

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

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The Fair Trading Amendment Act 2021 introduced a New Zealand prohibition on "unconscionable conduct" in trade. Previously, the law on unconscionable conduct was found in the equitable doctrine of unconscionable bargain. This article describes how New Zealand law has moved away from equitable unconscionability with this new prohibition. This article critically analyses some of the legal, social and economic justifications for introducing the prohibition, finding that some of the Ministry of Business, Innovation and Employment's justifications are not persuasive. The s 7 prohibition is based strongly on an equivalent section in the Australian Competition and Consumer Act 2010 (Cth). It is argued that long-standing doctrinal issues with Australia's prohibition provided a strong basis for New Zealand to pursue a different standard. Finally, this article explores the "unfair commercial practices" doctrines in the United States and European Union through the lens of anti-consumer practices in digital marketplaces. The conclusion is that the unfair commercial practices doctrine captures a wider range of anti-consumer conduct than does unconscionable conduct.

I INTRODUCTION

In August 2022, New Zealand will introduce a prohibition on "unconscionable conduct" in the Fair Trading Act 1986 (FTA).¹ The newly inserted s 7 of the FTA prohibits conduct "in trade" that is

* Submitted for the LLB (Honours) Degree, Te Kauhanganui Tātai Ture | Faculty of Law, Te Herenga Waka | Victoria University of Wellington, 2021. Thank you to Paul Scott for his feedback and guidance on this topic. I would also like to extend thanks to my parents, Rita Shasha, Max Bramwell and Toni Wharehoka for their encouragement, proofreading and manaaki.

1 Fair Trading Amendment Act 2021, s 2.

"unconscionable" (statutory unconscionability).² Section 8 contains a non-exhaustive list of factors to assess whether conduct is unconscionable. This includes:³

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

The court can consider several additional factors when a contract exists between a trader and affected person, including:⁴

- (1) any inducement to enter into the contract;
- (2) whether the affected person obtained legal advice or other professional advice;
- (3) the terms of the contract; and
- (4) whether the terms of the contract allow the affected person to reasonably meet their obligations.

The new ss 7 and 8 are the result of the Ministry of Business, Innovation and Employment's (MBIE) small business consultations in 2018, which found significant gaps existed in our laws targeting unfair commercial practices.⁵ On the basis of MBIE's recommendations, the New Zealand government effectively reproduced the unconscionable conduct prohibition from the Australian Competition and Consumer Act 2010 (Cth) (CCA), which authorises the Commerce Commission to investigate and enforce cases of alleged unconscionable conduct.⁶ The provision serves as a safety net, seeking to fill the gaps between more specific bright-line consumer law rules. The provision achieves this through enacting a broad "standard-based" prohibition (for example, the standard of "unconscionable"), which complements more specific "bright-line rules" (for example, misleading conduct).⁷

To understand the new Act, a discussion of unconscionability principles and case law is needed. Part II of this article sets out the current New Zealand law on equitable unconscionability and how the new FTA prohibition differs from equitable unconscionability. Part III critically analyses the

2 Section 6.

3 Section 6.

4 Section 6.

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

6 Ministry of Business, Innovation and Employment *Fair Trading Amendment Bill: Officials' Report to the Economic Development, Science and Innovation Committee* (30 July 2020) at 6; and Competition and Consumer Act 2010 (Cth), sch 2 s 21(4).

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

justifications for the new unconscionable conduct prohibition. Part IV sets out how the prohibition has operated in Australian consumer law. Part V sets out how the development of Australian case law has struggled to move away from the narrow equitable conception of unconscionability.

As a result of Australia's difficult experience with unconscionable conduct, New Zealand should pursue a different standard than "unconscionable". In recent years, several legal commentators, leading jurists and the chairperson of the Australian Competition and Consumer Commission (ACCC) have called for the Australian government to adopt an "unfair commercial practices" (UCP) doctrine in place of "unconscionable conduct".⁸ Part VI discusses "unfair commercial practices" regulations in the European Union and United States as an alternative doctrine to the Australian unconscionable conduct prohibition. Part VII discusses why the new "unconscionable conduct" prohibition will struggle to remedy unfair digital practices if New Zealand follows Australia's unconscionability jurisprudence. This article then evaluates the potential for a UCP doctrine in New Zealand, with particular focus on the doctrine's ability to better remedy unfair digital practices.

II NEW ZEALAND'S POSITION ON UNCONSCIONABLE CONDUCT

Presently, the equitable doctrine of unconscionable bargain ("equitable unconscionability") is invoked in contract law disputes. The doctrine is a defence against contractual performance when a contract was formed in unconscionable circumstances. If the stronger party unconscionably takes advantage of the weakness of a vulnerable party in a transaction, the vulnerable party may seek an equitable remedy.⁹ This equitable remedy is usually rescission of the contract.

A Principles of Equitable Unconscionability

New Zealand's principles of unconscionable bargain have been authoritatively stated by Tipping J in *Bowkett v Action Finance Ltd*.¹⁰ The focus in unconscionable bargain proceedings is on the

8 See for example Peter Applegarth "Credit and Unconscionability - The Rise and Fall of Statutes" (paper presented to WA Lee Equity Lecture, Supreme Court of Queensland, Brisbane, 19 November 2020) at 37–41; Chris Maxwell, President of the Victorian Court of Appeal "Equity And Good Conscience: The Judge As Moral Arbiter And The Regulation Of Modern Commerce" (speech to the Victoria Law Foundation Oration, Melbourne, 14 August 2019) at 16; Rob Sims, ACCC Chairperson "Tackling market power in the COVID-19 era" (speech delivered to National Press Club, Canberra, 21 October 2020); and *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, (2019) 368 ALR 1 at [311] per Edelman J.

9 Ministry of Consumer Affairs *Consumer Law Reform Additional Paper – Unconscionability* (October 2010) at 3.

10 *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449 (HC). See also *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205 at [30].

conduct of the stronger party against the vulnerable or disadvantaged party.¹¹ The following circumstances will normally be present when a court finds an unconscionable bargain:¹²

- (1) The weaker party is under a significant disability ["special disadvantage"].
- (2) The stronger party knows or ought to know of that disability ["knowledge"].
- (3) The stronger party has victimised the weaker in the sense of taking advantage of the weaker party's disability, either by active extortion of the bargain or passive acceptance of it in circumstances where it is contrary to conscience that the bargain should be accepted ["victimisation"].
- (4) There is a marked inadequacy of consideration and the stronger party either knows or ought to know that to be so.
- (5) There is some procedural impropriety either demonstrated or presumed from the circumstances.

The first three factors are "crucial" and must be present to find an unconscionable bargain.¹³ The latter two factors will usually be present, but an unconscionable bargain can still be found in their absence.¹⁴ Notably, unconscionable bargain takes into account substantive unconscionability, as in the terms of the contract that favour the stronger party, as well as procedural unconscionability, as in pre-contractual matters that affected the weaker party's contractual capacity. If the *Bowkett* factors are established, the stronger party has an onus to show that the transaction was "fair, just and reasonable" to rebut a finding of unconscionable bargain.¹⁵

B Differences between Statutory and Equitable Unconscionability

Statutory unconscionable conduct in s 7 of the FTA differs from equitable unconscionability in several important ways. Firstly, the statutory unconscionable conduct prohibition is "not limited by any rule of law or equity relating to unconscionable conduct".¹⁶ Section 7(3) expresses Parliament's intention to interpret statutory unconscionability more broadly than equitable unconscionability.¹⁷

Secondly, there is no vulnerability or special disadvantage requirement. Equitable unconscionability only accounted for a "special disadvantage" that was personal to the vulnerable party (for example, advanced age) rather than a commercial or situational disadvantage.¹⁸ The removal of the special disadvantage requirement, therefore, allows unconscionability to be more

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

12 *Bowkett v Action Finance Ltd*, above n 10, at 460.

13 At 460.

14 At 460.

15 *Gustav & Co Ltd v Macfield Ltd*, above n 10, at [30].

16 Fair Trading Amendment Act, s 6.

17 Section 6; and Ministry of Business, Innovation and Employment, above n 6, at 29.

18 Ministry of Consumer Affairs, above n 9, at 2.

readily applied in business-to-business contexts, where traditional "special disadvantages" like advanced age are unlikely to apply.¹⁹ The focus of statutory unconscionability inquiries is now on the nature of the impugned conduct, rather than the characteristics of the victim.²⁰ In keeping with the removal of the special disadvantage requirement, there is also no "victimisation" requirement that the stronger party have taken advantage of the weaker party.

Thirdly, statutory unconscionability can be applied to a system or pattern of unconscionable conduct.²¹ The "system of conduct" doctrine allows unconscionability to apply, for example, when the business design itself is unconscionable. Therefore, in "systems" cases, there is no requirement to prove the exploitation of particular individuals.²² Instead, it must be established that the internal system of the business was set up to operate unconscionably. For example, the Full Federal Court of Australia found that a telemarketing business that acquired the names of customers' friends to mislead them into purchasing products behaved unconscionably.²³ They used the name collection to cold-call customers using the pretence they were "referred by X friend" to gain the customer's trust.²⁴ Here, it did not matter whether particular individuals were harmed, but that the business "system" was intentionally designed to perform this fraud.²⁵

Fourthly, there is no requirement for actual or constructive knowledge of the weaker party or the unconscionable conduct itself. MBIE considered that a knowledge requirement would create an unnecessary burden on the claimant to prove the defendant's "specific state of knowledge", which would reduce the effectiveness of the provision.²⁶ Instead, businesses are encouraged to proactively avoid harmful conduct, and lack of awareness is not a defence.²⁷ Furthermore, a knowledge requirement would restrict the prohibition to circumstances where specific parties had been targeted,

19 Ministry of Business, Innovation and Employment, above n 6, at 32.

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

21 Fair Trading Amendment Act, s 6.

22 Thyme Burdon "When the company line is unlawful: an overview of systemic unconscionable conduct" (2018) 40 Law Soc Bulletin (SA) 22 at 22.

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

24 At [123].

25 Australia's experience with "systems" cases is discussed further in Part IV.

26 Ministry of Business, Innovation and Employment, above n 6, at 31.

27 At 31.

which "systems" cases do not require.²⁸ Removing the knowledge requirement creates a high burden on businesses to avoid unforeseeable harmful conduct.

Fifthly, the prohibition establishes a non-exhaustive list of factors to determine whether impugned conduct is unconscionable. This has been called the "sliding scale" of unconscionability, where the court weighs the cumulative effect of s 7 factors.²⁹ These factors take the statutory prohibition beyond the narrow test at equity.³⁰ For example, s 7 allows the court to consider the "form of the contract", including how transparent the terms of the contract are.³¹ This is a clear indication that substantive unconscionability can be considered by the courts.

Finally, the penalties for breaching s 7 of the FTA differ from common law remedies. Breaches of s 7 will attract the penalty clause of the FTA. The maximum fine for an individual is \$200,000 per breach.³² The maximum fine for a body corporate is \$600,000 per breach.³³ As will be discussed, under the Australian Consumer Law (the official title of sch 2 of the CCA) the maximum penalty is substantially higher, in one case exceeding the economic gain from the unconscionable conduct by a factor of 50.³⁴ The comparatively low penalties under the FTA may have implications for deterrence and compliance under the provision.

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

III JUSTIFYING UNCONSCIONABLE CONDUCT IN THE FAIR TRADING ACT

A 2018 MBIE survey purported to show a high prevalence of unfair commercial practices across the economy. Close to 50 per cent of businesses reported they were victims of unfair commercial practices, a figure which proved influential for parliamentary decision-makers given its reappearance across several official materials. This section critically evaluates whether this survey data demonstrated pervasive unfair commercial practices worthy of legislative intervention. Later, this

28 At 31.

29 Paterson and Brody, above n 7, at 352.

30 Jeannie M Paterson, Elise Bant and Matthew Clare "Doctrine, policy, culture and choice in assessing unconscionable conduct under statute: ASIC v Kobelt" (2019) 13 J Eq 81 at 92.

31 Fair Trading Amendment Act, s 6.

32 Fair Trading Act 1986, s 40(1)(a).

33 Section 40(1)(b).

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

section presents alternative qualitative justifications for the unconscionable conduct prohibition that do not rely on MBIE's quantitative data.

A MBIE's Survey Data

MBIE's 2018 small business survey resulted in a report recommending the adoption of an unconscionable conduct provision in the FTA.³⁵ The data formed a picture of unfair commercial practices across the economy. Examples of unfair practices included:³⁶

- (1) 47 per cent of businesses indicated they were treated unfairly by a supplier or customer yearly;
- (2) 34 per cent indicated this involved suppliers or customers not complying with the terms of a contract; and
- (3) 12 per cent considered they had been harassed, coerced, or otherwise subject to pressure.

However, MBIE's survey suffers from several methodological shortcomings in data collection. The survey was "opt-in", involved a subjective self-assessment and had a low sample size.³⁷ When a survey is left for individuals to select themselves as subjects, it does not follow the principles of probability sampling and is conducive to participation bias and self-selection bias, resulting in the surveying of subjects that disproportionately possess attributes that influence the data.³⁸ Here, MBIE's survey was attractive to participants with negative experiences regarding unfair business practices.

Additionally, the data do not indicate what proportion of unfair practices would have met the higher threshold of "unconscionable". As stated in Russell McVeagh's submission on MBIE's discussion paper, "asking whether a business feels it has been treated 'unfairly' is inherently subjective ... and is not necessarily indicative of a legal problem".³⁹ MBIE was criticised in several other submissions for relying heavily on these data.⁴⁰

35 Ministry of Business, Innovation and Employment *Discussion paper: protecting businesses and consumers from unfair commercial practices* (December 2018) at 6; and Ministry of Business, Innovation and Employment *Initial briefing to the Economic Development, Science and Innovation Committee* (30 April 2020) at 3.

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

37 At 11.

38 See Jelke Bethelhem "Selection Bias in Web Surveys" (2010) 78 *International Statistical Review* 161 at 162.

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

40 See for example Russell McVeagh, above n 39, at [8]; BusinessNZ "Submission to the Economic Development, Science and Innovation Committee on the Fair Trading Amendment Bill" at 3; Wellington Chamber of Commerce "Submission on unfair commercial practices consultations" at 3; New Zealand Bankers Association "Submission on unfair commercial practices consultations" at [8]; and DLA Piper "Submission on unfair commercial practices consultations" at 3.

Put simply, MBIE's survey data do not demonstrate a legal problem worthy of legislative intervention. The data do not demonstrate sufficiently widespread unfair practices across the economy, as the respondents choosing to respond to MBIE's survey likely do not represent the average business' experience. Additionally, more data should have been sought to understand whether the reported conduct meets the high standard of unconscionable. The next Part discusses how alternative qualitative justifications for statutory unconscionability are more persuasive than MBIE's survey.

B Weaknesses of Equitable Unconscionability

1 Lack of positive duty

Presently, equitable unconscionability only applies when invoked by claimants. The lack of legislative pronouncement means that the positive duty for parties to comply with a high standard of business conscience is limited.⁴¹ Contractual rescission does not require or strongly deter firms from avoiding similar conduct again.⁴² Therefore, equitable unconscionability has limited ability to influence future behaviour.⁴³ Instead, the doctrine's equitable purpose is to achieve justice in a particular case, with little regard for consistency or articulating social values.⁴⁴

For example, the Commerce Commission considered they could not prevent price gouging on consumer goods (for example, face masks) during the 2020 COVID-19 pandemic because of this gap in consumer protection law.⁴⁵ By contrast, the ACCC's COVID-19 guidelines to Australian businesses stated that excessive prices would risk breaching the prohibition on unconscionable conduct.⁴⁶ This example illustrates the prospective nature of unconscionable conduct regulations, as a means of guiding commercial behaviour *ex ante*, compared to the retrospective application of equitable unconscionable bargain principles.

2 Business-to-business contexts

Equitable unconscionability cannot apply in most business-to-business transactions because the special disadvantage, knowledge and victimisation elements are rarely applicable in business contexts. For the stronger party, *Australian Competition and Consumer Commission v Jayco Corp Pty Ltd*

41 Ministry of Business, Innovation and Employment, above n 36, at 10.

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

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

44 At 21.

45 Ministry of Business, Innovation and Employment, above n 6, at 8.

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

established it is difficult to attribute an unconscionable state of mind to corporations comprised of many individual agents, each with different states of knowledge.⁴⁷ This makes it difficult to establish the knowledge requirement. For the weaker party, it is difficult to establish that a business was at a "special disadvantage" as required under equitable unconscionability. Usual "disadvantages" in unconscionable bargain cases like advanced age or ill-health are unlikely to apply in business-to-business contexts.⁴⁸

3 *Special disadvantage requirement*

The special disadvantage requirement has caused difficulty in business-to-consumer contexts. Equitable unconscionability does not protect "average" consumers who are not under a "special disadvantage", even when the circumstances are manifestly unfair. For example, an "average" consumer might understand the unconscionable contract but does not have a real choice other than to enter into the contract.⁴⁹ This often arises in the predatory lending context, where debtors have no option but to accept loans with high interest rates and one-sided terms. Edelman J in the High Court of Australia has called these circumstances a "Hobson's Choice".⁵⁰

C *Economic Justifications for Statutory Unconscionability*

1 *Gaps in competition law*

According to the Ministry of Consumer Affairs, competition principles can regulate unfair commercial conduct without necessarily needing to amend the FTA. On this view, competition principles will "constrain and regulate that behaviour over time" when a dishonest supplier, of whom consumers disapprove, enters the marketplace.⁵¹ However, their argument is not supported by Australia's experience, where "competition has not been sufficient to regulate supplier behaviour".⁵² Howell and Wilson argue that consumer protection law intervenes because of undesirable distributive consequences from competitive markets. According to them, "markets are not interested in social

47 *Australian Competition and Consumer Commission v Jayco Corp Pty Ltd* [2020] FCA 1672 at [669].

48 Ministry of Business, Innovation and Employment, above n 6, at 32.

49 Consumer Policy Research Centre, above n 42, at 14.

50 *Kobelt*, above n 8, at [266] per Edelman J.

51 Ministry of Consumer Affairs, above n 9, at 2.

52 At 6.

justice or equity, even though these matters might be important for consumers".⁵³ Competitive markets, for instance, do not require firms to provide unprofitable or less profitable products.⁵⁴

Australia's consumer credit market illustrates this point. Consumer credit is generally considered a highly competitive market.⁵⁵ Despite this, Aboriginal Australians have extremely low access to credit and banking as a result of banks' forgoing unprofitable branches that serve lower-income areas.⁵⁶ The absence of reputable creditors in rural Australia led to an unregulated form of credit called "book-up" forming. Book-up is a form of credit where payment is deferred, subject to the customer giving the creditor their bank card and PIN until the debt is paid off.⁵⁷ Book-up credit is susceptible to unscrupulous traders taking advantage of the low regulatory oversight to exploit vulnerable consumers through "tying" conduct, high-interest rates and opaque terms.⁵⁸

As this discussion highlights, competition does not constrain and regulate unconscionable behaviour in all circumstances. An absence of choice and alternatives for lower socioeconomic consumers can still emerge in competitive markets, leaving them vulnerable to unscrupulous suppliers. Evidence shows some markets with low barriers to entry might actually incentivise unscrupulous suppliers to set up business.⁵⁹

2 *Misallocation of costs*

In a market economy, opportunities for consumers to exercise free and informed consent when making purchasing decisions promote competition in the market.⁶⁰ By its very nature, unconscionable conduct restricts free and informed consumer consent by allowing firms with market power to take advantage of consumer vulnerability. When market conditions are skewed in ways that favour firms that behave dishonestly, this can undermine competition and the efficient operation of the market.⁶¹ This is one type of "market failure".

53 Nicola Howell and Therese Wilson "The Limits of Competition: Reasserting a Role for Consumer Protection and Fair Trading Regulation in Competitive Markets" in Deborah Parry and others (eds) *The Yearbook of Consumer Law 2009* (Taylor & Francis, London, 2009) 147 at 153.

54 At 157.

55 At 158.

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

57 *Kobelt*, above n 8, at [21] per Kiefel CJ and Bell J.

58 At [165]–[192] per Nettle and Gordon JJ.

59 Howell and Wilson, above n 53, at 156.

60 Paterson and Brody, above n 7, at 337.

61 Ministry of Business, Innovation and Employment, above n 36, at 11.

The costs and risks of unconscionable conduct are borne by consumers and honest traders under the current legal framework. Without effective redress, the current framework gives legally non-compliant traders an advantage over honest traders.⁶² If unconscionable conduct is sufficiently widespread within a market, this can make honest traders become inefficient relative to their unscrupulous rivals and create a barrier to entry.⁶³ This restricts honest traders from entering markets and competing. Vulnerable consumers are also harmed under the current framework. For example, when vulnerable consumers receive a product unsuitable for their needs, or which they cannot afford, and the unconscionable business model has contributed to their lack of understanding, the consumer is effectively allocated the cost of the trader's unconscionable conduct.⁶⁴ According to Rosenbaum, firms are:⁶⁵

... more inclined to be honest in situations when (a) they stand to gain less monetarily from dishonest behavior and/or, (b) when the probability of being detected and the magnitude of punishment if apprehended, increase[s].

Therefore, the FTA remedies the misallocation of risks by placing a higher cost on unconscionable conduct and increasing the probability of detection by the Commerce Commission.

D ACCC's Justifications

1 Broader remedies

According to former ACCC chairperson Rod Sims, the primary reason for the statutory unconscionability prohibition was to broaden the range of remedies. Under the Australian Consumer Law, potential remedies include injunctions, compensatory damages, corrective advertising, contractual variation and pecuniary penalties.⁶⁶ Remedies apply on a "per breach" basis and an accumulation of breaches can result in significant penalties for unconscionable conduct. To put this into perspective, in *Australian Competition and Consumer Commission v Telstra Corp Ltd* the Federal Court fined Telstra AUD 50 million for unconscionably signing up 108 Aboriginal customers to

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

63 Nick Feltovich "The interaction between competition and unethical behaviour" (2019) 22 Exp Econ 101 at 101.

64 Paterson and Brody, above n 7, at 333.

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

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

contracts they could not afford and did not understand.⁶⁷ These penalties greatly exceeded the direct economic benefit deriving from the unconscionable conduct, estimated at AUD 800,000.⁶⁸ Compared to rescission, which is a weak deterrent, the Australian Consumer Law's strong penalties impose a high cost on firms engaging in unconscionable conduct and incentivise a high standard of business conduct.⁶⁹

2 Giving the ACCC enforcement powers

Australia's other main justification was to empower the ACCC to investigate and prosecute unconscionable conduct for several parties simultaneously, rather than relying on individual claimants. The ACCC's enforcement powers are important because, in unconscionable conduct cases, the "weaker party is usually not in a position itself to take legal action against the stronger party".⁷⁰

Australian Competition and Consumer Commission v Coles Supermarket Australia Pty Ltd shows how the ACCC's enforcement powers become significant when individual claimants are reluctant to litigate. For background, Coles Supermarket sought rebate payments from suppliers to compensate for "profit gaps", waste, markdowns and late deliveries.⁷¹ These payments were not required by the contractual arrangements and "profit gaps" often arose due to Coles' misconduct, completely outside of the suppliers' control.⁷² The Court found that Coles had acted unconscionably because the suppliers were much smaller, hugely dependent on Coles' business and feared the impact of refusing to pay the rebate.⁷³

Important to this discussion, despite the overt breach of contract, most suppliers did not pursue Coles for breach of contract for fear of commercial retaliation.⁷⁴ Therefore, *Coles Supermarket* demonstrates the utility of the unconscionable conduct prohibition when claimants are reluctant to litigate individually. The ACCC had no jurisdiction to pursue the breach of contract issue. The only recourse was through the unconscionable conduct prohibition. Accordingly, a statutory

67 *Australian Competition and Consumer Commission v Telstra Corp Ltd* [2021] FCA 502, (2021) 392 ALR 614 at [73].

68 Bayliss-McCulloch, above n 34.

69 Consumer Policy Research Centre, above n 42, at 14.

70 Fels and Lees, above n 66, at 361.

71 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at [8] and [92]–[108].

72 At [101]–[104]; and Fels and Lees, above n 66, at 365.

73 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd*, above n 71, at [98].

74 Fels and Lees, above n 66, at 373.

unconscionability provision complements existing common law actions, rather than usurping and replacing them.

In New Zealand, MBIE's regulatory impact statement found that "supermarkets [were often] penalising suppliers for promotions run with other retailers by demanding compensation for perceived losses caused by other retailers' promotions and deducting it from payments to suppliers".⁷⁵ Evidently, practices similar to those in *Coles Supermarket* cannot be prosecuted by the Commerce Commission under the current regulatory framework. Therefore, the new prohibition gives the Commerce Commission the power to apply the unconscionability doctrine to a broader range of unfair economic and social circumstances than under the current legal framework. The next Part discusses how these unconscionability principles might apply in New Zealand based on legislative history and case law developments under the equivalent Australian provision.

IV UNCONSCIONABLE CONDUCT IN AUSTRALIA

Sections 21 and 22 in sch 2 of the CCA contain the Australian prohibition on unconscionable conduct. This is equivalent to the amended s 8 in the FTA. Section 21 contains the general prohibition against unconscionable conduct. Section 22 contains a list of non-exhaustive factors to determine unconscionable conduct. The prohibition operates as a "safety net" in Australia's consumer protection law.⁷⁶ As such, it provides immediate legal recourse in circumstances where more specific "bright-line rules" fail to remedy unforeseen practices and conduct.⁷⁷ In this regard, the prohibition is not intended to supersede existing consumer protection laws, but to complement them by capturing "practices that somehow slipped through the consumer net".⁷⁸ A study of how the prohibitions in ss 21 and 22 have been applied in practice will provide a strong indication of how the prohibition is likely to operate in New Zealand.

A Legislative History

From the legislative history of the statutory unconscionable conduct prohibition, a tension emerges between the two competing interests of the courts and legislature. The courts have interpreted statutory unconscionability within the narrow scope of equitable unconscionability principles. As a response, the Australian legislature has tried to broaden the application of the provision through several unsuccessful reforms.

75 Ministry of Business, Innovation and Employment, above n 36, at 16.

76 Paterson and Brody, above n 7, at 332.

77 At 332.

78 At 341.

In 1986, Australia's first statutory prohibition on unconscionable conduct was added in s 51 of the Trade Practices Act 1974 (Cth) (TPA).⁷⁹ The prohibition was built upon the equitable doctrine.⁸⁰ In 1998, s 51AC was inserted into the TPA. Section 51AC added six new considerations to determine unconscionable conduct.⁸¹ As stated in the Bill's second reading, it was intended to "extend the common law doctrine of unconscionability expressed in the existing section 51AA".⁸²

In 2008, a Senate Standing Committee reported there was "no doubt that section 51AC of the Trade Practices Act has fallen short of its legislative intent".⁸³ This was because "the courts are not interpreting the section as broadly as was the legislative intent".⁸⁴ They recommended expressly clarifying that s 21AC is wider than the "special disadvantage" doctrine.⁸⁵ In 2010, the CCA replaced the TPA. Some recommendations of the 2008 Committee were adopted, including expressly allowing substantive unconscionability to be considered (ie the terms of the contract).⁸⁶

In 2012, following the recommendations of another expert panel, further amendments were made to the CCA. At the second reading of the Bill, the Minister gave the strongest expression that the prohibition was not limited to equitable unconscionability:⁸⁷

The [B]ill amends the law to make it clear that the prohibition is *not limited* to the equitable or [common law] doctrines of unconscionable conduct. The courts should not limit the application of the provisions by reference to ancient [common law] doctrines ...

The Bill inserted the s 21(4) interpretative principles which established that:⁸⁸

- (1) The section is not limited by the unwritten law relating to equitable unconscionability.
- (2) A "special disadvantage" is not required.
- (3) Unconscionable conduct can extend "beyond the formation of the contract to both its terms and the way in which it is carried out".

79 Applegarth, above n 8, at 21.

80 At 21.

81 At 21.

82 (30 September 1997) 216 CPD 8767.

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

84 At [3.1].

85 At [5.20].

86 *Kobelt*, above n 8, at [291] per Edelman J.

87 (27 May 2010) 7 CPD 4361 (emphasis added).

88 Competition and Consumer Act 2010 (Cth), sch 2 s 21(4).

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

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

B Australian Case Law

1 Against community conscience

The most important feature of Australian case law is that the s 22 unconscionability factors are not applied mechanically or rigidly.⁸⁹ Instead, the factors form part of a wider holistic evaluation of whether the impugned conduct was "against conscience by reference to the norms of society".⁹⁰ In other words, a normative standard of unconscionability is applied alongside the s 22 factors. Since "unconscionability" is an open-textured term, it requires judicial exposition to a normative standard.⁹¹ The values of the normative standard are derived from the case law, equity and community standards.⁹²

Australian courts have not always followed the "against community conscience" normative standard. Early authorities held that the normative standard was "conduct showing a high level of moral obloquy".⁹³ The "moral obloquy" standard was first applied in 2005 in *Attorney-General of New South Wales v World Best Holdings Ltd*.⁹⁴ More recently, Gageler J in *Paciocco v Australia and New Zealand Banking Group Ltd* approved the "moral obloquy" standard.⁹⁵ The "high level of moral obloquy" doctrine is viewed as a significantly higher normative standard to prove unconscionability than "against community conscience".⁹⁶

89 Nyuk Yin Nahan and Eileen Webb "Unconscionable Conduct in Consumer and Business Transactions" in Justin Malbon and Luke Nottage (eds) *Consumer Law & Policy in Australia and New Zealand* (Federation Press, Sydney, 2013) 154 at 170.

90 Brody and Temple, above n 62, at 171.

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

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

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

94 *World Best Holdings Ltd*, above n 93, at [121].

95 *Paciocco*, above n 93, at [188]; and *World Best Holdings Ltd*, above n 93, at [121].

96 Brody and Temple, above n 62, at 171.

However, according to the ACCC, Australian authority now supports "against community conscience" as the accepted normative standard.⁹⁷ The reference to community conscience first appeared in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*, where the Court downplayed the "high level of moral obloquy" standard:⁹⁸

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

The "against community conscience" standard of unconscionability views the prohibition as a general condemnation of conduct that is deemed to have violated community norms, rather than requiring particular weight to be given to any one s 22 factor.⁹⁹ Using "community conscience" as the normative standard gives sensitivity to the varied circumstances in which unconscionability can arise and gives effect to changes in normative societal values.¹⁰⁰ It places the *focus* of proceedings on the stronger party's conduct and whether that conduct was "against community conscience".

2 *System of conduct*

The other important feature of Australian case law is the judicial innovation of unconscionable "systems of conduct". The "system of conduct" doctrine allows the prohibition to apply when a business is intentionally designed to operate unconscionably. This does not require an individual to be identified who is disadvantaged by the unconscionable conduct.¹⁰¹ Therefore, the focus in "systems" cases is primarily on the conduct in question, rather than claimants' personal characteristics or adverse effects on claimants.¹⁰² The "system of conduct" principle was established in *Australian Securities and Investments Commission v National Exchange Pty Ltd*, which stated:¹⁰³

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

Here, the word "system" denotes that the internal design of the business must be set up to operate unconscionably. Claimants must show the unconscionable conduct was the result of an intentionally

97 Sims, above n 66.

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

99 JM Paterson and E Bant "Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online" (2021) 44 JCP 1 at 5.

100 *ACCC v Lux*, above n 98, at [23]; and Paterson and Brody, above n 7, at 344.

101 *Unique International College*, above n 23, at [103].

102 At [103].

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

adopted "internal method of working".¹⁰⁴ To prove an unconscionable "system of conduct" was intentionally adopted by the impugned firm, it must be shown that the unconscionable features were present in combination from a sufficient number of interactions so that it was "more likely than not that the respondent had designed and operated that combination as a system".¹⁰⁵

"Systems" cases do not require a particular disadvantaged individual to be identified.¹⁰⁶ However, it must be shown that a hypothetical consumer class might have been vulnerable to the unconscionable business design. It must be possible to ascertain a group of "vulnerable but unnamed members" with some certainty and precision.¹⁰⁷ Claimants can do this by presenting evidence of "similar examples of unconscionable conduct in regard to particular individuals".¹⁰⁸

In these cases, members alleging the "system of conduct" must be sufficiently representative of the entire consumer class and not dependent on their individual circumstances and vulnerabilities.¹⁰⁹ This was the principle from *Unique International College Pty Ltd v Australian Competition and Consumer Commission*:¹¹⁰

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

To demonstrate this principle, in *Unique International College*, evidence from six consumers from a class of 3,600, without accompanying evidence of why the experience of those six was representative of the group, was insufficient to establish an unconscionable "system of conduct".¹¹¹ In other words, they needed to establish that an internal process was deliberately adopted, rather than the conduct being merely circumstantial to these individual consumers.¹¹² Conversely, in *Australian Competition and Consumer Commission v EDirect Pty Ltd*, the critical features of a telemarketing system were present in enough transactions in combination to establish a "system of conduct".¹¹³ Here, the attributes of individual consumers were less important and the conduct was more generic,

104 *Unique International College*, above n 23, at [104].

105 Burdon, above n 22, at 22.

106 Sharpe, above n 92, at [5.16].

107 At [5.16].

108 At [5.16].

109 *Unique International College*, above n 23, at [135].

110 At [135].

111 At [238].

112 Sharpe, above n 92, at [5.15].

113 *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045 at [107]; and *Unique International College*, above n 23, at [124] and [135].

meaning evidence from fewer consumers was of greater probative value. These examples illustrate the highly fact-specific nature of the inquiry in "systems" cases.

V THE CASE AGAINST UNCONSCIONABLE CONDUCT

The widely criticised judgment in *Australian Securities and Investments Commission v Kobelt* demonstrates several tensions in the development of the statutory unconscionability doctrine. This Part will critically analyse the High Court's struggle with the special disadvantage, "moral obloquy" and equitable unconscionability doctrines. Through this critical analysis, this Part will demonstrate shortcomings in the CCA's unconscionability prohibition. *Kobelt* places the rationale behind New Zealand adopting the Australian unconscionable conduct prohibition in contention, especially when several high-ranking members from the Australian judiciary and the chairperson of the ACCC are calling for Parliament to amend the provision.¹¹⁴

For background, the 4–3 judgment in *Kobelt* was the third 4–3 decision under the unconscionable conduct prohibition. The high frequency of split judgments highlights how principles of statutory unconscionability are still unsettled.¹¹⁵ Despite being a judgment from Australia's highest appellate court, *Kobelt* did not provide much useful guidance about the principles of unconscionability. Gageler J acknowledged the judgment was:¹¹⁶

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

A Australian Securities and Investments Commission v Kobelt

1 Factual background

Lindsay Kobelt operated a "book-up" credit system from his general store, Nobbys, in Anangu, a region of Australia with a large Aboriginal population.¹¹⁷ He was also in the business of selling second-hand cars to his mostly rural customers.¹¹⁸ Under his book-up system, Kobelt obtained the bank cards and PINs of his customers when they entered the arrangement. Kobelt then withdrew funds from the customers' accounts every payday, with this often being from welfare payments.¹¹⁹ He would

114 See for example Applegarth, above n 8, at 37–41; Maxwell, above n 8, at 16; Sims, above n 8; and *Kobelt*, above n 8, at [311] per Edelman J.

115 Henry Materne-Smith "All Is Fair in Love and Remote Indigenous Communities? ASIC v Kobelt" (2019) 368 *Adel L Rev* 1 at 377.

116 *Kobelt*, above n 8, at [95] per Gageler J.

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

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

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

withdraw 100 per cent of the customers' bank balance, putting aside 50 per cent towards debt repayment and leaving the remaining 50 per cent to spend at Nobbys.¹²⁰

Several features of the book-up system and Kobelt's conduct are relevant for the unconscionable conduct issue. First, his 117 customers were vulnerable. They were impoverished and had low levels of education and financial literacy, with less than half able to "add up". Secondly, he did not provide terms and conditions or statements of accounts for his credit system, nor did he obtain information about his customers' ability to afford the debt. His recordkeeping was unintelligible, unable to be understood by two accountants, and he often accompanied customers' names with derogatory comments. Customers had no easy way to determine the extent of their indebtedness. Thirdly, effective credit rates for his second-hand cars were between 22 and 44 per cent annually. Customers were probably not aware of this charge, which greatly exceeded commercial credit rates. Fourthly, he exploited a temporary glitch in the Commonwealth Bank of Australia's systems to withdraw amounts that exceeded the customers' bank balance, which he was not authorised to do. Finally, since customers did not have access to their cards, debtors were only permitted to spend their 50 per cent balance at Nobbys. He had wide discretion over their spending, often preventing them from buying non-essential groceries. If customers wished to shop elsewhere, they had to pay Kobelt to make a "purchase order". This effectively tied debtors to Kobelt's shop.

2 *Majority judgment*

Kiefel CJ and Bell, Gageler and Keane JJ formed the majority and held that Kobelt's conduct was not unconscionable under the Australian prohibition. In short, because the Anangu people used the "book-up" system voluntarily, the majority held that Kobelt's book-up system was not unconscionable.¹²¹

Despite the majority recognising the special disadvantage of the customers, Kiefel CJ and Bell J found they still understood the "basic elements" of the system.¹²² Therefore, Kobelt did not take unconscientious advantage of his customers in providing book-up credit.¹²³ Keane J agreed that the victimisation requirement was not satisfied because of the "unusual market" that existed and because of the countervailing market power of the Anangu customers to collectively stop buying from

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

121 At [77]–[79] and [107]–[110].

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

123 Taking unconscientious advantage of a vulnerable party is required under the equitable unconscionability doctrine's focus on victimisation: at [58]–[61] per Kiefel CJ and Bell J.

Nobby's.¹²⁴ Gageler J concluded that participation in the book-up system reflected the "distinctive cultural practices" of the Anangu people.¹²⁵

The majority found it significant that the book-up system provided several advantages to the Anangu people, primarily that it provided access to credit despite their low incomes and few assets.¹²⁶ Because of this, their Honours decided that the use of book-up credit was a "matter of choice" and was not unconscionable. The majority's emphasis on "choice" to use the book-up system reflects that "book-up" is a popular form of credit in Aboriginal communities, with a long history in rural Australia.¹²⁷ Therefore, when applying the "against community conscience" normative standard, their Honours accommodated the test to meet the "peculiar circumstances of the case", meaning the unusual form of credit common to Aboriginal communities.¹²⁸

Each member of the majority applied slightly different principles of unconscionability. Keane J delivered the narrowest judgment, applying the "high level of moral obloquy" normative standard and narrowing the statutory doctrine to equitable unconscionability.¹²⁹ Kiefel CJ and Bell J narrowed the statutory doctrine to equity, but did not adopt the "moral obloquy" principle.¹³⁰ In contrast to the other majority judgments, Gageler J established a wider unconscionability doctrine. Gageler J thought statutory unconscionability was completely unconstrained by equitable unconscionability principles.¹³¹

3 *Minority judgment*

In contrast to the majority, Nettle and Gordon JJ held that Kobelt unconscionably took advantage of his vulnerable customers. Applying the s 22 factors, Nettle and Gordon JJ found that there was a power imbalance, a lack of consumer understanding and that the conduct was not necessary to protect Kobelt's legitimate interests.¹³² Their Honours found that book-up credit was not inherently

124 At [125]–[129] per Keane J.

125 At [110] per Gageler J.

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

127 Materne-Smith, above n 115, at 10.

128 *Kobelt*, above n 8, at [107] per Gageler J.

129 At [119] per Keane J.

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

131 At [83] per Gageler J.

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

unconscionable and it was possible to run a legitimate book-up system, but Kobelt had not done this.¹³³

Edelman J also applied the s 22 factors, agreeing with Nettle and Gordon JJ. In addition to their findings, Edelman J found that there was a lack of good faith when Kobelt exploited the Commonwealth Bank glitch, the consumers did not understand the documents, they had little ability to negotiate the terms, and the terms of the contract were unfair.¹³⁴ Edelman J was highly critical of statutory unconscionability authorities for narrowly restricting the doctrine to equitable unconscionability. He suggested the "unconscionable" standard should be replaced with "unfair" or "unjust":¹³⁵

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

4 *Criticisms of the judgment*

The majority's approach has been heavily criticised by commentators. *Kobelt* essentially decides that a credit system cannot be "against community conscience" if the consumers approve of it.¹³⁶ The emphasis on "customer approval" did not take into account the lack of information or alternatives presented to the vulnerable parties.¹³⁷ This was an example of a "Hobson's Choice" where the customers had few true alternatives for credit. Despite the credit system being unacceptable in any other contemporary context and falling well short of Australian credit regulations, the decision ostensibly sets a higher threshold before conduct is deemed "against community conscience" for Aboriginal communities.

At worst, this approach leaves the doctrine open to unconscious racial bias where predatory practices can be defended as "cultural preferences" which are permitted by consumer law, without critically analysing the historical and structural reasons indigenous cultures have been forced into alternative credit systems. According to Yates and Tania, book-up credit became common in Aboriginal communities because of the absence of reputable creditors in rural regions.¹³⁸ Aboriginal communities are among the most excluded from banking services in the developed world.¹³⁹

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

134 At [303]–[309] per Edelman J.

135 At [311] per Edelman J.

136 Paterson, Bant and Clare, above n 30, at 106.

137 At 120.

138 Yates and Tania, above n 56, at 272.

139 At 271.

Therefore, Aboriginal "cultural preferences" can only be understood as a response to an absence of mainstream credit options.

Furthermore, "voluntary choice" cannot justify binding a party to a credit contract when the decision-maker's ability to judge or protect their own best interests is compromised.¹⁴⁰ According to Applegarth, freedom of contract only protects parties who have the capacity to contract freely.¹⁴¹ Freedom of contract is not an absolute principle, but has been tempered with equity's concern with fairness, and statutory unconscionability provides "courts with means for checking whether contracts are truly products of contractual liberty".¹⁴² Therefore, "voluntary choice" should not have salvaged the conscience of Kobelt, since "his customers were so disadvantaged as to regard Kobelt's offering as acceptable".¹⁴³ In sum, the majority's approach has left unconscionability open to a defence that vulnerability is irrelevant when the vulnerable party made a "voluntary choice".

B Wider Doctrinal Issues

To help understand New Zealand's unconscionability prohibition, it is useful to analyse how the *Kobelt* decision approached long-standing doctrinal tensions in Australia's statutory unconscionability jurisprudence. This Part talks more broadly about the doctrinal problems from the majority's judgment.

1 Special disadvantage

As discussed in Part IV, "special disadvantage" is not required to establish statutory unconscionability. This was Parliament's intention for s 21(4)(b), which states, "this section is capable of applying ... whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour".¹⁴⁴

To be clear, courts may consider both special disadvantage and victimisation under s 21, because the section allows the court to consider "any other matter it considers relevant", beyond the list of factors.¹⁴⁵ However, three of the majority judges in *Kobelt* considered it was compulsory that the weaker party be subject to a special disadvantage and that the stronger party unconscionably take

140 Paterson, Bant and Clare, above n 30, at 101.

141 Applegarth, above n 8, at 34.

142 Brady Williams "Unconscionability as a Sword: The Case for an Affirmative Cause of Action" (2015) 107 CLR 2015 at 2066–2067.

143 Materne-Smith, above n 115, at 335.

144 Competition and Consumer Act 2010 (Cth), sch 2 s 21(4)(b).

145 Schedule 2 s 22(1).

advantage of that special disadvantage ("victimisation").¹⁴⁶ In *Pitt v Commissioner for Consumer Affairs, Kobelt* was treated as authority for the special disadvantage requirement:¹⁴⁷

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

Subsequently, lower courts have had to grapple with *Kobelt's* reintroduction of the special disadvantage requirement. In 2021, the Supreme Court of South Australia in *Pitt* formed a majority from the three dissenting judges and Gageler J to find that *Kobelt* did not establish a requirement for special disadvantage, but that it could be a valid analytical route in some cases.¹⁴⁸ *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* also dismissed the special disadvantage requirement from *Kobelt*, finding that:¹⁴⁹

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

2 Moral obloquy

As discussed in Part IV, the normative standard for statutory unconscionability is conduct that goes "against community conscience". That discussion mentioned the back-and-forth development of two parallel lines of authority in Australian case law. An alternative line of cases required conduct to meet the higher standard of a "high level of moral obloquy". Prior to *Kobelt*, Australian law appeared to be settled on the "against community conscience" standard. At the very least, the ACCC viewed this aspect of the law as settled when it submitted to MBIE's discussion paper in early 2019.¹⁵⁰

However, Keane J in *Kobelt* expressly considered the "moral obloquy" standard as settled law:¹⁵¹

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

146 *Kobelt*, above n 8, at [15] and [118] per Kiefel CJ and Bell and Keane JJ.

147 *Pitt v Commissioner for Consumer Affairs* [2021] SASCA 24 at [154].

148 At [155] and [159].

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

150 Sims, above n 66.

151 *Kobelt*, above n 8, at [119] per Keane J.

But, also in the majority, Gageler J expressed regret over his previous use of "moral obloquy" in *Paciocco v ANZ Bank*:¹⁵²

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

Keane J's approval of the "moral obloquy" standard reintroduced a widely condemned doctrine into Australian law. The "moral obloquy" doctrine has been criticised for usurping Parliament's chosen word of "unconscionable" with a different standard and implying that conscious wrongdoing is required to find unconscionable conduct.¹⁵³ In *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd*, "moral obloquy" was thought to be an imprecise threshold that does not assist the legal meaning of "unconscionability".¹⁵⁴ Golding and Giancaspro argue that the development of the parallel "moral obloquy" standard has "set Australia back in terms of generating greater clarity around what it means for conduct to be unconscionable".¹⁵⁵

3 *Back to equitable unconscionability?*

Despite repeated reform of the statutory unconscionability prohibition, Paterson argues it has "struggled to free itself from its equitable origins".¹⁵⁶ Delany describes the majority in *Kobelt* as taking the "complete anchoring option" by narrowing s 21 to equitable unconscionability.¹⁵⁷ Therefore, according to the majority, the intention of Parliament in adopting the term "unconscionable" was to freeze the doctrine as it existed in equity and that it was "not to be 'glossed, expanded, modified, or explained by a court'".¹⁵⁸

152 At [91] per Gageler J.

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

154 *Ipstar v APS Satellite*, above n 153, at [278].

155 Golding and Giancaspro, above n 153, at 3.

156 Paterson and Bant, above n 99, at 3.

157 Delany, above n 91, at 217.

158 At 209.

Kiefel CJ and Bell J narrowed the unconscionability doctrine to its equitable meaning by stating that "the term 'unconscionable' ... is to be understood as bearing its ordinary meaning".¹⁵⁹ Keane J was even more forthcoming in his "anchoring" of the equitable doctrine, stating that:¹⁶⁰

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

Both judgments have the effect of giving "unconscionable" its equitable meaning. This is reinforced by the Judges' citation of *Kakavas v Crown Melbourne Ltd* and *Thorne v Kennedy* as authorities, which were both decided under the old equitable doctrine rather than the statutory criteria.¹⁶¹

Additionally, as discussed earlier, the Court focused strongly upon the special disadvantage and victimisation requirements in equity, despite neither of these elements being required under s 21. None of the Judges focused on the obvious exploitative business context which would have likely led them to find an unconscionable "system of conduct".¹⁶² As such, their Honours ignored the stronger "system of conduct" analytical route, an innovation of the statutory prohibition, and decided the case purely on equitable unconscionability principles.

Subsequently, lower courts have treated *Kobelt* as authority for narrowing the scope of statutory unconscionability to equitable principles. The Supreme Court of South Australia in *Pitt* found that:¹⁶³

... a majority of the [*Kobelt*] Court ... emphasised the significance of the statutory appropriation of the equitable terminology of "unconscionability" in understanding the standard to be applied. Thus, while we accept that it is appropriate to apply the normative standard articulated by Gageler J ... this standard should be seen as reflecting the gravity of the *equitable conception* of unconscionability.

C Should New Zealand Adopt the Unconscionability Doctrine?

MBIE has ostensibly ignored the impact of *Kobelt* in Australian unconscionability jurisprudence, despite it being the latest decision from Australia's highest court. None of MBIE's reports published subsequent to the *Kobelt* decision have referred to the case. Their reports instead refer to *Lux* and *Coles Supermarkets* as Australia's "leading cases", despite their being older, lower court judgments

¹⁵⁹ *Kobelt*, above n 8, at [14] per Kiefel CJ and Bell J.

¹⁶⁰ At [119] per Keane J.

¹⁶¹ Paterson, Bant and Clare, above n 30, at 92. See also *Kakavas v Crown Melbourne Ltd* [2013] HCA 25, (2013) 250 CLR 392; and *Thorne v Kennedy* [2017] HCA 49, (2017) 263 CLR 85.

¹⁶² Paterson and Bant, above n 99, at 9.

¹⁶³ *Pitt v Commissioner for Consumer Affairs*, above n 147, at [163].

and less controversial authorities.¹⁶⁴ This Part argues that *Kobelt* challenges MBIE and Parliament's intention for the operation of s 7 of the FTA.

First, Parliament clearly intended that a "special disadvantage" would not be required for a claim under s 7 of the FTA. Section 7(2)(b) states: "This section applies whether or not a particular individual is identified as disadvantaged".¹⁶⁵ Despite this, *Kobelt* shows that Australian judges continue to place a high emphasis on the "special disadvantage" suffered by the claimant. Paterson argues that Australian judges have struggled to conceptualise principles prescribed by the statutory prohibition, instead deferring to familiar equitable unconscionability concepts like "special disadvantage".¹⁶⁶

Secondly, MBIE considers the Australian normative standard as "against community conscience".¹⁶⁷ While mostly correct, this understanding masks the frequent reappearance of the "high level of moral obloquy" doctrine which has unsettled Australian unconscionability principles. From *Kobelt*, Australia's normative standard for unconscionability is still not fully settled and MBIE needed to take this into account when considering whether statutory unconscionability is more legally certain than the alternatives proposed.

Thirdly, Parliament intended that the FTA unconscionability prohibition would be interpreted more broadly than equitable unconscionability.¹⁶⁸ This has not been achieved in Australia, despite repeated legislative guidance and reform attempting to force courts into broader interpretations of statutory unconscionability. Considering that New Zealand courts have decades of experience with equitable unconscionability principles, beginning with *Archer v Cutler* in 1980,¹⁶⁹ it is unlikely that they will be able to avoid the influence of equitable principles no matter how much legislative guidance is given.

Australia's unconscionability law has been damaged by judicial resistance in the face of clear legislative intent, contradictory authorities applying different normative standards and unsettled principles. The perceived benefits of a statutory unconscionability prohibition will be greatly limited if the courts follow the narrow approach of Australia's judiciary. The question remains: why is New Zealand adopting a standard in 2022 that Australia may depart from in the near future? The

164 Ministry of Business, Innovation and Employment, above n 6, at 6.

165 Fair Trading Amendment Act, s 6.

166 Paterson and Bant, above n 99, at 8.

167 Ministry of Business, Innovation and Employment, above n 36, at 35; and Ministry of Business, Innovation and Employment *Discussion paper: protecting businesses and consumers from unfair commercial practices*, above n 35, at 40.

168 Ministry of Business, Innovation and Employment, above n 6, at 29.

169 See *Archer v Cutler* [1980] NZLR 386 (HC) at 402.

chairperson of the ACCC and high-ranking members of the Australian judiciary have both expressed interest in exploring whether a standard of "unfairness" should replace the "unconscionable" standard.¹⁷⁰ The next Part considers whether the alternative standard of "unfair commercial practices" should have been given greater consideration in New Zealand.

VI UNFAIR COMMERCIAL PRACTICES

Paterson and Bant argue that Australia and New Zealand lag behind the United States and European Union consumer laws when it comes to regulating unfair commercial practices.¹⁷¹ This Part discusses how those models have operated and how they better address unfair commercial practices.

A European Union Model

The European Union (EU) Directive on Unfair Commercial Practices aims to achieve a consistent consumer law framework across the EU.¹⁷² The EU uses a three-tier framework, which includes unfair, misleading and aggressive commercial practices.¹⁷³ Unfair commercial practices is the most general prohibition of the three. Article 5(1) prohibits unfair commercial practices, which may include isolated, one-off incidents.¹⁷⁴ Article 5(2) determines a practice is "unfair" if:¹⁷⁵

- (1) it is contrary to the requirements of professional diligence;¹⁷⁶ and
- (2) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.¹⁷⁷

170 See for example Applegarth, above n 8, at 37–41; Maxwell, above n 8, at 16; Sims, above n 8; and *Kobelt*, above n 8, at [311] per Edelman J.

171 Paterson and Bant, above n 99, at 2.

172 Consumer Policy Research Centre, above n 42, at 23.

173 Borko Mihajlović "The Role of Consumers in the Achievement of Corporate Sustainability through the Reduction of Unfair Commercial Practices" (2020) 12 Sustainability 1009.

174 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22, art 5(1); and *R v X Ltd* [2013] EWCA Crim 818, [2013] 3 All ER 995 at [22].

175 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22, art 5(2).

176 Professional diligence is defined in art 2(h) as "the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity".

177 The average consumer is "reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors": Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22, preamble.

The Directive evaluates the material distortion of the average consumer's economic behaviour as a result of the UCP.¹⁷⁸ In other words, the Directive assesses whether the unfair conduct causes an average consumer to make a transactional decision that they would not have taken otherwise;¹⁷⁹ for example, if they were induced by unfair conduct to purchase a product they would not have otherwise purchased. However, the additional requirement of being contrary to professional diligence means, for example, that ordinary advertising materials which induce a consumer to make a purchase will not fall under art 5(2).

B United States Model

The Federal Trade Commission (FTC) is responsible for applying the prohibition on unfair acts or practices in the United States. Section 45(n) of the Federal Trade Commission Act deems acts or practices unfair where:¹⁸⁰

- (1) the act or practice causes or is likely to cause substantial injury to consumers;
- (2) the injury is not reasonably avoidable by consumers themselves; and
- (3) the harm is not outweighed by countervailing benefits to consumers or to competition.

The first element seeks to identify the actual or potential harm to consumers caused by the unfair practice.¹⁸¹ For example, financial harm or harms to health and safety are usually considered "substantial" consumer injuries.¹⁸² A substantial consumer injury can be one that causes the "distortion of consumer choice".¹⁸³ The second element is a fact-dependent inquiry into whether the unfair conduct was reasonably avoidable.¹⁸⁴ The third element is where the majority of the court's analysis occurs. Here, the court essentially performs a cost-benefit analysis of whether the anti-consumer costs outweigh the pro-consumer and pro-competition benefits of the conduct.¹⁸⁵ An act or

178 Alessandra Franchi, Elisa Turco and Mattia Bosio "European Union" in Dennis Campbell (ed) *Unfair trading practices: Special issue, 2016* (Kluwer Law International, Alphen aan den Rijn (Netherlands), 2016) 360 at 363.

179 Jennifer Slade and David Grant "The Consumer Protection from Unfair Trading Regulations: A Commentary" (2010) 2 *Travel Law Quarterly* 94 at 101; and Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22, art 5(2).

180 Federal Trade Commission Act 15 USC § 45(n); and *FTC v Wyndham Worldwide Corp* 799 F 3d 236 (3d Cir 2015) at 244.

181 Nelly Rosenberg "An Uphill Battle: FTC Regulation of Unreasonable Data Security as an Unfair Practice" (2017) 66 *DePaul L Rev* 1163 at 1197.

182 Cristina Coteanu *Cyber Consumer Law and Unfair Trading Practices* (Ashgate, Farnham (UK), 2005) at 164.

183 At 164.

184 Rosenberg, above n 181, at 1202.

185 At 1202.

practice is not unfair "unless it is injurious in its net effects".¹⁸⁶ To look at the effectiveness of the EU and United States model in practice, the next Part discusses several unfair digital practices that have been prevented by United States and EU consumer laws. By contrast, these practices are unlikely to fall within the ambit of the Australian and New Zealand unconscionability laws.

VII UNFAIR DIGITAL PRACTICES AND CONSUMER LAW

Consumer law faces many challenges from rapid innovation in digital technology. In particular, many novel anti-consumer digital practices may not fall squarely under a particular "bright-line rule" in consumer law, but nevertheless have negative impacts on consumer welfare. This article refers to anti-consumer practices perpetrated in digital marketplaces as "unfair digital practices". The unconscionable conduct prohibition requires explicitly and overtly unfair conduct to meet the high threshold of "unconscionable". However, meeting this high threshold can be an issue for regulators who seek to address subtle anti-consumer practices in digital marketplaces. Brody and Temple argue this high threshold can make it "difficult for regulators to take action against traders that test the boundaries".¹⁸⁷ By contrast, many noteworthy unfair digital practices have been prevented in the EU and United States by applying the UCP prohibition.

The widespread collection of consumers' personal and behavioural data in online browsing creates "consumer data profiles" which allow digital marketers to profile and target consumers based on their personal characteristics.¹⁸⁸ New techniques have been conceived to take advantage of consumers' data profiles. One such technique is "hypernudging", where "big data interacts with personalization in an effort to devise highly persuasive attempts to influence the behaviour of individuals".¹⁸⁹ This includes, for example, using data to learn about consumers' sensitivities, biases and vulnerabilities and adjusting the content and timing of marketing messages to effectively influence their decision-making.¹⁹⁰ Hypernudging has the "potential to manipulate people into forming certain desires or displaying certain behaviours".¹⁹¹ This Part discusses two examples of "hypernudging" and the contrasting responses of unconscionability regulations and the UCP.

186 At 1202.

187 Brody and Temple, above n 62, at 173.

188 Consumer Policy Research Centre, above n 42, at 23.

189 Marijn Sax, Natali Helberger and Nadine Bol "Health as a Means Towards Profitable Ends: mHealth Apps, User Autonomy, and Unfair Commercial Practices" (2018) 41 JCP 103 at 105.

190 At 106.

191 At 106.

A Search Rankings in Online Marketplaces

"Hyper nudging" techniques are prevalent throughout globally popular shopping websites.¹⁹² In online marketplaces, the ranking and ordering of goods presented to the consumer are determined algorithmically. Online marketplaces collect behavioural and personal data to profile consumers and "control the display of products visible to online consumers" based on these data profiles.¹⁹³ A University of Melbourne experiment demonstrated that consumers could be steered towards certain choices when shopping online by rearranging and re-positioning certain products, without the consumer realising.¹⁹⁴

Here, several issues might attract the attention of consumer regulation. First, the online marketplace can order the display of goods differently for individual consumers, including changing the display or order based on pricing.¹⁹⁵ This can be unfair, particularly when the algorithm is targeting consumers based on their sensitivities and biases or discriminating based on consumers' data profiles.¹⁹⁶ This creates a risk for vulnerable consumers, who might be "restricted in their purchasing choices and subject to unfavourable pricing" by the algorithm.¹⁹⁷

Secondly, it reduces consumer autonomy. Hyper nudging techniques manipulate consumers into unknowingly submitting their decision-making autonomy to marketing algorithms.¹⁹⁸ Unlike brick-and-mortar retail, where the display is identical for every customer, here the algorithm can lead customers towards particular choices by closing off alternative choices, thus reducing consumer autonomy.¹⁹⁹ The opaqueness of the algorithm may lead consumers into thinking they are making a free and informed decision, when in fact their choice is being directed or targeted by the algorithm.

B Mobile Health Apps

Mobile health apps, such as Garmin Connect or MyFitnessPal, continuously collect consumers' health data (for example, sleep patterns, movement data and heart rate) to make recommendations to users.²⁰⁰ These apps receive lots of personal data, make algorithmic predictions of a user's behaviour

192 Consumer Policy Research Centre, above n 42, at 10.

193 Jeannie Marie Paterson, Suelette Dreyfus and Shanton Chang *What We See and What We Don't: Protecting Choice for Online Consumers Policy Report* (University of Melbourne, 2020) at 1.

194 Consumer Policy Research Centre, above n 42, at 8.

195 Paterson, Dreyfus and Chang, above n 193, at 7.

196 At 7.

197 Consumer Policy Research Centre, above n 42, at 9.

198 Paterson and Bant, above n 99, at 14.

199 At 14.

200 Sax, Helberger and Bol, above n 189, at 104.

and are "always-on".²⁰¹ The regulatory challenge for consumer law is that these personalised suggestions often merge legitimate health messages with commercial content.²⁰² If users do not know whether what they are receiving is commercial content, "they will have a hard time practising their [consumer] autonomy".²⁰³ These apps apply "hypernudging" techniques to adjust the timing of messages and content based on users' personal characteristics.²⁰⁴ For example, some algorithms can determine when users need a "confidence boost", sending commercial messages timed to when users are most vulnerable.²⁰⁵

C The Unconscionable Conduct Prohibition's Applicability

Several commentators claim that the unconscionable conduct prohibition would likely not apply to the digital practices described above.²⁰⁶ Mik contends that "[a]bsent overt pressure, technological influences seem too subtle" to invoke the unconscionability prohibition.²⁰⁷ Dreyfus and Chang remark that in "cases of digital marketing the concern is unlikely to amount to misleading or unconscionable conduct, which impose relatively high standards of wrongdoing".²⁰⁸ Finally, Manwaring argues that the lack of clear community norms about the acceptability of unfair digital practices makes applying the "against community conscience" doctrine difficult.²⁰⁹

The problem with applying the prohibition is that these digital practices often do not mislead or impose obvious pressure on customers.²¹⁰ This is not the high level of wrongdoing required under the unconscionability prohibition. Instead, these practices subtly persuade or induce customers towards certain algorithmically selected decisions, leading consumers to choices they would not have otherwise made.²¹¹ The doctrine's focus on moral conscience (demonstrating its historical

201 At 105.

202 At 106.

203 At 107.

204 At 106.

205 At 106 and 114–115.

206 See for example Eliza Mik "The Erosion of Autonomy in Online Consumer Transactions" (2016) 8 Law, Innovation and Technology 1 at 31; Kayleen Manwaring "Will emerging information technologies outpace consumer protection law? The case of digital consumer manipulation" (2018) 26 CCLJ 141 at 174; Paterson, Dreyfus and Chang, above n 195, at 7; Paterson and Bant, above n 98, at 13; and Consumer Policy Research Centre, above n 42, at 14–16.

207 Mik, above n 206, at 31.

208 Paterson, Dreyfus and Chang, above n 193, at 10.

209 Manwaring, above n 206, at 174.

210 Paterson and Bant, above n 99, at 14.

211 At 14.

underpinnings from equity) might have been an appropriate regulatory response in simpler commercial contexts.²¹² However, it is a crude doctrinal response to regulate algorithms that have no conception of human morality and instead make automated decisions based on consumers' data within the parameters set by the programmer.

D The UCP Prohibition's Applicability

In contrast to the unconscionable conduct prohibition's focus on morality, both the EU and United States unfairness prohibitions measure the economic effects of a firm's practice. The EU model evaluates the distortion of consumers' economic behaviour. The United States model performs a cost-benefit analysis of pro- and anti-consumer effects and permits assessing the distortion of consumer choice.²¹³ Paterson argues that evaluating the distortion of consumers' economic behaviour allows UCP regulations to respond to subtle forms of digital manipulation.²¹⁴ For example, the European UCP test can take into account consumers' behavioural biases and whether those were exploited by traders.²¹⁵ Often, the subtle inducement of consumers' decision-making autonomy through these algorithmic techniques will amount to distorting a consumer's economic behaviour.

The application of the UCP doctrine to the issue of unfair search rankings in digital marketplaces demonstrates its strength compared to statutory unconscionability. Under the EU Directive on Unfair Commercial Practices, the non-transparent ranking of offers is now deemed "always unfair".²¹⁶ Since the focus of the UCP doctrine is on economic distortion, regulators thought that non-transparent search rankings infringed the UCP prohibition because it resulted in "transactional decisions which the consumer would not have otherwise made".²¹⁷ Additionally, EU regulators were concerned that the practice "may negatively affect consumer capacity to make a well-informed decision while acting in the market".²¹⁸

Several practices relating to unfair search rankings are now enforced by EU regulators. First, paying for prominent search placement in online marketplaces is now a UCP, unless the paid

212 See (27 May 2010) 7 CPD 4361.

213 Coteanu, above n 182, at 164.

214 Paterson, Dreyfus and Chang, above n 193, at 12.

215 Brody and Temple, above n 62, at 172.

216 Mateja Đurović "Adaptation of Consumer Law to the Digital Age: EU Directive 2019/2161 on Modernisation and Better Enforcement of Consumer Law" (2020) 68 *Annals of the Faculty of Law in Belgrade* 62 at 69.

217 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22, art 5(2).

218 Đurović, above n 216, at 69.

placement is clearly stated by the website host.²¹⁹ Secondly, when products are priced differently for different consumers based on decisions made by the digital marketplace's algorithm, this must be clearly communicated to consumers, otherwise it will be a UCP.²²⁰ Thirdly, online marketplaces must inform consumers of the parameters that determine the ranking of offers by the algorithm, otherwise it will be a UCP.²²¹ Finally, manipulating a consumer's online search rankings is a UCP.²²²

Regarding the second example of mobile health apps, when commercial offers are misleadingly framed as a health recommendation and consumers are hypernudged into making purchases at moments of vulnerability, this often leads to the "distortion of consumer behaviour" required by UCP prohibitions.²²³ In particular, an app could breach the UCP prohibition if it "deprives consumers factually of choice, abuses their trust in the integrity and usefulness of the app for health purposes, or tinkers with the authenticity of their decisions".²²⁴

VIII CONCLUSION

This article has shown that New Zealand's adoption of Australia's unconscionable conduct prohibition is more contentious than it might initially appear. Certainly, there are gaps in New Zealand's consumer protection laws that make the prohibition on unconscionable conduct preferable to the current legal framework. However, Parliament is not faced with a "Hobson's Choice" and alternatives to the unconscionable conduct prohibition were not considered with sufficient scrutiny. Australia's unconscionability jurisprudence has been characterised by the decades-long tension between narrow judicial interpretations and the wider parliamentary intention. As forecast by Edelman J, the likely resolution to this back-and-forth struggle is to replace the standard of "unconscionability" entirely.²²⁵ By contrast, adopting the "unfair commercial practices" doctrine would align New Zealand with European Union and United States consumer law and provide greater protection against innovative anti-consumer practices in digital marketplaces. The UCP doctrine is likely to be the next direction in Australia's consumer laws, given the spirited calls by the ACCC chairperson and high-

219 Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7 at (20).

220 At (45).

221 At (21)–(23).

222 Bram Duivenvoorde "The Upcoming Changes in the Unfair Commercial Practices Directive: A Better Deal for Consumers?" (2019) 8 *Journal of European Consumer and Market Law* 219 at 224.

223 Sax, Helberger and Bol, above n 189, at 114–115.

224 At 129.

225 *Kobelt*, above n 8, at [311] per Edelman J.

ranking members of the judiciary for the government to adopt the standard.²²⁶ New Zealand should strongly consider following Australia's lead, especially given the desirability of having aligned consumer laws in the single trans-Tasman market.

²²⁶ See for example Applegarth, above n 8, at 37–41; Maxwell, above n 8, at 16; Sims, above n 8; and *Kobelt*, above n 8, at [311] per Edelman J.