally binding contract had been formed[99] and was repudiated by the respondent[100] but felt that this repudiation alone did not amount to unconscionable conduct.[101] His Honour observed that all parties were 'intelligent and experienced' as well as 'professional and highly educated, perfectly well able to look after their own interests'.[102] He then said that the applicants 'acted with perhaps less prudence than they might have done' before labelling this a 'far cry' from making good a claim of unconscionability.[103] The subtext here is that failing to properly guard your own interests and having those interests used by a counterparty as bargaining chips in commercial negotiations is not unconscionable. It is certainly immoral and

95 On reasonableness in the context of promissory estoppel, see, eg, *Commonwealth Bank of Australia v Carotino (Australia) Pty Ltd* [2011] SASC 42; *Murphy v Overton Investments Pty Ltd* (2001) 112 FCR 182, 201–3 [61]–[72] (Branson J).

96 Andrew Robertson, 'Reasonable Reliance in Estoppel by Conduct' (2000) 23(2) *University of New South Wales Law Journal* 87; Elise Bant and Michael Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35(3) *Oxford Journal of Legal Studies* 427 <https://doi.org/10.1093/ojls/gqv006>.

97 [2005] FCA 105 ('*Macdonald*').

98 Ibid 23 [98], [100].

99 Ibid 60 [211].

100 Ibid 66 [234].

101 Ibid 77 [280]–[281].

102 Ibid 76–7 [279].

103 Ibid.

unprofessional to act as AWI did,[104] but in Weinberg J's view this merely placed the conduct towards the lower end of the spectrum of commercial behaviour. Indeed, a subsequent passage in his Honour's reasoning makes so much clear:

> It goes without saying that [the AWI Managing Director's] opinion that AWI had acted unconscionably towards the applicants by failing to discharge its obligations under the contract has no particular legal significance. Any promise that is deliberately broken could easily be characterised as 'unconscionable'. That is not the sense in which the term is used in s 51AC.[105]

Weinberg J's semantic analysis provides firm evidence of the legal spectrum of commercial behaviour. As his Honour states, conduct can be 'unconscionable' in the broader moral sense without breaching the statutory threshold delineating commercial immorality and commercial unconscionability.[106]

Body Bronze International Pty Ltd v Fehcorp Pty Ltd ('*Body Bronze*')[107] concerned a dispute between a franchisor of tanning salons (the appellant, Body Bronze) and a franchisee (the respondent, Fehcorp). Fehcorp established a salon in Chadstone, Victoria, the arrangement being facilitated through two documents: a heads of agreement and a franchise agreement. The heads of agreement contained a clause – the 'safety net' clause – stipulating that Body Bronze would lend Fehcorp additional funds if the salon fit-out costs exceeded $250,000. This clause was not reflected in the subsequent franchise agreement which, by virtue of an entire agreement clause within, superseded all prior representations and agreements. Fehcorp's costs blew out and it sought financial support from Body Bronze. Body Bronze initially paid some invoices whilst denying liability to do so under the franchise agreement before later refusing to lend any more money altogether and seeking reimbursement. After Fehcorp refused to pay, Body Bronze served notice of breach and reclaimed possession of Fehcorp's salon. One of Fehcorp's (the initial plaintiff) claims in the trial case was that Body Bronze (the initial defendant), in intentionally violating the safety net clause, acted unconscionably contrary to section 51AC of the *TPA* (*ACL* section 21).

Fehcorp succeeded at first instance. On appeal, the Victorian Court of Appeal recognised the importance of the safety net clause[108] and determined that there was no

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104 Of course, as in *Berbatis* (n 45), the actions of those natural persons responsible for the management and administration of the corporate entity accused of unconscionable behaviour (ie, the AWI directors with whom the applicants were negotiating) can be ascribed to the entity itself pursuant to attribution theory and the legal concept of the 'directing mind and will of the company': see Eilis Ferran, 'Corporate Attribution and the Directing Mind and Will' (2011) 127 (April) *Law Quarterly Review* 239; Ernest Lim, 'A Critique of Corporate Attribution: "Directing Mind and Will" and Corporate Objectives' (2013) 3 *Journal of Business Law* 333. The corporate entity is, at law, a separate entity capable of committing legal wrongs through human actors: *Salomon v A Salomon & Co Ltd* [1897] AC 22. Indeed, the *ACL* (n 42) and *Competition and Consumer Act 2010* (Cth) envisage both natural persons *and* corporations as being capable of engaging in unconscionable conduct: at s 131. In this way, the capacity for moral reasoning is vicariously imputed to the corporate entity.

105 *Macdonald* (n 97) 77 [280].

106 On these 'two faces' of unconscionability – one as a ground of relief with specific rules and the other as a broader theoretical concept premised on fairness and morality, and underlying various equitable remedies – see Anthony Mason, 'Law and Morality' (1995) 4(2) *Griffith Law Review* 147, 158–60.

107 (2011) 34 VR 536 ('*Body Bronze*').

108 Ibid 552–3 [80] (Macaulay AJA, Harper JA agreeing at 539 [1], Hansen JA agreeing at 539 [2]).

imbalance of bargaining strength between the parties.[109] However, unconscionable conduct, the Court observed, requires evidence of a 'pejorative moral judgment'.[110] Deliberate conduct causing harm to the other party, such as a breach of contract, does not necessarily possess the profoundly immoral quality of unconscionability.[111] 'There may be nothing offensive to conscience in a commercial participant taking such a commercial decision in given circumstances.'[112] The Court added that the answer to the question of 'what "more" is required than conscious breach to convert it into unconscionable conduct' – that is, to shift it up the spectrum of commercial behaviour – lies, at least in part, in 'the value judgment of the particular decision-maker' but added that this judgment 'is not to be informed merely by a sense of distaste for the impugned conduct'.[113]

In the present case, Body Bronze was deemed *not* to have acted unconscionably towards Fehcorp. Not only were the parties balanced in terms of bargaining positions and power, but Fehcorp understood the nature and effect of all relevant documentation and Body Bronze had not acted unfairly nor covertly.[114] Body Bronze was, in fact, under significant financial pressure and held legitimate concerns about the viability of its working relationship with Fehcorp. Fehcorp had contractual remedies against Body Bronze, had access to legal advice, and did not rely upon Body Bronze to act in good faith when relying upon the terms of the franchise agreement.[115] Body Bronze might have acted zealously and to Fehcorp's detriment, but it did not act in a way that showed no regard for conscience or which was irreconcilable with what is right or reasonable.[116]

The Victorian Court of Appeal in *Director of Consumer Affairs Victoria v Scully* ('*Scully*') offered helpful comment as to whether the intentional failure to fulfill a contractual promise could amount to unconscionable conduct.[117] The Court recognised that the party in breach might have had 'sound reasons for breaking the contract' and that those reasons might not involve any wish to exploit the innocent party.[118] The Court added that such sound reasons were of no significance in defence of a breach of contract claim but could be 'highly relevant' in a defence to an unconscionable conduct claim.[119] Clearly, then, placing impugned conduct on the legal spectrum of commercial behaviour requires consideration of the *purpose(s)* for which the defendant acted as they did. *Scully* suggests that committing some immoral act in a business setting, one which leads to the other

109 Ibid 554 [84].
110 Ibid 555 [89], citing *Hurley v McDonalds Australia Ltd* (2000) ATPR ¶41-741.
111 *Body Bronze* (n 107) 555 [91].
112 Ibid 556 [92].
113 Ibid 556 [93]–[94]. See also *Bradley v Voltex Group Holdings Pty Ltd* [2016] FCA 1230, 60 [187] (Jagot J); *QNI Resources Pty Ltd v Sino Iron Pty Ltd* (2017) 1 Qd R 167, 172 [22] (Jackson J); *Cargill Australia Ltd v Viterra Malt Pty Ltd* [2017] VSC 126, 88–9 [181] (Daly AsJ).
114 *Body Bronze* (n 107) 557 [96]–[97] (Macaulay AJA, Harper JA agreeing at 539 [1], Hansen JA agreeing at 539 [2]).
115 Ibid.
116 Ibid 557 [97].
117 (2013) 303 ALR 168.
118 Ibid 182–3 [47] (Santamaria JA, Neave JA agreeing at 169 [1], Osborn JA agreeing at 170 [2]).
119 Ibid.

party suffering some form of harm, is more defensible where the act is driven by tenable and legitimate motives and is therefore lower on the spectrum. Mere unreasonableness or unfairness, the Court stated, will not suffice to support a finding of unconscionability; the conduct must also be unethical and involve some degree of 'moral tainting'.[120]

Transerve Pte Ltd v Blue Ridge WA Pty Ltd ('*Transerve*') usefully explores the distinction between immoral and unconscionable conduct.[121] Essentially, Transerve (subcontractor) alleged that Blue Ridge (contractor) acted unconscionably towards it in various ways, including terminating without giving a 'show cause' notice under the subcontract, failing to make payments, and making misleading statements to the head contractor about Transerve's finances.[122] Blue Ridge's case was that it terminated due to Transerve's alleged 'nonperformance and failure to meet the delivery schedule'.[123] Transerve felt the primary purpose of the termination was in fact to enable Blue Ridge to take over the works for its own benefit and profit, making it unconscionable. Barker J in the Federal Court felt that Blue Ridge had perhaps acted with a considerable degree of unfairness but that this conduct fell short of unconscionability given it was ultimately driven by legitimate commercial concerns:

> In my view, as sharp and concealing as Mr Mackenzie's [Blue Ridge representative] conduct was at this point – ensuring that Transerve did not get any wind of his side-dealings with [head contractor] Roy Hill – that conduct was driven by … commercial concerns and the estimation made, rightly or wrongly, by Mr Mackenzie that unless he took the action he was proposing, the existing contractual arrangements that Blue Ridge had with Roy Hill and the subcontract arrangements that Blue Ridge had with Transerve would effectively collapse to Blue Ridge's financial and reputational disadvantage.[124]

In this situation, Barker J held, it made sense for Blue Ridge to terminate because the contractual arrangement was projected to fail and would have seen the company incur considerable reputational and financial losses. There was, in other words, an informed basis for this conduct. It was not motivated purely by the allure of alternative commercial opportunities or some latent desire to exploit Transerve. If there were such 'ulterior motives' for the conduct, this would, as was suggested in *Wolfe v Permanent Custodians Ltd*,[125] likely have escalated it on the spectrum of commercial behaviour and potentially rendered it unconscionable.

An intentional breach of contract is just one form of conduct that raises questions of conscionability. The decision to purposely violate a legal agreement and glibly incur liability to pay damages is clearly immoral from the innocent party's perspective. The primary obligation of a party is to perform their contractual obligations and honour their promises.[126] It follows that a promisee

120 Ibid 183 [48].
121 [2015] FCA 953 ('*Transerve*').
122 Ibid 40–1 [250].
123 Ibid 33 [219].
124 Ibid 73–4 [384].
125 [2012] VSC 275, 78–9 [316], 80 [321] (Zammit AsJ). This finding was not disturbed on appeal: *Wolfe v Permanent Custodians Ltd* [2013] VSCA 331, 4 [17], 12 [42] (Warren CJ, Neave and Whelan JJA).
126 *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460, 504 (Windeyer J).

has the corresponding legal right to the performance of the contract.[127] Of course, in some cases, the rule does not hold, such as where a party enjoys a conditional discretion within the contract to terminate. This *is* a positive right to terminate. A broader but related question is whether the mere exercise of *any* contractual right can be regarded as unconscionable. The case law has similarly addressed this question. One leading case on point is *Mastronardo v Commonwealth Bank of Australia Ltd* ('*Mastronardo*').[128]

Mastronardo concerned a series of facilities provided to Adrian and Claudia Mastronardo by the respondent bank ('CBA'). One facility went to Remo Corporation, a property development company that Adrian and his father operated. The other facility provided loan finance to the Mastronardos so they could purchase a property. The Remo facility was secured by mortgages over properties owned by the company. The facility was varied numerous times, resulting in further loans being advanced and repayment dates being extended, as well as other terms being amended (notably, one – known as the 'release provision' – which made the release of certain mortgaged properties conditional on there being no default and on the loan-to-value ratio following release of the properties being less than 70%). CBA subsequently became concerned about the Remo Corporation's financial position and requested that it refinance all of its facilities despite the fact that much of the Remo Facility was not due. CBA refused to release the Mastronardos' properties secured by the mortgages. They sued CBA, alleging anticipatory breach of contract and further that its failure to release the properties and to request refinancing was unconscionable contrary to section 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*').

The Court held that CBA had not acted unconscionably in its reliance upon and enforcement of the terms of its loan contract (notably the release provision) and in its request that Remo Corporation refinance.[129] Although the Remo Corporation and the Mastronardos had paid all instalments on time, CBA considered the company's business risky and foreshadowed default given the company stopped making interest payments on its facilities and the Mastronardos then stopped paying interest on their loan.[130] It was not plausible that Remo Corporation or the Mastronardos would be able to make the payments required to trigger the release provision.[131] The Mastronardos were experienced and successful property developers and they were on notice that CBA wanted the facilities refinanced.[132] The facility terms were known to them, and they did not make timely efforts to attempt refinance and trigger the release provision.[133]

Referring specifically to the section 12CC(2) factors in the *ASIC Act*, the Court noted that neither Remo Corporation nor the Mastronardos lacked bargaining

127 *O'Keefe v Williams* (1910) 11 CLR 171, 211 (Isaacs J); *Zhu v Treasurer (NSW)* (2004) 218 CLR 530, 574 [128] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ).
128 [2018] NSWCA 136.
129 Ibid [77] (White JA, Bathurst CJ agreeing at [1], Macfarlan JA agreeing at [2]).
130 Ibid [76].
131 Ibid [73]–[74].
132 Ibid [77].
133 Ibid.

strength and CBA had willingly extended the terms of the facilities.[134] They were not unfairly pressured in any way by CBA, and CBA had in fact fully disclosed its intended conduct, evidenced its willingness to negotiate its loan terms and acted in good faith.[135] The terms CBA imposed were reasonably necessary to protect its legitimate interests. There was, in sum, no unconscionability.[136]

What is clear from this decision is that the mere reliance upon and enforcement of contract terms cannot be regarded as unconscionable. In other contexts, such as insurance, it might be said to violate the statutory duty of utmost good faith.[137] But within the context of the consumer law and the equitable doctrine of unconscionability, it is not conduct which is so 'irreconcilable with what is right or reasonable' and which demonstrates an obvious disregard for conscience[138] that it can be placed upon the highest end of the spectrum of commercial behaviour and become unconscionable. In a manner similar to the landlord in *Berbatis*, all that CBA did here was exercise rights it had against a party that found itself in a disadvantageous position by virtue of their personal and commercial circumstances. It is also significant in this case that the Mastronardos and Remo Corporation were partly blameworthy in that they placed themselves in a difficult financial position and consequently found the terms of their facilities with CBA to be inconvenient. This immediately pulls CBA's conduct lower down the spectrum.

There have been suggestions in other cases that the failure to highlight unexpected or inconvenient terms which may be unfavourable to the other party is a form of unconscionability. This argument was raised in *Gispac Pty Ltd v Michael Hill Jeweller (Australia) Pty Ltd* ('*Gispac*').[139] It was Michael Hill, the well-known jewellery retailer, alleging unconscionability against Gispac, which supplied paper carry bags. Essentially, Michael Hill took issue with Gispac's terms, revised in 2012 and purportedly incorporated into a series of sale agreements made between the parties in 2014 and 2015. The '2012 terms' imposed requirements such as minimum purchase quantities, additional payment obligations and exclusivity arrangements, and also established 2-year terms which were automatically renewed on a rolling basis. The sale agreements signed by a Michael Hill employee included a link to the 2012 terms, which the employee did not open and read. Michael Hill contended that Gispac's failure to explicitly communicate its inclusion of the 2012 terms into the new sales agreements – terms it considered 'onerous' and 'detrimental' – was unconscionable within the meaning of *ACL* section 21.[140] Michael Hill was scathing in its submissions, stating:

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134 Ibid [94].
135 Ibid.
136 Ibid [96].
137 See, eg, *Ziogos v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme* [2015] NSWSC 1385 (enforcing policy clause permitting rejection of claim where no credible and genuine reasons to do so). The duty of utmost good faith is imposed upon the parties to an insurance contract pursuant to section 13(1) of the *Insurance Contracts Act 1984* (Cth).
138 *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd [No 2]* (2009) 253 ALR 324, 347 [113].
139 [2024] NSWSC 18 ('*Gispac*').
140 Ibid [193], [195] (Gleeson J).

> For a party, even a commercial party, to … include such onerous terms in a contract and not inform the counterparty specifically about terms that may be significantly detrimental to the counterparty, is not conduct which should be countenanced in the 21st century business landscape in Australia. It is conduct that should not stand. It is conduct which offends against conscience and ethical and moral principles of fair dealing; principles upon which the law has been constructed. Gispac's silence as to, and otherwise failure to bring to Michael Hill's specific attention [the impugned clauses] of the 2012 Terms was, in all of the circumstances, … unconscionable within the meaning of s 21 [of the] *ACL*.[141]

The unconscionability claim failed. Gleeson J, sitting alone in the New South Wales Supreme Court, rejected Michael Hill's explication of the test for unconscionability. This explication included references to 'what is right and acceptable commercial behaviour' and conduct that 'offends against conscience and ethical and moral principles of fair dealing'.[142] His Honour dismissed these statements as being too broad; unconscionability means more than doing something that might be seen as generally wrong in a commercial setting. He then worked through the *ACL* section 22 factors. Not only did the 2012 terms potentially permit lower prices, there was no evidence of rival supplier prices.[143] The 2012 terms were also 'Gispac's standard terms on which Gispac supplied paper bag products in similar transactions between it and 15 to 20 of its other customers'.[144] Gispac did not specifically inform those other counterparties about the content of the 2012 terms. It also did not unreasonably fail to disclose the 2012 terms; rather, those terms were brought to Michael Hill's attention prior to signing the sales agreements.[145] Gispac also did not fail to act in good faith.[146]

Gleeson J then considered *ACL* section 22(1)(j), which speaks to the content, effect, and negotiation of contracts between a supplier and a customer. Although Michael Hill did not expect to see some of the 2012 terms given the company had not encountered such terms in other contracts, and certain such terms were not specifically mentioned to the company, this was immaterial. 'Michael Hill', his Honour noted, 'is a commercial entity with significant resources and access to legal advice'.[147] The employee who digitally signed the 2014 and 2015 sale agreements was not tricked into doing so and understood that Gispac required the 2012 terms to be agreed before it would proceed with the order of bags. The employee 'chose not to take steps to satisfy himself of Michael Hill's obligations under the Sales Agreements' and opted not to seek legal advice.[148] Gleeson J thus concluded:

> In the context of a commercial negotiation at arm's length for the supply of goods to the customer expressly on the supplier's standard terms and conditions, I am not persuaded that Gispac's failure to inform Michael Hill about the inclusion of

141 Ibid [195].
142 Ibid [220].
143 Ibid [222], speaking to *ACL* (n 42) s 22(1)(e).
144 *Gispac* (n 139) [223], speaking to *ACL* (n 42) s 22(1)(f).
145 *Gispac* (n 139) [224], speaking to *ACL* (n 42) s 22(1)(i).
146 *Gispac* (n 139) [225], speaking to *ACL* (n 42) s 22(1)(l).
147 *Gispac* (n 139) [226].
148 Ibid.

> specific provisions in the 2012 Terms … constitutes a substantial departure from that which is generally acceptable commercial behaviour.[149]

His Honour cited Colvin J in *Australian Competition and Consumer Commission v Geowash Pty Ltd [No 3]* ('*Geowash*')[150] in support of his conclusion and expression of principle.[151] In that case, Colvin J spoke expressly of the distinction between immoral and unconscionable conduct. His Honour, speaking of *ACL* section 21, confirmed that unconscionability 'is not the mere breach of accepted standards of commercial behaviour'.[152] He continued:

> Section 21 does not have the consequence that any breach of the norms underpinning commercial laws or those expressed in codes of conduct or prevailing business standards becomes a contravention of the *ACL*. Nor is it the case that any conduct that involves an element of hardship or unfairness to the other party is unconscionable. Rather, unconscionable conduct is characterised by a substantial departure from that which is generally acceptable commercial behaviour. It is a departure which is so plainly or obviously contrary to the behaviour to be expected of those acting in good commercial conscience that it is offensive.[153]

Through this passage, we are again reminded that conduct at the upper unconscionable end of the spectrum of commercial behaviour must *substantially depart* from that which is generally acceptable in the course of commerce.[154] The courts clearly accept that some conduct will be unfair or result in hardship, but to contravene equity and the statutory proscriptions against unconscionable conduct, that conduct must be 'excessive or unwarranted or without principle'.[155] The 'proper approach', according to Colvin J in *Geowash* is

> to consider what is right and proper in commercial dealings and then evaluate how far from such standards (if it all) the conduct in question has departed. There must be aspects of the conduct in the particular case that mean that it may be plainly or obviously criticised when viewed through the lens of an understanding of proper commercial behaviour according to prevailing norms and standards.[156]

The suggestion here is that placing conduct along the spectrum is not as difficult as it would first seem, for conduct towards the upper end will *plainly or obviously* be impugnable to such an extent that it can be deemed unconscionable. Of course, all behaviours can be placed in context and context is difficult to appreciate when it is being spoken of retrospectively rather than experienced in the moment. Michael Challinger speaks to this when examining how the law defines 'family violence'.

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149 Ibid [227] (citations omitted). As Gleeson J noted at paragraph [72] of the judgment, by signing the agreement, Michael Hill (via its employee) was bound to, and deemed to agree with, the terms within the agreement, even where those terms had not actually been read and understood. This is the foundational rule in *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, approved in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165. His Honour cited both cases when speaking to this point.

150 (2019) 368 ALR 441 ('*Geowash*').

151 *Gispac* (n 139) [227].

152 *Geowash* (n 150) 546 [662].

153 Ibid.

154 'The plaintiff must be able to point to conduct on the part of the defendant, beyond the ordinary conduct of the business, which makes it just to require the defendant to restore the plaintiff to his or her previous position': *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 401–2 [20] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

155 *Geowash* (n 150) 548 [664] (Colvin J).

156 Ibid 549 [666].

This term, he argues, is defined 'so broadly that it includes the sort of friction that occurs occasionally in even the happiest household: raised voices, a slammed door, unkind words, the silent treatment'.[157] He goes on to say that, as in any offending, 'there's a continuum that ranges from minor to heinous. Slamming a cupboard door and swearing isn't nice, but it's very different from terrorising a woman, threatening to kill her, then half-choking her and breaking her arm'.[158] The point is that we must be careful not to conflate objectionable or immoral conduct with conduct that is indisputably unconscionable. It is easy for any conduct that is 'out of line' to be branded as commercially unacceptable, but as the cases discussed above demonstrate, business does not mean *never doing anything wrong*; it means never doing anything so wrong that it can be seen as 'so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience'.[159] Conduct said to be unconscionable must be judicially evaluated by reference to the values and norms recognised by the relevant statutory proscriptions, and accepted and acceptable community standards.[160]

A final relevant case example is *Kobelt*. This case concerned the commercial practices of Mr Lindsay Kobelt, a shopkeeper in the Anangu Pitjantjatjara Yankunytjatjara Lands ('APY Lands') located in the far north of South Australia. Mr Kobelt utilised a 'book-up' credit system when selling goods within this remote Aboriginal community, with many of his customers providing their debit cards and personal identification numbers to him, and permitting him to withdraw funds from their accounts to pay for goods attained on credit between 'pay days'.[161] ASIC argued that this method of supplying credit to local residents was unconscionable under section 12CB(1) of the *ASIC Act*. By 4:3 majority, the High Court dismissed ASIC's case. Rather than unconscientiously exploiting his customers, Mr Kobelt provided the book-up credit system in response to local demand and to suit the local market.[162] Notwithstanding his poor record-keeping and the general vulnerability of his predominantly Indigenous customers, Mr Kobelt's clientele were willing participants in the book-up credit system and, in fact, the system benefited them by addressing the 'humbugging' phenomenon common within Aboriginal communities. Humbugging is a form of demand sharing, a cultural practice whereby members of Indigenous Australian communities with access to useful and popular resources such as money or mobile phones are pressured to share those resources among the community.[163] By having custody of their bank accounts, Mr

157 Michael Challinger, *Mostly Guilty: A Low-Flying Barrister's Working Life* (Hybrid Publishers, 2021) 106.
158 Ibid 107.
159 *Kobelt* (n 45) 40 [92] (Gageler J).
160 *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR ¶42-447, 43,463 [23] (Allsop CJ, Jacobson and Gordon JJ); *Paciocco* (n 59) 275 [298] (Allsop CJ).
161 The customer debit cards were linked to the bank accounts to which their wages or Centrelink payments were credited. Those customers were then entitled to attain goods on the spot, even where they lacked money at the particular time.
162 *Kobelt* (n 45) 32–3, 35–6 (Kiefel CJ and Bell J).
163 Rachel Yates and Sharmin Tania, 'The Place of Cultural Values, Norms and Practices: Assessing Unconscionability in Commercial Transactions' (2019) 45(1) *Monash University Law Review* 232, 267.

Kobelt enabled his Indigenous customers to avoid having to distribute their limited funds among multiple other community members.

On face value, Mr Kobelt's conduct seemed entirely inappropriate. The thought of a vendor having control of a customer's back accounts and withdrawing funds from those accounts to pay off debts to the vendor seems somewhat extortionate. The temptation is to brand such conduct unconscionable given how unusual it is compared to standard retail practices in urban communities. But context *must* be considered. The unique cultural context in this case supported the view that Mr Kobelt's system, though potentially unacceptable in mainstream Australian society, was adapted and appropriate to the environment in which it was used. The evidence of the cultural norms and practices of the Anangu residents of the APY Lands justified Mr Kobelt's approach to retail. Kiefel CJ and Bell J commented that 'Mr Kobelt was not required to act in an altruistic or disinterested way in his dealings with his customers', nor to devise alternative, superior forms of providing credit.[164] They added that the book-up credit system was open to abuse but was not abused.[165] Employing unique business methods that retain customers and generate profit is the essence of commerce, and any intelligent businessperson would seek to do so.[166] Without proof of unconscientious exploitation, intentional or otherwise, one cannot sustain a charge of unconscionability.

Gageler J (as he then was) similarly viewed Mr Kobelt's conduct as conscionable given the Anangu people with whom Mr Kobelt dealt 'considered that continued participation in the book-up system suited the interests of them and their families having regard to their own preferences and distinctive cultural practices'.[167] Keane J also made a pertinent point: the fact Mr Kobelt was pursuing his own commercial interests with a view to profit was to 'state the obvious' and also said very little as to whether he engaged in unconscionable conduct.[168] It was also unhelpful 'in discerning whether the conduct in question exhibits those features which distinguish unconscionable conduct from the legitimate pursuit of self-interest'.[169] Mr Kobelt's system, unusual as it was, benefited his customers and did not take advantage of them.[170]

164 *Kobelt* (n 45) 34 [75].
165 Ibid 35–6 [79].
166 As Keane J noted, '[t]he pursuit by those engaged in commerce of their own advantage is an omnipresent feature of legitimate commerce': ibid 47 [117].
167 Ibid 46 [110].
168 Ibid 47 [117].
169 Ibid 47–8 [117].
170 Ibid 51–2 [124]–[129].

V PROBING FURTHER THE EVALUATIVE EXERCISE

Let us now take stock of the cases in which allegations of unconscionability have failed. We can see, as commentators have astutely observed,[171] that defining and giving content to the doctrine of unconscionability has been notoriously difficult. The cases addressing allegations of unconscionable conduct in the course of trade or commerce are discordant in their expressions and applications of the equitable principle and are also naturally coloured by their specific facts. Taken in the aggregate, these cases readily demonstrate the existence of a spectrum of commercial behaviour ranging from merely objectionable or immoral at the lowest end to unconscionable at the highest, as opposed to some binary scheme. Such spectrums exist in other areas of commercial law addressing similarly normative concepts,[172] including good faith which is, in part at least, concerned with and shaped by the reasonable expectations of the parties.[173] The case law addressing these concepts, though generating a diverse and sometimes confusing mass of principles, is nonetheless helpful in 'mapping out a spectrum' through which commercial behaviours can more readily be assessed by the courts.[174] The locations of the points along this spectrum are informed by the courts' evaluations of commercial conduct from case to case.

The cases in which unconscionability has been disproven are as valuable to this mapping exercise as the cases in which unconscionability has been proven. Such a sentiment reflects Plato's view of pleasure and pain being symbiotic in that our perceptions of what is 'good' inexorably inform our understanding of what is 'bad'.[175] To frame the point in the present context, one cannot fully appreciate and identify unconscionable commercial behaviour without also comprehending behaviours which are not unconscionable. In any event, the doctrine of precedent, in its noble pursuit of consistency and even-handed justice, encourages the use of analogy between fact patterns and legal issues. Constructing the spectrum is therefore an exercise in jurisprudential development, establishing markers that guide the conduct of commercial parties and assist the courts and practitioners in determining if that conduct exceeds permissible limits.

The conduct exhibited by the defendants in *Berbatis* arguably lies at the middle to lower end of the spectrum. The lessor seized upon a valuable opportunity arising out of their tenant's personal circumstances. They were cunning and strategic, and enjoyed stronger bargaining power, but they were not exploitative. They could have

171 See, eg, Jeffrey Goldberger, 'Unconscionable Conduct and Unfair Contract Terms' (2016) 30(2) *Commercial Law Quarterly* 16.

172 See Buchan and Gunasekara (n 52) 547–58.

173 Nicholas Reynolds, 'The New Neighbour Principle: Reasonable Expectations, Relationality, and Good Faith in Pre-contractual Negotiations' (2017) 60(1) *Canadian Business Law Journal* 94.

174 Ibid 105–6.

175 Plato, *Philebus*, 35c–36b, 41c–41e. This perspective also finds support in Buddhist teachings, which speak of the role of suffering (the 'bad') in helping us appreciate the value, and reach the point, of true happiness (the 'good'): see, eg, Dalai Lama, 'Happiness from a Buddhist Perspective' (2014) 29(1) *Journal of Law and Religion* 5 <https://doi.org/10.1017/jlr.2013.13>; Matthieu Ricard, 'A Buddhist View of Happiness' (2014) 29(1) *Journal of Law and Religion* 14 <https://doi.org/10.1017/jlr.2013.9>.

acted entirely on sentiment, which would have been the 'friendlier' course, but they were not obligated to do so.[176] The High Court appeared to be swayed by the defendants' use of their position to leverage a settlement of legal claims being made against them. It was a rational tactic which, while perhaps morally objectionable given the Roberts' unfortunate family situation, was not unconscionable. This suggests that conduct which is tactical and in legitimate pursuit of sound commercial and personal objectives will fall short of the unconscionability threshold. Consistent with this, conduct which is strategic but nonetheless predatory or manipulative, seizing upon and exploiting the vulnerabilities of the weaker party (as opposed to just their situational disadvantage), will be higher on the spectrum and likely become unconscionable.

This provides an alternative justification for the Court's conclusion in *Pitt*, where the real estate agent utilised the common tactics of offering to purchase a property off-market and providing an extended option to do so in order to encourage the sale. The vendor was, like the Roberts in *Berbatis*, in a difficult personal situation and needed to dispose of a proprietary interest to offset financial liabilities. A party who is 'fortunate' enough to have a counterparty in situational need is not necessarily being unconscionable by leveraging that need. *Pitt* also offers helpful insight into where the agent's conduct in that case registers on the spectrum of commercial behaviour. Clearly, it was towards the midpoint to lower end and perhaps slightly higher than *Berbatis* given there were multiple other factors at play in *Pitt*. For example, the complainant there was elderly, impecunious, suffered from a gambling addiction, and lacked business acumen – all features the complainants in *Berbatis* did not possess. *Pitt* also concerned the complainant's primary personal asset (his home), whereas *Berbatis* concerned a business asset. The 'need', and proportionate consequences of unconscionable conduct, were therefore arguably greater in *Pitt*.

Pitt also echoes the trite point that any neglected opportunities to attain appropriate, independent legal and financial advice also serve to negate allegations of exploitation and therefore pull conduct lower on the spectrum. More helpfully, it emphasises the importance of mutual advantages in downplaying the iniquity of a defendant's conduct. Mr Pitt, though injured in some ways by the defendant's conduct, also *benefited* from it. He was permitted to sell his home quickly and obtain the funds he needed to transition into retirement living. Though the presence of benefits will not exculpate a defendant, it will certainly play a role in the evaluative exercise employed by the courts.

The 'intentional breach' cases also help us quantify the apparent gravity of commercial conduct. Most of these, it would seem, lie just short of the midpoint of the spectrum. Breaking contractual promises is bad and sounds in damages, and it can have powerful consequences for the innocent party; but this alone does not prove unconscionability. Controversially, renowned commentators such as Oliver Wendell Holmes have argued that parties have the 'right' to break contracts

176 One is reminded of Gordon Gecko's remarks in *Wall Street* (Edward R Pressman, 1987) 01:17:51–01:18:07: 'Greed, for lack of a better word, is good. Greed is right. Greed works. Greed clarifies, cuts through, and captures the essence of the evolutionary spirit.'

where they are willing to assume the liability that flows from doing so and that they should even be encouraged to walk away from contracts where this results in the attainment of more valuable opportunities elsewhere: the so-called theory of 'economic breach'.[177] Others such as Robert Birmingham[178] and Richard Posner[179] also support this theory. The economic justification for intentional contract breaches calculated to facilitate more beneficial results serves to counterbalance the offensive nature of such conduct. A related point is that an intentional breach will likely be deemed conscionable where the innocent party was capable of protecting their own interests. Repudiation and breach are common occurrences in contractual relationships and the courts have stressed that calculated breach is not in itself sufficient to sustain a claim of unconscionability. Gamesmanship is part and parcel of commerce.

Macdonald bears out both of these points, Weinberg J expressly commenting that intentional breaches, though unprofessional and unfair, are not, without more, unconscionable. The same can be said of *Body Bronze*, though that case also supports the point made in *Berbatis* that legitimate commercial reasons underpinning immoral conduct (eg, an intentional breach of contract) will not in isolation be unconscionable. The defendant harboured genuine concerns about the viability of its working relationship with the complainant and it needed to secure its own financial position. The defendant's concerns in *Transerve* were different – projected failure of the project, and potential reputational and financial losses – but, again, were supported by the evidence and influential in dismissing the unconscionability claim. The defendant's conduct was said to be 'sharp and concealing' but the distasteful nature of this conduct and its impact on the complainant was outweighed by its legitimate triggers and the absence of exploitation.[180] These cases again highlight the weight of genuine reasons for impugned conduct in terms of placing that conduct lower on the spectrum. In the case of intentional contract breaches, it is clear that such conduct lies in the lower half of the spectrum. The evidence from case to case can, of course, increase the seriousness of an intentional breach and take it higher up the spectrum, but the leading case law tells us that the challenge for plaintiffs is considerable.

Lying perhaps at the lowest pole of the spectrum is the mere exercise of contractual rights. We saw in *Mastronardo* that this conduct was deemed to fall well short of the threshold for statutory unconscionability. After all, how might one party's exercise of a contractual power, which the other party has freely and willingly agreed to, be later construed as unconscionable? As Weinberg J suggested in *Macdonald*, any act which results in unfair consequences for the

177 Oliver Wendell Holmes Jr, *The Common Law* (Harvard University Press, 2009) 272 <https://doi.org/10.2307/j.ctt13x0kkk>. Holmes' original statement appeared in his book published in 1881 by Little, Brown & Co. He repeated his view in a journal article published 16 years later: 'The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else': OW Holmes, 'The Path of Law' (1897) 10(8) *Harvard Law Review* 457, 462 <https://doi.org/10.2307/1322028>.

178 Robert L Birmingham, 'Breach of Contract, Damage Measures, and Economic Efficiency' (1970) 24(2) *Rutgers Law Review* 273.

179 Richard A Posner, *Economic Analysis of Law* (Aspen Publishing, 9th ed, 2014).

180 *Transerve* (n 121) 73–4 [384] (Barker J).

other party will naturally be construed by that party as 'unconscionable' in the broadest moral sense, but it is not so in the legal sense of the word.[181] Of course, it is certainly possible, particularly in the *manner* in which the right is exercised,[182] but this manner would have to be particularly egregious and exploitative to become unlawful. Moreover, the typical negative bias against financial institutions[183] would have to be assuredly set aside. As with our natural inclination to 'stand up for the little guy' and support the stereotypically weak and vulnerable, we are normally predisposed to dislike banks and see them as greedy and unscrupulous, and brand any decisions they take against customers resulting in harm as exploitative and unjustified. We therefore see it as unfair for a bank to exercise its rights and not permit the customers to salvage their situation, even without knowing all the facts. Lest we forget, the Mastronardos were largely to blame for putting themselves in their disadvantageous financial and commercial position.

Had CBA exercised its rights prematurely or without a reasonable, evidential basis for doing so, this would have affected the assessment of its conduct and cast it in a poorer light. Similarly, a refusal to negotiate, the application of pressure, or the failure to disclose its intended conduct all would have weighed against CBA and provided support for the claim that it had unconscientiously exploited the Mastronardos. Clearly, then, proof that a contractual right has been exercised in circumstances that were unquestionably justified and where this course served to protect the party exercising the right – as in *Mastronardo*, where the bank sought to protect its financial position when the debtor's default seemed plausible – is likely to ensure that the conduct remains at the foot of the spectrum. Cases such as *Macdonald* and *Amadio* confirm that such an outcome is even more likely where the plaintiff has commercial knowledge and experience, because one can safely presume that such parties are better equipped to recognise and protect their own interests. If they were otherwise, their susceptibility would likely shift the cursor upwards on the spectrum of commercial behaviour, because the defendant is more likely in this case to have seized upon their weaknesses.

Slightly above the mere exercise of contractual rights on the spectrum of commercial behaviour is the failure to highlight unexpected or inconvenient terms which may be unfavourable to the other party. We saw in *Gispac* that such behaviour was deemed to fall well short of the unconscionability threshold. What places this behaviour marginally above the permissible enforcement of rights? Electing not to highlight particular terms is a positive choice. Whereas one has a positive right to enforce their contractual entitlements, they do not have a positive right *per se* to avoid divulging information. Indeed, in some cases, remaining

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181 *Macdonald* (n 97) 77 [280].

182 Note, also, that the statutory doctrine of unconscionability can apply to systems of conduct or patterns of behaviour, as well as to the terms of any resulting contract and manner in which that contract is carried out: *ACL* (n 42) s 21(4); *ASIC Act* (n 42) s 12CB(4).

183 For empirical proof of this bias, see, eg, John Grable, Eun Jin Kwak and Kristy Archuleta, 'Distrust of Banks Among the Unbanked and Banked' (2023) 41(6) *International Journal of Bank Marketing* 1498 <https://doi.org/10.1108/IJBM-10-2022-0441>; Helmut Stix, 'Why Do People Save in Cash? Distrust, Memories of Banking Crises, Weak Institutions and Dollarization' (2013) 37(11) *Journal of Banking and Finance* 4087 <https://doi.org/10.1016/j.jbankfin.2013.07.015>.

silent can fall foul of other consumer law provisions, including *ACL* section 18 prohibiting misleading or deceptive conduct.[184] There would arguably be a greater expectation that a party point out potentially inconvenient terms for the other party than avoid exercising a contractual right. Such an expectation might even be said to complement the established duty to cooperate[185] and align with principles of good faith in contractual performance.[186]

What places the sort of conduct seen in *Gispac* at the suggested (low) point on the spectrum? The defendant in that case, though not going out of its way to notify its customers in respect of its terms of service and any associated updates, treated all parties the same and utilised the same terms with each. Moreover, though it arguably would have been fairer for the defendant to do more than it did to highlight the 2012 terms to Michael Hill, it was not *obligated* to do so, particularly as Michael Hill had significant resources and access to legal advice. Nonetheless, choosing not to say or do more where you could have done so arguably increases the culpability of the behaviour. It may well also point to more insidious but scarcely detectable practices, such as the active and intentional exploitation of the known apathy consumers have with respect to reading the terms of the agreements they sign.[187] This, in turn, may see the failure to highlight unexpected or inconvenient terms (which may be unfavourable to the other party) become something more sinister and unconscientious, taking it higher up the spectrum of commercial behaviour. In *Gispac*, however, the evidence showed that Gispac not only made Michael Hill aware of the relevant 2012 terms but also *required* that they be read.

Finally, there is *Kobelt*. It is hard to place the conduct in this case on the spectrum of commercial behaviour, primarily because that conduct was undoubtedly *questionable* even if the High Court ultimately deemed it to be conscionable. The defendant's book-up credit system, so ASIC pleaded and the trial judge accepted, locked Mr Kobelt's Anangu customers into 'a cycle of perpetual indebtedness to him'.[188] Both the Federal Court and a majority of the High Court after it rejected this, stressing that the practice had to be viewed in the context of all other circumstances, particularly the fact that Mr Kobelt's customers did occasionally clear their debts and terminate their arrangement with him, and they were free

184 See *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; *EK Nominees Pty Ltd v Woolworths Ltd* [2006] NSWSC 1172.

185 See *Mackay v Dick* (1881) 6 App Cas 251; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596.

186 See *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 268 (Priestley JA).

187 Many an empirical study has demonstrated that consumers scarcely read the terms of the agreements they sign, whether in physical or digital form: see, eg, Scott J Burnham, 'How to Read a Contract' (2003) 45(1) *Arizona Law Review* 133; Michael G Faure and Hanneke A Luth, 'Behavioural Economics in Unfair Contract Terms: Cautions and Considerations' (2011) 34(3) *Journal of Consumer Policy* 337 <https://doi.org/10.1007/s10603-011-9162-9>; Ian Ayres and Alan Schwartz, 'The No-Reading Problem in Consumer Contract Law' (2014) 66(3) *Stanford Law Review* 545; Yannis Bakos, Florencia Marotta-Wurgler and David R Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43(1) *Journal of Legal Studies* 1 <https://doi.org/10.1086/674424>.

188 *Kobelt* (n 45) 43 [103] (Gageler J).

and able to access money for the purposes of shopping elsewhere.[189] Moreover, as mentioned earlier, the system did helpfully immunise Mr Kobelt's customers against 'humbugging' and permitted them to buy groceries in between income payments. At the same time, Mr Kobelt was haphazard in his bookkeeping, such that his customers were generally unaware of their financial state, and his pricing practices and manner of exercising dominion over his customers' bank accounts clearly perturbed the High Court.[190] The system he employed was obviously open to abuse.[191] Despite the High Court's finding, there is clear controversy surrounding Mr Kobelt's conduct. It is the dubious nature of this practice that draws the cursor up on the spectrum of commercial behaviour.

If the cases and relevant factors and principles discussed in this Part were translated into a 'default' position on the spectrum, and acknowledging that the facts and circumstances of individual cases can draw the cursor upwards and downwards along said spectrum, it is suggested that it would appear something close to what is presented in Figure 1 below:

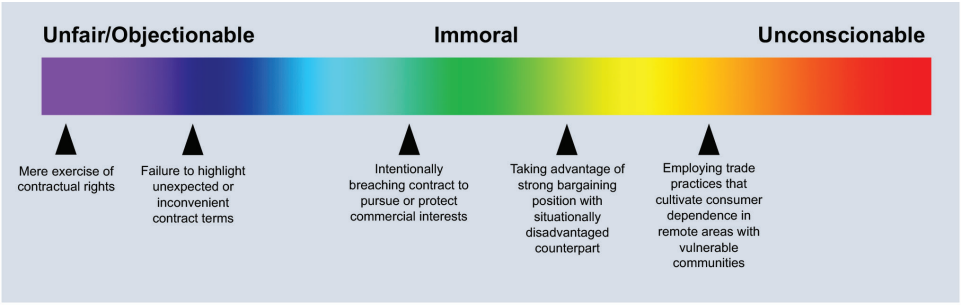

Figure 1: Spectrum of commercial behaviour.

This is purely illustrative of the underlying point made in this article, which is that the cases in which unconscionability has not been proven are as essential to informing our understanding of the doctrine as the cases in which it has been proven. One can hardly deny Plato's logic that comprehending what is 'bad' inevitably requires understanding the antithetical notion of 'good'. The spectrum provides a tentative indication of how common commercial behaviours are, prima facie, likely to be perceived by the courts when those behaviours are being evaluated in the context of the equitable doctrine of unconscionability. Market players can, therefore, use the spectrum to better anticipate how their behaviour will be perceived when viewed through a consumer law lens and to guide their behaviour. It indicates where the boundary separating acceptable (but arguably immoral) and unlawful conduct lies, and ideally extends to dissuading parties from 'going too far' in their commercial dealings with others. As Paul Finn notes, society

189 Ibid 44 [105].
190 See, eg, ibid 22 [31] (Kiefel CJ and Bell J), 41–2 [98]–[99] (Gageler J), 47 [116] (Keane J).
191 Ibid 36 [79] (Kiefel CJ and Bell J).

in this sense relies upon the law as 'a powerful instrument both in facilitating and in constraining human action and endeavour'.[192]

This 'educative' role does not just apply to the stronger commercial parties but to the meek as well. The effective invocation of the unconscionability doctrine also signals to traditionally disadvantaged parties that they are deserving of protection and serves to neutralise the power imbalance that was exploited by the stronger party.[193] Strategically, defence counsel can also use the spectrum to appreciate the magnitude of the challenge they have in establishing the blamelessness of their client's conduct and to tactically craft arguments analogising that conduct with those cases in which an unconscionability claim was not substantiated.

VI CONCLUSION

Gageler J (as he then was) in *Kobelt* described unconscionability as 'an obscure English word which centuries of use by courts administering equity have transformed into a legal term of art'.[194] In spite of enduring uncertainty as to the doctrine's precise content and theoretical basis, it is clear that equity devised it as a vehicle to avoid 'grossly immoral' commercial conduct.[195] The difficulty in practice has been establishing how the courts determine that conduct is *grossly* immoral and not just immoral; the former being unlawful and inequitable while the latter is merely objectionable. We must not be too quick to dismiss the cases in which unconscionability has not been found. These cases are as essential to developing our understanding of unconscionability as are the cases in which it has been proven. The normative standards of fairness underlying the doctrine stem from natural and generalised norms of commercial and civil behaviour.[196] But those norms lie upon a spectrum, such that there is *some* tolerance among market players and at law for behaviours that are objectively 'unfair' but not unlawful (ie, those that push equity's envelope). By surveying the relevant cases, this article has sought to probe the somewhat arbitrary distinction between immoral and unconscionable conduct, positing a spectrum of commercial behaviour identifying what appears to be the 'default' judicial perception of the gravity of various forms of business conduct.

192 Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17(1) *Melbourne University Law Review* 87, 88. One may question the efficacy of legal judgments translating into behavioural norms, but that is a separate issue.

193 Jeffrey L Harrison, 'Class, Personality, Contract, and Unconscionability' (1994) 35(2) *William and Mary Law Review* 445.

194 *Kobelt* (n 45) 36 [81].

195 Keith William Diener, 'The Doctrine of Unconscionability: A Judicial Business Ethic' (2016) 8(2) *University of Puerto Rico Business Law Journal* 103, 128.

196 Amy J Schmitz, 'Embracing Unconscionability's Safety Net Function' (2006) 58(1) *Alabama Law Review* 73.