

Unconscionability in Commercial Law

UNCONSCIONABILITY

The taking of *unfair and improper advantage* of another party's disability. This doctrine is linked to the common law doctrine of duress and the equitable doctrine of undue influence.

UNCONSCIONABILITY

The doctrine developed from two classes of cases:

- ▶ Those concerned with the protection of ‘expectant heirs’ (exclusively young men) who sold or mortgaged the future revisionary interest in property they would eventually inherit, for a present gross undervalue. “The expectant heir was at a disadvantage because he was *obliged to maintain a high level of consumption* and the bargain was unfair because of the disparity between the price and the value.”
- ▶ Those concerned with “the ‘unconscientious use of power arising out of the circumstances and conditions’ (*Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 per Lord Selborne at 490) to transactions in which the parties were not on equal terms as one party suffered from a personal disability such as physical or mental weakness, poverty, ignorance or “lack of education coupled with no independent advice.”

Pearson et al, *Commercial Law: Commentary and Materials*, 4th ed, ThomsonReuters, Sydney 2019, p683.

THE 3 REQUIREMENTS

- a. the weaker party must have been under a *special disability* vis-à-vis the stronger;
- b. the stronger party must have been *aware* of that special disability.
- c. it must have been unfair for the stronger party to procure agreement in those circumstances.

Consider the facts of *Baker v Monk* (1864) 55 ER 430, TBK [12.10], p. 683.

EFFECT OF UNCONSCIONABILITY

- a. The contract is voidable at the instance of the weaker party.
- b. In appropriate cases the court may simply reduce that party's liability instead of extinguishing it completely.
- b. The right to relief can be lost through ratification, affirmation, delay, intervention by a third party or even unconscionable conduct by the weaker party.

Unconscionability

- ▶ The taking of unfair and improper advantage of another party's disability, eg the discussion of *The Commercial Bank of Australia Ltd. v. Amadio and Another* (1983) 151 CLR 447
- ▶ The three requirements of unconscionable conduct, as stated in Deane J's decision:
 - ▶ The weaker party must have been under a special disability vis-à-vis the stronger
 - ▶ The stronger must have been aware of that special disability
 - ▶ It must have been unfair for the stronger to procure agreement in those circumstances

Unconscionability

- ▶ In ***Commercial Bank of Australia v Amadio (1983) 151 CLR 447*** the issue was whether Mr & Mrs Amadio were bound by the contract of guarantee in the circumstances in which they signed it. The High Court held that the contract of guarantee and the mortgage supporting it could be set aside. The Court held that the Amadios were at a serious disadvantage for a number of reasons and the Bank's representative had closed his eyes to their vulnerability.
- ▶ Equity will set aside a transaction where the party wishing to escape the contract was under a "serious disadvantage vis-à-vis the other".
- ▶ Adequacy of consideration is a relevant but not essential factor when assessing special disadvantage.

Unconscionability

- ▶ ***Special disadvantage***
- ▶ *In Blomley v Ryan (1956) 99 CLR 362 at 405 Fullagar J said (approved in Amadio):*

“The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid [grant specific performance] or to set a transaction aside [make it voidable], are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis a vis the other.”

Unconscionability

► *Special disadvantage*

In *Louth v Diprose (1992) 175 CLR 621* the issue was whether Diprose was under a special disadvantage as a consequence of his infatuation with and emotional dependency on Louth. The Court found that Diprose was under a special disadvantage due to two factors:

- the fact of his infatuation with Louth; and
- his consequent 'extraordinary vulnerability' in the false atmosphere of crisis created by Louth.

► In dissent, Toohey J pointed out that Diprose had chosen to remain in this relationship, despite its apparent disadvantages for him. He considered that while Diprose was emotionally involved with Louth, it did not follow that 'he was emotionally dependent on her in any legal sense.'

Unconscionability

- ▶ ***Special disadvantage***

In ***Bridgewater v Leahy (1998) 72 ALJR 1525*** the Court found there to be a special disadvantage in a relationship between an uncle and his nephew. According to the Court, the special disadvantage stemmed from a strong emotional dependence or attachment that the Court felt the uncle had for the nephew.

- ▶ *This dependence arose out of uncle's goal to preserve his land holdings as far as possible and the perception that the nephew would do so in a reliable and experienced fashion.*
- ▶ *Lack of independent advice in relation to the transaction was also a factor.*
- ▶ *In this case, a 'special disadvantage' was found to arise out of a relationship, rather than just a constituent disability in the person affected.*

Unconscionability

- ▶ Unconscionable bargaining - Statutory Regime
- ▶ *Contracts Review Act 1980* (NSW)
- ▶ Section 7 of the *Contracts Review Act 1980* (NSW) provides a number of remedies if it finds a contract or a provision of a contract to have been 'unjust in the circumstances'. 'Unjust' is defined in the Act as including 'unconscionable, harsh or oppressive' provisions/contract.

In ***West v AGC Advances Ltd (1986) 5 NSWLR 610*** the issue was whether the loan agreement Mrs West signed with AGC should be set aside as 'unjust in the circumstances'. The Court held that the contract should not be set aside:

'[A] contract will not be unjust as against a party unless the contract or one of its provisions is the product of unfair conduct on his part either in the terms which he has imposed or in the means which he has employed to make the contract.' (per McHugh J)

Unconscionability

Unconscionable bargaining - Statutory Regime

In *Esanda Finance Corp v Tong* (1997) 41 NSWLR 482 the issue again was whether a mortgage should be set aside under the *Contracts Review Act 1980* (NSW). The Court held that the mortgage should not be set aside entirely.

- ▶ Here, the mortgage was not fully set aside, but was set aside to the extent of the injustice (cf *Vadasz v Pioneer Concrete*).
- ▶ The Tongs succeeded in an action in negligence against their solicitors.

Unconscionability

POSITION OF LENDERS IN UNCONSCIONABLE TRANSACTIONS

Can a bank insist on the validity of a transaction where the unconscionable conduct was not perpetrated by it, but by the spouse seeking to secure the transaction?

In ***Garcia v National Australia Bank (1998) 194 CLR 395*** the High Court held that it will be unconscionable for a creditor to enforce a guarantee in such circumstances where

- ▶ the guarantor did not understand the purport and effect of transaction;
- ▶ the transaction was voluntary, in the sense that the guarantor received no gain from it;
- ▶ the creditor is taken to understand that, as a wife, the guarantor may repose trust and confidence in her husband in matters of business and so understand that the husband may not fully and accurately explain the purport and effect of the transaction to his wife; and
- ▶ the creditor did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her.

Undue Influence

- ▶ This equitable doctrine focuses on the ‘quality of consent of the weaker party’ (*Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 per Deane J at 474.).
- ▶ Undue influence occurs where one party abuses the influence that he or she has over the decisions of the other in order to obtain some undue benefit, either personally or for some third party
- ▶ Undue influence can arise
 - ▶ through some relationship of trust and confidence (fiduciary relationship); or
 - ▶ through actual coercion or general domination

*continued after two pages...*¹⁴

Relationships of Trust and Confidence

- ▶ “Special relationships” (or “relationships of influence”) also referred to as ‘per se’ relationships; and
- ▶ Other relationships (where a high degree of trust and confidence has developed) also referred to as ‘de facto’ relationships of trust and confidence

Undue Influence...

- ▶ The presumption of undue influence mentioned above can be rebutted:
 - ▶ by proving access to independent advice
 - ▶ by proving that independent advice would have been disregarded; or
 - ▶ by proving independent judgment
- ▶ The effects of undue influence are:
 - ▶ The contract can be set aside (rescinded) by the party under the influence
 - ▶ The court can do what is needed to restore the parties to their original positions

Undue Influence...

In *Johnson v Buttress* (1936) 56 CLR 113 the issue was whether there was the requisite relationship of influence in this case (of neighbours)?

The Court accepted that there was such a special relationship and that the presumption of undue influence had not been rebutted:

“The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise affecting the alienator’s will or freedom of judgment in reference to such a matter.” (per Dixon J)

In this case, Mr Buttress was in a vulnerable position in relation to Mrs Johnson and she was unable to show that he had made his gift free of any influence on her part.

Duress

In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] 1 QB 705 the issue was whether or not economic duress applied in the circumstances? The Court held that:

- ▶ Duress is not limited to the traditional categories of person and goods;
- ▶ If one can establish the right facts, then the compulsion involved in the duress may be of an economic kind; and
- ▶ If there has been economic duress a contract entered into via such duress will be voidable.

In this case, there was economic duress because Hyundai had demanded an increased price without any legal justification for doing so and would not accept anything but agreement to that demand. However, relief was denied because North Ocean had delayed for a considerable period before bringing the action (*Lâches*).

Duress

- ▶ Duress in contracts is the pressure exerted by one person to coerce another to contract on particular terms
- ▶ Duress of the person consists of:
 - ▶ actual violence
 - ▶ a present threat of violence; or
 - ▶ actual or threatened imprisonment
- ▶ To constitute duress threats must:
 - ▶ be of death, bodily harm or imprisonment
 - ▶ be calculated to cause fear; and
 - ▶ be actually cause that fear

continued on next page... 19

Duress...

- ▶ The effects of duress:
 - ▶ The contract is voidable by the party coerced
 - ▶ The right to avoid can be lost by ratification or affirmation
 - ▶ Damages may be obtainable in the tort of intimidation
- ▶ For economic duress, it has to prove:
 - ▶ some form of economic pressure induced the contract; and
 - ▶ that pressure went beyond what was legitimate

STATUTORY UNCONSCIONABILITY

In Australia, statutory unconscionability is dealt with under five different statutory regimes:

- ▶ The ACL (replacing the regime set out in the *Trade Practices Act 1974* (Cth))
- ▶ *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act)
- ▶ *Corporations Act 2001* (Cth)
- ▶ Within the *National Credit Code*
- ▶ *Contracts Review Act 1980* (NSW)

STATUTORY UNCONSCIONABILITY AND THE *AUSTRALIAN CONSUMER LAW* (ACL)

The ACL contains three provisions which allow a party to terminate a contract for unconscionable conduct and to seek remedies under that law:

- a. Section 20 - unconscionable conduct within the meaning of the unwritten law.
- b. Section 21 - unconscionable conduct by a business in its dealings with its customers.
- c. Section 22 - unconscionable conduct by businesses in their dealings with other businesses.

STATUTORY UNCONSCIONABILITY AND THE AUSTRALIAN CONSUMER LAW (ACL)

21 Unconscionable conduct in connection with goods or services

(1) 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.

(2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:

- (a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or
- (b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

(3) For the purpose of determining whether a person has contravened subsection (1):

- (a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- (b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of the Parliament that:

- (a) this section is not limited by the unwritten law relating to unconscionable conduct; and
- (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
- (c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
 - (i) the terms of the contract; and
 - (ii) the manner in which and the extent to which the contract is carried out;and is not limited to consideration of the circumstances relating to formation of the contract.

STATUTORY UNCONSCIONABILITY AND THE AUSTRALIAN CONSUMER LAW (ACL)

22 Matters the court may have regard to for the purposes of section 21

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the supplier) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the customer), the court may have regard to:

- (a) the relative strengths of the bargaining positions of the supplier and the customer; and
- (b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
- (c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
- (e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and
- (f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and
- (g) the requirements of any applicable industry code; and
- (h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

.....

STATUTORY UNCONSCIONABILITY AND THE AUSTRALIAN CONSUMER LAW (ACL)

22 Matters the court may have regard to for the purposes of section 21

...

(i) the extent to which the supplier unreasonably failed to disclose to the customer:

(i) any intended conduct of the supplier that might affect the interests of the customer; and

(ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and

(l) the extent to which the supplier and the customer acted in good faith.

...

STATUTORY UNCONSCIONABILITY AND THE AUSTRALIAN CONSUMER LAW (ACL)

22 Matters the court may have regard to for the purposes of section 21

...

(2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the acquirer) has contravened section 21 in connection with the acquisition or possible acquisition of goods or services from a person (the supplier), the court may have regard to:

- (a) the relative strengths of the bargaining positions of the acquirer and the supplier; and
- (b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and
- (c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and
- (e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and
- (f) the extent to which the acquirer's conduct towards the supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like suppliers; and...

STATUTORY UNCONSCIONABILITY AND THE AUSTRALIAN CONSUMER LAW (ACL)

22 Matters the court may have regard to for the purposes of section 21

...

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the supplier acted on the reasonable belief that the acquirer would comply with that code; and

(i) the extent to which the acquirer unreasonably failed to disclose to the supplier:

(i) any intended conduct of the acquirer that might affect the interests of the supplier; and

(ii) any risks to the supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the supplier); and

(j) if there is a contract between the acquirer and the supplier for the acquisition of the goods or services:

(i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the acquirer and the supplier in complying with the terms and conditions of the contract; and

(iv) any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the goods or services; and

(l) the extent to which the acquirer and the supplier acted in good faith.

Statutory Unconscionability

- ▶ *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 (TBK: [17.280])
- ▶ *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292

But ‘Where both parties are labouring under the same mistake in good faith, unconscionable conduct has not been established: *Spira v Commonwealth Bank of Australia* (2003) 57 NSWLR 544 at [60].

Statutory Unconscionability

- ▶ It is ‘undesirable to attempt any comprehensive definition of that which is ‘unconscionable’’: *NRM Corporation Pty Ltd v Australian Competition and Consumer Commission* [2016] FCAFC 98 at [164]: TBK p. 708.
- ▶ Section 21 ACL does not limit unconscionable conduct to conduct within the meaning of the unwritten law: s.21(4)(a)
- ▶ ‘Unconscionable conduct’ sits somewhere between ‘mere unfairness or unjustness’ and a ‘high level of moral obloquy’ [*ie public censure or condemnation*]: *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* (2017) 251 FCR 404 at [52]. It does not necessarily include intentional breach of contract: *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* (2011) 34 VR 536 at [91].
- ▶ See also the discussion at TBK [12.20].

Statutory Unconscionability

ACCC v Get Qualified Australia Pty Ltd (in liq) (No.2) [2017] FCA 709

- ▶ Per Beach J: [59] The following propositions are not seriously contestable in relation to ss 21 and 22.
- ▶ [60] First, “unconscionability” means something not done in good conscience or conduct against conscience by reference to the norms of society. But that is to be understood and applied in the context of trade or commerce, but including consumer protection objectives directed at the requirements of honest and fair conduct free of deception (see generally *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199 at [259] to [304]). But one must be careful in using the phrase “norms of society” to ensure that the identification thereof is not interlarded with some distorted subjective view of social philosophy. It is fraught with risk to move beyond the explicit and implicit norms enshrined in and bounded by the statutory language of ss 21 and 22 construed in context, being trade or commerce, notwithstanding the apparent breadth of s 21(4) and the non-limiting prefatory words of s 22(1). Moreover, the evaluation of unconscionability must not be decontextualised from the particular case under consideration.
- ▶ [61] Second and relatedly, in order to determine whether conduct is unconscionable, it is necessary to look at all the conduct, by “[s]tanding back and looking at the whole episode” (*Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [44]).
- ▶ [62] Third, as the norms of society include statutory prohibitions on deceptive conduct and the regulation of unsolicited consumer agreements, deceptive practices and contraventions of provisions concerning unsolicited consumer agreements can form part of the “whole episode”, for the purpose of assessing whether, in all the circumstances, the conduct in question is unconscionable (*Lux Distributors* at [41] to [44]).

Statutory Unconscionability

ACCC v Get Qualified Australia Pty Ltd (in liq) (No.2) [2017] FCA 709

- ▶ Per Beach J: [59] The following propositions are not seriously contestable in relation to ss 21 and 22.
- ▶ ...
- ▶ [63] Fourth, s 22(1) of the ACL sets out a non-exhaustive list of factors to which the Court may have regard for the purpose of determining whether a person has contravened s 21. The matters enumerated assist in understanding the scope of the meaning of unconscionable conduct, but the presence of one or more matters contained in s 22(1) (or indeed their absence) is not necessarily determinative.
- ▶ [64] Fifth, s 21(4)(b) of the ACL states that it is the intention of Parliament that s 21 is “capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour”.
- ▶ [65] Relatedly, proof of examples of similar unconscionable conduct in respect of individual cases can be used to demonstrate the features of a system of conduct or pattern of behaviour, even though no particular individual need be identified as having been disadvantaged.
- ▶ [66] Finally, the evidence of unconscionable conduct may be quite varied and, in some cases, not even substantial, but still form part of an overall pattern or system of unconscionability. It may be established by a systemic pattern of behaviour involving an accumulation of minor incidents.

Statutory Unconscionability

Paciocco v Australia and New Zealand Banking Group Limited (2015) 236 FCR 199

Per Allsop CJ: [262] That a degree of morality lies within the word “unconscionable” is clear. “Unconscionability” is a value-laden concept. “Obloquy” is “the condition of being spoken against; bad repute; reproach; disgrace; a cause of detraction or reproach;”; “obliquity” is “a deviation from moral rectitude, sound thinking or right practice; a delinquency; a fault or error.”: *The Shorter Oxford English Dictionary on Historical Principles* (3rd Ed, Oxford, 1969) Vol 2 p 1428. That unconscionability contains an element of deviation from rectitude or right practice or of delinquency can be readily accepted, **as long as the phrase “moral obloquy” is not taken to import into unconscionability a necessary conception of dishonesty.** The statutory language is “unconscionable”: that is, against conscience. A sense of moral obloquy or moral obliquity can be accommodated within the meaning or conception of unconscientious or unconscionable conduct. That said, an understanding of the meaning conveyed by the word “unconscionable” in the statute is not simply restated by substituting other words for those chosen by Parliament; danger easily lurks in the use of other words to capture the meaning of the statutory language. **The task involved is not the choice of synonyms; rather, it is to identify and apply the values and norms that Parliament must be taken to have considered relevant to the assessment of unconscionability: being the values and norms from the text and structure of the Act, and from the context of the provision.** Parliament has given some guidance to its proper application (and to its meaning) by identifying in s 12CC certain non-exhaustive factors that may be taken into account by a court in deciding whether conduct was unconscionable. Given the value-laden character of the word, it is necessary to ascertain and organise the relevant values and norms by reference to which the meaning of the word is to be ascertained, and by reference to which the application of the section is to be undertaken (the two tasks being distinct). **It must, however, be emphasised at the outset that the values and norms that are relevant are those that Parliament has considered, or must be taken to have considered, as relevant.** The following discussion should be understood as dealing with those matters, and not with any values or norms disembodied from, or unconnected with, the choice made by Parliament. *(emphasis added)*

Statutory Unconscionability

***Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199 per Allsop CJ)**

263. The first group of values are the enduring historical (and contemporary) norms and values that are recognised in the unwritten law referred to in s 12CA, and that are embedded within the conception of unconscionable conduct as referred to in s 12CB. These are the norms and values in the law, especially, but not limited to, Equity, that bear upon the notion of conscience, in this context the conception of a business conscience – one attending conduct in trade or commerce. These norms and values can be seen in the different branches of the general law, as well as in statute.
264. One should commence with the value of certainty. It is a consideration and legal value central to the rational and coherent operation of the section (and a matter of central concern to Spigelman CJ in *World Best*). Certainty in the law is an element or essence of enduring importance. As Sir Frederick Pollock said in *The First Book of Jurisprudence for Students of the Common Law* (5th Ed, London: Macmillan, 1923) at 37:
- ▶ [T]he normal and necessary marks, in a civilised commonwealth, of justice administered according to law... [are] Generality, Equality, and Certainty.
265. These considerations are central to law's acceptance as an objective form of societal will, and not the subjective views of fellow humans finding themselves in a position of power. Certainty goes to the heart of the conception of the rule of law, not of men.

Statutory Unconscionability

***Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199 per Allsop CJ)**

266. Certainty is a quality sometimes posited as a reason for removing from the expression of rules to govern conduct (in particular in regard to commercial conduct) standards, values and norms that lack precise definition, or that involve the application of values, or that apply or operate in contestable fields or with contestable results. But no sophisticated legal system, or society, seeks intellectual refuge in the proposition that rules alone are the guardians of the security of certainty. Lord Mansfield recognised this. He said that the law merchant must be easily learned and easily retained: *Hamilton v Mendes* (1761) 2 Burr 1198 at 1214; 97 ER 787 at 795. The rules to which Lord Mansfield referred did not depend on subtleties and niceties of expression or idea, rather they were easily learned and easily retained, because they were “the dictates of common sense, drawn from the truth of the case”: at 1214; 795. That was not a call for rules of unbending logical expression; rather, for rules (or principles) expressed in language that reflected the customs, norms and values of the society, or commerce, of the time.
267. The place of norms, values and principles in commercial law, lacking particular precision, but stating a value or general standard, can be seen in the common law, statutes on commercial subjects, in Equity, and in other branches of commercial law. Sometimes, a rule can only be expressed at a certain level of generality, often involving a value judgment. To do otherwise, and to seek precise rules for all circumstances, may be to risk complexity, incoherence and confusion.

Statutory Unconscionability

Paciocco v Australia and New Zealand Banking Group Limited (2015) 236 FCR 199 per Allsop CJ

268. The common law has many rules and principles expressed in terms of norms and values, rather than specific definitions expressed in terms of *a priori* logic that are sufficient by linguistic formulae to capture or recognise precise future situations of application. This was so in commerce, as in other fields of activity and life. As Lord Wright said in *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494 at 507, the legal implication of what is *reasonable* runs throughout the whole of English law, and is easily made. The notion of good faith in contract (not Equity) discussed later is another example. The law of restitution involving the informing concept of unjust enrichment is another. The relief from penalties and unconscionable restraints of trade are two more: see generally the comments of Lord Diplock in *Schroeder Music Publishing Co v Macaulay* [1974] 1 WLR 1308 at 1315-1316.
269. Sometimes, provisions of statutes central to the operation of commerce, are expressed in terms of generality laden with value judgments. For instance, in marine insurance, the notion of discharge of the insurer from liability is central to the operation of the promissory warranty and to the operation of the principles of deviation and delay: see the *Marine Insurance Act 1909* (Cth) ss 39-47 (warranties), and ss 52-54 (deviation and delay). The discharge of the insurer will see the assured lose for all time, the benefit of the contract of insurance. ...

Statutory Unconscionability

Paciocco v Australia and New Zealand Banking Group Limited (2015) 236 FCR 199 per Allsop CJ

296. The working through of what a modern Australian commercial, business or trade conscience contains and requires, in both consumer and business contexts, will take its inspiration and formative direction from the nation's legal heritage in Equity and the common law, and from modern social and commercial legal values identified by Australian Parliaments and courts. The evaluation of conduct will be made by the judicial technique referred to in *Jenyns*. It does not involve personal intuitive assertion. It is an evaluation which must be reasoned and enunciated by reference to the values and norms recognised by the text, structure and context of the legislation, and made against an assessment of all connected circumstances. The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.
297. The variety of considerations that may affect the assessment of unconscionability only reflects the variety and richness of commercial life. It should be emphasised, however, that faithfulness or fidelity to a bargain freely and fairly made should be seen as a central aspect of legal policy and commercial law. It binds commerce; it engenders trust; it is a core element of decency in commerce; and it gives life and content to the other considerations that attend the qualifications to it that focus on whether the bargain was free or fair in its making or enforcement.

Statutory Unconscionability

***Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199 per Allsop CJ)**

298. The normative standard of a business conscience referred to in the statute is permeated with accepted and acceptable community values: *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [23]; *Perpetual Trustee Company Limited v Khoshaba* [2006] NSWCA 41 at [64] and *Australian Securities and Investment Commission v National Exchange Pty Ltd* [2005] FCAFC 226; 148 FCR 132 at 139-140, esp [30].
299. These considerations may involve behaviour that is best evaluated relationally in a transaction; they may involve conduct that can be evaluated against normative or ethical standards, apart from any particular transaction: see, for instance, *National Exchange*.

The High Court affirmed the Full Court's views on unconscionable conduct and did not suggest that the foregoing statements of principle by Allsop CJ were incorrect: ***Paciocco v Australia and New Zealand Banking Group Limited* (2016) HCA [28]** per Keane J at [292] - [294]; French CJ at [2] and Kiefel J at [70] agreed, and per Gageler J at [181] - [191]: TBK, p.707.

UNFAIR CONTRACT TERMS AND THE *AUSTRALIAN CONSUMER LAW*

Part 2-3 of Ch 2 of the ACL regulates unfair contract terms in “standard form consumer contracts” - rendering them void.

Terms are unfair if:

- a. they cause a significant imbalance in the parties’ rights and obligations under the contract.
- b. they are not reasonably necessary to protect the legitimate interests of the party inserting them.
- c. they would cause detriment to the other party if applied or relied on.

UNFAIR CONTRACT TERMS AND THE *AUSTRALIAN CONSUMER LAW*

Provisions in the ACL on unfair contract terms draw on similar provisions set out in the *Contracts Review Act 1980* (NSW).

In 2003 Victoria introduced s32W of the *Fair Trading Act 1999* (Vic) based on the *Unfair Terms in Consumer Contracts Regulations 1994* (UK) (superseded by the Consumer Rights Act 2015) which, in turn, was the domestic implementation of obligations sourced from 'old' EU law (Unfair Consumer Contract Terms Directive 93/13/EEC of 1993).

UNFAIR CONTRACT TERMS AND THE *AUSTRALIAN CONSUMER LAW*

- ▶ The provisions of the ACL apply to small business contracts as well as to consumer contracts.
- ▶ The provisions are mirrored in the ASIC Act concerning contract terms relating to the supply or possible supply of services that are financial services or of financial products: ss12DA, 12DB, 'ASIC Act'.

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- ▶ The terms ‘consumer contracts’ and ‘small business contracts’ are defined specifically for the ‘Unfair Contract Terms’ regime of the ACL: s.23. The definition of ‘consumer’ here is *NOT* the same as that set out elsewhere in the ACL.
- ▶ Section 23 has limited operation. It only applies to **standard form** consumer contracts and, **from 12 November 2016**, small business contracts.

UNFAIR CONTRACT TERMS AND THE *AUSTRALIAN CONSUMER LAW*

- ▶ All terms in a relevant contract can be challenged as ‘unfair’ unless they fall within the exemptions set out in s.26 ACL:
- ▶ A term that defines the subject matter of the contract; or
- ▶ Sets the upfront price payable under the contract. This is defined in s.26(2) as the consideration for the supply, sale or grant that is disclosed at or before the formation of the contract; or
- ▶ Is a term required or expressly permitted by a law of the Commonwealth, a State or Territory; **and**
- ▶ certain classes of contract, such as charterparties: section 28

UNFAIR CONTRACT TERMS AND THE *AUSTRALIAN CONSUMER LAW*

- ▶ If a term is found to be ‘unfair’ then it is void, but the rest of the contract remains binding on the parties if that is possible without the particular term: s.23(2)
- ▶ If a term is declared unfair under s.250 ACL, then further orders may be granted such as injunctions, compensation or other orders against the person who would otherwise benefit from the clause.

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- ▶ The test of unfairness is set out in s.24 and requires satisfaction of three elements:
 - ▶ Cause a significant imbalance in the parties' rights and obligations; and
 - ▶ Was not reasonably necessary to protect the legitimate interests of the party relying upon it; and
 - ▶ It would cause financial or other detriment if relied upon.
- ▶ Examples of 'unfair' terms are set out in s.25. The list is inexhaustive

UNFAIR CONTRACT TERMS AND THE *AUSTRALIAN CONSUMER LAW*

- ▶ The categories in Section 25 are not necessarily easily understood: e.g., not all termination or variation clauses will be ‘unfair’: they will be subject, most likely, to whether or not they are ‘reasonable’ in all the circumstances.
- ▶ Clarity in how the legislation works will come from decisions over time.
- ▶ See further, e.g., *ACCC v CLA Trading Pty Ltd* [2016] FCA 377
- ▶ *ACCC v CAN 117372915 Pty Ltd (in liq)* [2015] FCA 368
- ▶ *ACCC v Chrisco Hampers Australia Ltd* [2015] FCA 1204
- ▶ *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224