

Bond University

Bond Law Review

Volume 35

Issue 1

2023

Still Jammed! Lingering Questions About the Statutory Unconscionability
Doctrine Post *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409

Mark Giancaspro
University of Adelaide

Follow this and additional works at: <https://blr.scholasticahq.com/>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 Licence](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Still Jammed! Lingering Questions About the Statutory Unconscionability Doctrine Post *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409

MARK GIANCASPRO*

Abstract

The High Court of Australia recently delivered its highly anticipated judgment in Stubbings v Jams 2 Pty Ltd (2022) 399 ALR 409 ('Stubbings (HCA)'). The case represents the most recent examination of the unsettled statutory doctrine of unconscionability in the land's highest judicial forum. Regrettably, the High Court spurned the opportunity to clarify several lingering questions that continue to plague the doctrine. These questions concern matters ranging from the proper distinction between the various unconscionability provisions in the consumer law to the requirements needed under each. This article extrapolates what it can from Stubbings (HCA) and other leading cases to try and add clarity to the frequently litigated but poorly understood statutory unconscionability doctrine.

I Introduction

The High Court of Australia in *Stubbings v Jams 2 Pty Ltd*¹ had a glorious opportunity. The case provided the perfect chance to clear up some of the confusion burdening the maligned doctrine of unconscionability as enshrined in the Australian Consumer Law ('ACL') and the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'). Unfortunately for practitioners, scholars, and consumers alike, the chance was, respectfully, spurned. As a result, despite arising on the facts and through the parties' submissions, a variety of lingering questions about the scope, content and application of the doctrine remain. This article identifies some of these questions and attempts to offer guidance as to the ostensible status quo regarding each. Part II provides important context as to how the equitable concept of unconscionability came to be, before Part III traces the doctrine's long and tortured entrance into the statutory regime governing

* LLB (Hons.), LP, PhD. Senior Lecturer, Law School, University of Adelaide.

¹ (2022) 399 ALR 409 ('*Stubbings (HCA)*').

consumer transactions. Part IV then discusses *Stubbings (HCA)* and uses this case to demonstrate the operation of the modern statutory doctrine of unconscionability.

In Part V, a selection of lingering and important questions concerning unconscionable conduct, left open by the High Court in this most recent case, are canvassed. What is the proper distinction between the forms of unconscionability captured in sections 20 and 21 of the *ACL* (ss 12CA and 12CB of the *ASIC Act*)? Is ‘moral obloquy’ an essential aspect of statutory unconscionability? What amounts to a ‘system of conduct’ for the purposes of *ACL* s 21(4) (*ASIC Act* s 12CB(4))? When is a defendant ‘wilfully blind’ to a plaintiff’s special disadvantage for the purpose of establishing their knowledge of the disadvantage? This article extrapolates what it can from *Stubbings (HCA)* and other leading cases to try and provide answers to these queries. Finally, in Part VI, it is concluded that the High Court must, in the next appropriate case, provide conclusive guidance regarding the issues raised in Part V. As the statutory doctrine continues to evolve and be invoked in a growing number of cases, it is critical that its boundaries be more clearly delineated to avoid it devolving into an illusory and unworkable provision in the statutory consumer law framework.

II Origins of the Equitable Concept of Unconscionability

Equity emerged in England from around the 13th century.² This body of principle developed in response to the exponential rigidification of the common law system from its inception by William the Conqueror in 1066. The common law system’s initial efficiencies were overborne by its obsession with form and procedure, tardiness in fashioning suitable remedies, and tendency to be exploited by stronger parties with more resources (or a willingness to intimidate juries).³ Citizens began to petition the King directly in pursuit of justice, and the King responded by delegating the growing number of such matters to the Chancellor, who headed the Chancery (royal secretariat).⁴ With Edward III’s decree of 1349, chancellors were charged with adjudicating equitable matters and by 1474 the Court of Chancery was established and devoted specifically to the equitable jurisdiction.⁵ The chancellors were generally ecclesiastics who drew upon canonical principles when deciding cases.⁶ The notion of ‘conscience’, infused by religious ideals

² John McGhee, *Snell’s Equity* (Sweet and Maxwell, 31st ed, 2005) 6.

³ *Ibid.*

⁴ Mark Giancaspro and Colette Langos, *Contract Law: Principles and Practice* (LexisNexis, 2022) 7.

⁵ *Ibid* 7-8.

⁶ McGhee (n 2) 7.

such as morality and righteousness, became the guiding precept for cases decided in equity.⁷

By the 18th century, one of equity's key concerns was the setting aside of unconscientious and improvident dealings, particularly those involving expectant heirs who were being swindled out of fair deals for their property interests, and those who laboured under some kind of unique disadvantage such as ignorance or poverty.⁸ The body of English case law addressing such 'catching bargains' is centred in the 19th century,⁹ with many cases lending support to a broader equitable principle invalidating transactions in circumstances where weak or disadvantaged parties were exploited by a stronger counterpart.¹⁰ There were several attempts to consolidate this principle, such as Lord Denning's famous effort in *Lloyds Bank Ltd v Bundy*.¹¹ His Lordship's restatement was rejected a decade later,¹² though its status as a standalone doctrine has been endorsed in more recent decisions.¹³

Nonetheless, as Liew and Yu explain,¹⁴ the English courts in contemporary times are far more restrictive in their approach to intervening in completed contracts on the basis of this equitable doctrine (which, it should be said, has been inconsistently described among the English appellate courts). The dominant policy guiding judicial intervention appears to be the protection of those entering into contracts on the basis of more precisely defined relationships of influence.¹⁵ The broader principle applicable to those commercial parties who are not in such relationships of influence seems to be less actively invoked. In contrast, the various doctrines derived from equity play a far more prominent role in Australian contract law than they do in English contract law.¹⁶ One of the more significant points of

⁷ For an excellent discussion of the notion of 'conscience' and its role in the complex evolution of equity, see Graham Virgo, *The Principles of Equity and Trusts* (Oxford University Press, 2020) 28-31.

⁸ Samantha Hepburn, *Principles of Equity and Trusts* (Federation Press, 5th ed, 2016) 227.

⁹ John D Heydon, Mark Leeming and Peter G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies* (LexisNexis, 5th ed, 2015) 501.

¹⁰ See, eg, *Fry v Lane* (1888) 40 Ch D 312; *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87. Of course, the principle had been loosely referred to and supported in earlier decisions, such as *Evans v Llewellyn* (1781) 1 Cox Eq Cas 333. [1975] QB 326, 339.

¹¹ See the judgment of Lord Scarman in *National Westminster Bank v Morgan* [1985] AC 686.

¹³ See, eg, *Humphreys v Humphreys* [2004] EWHC 2201 (Ch), [106] (Rimer J); *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB), [34]-[36] (Blair J); *Adare Finance DAC v Yellowstone Capital Management SA* [2020] EWHC 2760 (Comm), [69] (Peter MacDonald Eggers QC); *Al-Subaihi and another v Al-Sanea* [2021] EWHC 2609 (Comm), [166] (Sir Ross Cranston); *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40, [24] (Lord Hodge, with whom Lords Reed, Lloyd-Jones and Kitchin agreed) ('*Pakistan International Airline Corporation*').

¹⁴ Ying Khai Liew and Debbie Yu, 'The Unconscionable Bargains Doctrine in England and Australia: Cousins or Siblings?' (2021) 45(1) *Melbourne University Law Review* 206.

¹⁵ *Ibid* 236-7.

¹⁶ Andrew Stewart, Warren Swain and Karen Fairweather, *Contract Law: Principles and Context* (Cambridge University Press, 2019) 380.

divergence between these jurisdictions is the indisputable existence in Australia of a separate doctrine of unconscionable bargains. This doctrine is far broader and more established. It was best extrapolated by Deane J in the seminal case of *Commercial Bank of Australia Ltd v Amadio* ('*Amadio*').¹⁷

In *Amadio*, Deane J held that, to establish unconscionability, three elements must be present: (1) the weaker party was affected by a special disadvantage; (2) the stronger party was aware, or should have been aware, of this disadvantage; and (3) the stronger party took advantage of the weaker party's disadvantage in circumstances where the transaction was not fair, just and reasonable.¹⁸ This is essentially analogous to the earlier English doctrine.¹⁹ 'Special disadvantage' arises from the nature of the relationship between the parties whereby the weaker party is susceptible to control or influence by the stronger party. While not closed, the list of categories of special disadvantage provided by the High Court in *Blomley v Ryan*²⁰ is helpful in comprehending how such disadvantage can arise:

... poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance 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-à-vis the other.

The disadvantage becomes 'special' only where it is one which 'seriously affects the ability of the innocent party to make a judgement as to his own best interest'.²¹ In *Amadio*, for example, the respondents (Mr and Mrs Amadio) were deemed to be afflicted by a special disadvantage in their dealings with the appellant bank because they were quite senior, had an imperfect grasp of English, lacked experience in commercial dealings, and were not properly explained the nature of the financial documentation they were signing. They had executed a mortgage and guarantee in favour of Commercial Bank to secure an overdraft granted to a land development company owned by their son.

¹⁷ (1983) 151 CLR 447 ('*Amadio*').

¹⁸ Ibid 474 (Deane J). Importantly, these elements 'should not be understood as if they were to be addressed separately as if they were separate elements of a cause of action in tort': *Stubblings (HCA)* (n 1) 418 [39] (Kiefel CJ, Keane and Gleeson J). Instead, they should be addressed cumulatively in the context of every connected circumstance: *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 118-119 (Dixon CJ, McTiernan and Kitto JJ).

¹⁹ In *Pakistan International Airline Corporation* (n 13) [24]: '[T]he equitable doctrine of unconscionable bargains has been applied where B is at a serious disadvantage relative to A through 'poverty, or ignorance, or lack of advice or otherwise' so that circumstances existed of which unfair advantage could be taken; A exploited B's weakness in a morally culpable manner; and the resulting transaction was not merely hard or improvident but overreaching and oppressive.'

²⁰ (1956) 99 CLR 362, 405 (Fullagar J), 415 (Kitto J).

²¹ *Amadio* (n 17) 462; *Thorne v Kennedy* (2017) 263 CLR 85, 126; *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 57-8 ('*Kobelt*').

Commercial Bank did not disclose that the son's company was in a poor financial state, nor that it had selectively dishonoured cheques to create the appearance of a solvent, functional company. The Amadios were also misinformed as to the extent of their guarantee. Commercial Bank sought to enforce the guarantee when the son's company collapsed, but the Amadios successfully had the mortgage set aside on the grounds that the bank acted unconscionably. The bank had clearly taken advantage of the Amadios in circumstances where it was not fair and reasonable to do so.

As Part IV explains, unlike the Amadios, the appellant in *Stubbings (HCA)* was not afflicted by seniority or any language barrier. He did, however, share three 'special disadvantages' with the Amadios: (1) a general lack of business acumen; (2) a minimal education; and (3) inadequate knowledge of the nature of the hazardous financial transaction he was entering into. In addition, Mr Stubbings was relatively impecunious. But merely transacting while under the effect of some special disadvantage is insufficient to demonstrate unconscionability. As Deane J explained in *Amadio*, the equitable doctrine also requires that the stronger party has actual or constructive knowledge of the weaker party's special disadvantage. As longstanding precedent²² and the High Court's more recent decision in *Stubbings (HCA)*²³ confirm, constructive knowledge can be established through proof of the defendant's wilful blindness or ignorance to the plaintiff's special disadvantage. One therefore cannot 'turn a blind eye' to the possibility that the weaker party has a special disadvantage if the circumstances give rise to that very possibility.²⁴

The final requirement under the Australian conception of the unconscionability doctrine is that the defendant be proven to have taken unconscientious advantage of the plaintiff's special disadvantage.²⁵ The transaction must be shown to be fair, just, and reasonable, otherwise it will be presumed to have been procured through unconscionable conduct on the part of the defendant. In *Amadio*, 'the circumstances required that the respondents be acquainted with the true financial position of the company and thereby enabled to make an

²² *Owen & Gutch v Homan* (1853) 4 HL Cas 997; 10 ER 752.

²³ *Stubbings (HCA)* (n 1) 420 [49] (Kiefel CJ, Keane and Gleeson JJ), [165]-[168] (Steward J). For implicit support of this proposition in the judgment of Gordon J, who decided the case on the basis of s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'), see paras [77], [80]-[81]. This aspect of the judgment is discussed in greater depth in Part V.

²⁴ *Amadio* (n 17) 467.

²⁵ As Kiefel CJ, Bell, Gageler, Keane and Edelman JJ explained in *Thorne v Kennedy* (2017) 263 CLR 85 (at 103) the defendant 'must also unconscientiously take advantage of that special disadvantage. This has been variously described as requiring "victimisation", "unconscientious conduct", or "exploitation"'. See also *Amadio* (n 17) 459-460, 461, 474; *Louth v Diprose* (1992) 175 CLR 621 at 626; *Turner v Windever* [2003] NSWSC 1147 at [105].

informed decision'.²⁶ Commercial Bank withheld critical information regarding the respondents' son's company and misinformed them as to the extent of their guarantee. They were exploited. As explained in Part IV, the appellant in *Stubbings (HCA)* was as well. He was the victim of an opaque scheme of asset-based lending designed to exploit his financial vulnerability and immunise the lenders from critical knowledge of his personal and fiscal circumstances. The common thread between the cases, and the heart of the third element of the modern unconscionability doctrine, is that underlying immorality and lack of conscience characterise the transactions, and justify their annulment.

It is important when discussing the evolution of the equitable concept of unconscionability to appreciate that it does not 'roam at large'.²⁷ The concept is inherently open-textured given it is underpinned by the malleable notion of conscience, but it is enlivened only when the impugned conduct supports the grant of relief under the specific principles of established equitable doctrines.²⁸ Put another way, it is not sufficient for a party to invoke the doctrine of unconscionability purely because they have entered into an improvident transaction, or because they feel they have been unfairly treated.²⁹ If they seek relief from a bargain on the basis that it was unconscionably procured, they must frame the defendant's behaviour within one of the accepted classifications of conduct deemed in equity to be 'unconscionable'.³⁰ The doctrine expressed in *Amadio* is, like all other doctrines captured under the umbrella of 'unconscionable conduct' as understood in equity, one with 'specific requirements' which must be met before the courts will intervene.³¹

When in the early years following Federation there arose impetus for the introduction of legislation to govern trading and commercial practices, there was seemingly little interest in the equitable doctrine of unconscionability featuring. It would not be until 1986 that this doctrine formed a central part of the legislative framework regulating commercial markets. Part III now traces the toilsome history of the

²⁶ *Amadio* (n 17) 469.

²⁷ *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491, 498-9 (French J) ('*Berbatis*') citing Joachim Dietrich, *Restitution: A New Perspective* (Federation Press, 1998) 48.

²⁸ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 245 (Gummow and Jayne JJ). See also *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2001) 117 FCR 301, 319 (per curiam) ('*Samton Holdings*').

²⁹ *Samton Holdings* (n 28) 319 (per curiam): 'equitable doctrine does not presently provide a remedy against conduct simply on the basis that it is unfair in the opinion of a judge'. See also *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 401-2 ('*Kakavas*'); cited in *Stubbings (HCA)* (n 1) 418 [38]. See also Stewart, Swain and Fairweather (n 16) 380.

³⁰ *Samton Holdings* (n 28) 318-19 (per curiam).

³¹ *Berbatis* (n 27) 499 (French J); Rick Bigwood and Joachim Dietrich, 'Uncertainty in Private Law: Rhetorical Device or Substantive Legal Argument?' (2021) 45(1) *Melbourne University Law Review* 60, 77.

unconscionability doctrine's statutory enshrinement. This history illustrates the extraordinary difficulty in defining the content and scope of the unconscionability doctrine and may go some way to explaining the judiciary's consistent grapples with the same.

III Statutory Enshrinements, Past and Present

The colonial markets that operated throughout Australia prior to 1901 were largely unregulated and fiercely territorial.³² Even post-Federation, it was standard practice for restrictive agreements to be formulated between competitors in these relatively unsophisticated markets, and these were even encouraged by trade associations and business cooperatives.³³ The common view was that such arrangements avoided harmful competition, facilitated price certainty, ensured stability of supply, fostered equality between markets and, in some sectors, guaranteed higher wages and employment.³⁴ The mood appeared to shift in the 1890s, as the 'prevalence of price-fixing collusion between firms led to growing community concern as to whether such action was against the public interest'.³⁵ Initial attempts from the newly established Federal Government to impose statutory controls on trade practices within the state and territory markets focussed upon the avoidance of monopolies, particularly those of foreign companies under-pricing goods to expand their market share.³⁶ Other statutory powers to scrutinise various different commercial practices were seldom utilised. None of these legislative instruments made reference to the general notion of unconscionable commercial behaviour and so, logically, no kind of proscription against the same existed at this time.

In 1965, the first comprehensive Australian trade practices legislation was championed and drafted by the then Attorney-General, Sir Garfield Barwick.³⁷ The resultant *Trade Practices Act 1965* (Cth) was designed to 'preserve competition in Australian trade and commerce to the extent required by the public interest'.³⁸ However, it was narrow in its scope, centring on specific anti-competitive practices.

³² For a detailed account of the history of trade practices legislation in Australia, see Kerrie Round and Martin P Shanahan, 'From Protection to Competition: The Politics of Trade Practices Reform in Australia and the *Trade Practices Act 1965*' (2012) 58(4) *Australian Journal of Politics and History* 497.

³³ Ibid 498-9.

³⁴ Ibid 499.

³⁵ Simon Ville, 'Business Development in Colonial Australia' (1998) 38(1) *Australian Economic History Review* 16, 37.

³⁶ Round and Shanahan (n 32) 499. The principal legislation in this regard was the *Australian Industries Preservation Act 1906* (Cth), which was modelled on the *Sherman Act 1890* 15 USC (USA). Its Preamble described it as an Act for 'the preservation of Australian industries, and the repression of destructive monopolies'.

³⁷ Following Barwick's appointment as Chief Justice of the High Court of Australia on 27 April 1964, Billy Snedden was appointed Attorney-General and charged with finalising the Bill.

³⁸ *Trade Practices Act 1965* (Cth), Preamble.

Following a High Court challenge which exposed constitutional defects in the Act,³⁹ a new Act—the *Restrictive Trade Practices Act 1971* (Cth)—was introduced to largely replicate it in an indisputably valid form.⁴⁰ Again, unconscionable conduct was not mentioned in this instrument, nor in its replacement: the *Trade Practices Act 1974* (Cth) ('TPA'),⁴¹ administered by the newly established Trade Practices Commission.

The tide turned on 1 April 1976. It was then that the Minister for Small Business and Consumer Affairs of the time, the Hon John Howard MP, established the Trade Practices Act Review Committee and issued terms of reference for an inquiry into the TPA. Specifically, the 'Swanson Committee', as it came to be known,⁴² was charged with determining whether the TPA was achieving its intended purposes, benefiting the Australian market and consumers, causing difficulties or unnecessary costs, inhibiting economic recovery and growth, or in need of amendments to improve its operation.⁴³ Among the many recommendations in its report was the introduction of a general prohibition against unconscionable conduct in commerce. It stated:

[W]e do see advantages in prohibiting, ... as a civil matter only, unconscionable conduct or practices in trade or commerce. The Committee so recommends, principally to give the Act a greater ability to deal with the problem outlined in the first paragraph of this chapter—the general disparity of bargaining power between sellers and buyers.⁴⁴

While concerned that a general prohibition of 'unfair conduct' akin to that contained in the *Federal Trade Commission Act 1914* (US) would generate uncertainty in the Australian setting,⁴⁵ the Swanson Committee saw value in proscribing *unconscionable* conduct given this

³⁹ *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

⁴⁰ Restrictive Trade Practices Bill 1971 (Cth). The Explanatory Memorandum to the Bill stated: 'The purpose of the Bill is to overcome the constitutional defects that have been found by the High Court to exist in the *Trade Practices Act 1965-1971*. The Bill provides for the repeal of the existing Act and for the re-enactment of similar provisions on a different constitutional basis': Explanatory Memorandum, Restrictive Trade Practices Bill 1971 (Cth) [1]-[2].

⁴¹ The scope of this Act was clearly broader than its predecessor given it aimed not only to replicate and add to the various provisions in the *Restrictive Trade Practices Act 1971* (Cth) but to 'make provision for the protection of consumers from certain unfair practices': Explanatory Memorandum, Trade Practices Bill 1974 (Cth) [1]. The Act was later amended to expressly stipulate as its object the enhancement of the welfare of Australians 'through the promotion of competition and fair trading and provision for consumer protection': *Trade Practices Act 1974* (Cth), s 2.

⁴² This was due to the Committee being chaired by Mr Thomas Baikie Swanson, a renowned pharmaceutical chemistry academic and businessman.

⁴³ Trade Practices Act Review Committee, Parliament of Australia, *Report to the Minister for Small Business and Consumer Affairs* (Report, August 1976) 1.

⁴⁴ Ibid 67 [9.59]. This imbalance was said to have arisen from various factors, such as 'the substantial increase in the range of products available to consumers in a modern industrialised society, the bewildering array of available options, and the development, with the aid of mass-media, of sophisticated and persuasive mass-marketing techniques'. See ibid 58 [9.1].

⁴⁵ Ibid 67 [9.58].

concept emerged from the equitable jurisdiction of the courts, had been enshrined in state and territory legislation, and was therefore a ‘familiar concept’ within Australia.⁴⁶ It made a point of saying that unconscionable conduct was distinct from, and rarely encompassed by, the standards of misleading or deceptive conduct.⁴⁷ Further, the notion of unconscionability was said to be broad enough to deal with various other forms of reprehensible commercial conduct without being afflicted by the vagueness of alternative concepts such as ‘harshness’.⁴⁸ Finally, the Swanson Committee recommended that ‘fairly detailed legislative guidance’ be provided to aid in determining whether conduct should be considered unconscionable.⁴⁹

The Swanson Committee’s recommendation initially went unheeded. It would not be until 1986 that a statutory prohibition on unconscionable conduct was introduced to the TPA. Two years prior, in February 1984, a parliamentary Green Paper entitled *Trade Practices Act: Proposals for Change* considered that the TPA ‘should be amended along the lines of the recommendations of the Swanson Committee’.⁵⁰ And so it was that, pursuant to the *Trade Practices Revision Act 1986* (Cth), s 52A was inserted into the TPA. Subsection (1) of this provision stated: ‘A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable’. Factors relevant to this assessment were listed in s 52A(2). In 1992, however, s 52A was renumbered and relocated to s 51AB so that it followed the new s 51AA, sub-s (1) of which provided: ‘A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories’.⁵¹

This amendment was substantial and provides crucial context for the discussion that follows in Parts IV and V.⁵² This was the first time there appeared a statutory demarcation between unconscionability as understood within ‘the unwritten law’ and unconscionability occurring in the specific context of the supply or acquisition of goods or services. This demarcation was justified on the basis that s 51AA was broader,

⁴⁶ Ibid 67 [9.60].

⁴⁷ Ibid.

⁴⁸ Ibid 67 [9.61].

⁴⁹ Ibid 67 [9.62].

⁵⁰ Senator the Hon Gareth Evans QC, the Hon Barry Cohen MP and the Hon Ralph Willis MP, Parliament of Australia, *The Trade Practices Act: Proposals for Change* (Green Paper, February 1984) 17 [71].

⁵¹ Both of these amendments were enacted through ss 8 and 9 of the *Trade Practices Legislation Amendment Act 1992* (Cth).

⁵² The relevant discussion in Part V is under subheading (a), where the distinction between *ACL* ss 20 and 21, the modern incarnation of TPA ss 51AA and 51AB, and the *ASIC Act* (n 23) equivalents, are analysed against the backdrop of the *Stubbings* litigation and other relevant case law.

embodying the equitable concept of unconscionability recognised by the High Court in *Amadio*⁵³ and applying to ‘a greater range of commercial settings’ not necessarily involving consumer transactions for the supply or acquisition of goods or services (which is within the purview of s 51AB).⁵⁴ Section 51AC was introduced in 1997⁵⁵ following recommendations in the Reid Report⁵⁶ that small businesses specifically should enjoy the benefit of statutory protection against unconscionable conduct. The weight of evidence received by the relevant committee supported the view that businesses of this scale were often exploited and had no recourse due to the limited scope of s 51AA.⁵⁷

Sections 51AC(1) and (2) prohibited, respectively, a corporation or person in trade or commerce from engaging in unconscionable conduct in connection with the supply or acquisition (or possible supply or acquisition) of goods or services to a person (other than a listed public company). The exclusion of listed public companies, and the limitation expressed in other subsections of the provision to transactions not exceeding \$1 million,⁵⁸ were designed to confine the provision to dealings involving small businesses.⁵⁹ Factors relevant to establishing unconscionable conduct under s 51AC were listed in sub-ss (3) (supplier vis-à-vis business consumer) and (4) (acquirer vis-à-vis small business supplier) to this provision. Come 1998, there were, therefore, three proscriptions against unconscionable conduct in the TPA: s 51AA

⁵³ Explanatory Memorandum, Trade Practices Legislation Amendment Bill 1992 (Cth) [41]-[45].

⁵⁴ Ibid [46]-[47].

⁵⁵ Pursuant to the Trade Practices Amendment (Fair Trading) Bill 1997 (Cth), which was eventually passed as the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth). It should be noted that two years earlier, in 1995, the Trade Practices Commission was merged with the Prices Surveillance Authority to form the Australian Competition and Consumer Commission (ACCC). This was one of many reforms introduced by the *Competition Policy Reform Act 1995* (Cth) and recommended in the Hilmer Report of 1993 (Frederick G Hilmer, Mark Rayner and Geoffrey Taperell, Parliament of Australia, *National Competition Policy Review* (Report, August 1993)).

⁵⁶ House of Representatives Standing Committee on Industry, Science and Resources, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia* (Report, May 1997).

⁵⁷ Ibid ch 6. See especially [6.22]: ‘The Committee does not accept that the equitable doctrine of unconscionability embodied within Section 51AA of the Trade Practices Act is capable of dealing with the types of conduct complained about to this inquiry and considers that a broader provision is required’. The Committee actually recommended a broader prohibition against *unfair* conduct, rather than *unconscionable* conduct. See ibid [6.73] (Recommendation 6.1). However, the Federal Government opted to retain the unconscionability standard, citing the desirability of building upon an existing body of case law interpreting existing and effective consumer protection provisions of the TPA, and the uncertainty that would arise from abandonment of such a recognised standard: Peter Reith, *Commonwealth Parliamentary Debates*, House of Representatives (30 September 1997) 8765.

⁵⁸ Stipulated expressly in s 51AC(7) of the TPA. This limit was increased to \$3 million (July 2000) and then \$10 million (September 2000) before being removed altogether in 2008 following the passage of the *Trade Practices Legislation Amendment Act 2008* (Cth).

⁵⁹ Department of the Parliamentary Library (Cth), *Bills Digest* (Digest No 55 of 1997-98, 13 October 1997).

(unconscionable conduct within the meaning of the unwritten law), s 51AB (unconscionable conduct in connection with the supply of goods or services involving consumers), and s 51AC (unconscionable conduct in connection with the supply or acquisition of goods or services not involving a listed public company). The ensuing years witnessed a series of further inquiries and various amendments to the competition and consumer provisions of the TPA. But the most significant amendment to date, particularly in respect of the statutory doctrine of unconscionability, was inspired by the Productivity Commission's largescale review of the national consumer policy framework, commencing in 2006 and concluding in 2008.⁶⁰

The Productivity Commission's overarching view was that Australia's existing consumer policy framework was inconsistent, inefficient, and not capable of adaptation to rapidly changing consumer markets.⁶¹ It was also said to be costly to administer and to provide inadequate redress mechanisms for consumers.⁶² The Commission pressed for 'the introduction of a single generic consumer law applying across Australia, based on the consumer provisions in the [TPA], modified to address gaps in its coverage and scope'.⁶³ This recommendation was accepted, and the Federal Government passed the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth). This Act rebranded the TPA as the *Competition and Consumer Act 2010* (Cth) ('CCA')⁶⁴ and simultaneously consolidated the numerous consumer protection regimes that previously operated across the Australian jurisdictions. Schedule 2 to the CCA contains the Australian Consumer Law, which houses the comprehensive suite of consumer protection provisions incorporating the modern proscriptions against unconscionable conduct.

As introduced, ACL ss 20, 21 and 22 largely replaced TPA ss 51AA, 51AB and 51AC respectively, with minor amendments.⁶⁵ However, the *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018* (Cth) facilitated the consolidation of ACL ss 21 and 22 so as to remove the distinction between consumer and business transactions

⁶⁰ Productivity Commission, Parliament of Australia, *Review of Australia's Consumer Policy Framework* (Final Report, 30 April 2008).

⁶¹ *Ibid* vol 1, 2.

⁶² *Ibid* vol 1-3.

⁶³ *Ibid* vol 1, 2.

⁶⁴ The CCA is the principal piece of national legislation concerned with enhancing the welfare of Australians through the promotion of competition and fair trading, and consumer protection: CCA s 2. It applies uniformly across all states and territories. See *Fair Trading (Australian Consumer Law) Act 1992* (ACT) s 7; *Fair Trading Act 1987* (NSW) s 32; *Consumer Affairs and Fair Trading Act 1990* (NT) s 27; *Fair Trading Act 1989* (Qld) s 16; *Fair Trading Act 1987* (SA) s 14; *Australian Consumer Law (Tasmania) Act 2010* (Tas) s 6; *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 8; *Fair Trading Act 2010* (WA) s 19.

⁶⁵ For example, references to 'corporation' were substituted with 'person' to broaden its application and unequivocally capture natural persons, corporate entities, and unincorporated bodies.

with respect to unconscionable conduct. Section 21 became the unified operative provision. The factors to which a court may have regard when considering if particular conduct is unconscionable are now the same for both and contained in the current s 22. The rationale for this merger was to promote coherence and obviate the risk of the courts ascribing different meanings to the concepts contained in both sections.⁶⁶

And so it was that the modern forms of statutory unconscionable conduct took shape. Today, we have *ACL* ss 20 and 21. Section 20(1) reads: ‘A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time’. This provision does not apply to conduct prohibited by s 21.⁶⁷ The reference to the ‘unwritten law’ restricts the provision to the array of common law and equitable principles emerging from the courts of England prior to the establishment of Australia’s judicial system, and to the principles that have since been developed in the Australian courts over time (as they apply and relate to the concept of unconscionable conduct).⁶⁸ Both the Federal Court⁶⁹ and the High Court⁷⁰ of Australia have confirmed that *ACL* s 20, its predecessors, and its equivalents under the *Australian Securities and Investments Commission Act 2001* (Cth),⁷¹ in referring to the unwritten law, speak of the accepted equitable classifications or categories of ‘unconscionable conduct’. The most prominent of these is the *Amadio* doctrine of unconscionability. Establishing unconscionability under s 20 therefore requires satisfaction of the various elements expressed in *Amadio*.

In contrast, s 21(1) of the *ACL* reads: ‘A person must not, in trade or commerce, in connection with: (a) the supply or possible supply of goods or services to a person; or (b) the acquisition or possible acquisition of goods or services from a person; engage in conduct that is, in all the circumstances, unconscionable’.⁷² Unlike s 20, s 21 is

⁶⁶ Treasury, Parliament of Australia, *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct* (Report, February 2010) 37.

⁶⁷ *Competition and Consumer Act 2010* (Cth) sch 2 s 20(2) (‘*ACL*’).

⁶⁸ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) [4.21].

⁶⁹ *Samton Holdings* (n 28); *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* (2001) 117 FCR 23; *Optus Networks Ltd v Telstra Corporation Ltd (No 3)* [2009] FCA 728.

⁷⁰ *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; *Kobelt* (n 21).

⁷¹ The *ACL* does not apply in respect of the supply of *financial* products or services: *CCA* s 131A. Instead, the *ASIC Act* (n 23) applies. Sections 20–22 of the *ACL* are replicated in ss 12CA–12CC of the *ASIC Act* (n 23).

⁷² Section 21 previously excluded any supply or acquisition of goods or services to or from a ‘listed public company’. A listed public company, as defined in s 995-1 of the *Income Tax Assessment Act 1997* (Cth), is one which offers shares on an approved stock exchange. It was previously thought that such companies were of a large enough scale to make them resistant to unconscionable conduct. The exclusion of listed public companies was removed following a review of the *ACL* conducted by Consumer Affairs Australia and New Zealand (CAANZ) in 2017. CAANZ opined that ‘public listing is not necessarily a reflection of a trader’s size, level of resourcing or its ability to withstand unconscionable conduct’: Consumer Affairs

restricted to transactions relating to the actual or possible supply or acquisition of goods or services. Despite this, s 21 is still far broader because it provides a wider range of factors to consider in determining if conduct is unconscionable.⁷³ It can also apply to a ‘system of conduct or pattern of behaviour’ regardless of whether a particular individual is disadvantaged by the conduct.⁷⁴ Additionally, if a contract arises from negotiations between the parties, the courts can also consider that contract’s terms and the manner and extent to which it is carried out.⁷⁵

Section 22 of the *ACL* provides a non-exhaustive list of factors to which the court may have regard in determining whether a party has breached s 21.⁷⁶ Some of the factors include: the relative bargaining strengths of the parties;⁷⁷ the plaintiff’s understanding of any documents relating to the transaction;⁷⁸ any undue influence or pressure was exerted on, or any unfair tactics were used against, the plaintiff;⁷⁹ the extent to which the parties acted in good faith;⁸⁰ and, where a contract for goods or services exists between the parties, the defendant’s willingness to negotiate the terms of the contract with the plaintiff, the terms of the contract, and the parties’ conduct in complying with those terms.⁸¹ The courts have stressed that these factors are to be considered cumulatively in the context of all relevant facts and circumstances; they are not a ‘checklist’, and no one factor (or select group of factors) is determinative.⁸² Indeed, some factors may point *against* the conclusion that particular conduct is unconscionable. As *Stubbings (HCA)* and other cases⁸³ make clear, the various common law understandings of the notion of ‘unconscionable conduct’ simultaneously inform the evaluative process under *ACL* s 21.

But defining conduct as ‘unconscionable’ has proven notoriously difficult for the courts. From the earliest days of the Court of Chancery it was clear that such conduct was contrary to ‘the Crown’s

Australia and New Zealand (CAANZ), ‘Australian Consumer Law Review: Final Report’ (March 2017) 50.

⁷³ ‘Section 20 of the *ACL* is narrower in its application than s 21. It focuses on unconscionable conduct in equity’: *Good Living Company Pty Ltd ATF The Warren Duncan Trust No 3 v Kingsmede Pty Ltd* [2019] FCA 2170, [197] (Markovic J).

⁷⁴ *ACL* (n 67) s 21(4).

⁷⁵ *Ibid* s 21(4)(c).

⁷⁶ Section 22(1) pertains to the supply or possible supply of goods or services between a supplier and a customer, whereas s 22(2) pertains to the acquisition or possible acquisition of goods or services between an acquirer and a supplier. The lists of factors in both s 22(1) and (2) are identical. Only the s 22(1) factors are discussed here, for illustrative purposes.

⁷⁷ *ACL* (n 67) s 22(1)(a).

⁷⁸ *Ibid* s 22(1)(c).

⁷⁹ *Ibid* s 22(1)(d).

⁸⁰ *Ibid* s 22(1)(l).

⁸¹ *Ibid* s 22(1)(j).

⁸² *Kobelt* (n 21) 61 (Nettle and Gordon JJ).

⁸³ See, eg, *Paciocco v Australia & New Zealand Banking Group Ltd* (2015) 321 ALR 584, 648 (Allsop CJ).

conscience'.⁸⁴ But articulating this in terms of instructive principle has been no simple feat. Predictably, the contemporary authorities are distinctly inharmonious as to the meaning of 'unconscionable' within the context of the statutory framework. It has been said to describe serious conduct that is clearly unfair or unreasonable,⁸⁵ or which is 'irreconcilable with what is right or reasonable'.⁸⁶ In *Director of Consumer Affairs Victoria v Scully*, Santamaria JA suggested that statutory unconscionability naturally involved the violation of community standards and the tenets of public policy:

[T]he intentional breach or reckless disregard of certain norms or standards amounts to statutory unconscionability. Those norms or standards must be more than those that happen to be personal to the court or tribunal charged with the responsibility of deciding whether conduct is unconscionable. Certainly, they will include norms of honesty and fair dealing and norms which exclude exploitation and deception. Some such norms and standards may be detected in the principles of public policy immanent in legislation such as the Competition and Consumer Act and the Australian Consumer Law.⁸⁷

It has also been stated by appellate courts on several occasions that establishing statutory unconscionability requires evaluating the facts and evidence by reference to a 'normative standard of conscience'; a standard permeated with acceptable community values and mores.⁸⁸ As will be discussed in Part V, the common equitable foundation for both ss 20 and 21 of the *ACL* has seemingly caused some courts to conflate the provisions and confuse the distinct requirements under each. Nonetheless, it is clear that the broader precepts of equity do inform the application of either provision. This article now turns to examining how the High Court in *Stubbings (HCA)* approached the task.

IV The Modern Statutory Doctrine in Action: *Stubbings (HCA)*

The appellant, Mr Jeffrey Stubbings, owned two properties in Narre Warren in south-eastern Melbourne, both of which were mortgaged. Mr Stubbings lived elsewhere in rented premises but, following a dispute with the landlord, opted to vacate and purchase another property to live

⁸⁴ Frank Tudsbury, 'Equity and the Common Law' (1913) 29(2) *Law Quarterly Review* 154, 159; Howard L Oleck, 'Historical Nature of Equity Jurisprudence' (1951) 20(1) *Fordham Law Review* 23, 35.

⁸⁵ *Cameron v Qantas Airways Ltd* (1995) 55 FCR 147, 179; *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253, 264.

⁸⁶ *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 2)* (2009) 253 ALR 324, 347.

⁸⁷ *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 186.

⁸⁸ See, eg, *Australian Competition and Consumer Commission v Lux Distributors* [2013] FCAFC 90, [23]; *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50, [296]; *Kobelt* (n 21) 38, 59, 78.

in. He required finance to do so. Following a failed loan application with a bank, Mr Stubbings was introduced by his friend to Mr Trayan Tzountzourkas, who described himself as a consultant for Ajzensztat, Jeruzalski & Co, a law firm ('AJ Lawyers'). AJ Lawyers were in the business of 'asset-based lending', a system whereby 'loans are made exclusively on the basis of the value of the assets securing the loan' without regard to the borrower's capacity to repay by instalments under the contract.⁸⁹ The lender in such arrangements is insulated in the event of the borrower's default due to adequate security being available in the event of default.

AJ Lawyers brokered an asset-based loan for Mr Stubbings through which the respondents, three companies (including Jams 2 Pty Ltd), loaned \$1,059,000 to Victorian Boat Clinic Pty Ltd ('VBC'), a shell company with no assets of which Mr Stubbings was sole director and shareholder.⁹⁰ The funds would be used to purchase a residential property in Fingal, south of Melbourne, with the balance being used to pay out the existing mortgages on his Narre Warren properties and service the first three months' of interest on the new loan. The loan was secured by a guarantee given by Mr Stubbings and supported by mortgages over the Fingal and Narre Warren properties. Notably, Mr Stubbings was unemployed and had nominal income, no assets (other than the Narre Warren properties), and insufficient funds both to pay the required 10% deposit on the Fingal property and to service the loan.⁹¹

AJ Lawyers required Mr Stubbings to produce signed certificates stipulating that he had received independent legal and financial advice in respect of the transaction, which he provided to them. Though never expressly stated in the mortgage documentation, it was clear from the context that approval of the loans was conditional on the certificates being obtained.⁹² The loans were settled, and Mr Stubbings purchased the Fingal property. Three months later, VBC defaulted on the loan and the respondents sought to enforce the guarantee and execute on the mortgages. In his defence, Mr Stubbings argued that the transaction had been procured through the unconscionable conduct of the respondents via their agent, AJ Lawyers, and was subsequently unenforceable. Though somewhat unclear from Mr Stubbings' filed defence and

⁸⁹ *Stubbings (HCA)* (n 1) 410 [1]; *Perpetual Trustee Co Ltd v Khoshaba* (2006) 14 BPR 26,639, 26,660 (Basten JA); *Kowalczyk v Accom Finance Pty Ltd* (2008) 77 NSWLR 205, 227 (Campbell JA). For a general discussion of asset-based lending, see Lee Aitken "'Asset Lending" and the Improvident Borrower' (2012) 86(2) *Australian Law Journal* 134.

⁹⁰ The purpose of arranging the transaction in this manner was to avoid the application of the *National Credit Code* to the loan made to Mr Stubbings. Loans to companies are not governed by the Code; the debtor must be either a natural person or a strata corporation: *National Credit Code*, s 5(1)(a).

⁹¹ *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200, [8] ('*Stubbings (VCA)*').

⁹² *Stubbings (HCA)* (n 1) 414 [21].

counterclaim,⁹³ the argument as to unconscionability was based upon s 12CB of the *ASIC Act*, s 21 of the *Australian Consumer Law*,⁹⁴ and the broadly stated concept of unconscionability ‘at law’.⁹⁵

At first instance, the primary judge, Robson J, held that the respondents (original plaintiffs) had, by their agent, demonstrated both wilful blindness as to Mr Stubbings’ financial and personal circumstances and a ‘high level of moral obloquy’.⁹⁶ AJ Lawyers’ system of arranging asset-based loans as agent for its clients was characterised as involving a deliberate intention to avoid seeking or receiving information as to the personal and financial circumstances of borrowers.⁹⁷ His Honour also concluded that the purpose of the system was to protect (or ‘immunise’) the lenders from claims that the loans should be set aside as unconscionable under the principles of equity.⁹⁸ It was ordered that the mortgages be discharged and the loan agreement vitiated.⁹⁹

The lenders appealed, arguing that the primary judge erred in finding that the transaction was unconscionable. The Victorian Court of Appeal (‘VCA’) concluded that the primary judge’s reasons reflected an adverse view of asset-based lending as a general concept and that this overwhelmed his Honour’s determination of the unconscionability issue.¹⁰⁰ The court opined that AJ Lawyers lacked either actual or constructive notice of Mr Stubbings’ desperate personal and financial circumstances.¹⁰¹ Rather, AJ Lawyers were entitled to rely upon the certificates of advice tendered by Mr Stubbings as proof that he had been properly counselled regarding the transaction, and this made it reasonable for the firm to refrain from further inquiries as to Mr Stubbings’ circumstances.¹⁰² In a point to be elaborated upon in Part V, the VCA unhelpfully conflated the differing principles governing the application of the equitable unconscionability doctrine and the statutory doctrine governed by s 12CB of the *ASIC Act* in reaching this conclusion. Nonetheless, the appellants succeeded. Mr Stubbings then appealed to the High Court of Australia.

Once more, the appellant’s submission were somewhat convoluted, though it appears he maintained the position that the respondents had

⁹³ Mr Stubbings’ statement of claim and the originating process were described by the initial trial judge as ‘largely unintelligible’: *Jams 2 Pty Ltd v Stubbings (No 3)* [2019] VSC 150, [234]. Mr Stubbings represented himself in the proceedings.

⁹⁴ Contained within the *ACL* (n 67).

⁹⁵ *Jams 2 Pty Ltd v Stubbings (No 3)* [2019] VSC 150, [43], [234], [249] (‘*Stubbings (No 3)*’).

⁹⁶ *Ibid* [313], [315].

⁹⁷ *Ibid* [17], [282], [284], [310]–[312].

⁹⁸ *Ibid* [11], [285], [313], [292]–[293], [298], [313]–[314]. The *ACL* was deemed to be inapplicable given the transaction concerned financial products or services to which the *ASIC Act* (n 23) applied. See *ibid* [320], [323], [327]–[328].

⁹⁹ *Jams 2 Pty Ltd v Stubbings (No 4)* (2019) 59 VR 1, 14–15.

¹⁰⁰ *Stubbings (VCA)* (n 91) [126].

¹⁰¹ *Ibid* [130].

¹⁰² *Ibid* [132].

acted unconscionably either under the general law or pursuant to *ASIC Acts* 12CB.¹⁰³ Mr Stubbings accepted that asset-based lending was not, in and of itself, unconscionable, but submitted that this particular instance was unlawful.¹⁰⁴ He further argued that the VCA ‘attributed unwarranted significance to the certificates of independent advice’¹⁰⁵ and that the circumstances should have suggested that he had not been appropriately advised as to the risks associated with the transaction. In their joint judgment, Kiefel CJ, Keane and Gleeson JJ framed their analysis around the equitable doctrine of unconscionability described in *Amadio*.¹⁰⁶ They readily accepted that Mr Stubbings was labouring under a ‘special disadvantage’ in that he lacked business acumen and was both impecunious and incapable of even the simplest calculations.¹⁰⁷ For their Honours, the matter turned on the extent of the respondents’ knowledge of Mr Stubbings’ circumstances and whether AJ Lawyers exploited his disadvantage.

In their Honours’ collective view, the respondents did not actually know, but should certainly have appreciated, that Mr Stubbings was especially vulnerable to inevitable financial ‘disaster’ under the transaction.¹⁰⁸ The certificates signed by Mr Stubbings were described as ‘artificial’ and ‘mere window dressing’.¹⁰⁹ They were largely populated with ‘bland boilerplate language’ which did not suggest that Mr Stubbings had properly turned his mind to the effects and consequences of his loan arrangement.¹¹⁰ It was also damning that the lawyer and accountant Mr Stubbings approached for the certificates were both suggested by AJ Lawyers and were told by the latter that they would only be paid if the loans went ahead.¹¹¹ This, it was held, undermined their independence and the advice they provided to Mr Stubbings (as reflected in the certificates).¹¹² According to Kiefel CJ, Keane and Gleeson JJ, AJ Lawyers appreciated that the loans made to Mr Stubbings were a ‘dangerous transaction’ from his perspective but were lured by ‘the prospect of obtaining the profit to be made by the

¹⁰³ See Jeffrey William Stubbings, ‘Appellant’s Submissions’, Submission in *Stubbings v Jams 2 Pty Ltd*, M13/2021, 16 April 2021; Jeffrey William Stubbings, ‘Appellant’s Outline of Oral Submissions’, Submission in *Stubbings v Jams 2 Pty Ltd*, M13/2021, 14 October 2021.

¹⁰⁴ *Stubbings (HCA)* (n 91) 417 [34].

¹⁰⁵ *Ibid* [35].

¹⁰⁶ (1983) 151 CLR 447, 459-460, 461, 474. See *Stubbings (HCA)* (n 1) 418 [38]-[39].

¹⁰⁷ *Stubbings (HCA)* (n 1) 419 [41].

¹⁰⁸ *Ibid* 419-20 [44]-[47].

¹⁰⁹ *Ibid* [48]-[49].

¹¹⁰ *Ibid*.

¹¹¹ *Stubbings (No 3)* (n 95) [314]; *Stubbings (VCA)* (n 91) [23]; *Stubbings (HCA)* (n 1) 439-40 [141]-[142].

¹¹² The VCA considered that this fact did not undermine neither the independence of the professionals providing advice to Mr Stubbings nor the reliability of that advice (as reflected in the certificates): *Stubbings (VCA)* (n 91) [134]. The High Court, however, disagreed. It held that the primary judge’s contrary finding was entirely consistent with his Honour’s other findings and readily supported by the evidence. See *Stubbings (HCA)* (n 1) 439-40 [142].

taking of [his] equity by way of interest payments'.¹¹³ AJ Lawyers 'took the opportunity to exploit [Mr Stubbings'] lack of business acumen and meagre financial resources to deprive him of his equity in the Narre Warren properties'.¹¹⁴ This, their Honours concluded, was unconscionable under principles of equity, and it was unnecessary to consider whether the respondents (through AJ Lawyers) had acted unconscionably under *ASIC Act* s 12CB.¹¹⁵

Justice Gordon also allowed the appeal though focussed on the 'alternative' ground for the finding of unconscionability; namely, *ASIC Act* s 12CB. Her Honour correctly observed that this form of 'statutory unconscionability' pertains specifically to conduct involving the supply of financial services in trade or commerce and that it is established by consideration of all the circumstances and the relevant factors listed in s 12CC of the *ASIC Act*.¹¹⁶ It was also noted that the prohibition in s 12CB can apply to a 'system of conduct or pattern of behaviour', irrespective of whether a particular individual has actually been disadvantaged by the conduct or behaviour.¹¹⁷ In assessing whether conduct is unconscionable within the meaning of s 12CB, her Honour cited the ratio of Nettle, Gordon and Edelman JJ in *Kobelt*,¹¹⁸ and explained that this evaluation required reference to 'the values and norms recognised by the statute' and to a 'normative standard of conscience which is permeated with accepted and acceptable community standards'.¹¹⁹

Her Honour agreed with the appellant's central argument: that 'the lenders' system of lending money secured against a guarantor's property, suspecting that the guarantor had no income or capacity to service the loan, yet deliberately avoiding information as to the guarantor's financial or personal circumstances in order to "immunise" themselves from knowledge of vulnerability', was unconscionable.¹²⁰ AJ Lawyers carefully structured their loans to avoid the application of the *National Credit Code*¹²¹ and charged very high interest on the loans.¹²² They targeted a vulnerable clientele for whom loans of the kind AJ Lawyers offered would be especially 'dangerous'.¹²³ AJ Lawyers purposely avoided borrowers' critical financial information; they performed no credit checks or income assessments and disregarded

¹¹³ *Stubbings (HCA)* (n 1) 421 [51].

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* 421 [52].

¹¹⁶ *Ibid* 422-23 [55]-[57].

¹¹⁷ *Ibid* 422 [55]. As much is stated in s 12CB(4)(b) of the *ASIC Act* (n 23).

¹¹⁸ *Kobelt* (n 21) 78.

¹¹⁹ *Stubbings (HCA)* (n 1) 422-23 [57].

¹²⁰ *Ibid* 423 [59].

¹²¹ *Ibid* 423 [61].

¹²² *Ibid* 423 [62].

¹²³ *Ibid* 424 [64]-[65].

the asset position of a given borrower.¹²⁴ All loan negotiations occurred exclusively through intermediaries.¹²⁵ The certificates of advice they required did not suggest that ‘the guarantor had turned their attention to or had had their attention drawn to the financial consequences for them’.¹²⁶ These aspects of AJ Lawyers’ method for issuing loans bespoke a system of conduct that was unconscionable and which exploited the appellant.¹²⁷

Justice Gordon identified those factors in s 12CC of the *ASIC Act* which captured the aspects of AJ Lawyers’ system of conduct.¹²⁸ In particular, their system utilised ‘unfair tactics’,¹²⁹ lacked good faith¹³⁰ and transparency,¹³¹ cultivated and exploited a significant power imbalance between the parties,¹³² and was aimed at those who would generally be regarded as unsuitable for loan finance from most other lenders.¹³³ The appellant was effectively coerced and pressured into the arrangement,¹³⁴ the terms of which were oppressive and potentially damaging.¹³⁵ Justice Gordon concluded that ‘the lenders’ conduct in respect of Mr Stubbings was unconscionable contrary to the prohibition in s 12CB of the *ASIC Act* and unconscionable in equity’.¹³⁶

Finally, Steward J rounded out the majority. His Honour essentially made the same observations as Gordon J in respect of AJ Lawyers’ ‘system of conduct’ in structuring asset-based loans to borrowers.¹³⁷ He reiterated critical features of this system, such as AJ Lawyers’ use of intermediaries to distance itself from borrowers and knowledge of their financial circumstances.¹³⁸ The inauspicious nature of the appellant’s loan arrangement (particularly the exorbitant fees involved), and his lack of understanding of the same, were highlighted.¹³⁹ Justice Steward ultimately concluded that AJ Lawyers, as agent for the respondents, had ‘acted unconscionably in accordance with equitable principles in failing to make necessary enquiries concerning the personal and financial circumstances of the appellant’.¹⁴⁰ This finding, his Honour held, turned on the narrow question of whether the certificates signed by the

¹²⁴ Ibid 424 [66]-[68].

¹²⁵ Ibid 424-5 [69]-[70].

¹²⁶ Ibid 425 [74], 429 [93].

¹²⁷ Ibid 426-7 [80].

¹²⁸ Ibid 427-30 [82]-[94].

¹²⁹ *ASIC Act* (n 23) s 12CC(1)(d).

¹³⁰ Ibid s 12CC(1)(l).

¹³¹ Ibid s 12CC(1)(e), (i), (j)(i).

¹³² Ibid s 12CC(1)(a), (c), (e), (i), (j)(i).

¹³³ Ibid s 12CC(1)(e).

¹³⁴ Ibid s 12CC(1)(d), (l).

¹³⁵ Ibid s 12CC(1)(j)(ii).

¹³⁶ *Stubbings (HCA)* (n 1) 429-30 [94].

¹³⁷ Ibid 431-36 [102]-[124].

¹³⁸ Ibid 438 [133].

¹³⁹ Ibid 438-39 [134]-[140].

¹⁴⁰ Ibid 443 [153].

appellant and requested by the respondents (via their agent) precluded a finding of wilful blindness and immunised its failure to make enquiries about the appellant's circumstances from a conclusion that they had acted unconscionably.¹⁴¹

The appellant was described as having a special disadvantage in that he lacked education, business experience, and an understanding of the impugned transactions, and he was relatively impoverished.¹⁴² AJ Lawyers were clearly alive to the possibility that the appellant was in a position of special disadvantage. Had they made further enquiries, they would have discovered that Mr Stubbings was in a truly dire financial situation and that the transaction was particularly disastrous for him.¹⁴³ Their system of lending was engineered to frustrate the provision of equitable relief. This was sufficient to fix them with knowledge of the appellant's special disability.¹⁴⁴ Finally, the respondents and their agents were significantly enriched through the present transaction, at the appellant's expense. He should have been appropriately warned of the fiscal consequences of the loan arrangement, and he was not. He was therefore unconscientiously exploited.¹⁴⁵ The certificates provided by the appellant did not undo this conclusion. They were defective in that they did not confirm key details, such as the appellant's capacity to service the loans or that he had received financial advice in his capacity as guarantor of those loans.¹⁴⁶

The appeal was allowed, and the VCA's judgment was set aside. As will be discussed in Part V, the VCA judgment was, respectfully, confused in many respects. The opportunity was present for the High Court to clarify some of these concerns arising on the facts and in the parties' submissions. While the outcome was, in the author's view, correct, the process by which the outcome was reached was patently unsatisfactory. The High Court's decision was as problematic as the one it overturned. Part V explains why this is so, canvassing the questions lingering post-*Stubbings (HCA)* and attempting to provide clarity through aggregation and analysis of the leading authorities.

¹⁴¹ Ibid 443-44 [154].

¹⁴² Ibid 444 [157].

¹⁴³ Ibid 445-46 [162].

¹⁴⁴ Ibid 446 [163], 446-47 [167]-[168].

¹⁴⁵ Ibid [169].

¹⁴⁶ Ibid [171]-[173].

V Lingering Questions

A *Distinguishing ASIC Act ss 12CA and 12CB (ACL ss 20 and 21)*¹⁴⁷

One of the more controversial aspects of the decision in *Stubbings (VCA)* was the VCA's expression of the method for determining the content of the standard of unconscionability expressed in *ASIC Act* s 12CB. The VCA relied considerably upon the seminal High Court decision of *Kobelt*, which concerned *ASIC*'s investigation into the controversial 'book-up' credit system¹⁴⁸ utilised by some storekeepers in many of Australia's remote Aboriginal communities. Mr Lindsay Kobelt was one such storekeeper, operating Nobby's Mintabie General Store in the Anangu Pitjantjatjara Yankunytjatjara Lands ('APY Lands') located in the far north of South Australia. Mr Kobelt sold groceries, fuel, and second-hand cars through a book-up credit system. *ASIC*'s argument was that Mr Kobelt's supply of credit to residents of remote Aboriginal communities in the APY Lands was unconscionable under s 12CB(1) of the *ASIC Act*.

A High Court majority¹⁴⁹ rejected *ASIC*'s argument, holding that Mr Kobelt had not unconscientiously exploited his customers. Rather, he had provided the book-up credit system in response to local demand and to suit the local market.¹⁵⁰ Section 12CB(1), according to Kiefel CJ and Bell J, required 'an evaluative judgment'.¹⁵¹ The pivotal inquiry was whether the impugned conduct was against conscience, and this was to be determined by reference to the factors outlined in s 12CC(1) and the totality of the circumstances.¹⁵² Somewhat similar sentiments were expressed by Gageler J,¹⁵³ who observed that one would fall short of the normative standard of conduct prescribed by s 12CB(1) where they engaged in conduct 'so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience'.¹⁵⁴ His Honour identified two possible interpretations of s 12CB(1):

¹⁴⁷ As explained in Part IV, the relevant statutory proscription against unconscionable conduct in *Stubbings (HCA)* was s 12CB(1) of the *ASIC Act* (n 23); the equivalent of *ACL* s 21(1). The following discussion is therefore relevant to the provisions under either statute.

¹⁴⁸ This system involved customers providing their debit card (linked to the bank account to which their wages or Centrelink payments were credited) to storekeepers, along with their personal identification number. Those customers could then attain goods on the spot, including between 'pay days', and pay for them later. The storekeeper would, with each customer's authorisation, withdraw funds from the customer's account and pay it towards their debt for goods acquired.

¹⁴⁹ Kiefel CJ, Bell, Gageler and Keane JJ; Nettle, Gordon and Edelman JJ dissenting.

¹⁵⁰ *Kobelt* (n 21) 32-3, 35-6.

¹⁵¹ *Ibid* 27.

¹⁵² *Ibid* 34-6.

¹⁵³ *Ibid* 43.

¹⁵⁴ *Ibid* 40.

The section might, on the one hand, be seen to confer statutory authority on a court exercising jurisdiction in a matter arising under it to develop the equitable conception of unconscionable conduct taking into account a range of considerations that are broader than those traditionally taken into account by courts administering equity and that include the considerations specifically identified in s 12CC. The section might, on the other hand, be seen to prescribe a normative standard of conduct, which standard a court exercising jurisdiction in a matter arising under it is required to recognise and to administer having regard to considerations which include those identified in s 12CC.¹⁵⁵

Justice Gageler considered the second interpretation to be the correct one,¹⁵⁶ with what seemed to be greater emphasis placed upon the general equitable principles underpinning s 12CB(1) in establishing unconscionable conduct, as opposed to the s 12CC(1) factors. Justice Keane also underscored the moral foundation of the evaluative assessment prescribed by s 12CB(1),¹⁵⁷ regarding ‘moral obloquy’ as the yardstick.¹⁵⁸ Justices Nettle and Gordon, in the minority, aligned more closely with Gageler J’s analysis. Their view was that the equitable principles underpinning unconscionability (and captured by s 12CA(1)) helped to ascribe meaning to s 12CB(1) but that the s 12CC factors were determinative.¹⁵⁹

Justice Edelman favoured the approach of Nettle and Gordon JJ.¹⁶⁰ Their Honours felt the meaning of s 12CB(1) could not be understood ‘other than against its background in equitable doctrine and the repeated responses by parliaments to that equitable doctrine’.¹⁶¹ Despite not being restrained by mandatory reference to the unwritten law, as with s 12CA(1), s 12CB(1) was still informed by the norms and values recognised by the statute, as well as the broader community standards and values that underpin it.¹⁶² The minority concluded that the s 12CC factors and, more broadly, equitable notions of unreasonableness and unfairness, pointed to Mr Kobelt’s conduct as being unconscionable.

In *Stubbings (VCA)*, the VCA favoured the minority’s view in *Kobelt*. The VCA opined that the equitable principles of unconscionability remained relevant to the interpretation of s 12CB(1).¹⁶³ The court drew an analogy between equity’s broad analysis of unconscionable conduct with the statement in s 12CB(1) that ‘all the

¹⁵⁵ Ibid 37.

¹⁵⁶ Ibid 38.

¹⁵⁷ Ibid 48-9.

¹⁵⁸ This was in spite of Gageler J’s express retraction of ‘moral obloquy’ in the same case. See *ibid* at 39-40.

¹⁵⁹ Ibid 56, 60.

¹⁶⁰ Ibid 90-94.

¹⁶¹ Ibid 94.

¹⁶² *Kobelt* (n 21) 78, 88.

¹⁶³ *Stubbings (VCA)* (n 91) [78].

circumstances' be considered when evaluating impugned conduct.¹⁶⁴ A strange feature of the VCA's decision is that, despite recognising the consistent statements of Gageler J and the minority in *Kobelt* as being *obiter dicta*,¹⁶⁵ the court felt it was compelled to follow the same approach on the basis of the a key principle stated in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.¹⁶⁶ That principle is that intermediate appellate courts should not depart from 'long-established authority and seriously considered *dicta*' in High Court judgments, nor from the decisions of other intermediate appellate courts, unless convinced they are plainly wrong.¹⁶⁷

Although this is true, and that the principles of equity remain relevant to the interpretation of s 12CB(1), the VCA seemed heavily preoccupied with the broader equitable notions underpinning the unconscionability doctrine. It appeared far less interested in the s 12CC factors; or, at least, it was ineffective in framing its judgment within the precise wording of those factors. This is not a triviality, nor mere semantics. Parliament clearly attempted to delineate the equitable doctrine in s 12CA (*ACL* s 20) from the more nuanced statutory doctrine in s 12CB (*ACL* s 21), with the latter seeking to move away from the narrower equitable principles that govern unconscionability at common law. The unconscionability doctrine in equity, though potentially applicable in situations to which s 12CB (*ACL* s 21) applies, is not intended to do so.¹⁶⁸ As discussed in Part III, Parliament intended s 12CB (*ACL* s 21) to apply specifically to consumer transactions for goods and services. This provision therefore diverges in its approach to establishing unconscionability by focussing upon a range of individual factors stipulated by statute, not the courts. One would assume that this divergence warrants a stronger separation between the equitable and statutory conceptions of unconscionability. Both the High Court in *Kobelt* and the VCA in *Stubbings (VCA)*, however, appeared to bring the provisions closer together than it would seem the Parliament intended.

Both courts emphasised the 'significant' role that the unwritten law played in ascribing meaning to the term 'unconscionable' under s 12CB(1).¹⁶⁹ The non-exhaustive list of factors in s 12CC (*ACL* s 22) was said to provide 'express guidance' with respect to the 'norms and values that are relevant to inform the meaning of unconscionability and its practical application'.¹⁷⁰ The VCA in *Stubbings (VCA)* reiterated

¹⁶⁴ Ibid [79].

¹⁶⁵ Ibid [90].

¹⁶⁶ (2007) 230 CLR 89.

¹⁶⁷ Ibid 150–2.

¹⁶⁸ Note also that *ASIC Act* (n 23) s 12CA (*ACL* s 20) does not apply to conduct prohibited by *ASIC Act* 12CB (*ACL* s 21). See *ASIC Act* (n 23) s 12CA(2); *ACL* (n 67) s 20(2).

¹⁶⁹ *Kobelt* (n 21) 56; cited in *Stubbings (VCA)* (n 91) [87].

¹⁷⁰ *Kobelt* (n 21) 60; cited in *Stubbings (VCA)* (n 91) [88].

Gageler J's caution in *Kobelt* that the normative standard in s 12CB did not authorise the courts to 'dilute the gravity of the equitable conception of unconscionable conduct so as to produce a form of equity-lite'.¹⁷¹ With respect, this comment reflects the High Court's bizarre but misguided view of s 12CB. The fact that s 12CB is framed differently to s 12CA does not mean that it will be misused and more readily deliver findings of unconscionability, even if applying statutory factors might be 'simpler' in practice than applying the equitable doctrine. But more importantly, s 12CB has been consciously designed to apply to specific forms of transaction and to distance itself from the equitable doctrine. This provision expressly provides that the statutory doctrine of unconscionability 'is not limited by the unwritten law of the States and Territories relating to unconscionable conduct',¹⁷² and s 12CA 'does not apply to conduct that is prohibited by section 12CB'.¹⁷³

Justices Nettle and Gordon in *Kobelt*, both in the minority, considered the s 12CC factors to represent an expression of the underlying norms and values relevant to establishing unconscionability¹⁷⁴ and saw them as establishing a framework for the principles underpinning the notion of conscience identified in s 12CB.¹⁷⁵ Justice Gordon in *Stubbings (HCA)* approved of this view¹⁷⁶ and went on to say that the 's 12CC considerations assist in evaluating whether the conduct in question is "outside societal norms of acceptable commercial behaviour [so] as to warrant condemnation as conduct that is offensive to conscience"'.¹⁷⁷ These statements from various members of the High Court imply that the s 12CC factors feed into the assessment of whether conduct offends conscience. This appears to put the cart before the horse; if an analysis of the s 12CC factors suggests that a person has acted unconscionably, then that would by default deem them to have acted against conscience. Put another way, the factors do not provide a bridge to the equitable doctrine; rather, the principles behind the equitable doctrine *inform* the statutory factors but do not *govern* their application. It is respectfully submitted that the High Court's persistent preoccupation with tethering the equitable doctrine to the statutory doctrine in this manner is inappropriate and incorrect.

¹⁷¹ *Kobelt* (n 21) 39; cited in *Stubbings (VCA)* (n 91) [85].

¹⁷² *ASIC Act* (n 23) s 12CB(4)(a); *ACL* (n 67) s 21(4)(a).

¹⁷³ *ASIC Act* (n 23) s 12CA(2); *ACL* (n 67) s 20(2).

¹⁷⁴ *Kobelt* (n 21) 60.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Stubbings (HCA)* (n 1) 422-23 [57].

¹⁷⁷ *Ibid* 423 [58]; citing Gageler J in *Kobelt* (n 21) 40.

B Identifying a ‘System of Conduct’ under ASIC Act s 12CB(4)(b) (ACL s 21(4))

Section 12CB(4)(b) of the *ASIC Act* (ACL s 21(4)(b)) states that s 12CB (ACL 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’. Justice Gordon in *Stubbings (HCA)* noted that a ‘system’ connotes an internal method of working, while a ‘pattern’ connotes the external observation of events.¹⁷⁸ In *Australian Competition and Consumer Commission v EDirect Pty Ltd*, Reeves J observed that, by its ordinary meaning, a system is ‘an assemblage or combination of things or parts forming a complex or unitary whole; ... a co-ordinated body of methods, or a complex scheme or plan of procedure’.¹⁷⁹ These definitions are evidently broad, which is why, as some commentators¹⁸⁰ and courts¹⁸¹ have observed, the identification of a system of conduct in a given case is necessarily fact-specific.

The system employed by AJ Lawyers in *Stubbings (HCA)*, as explained by Steward J, involved the issue of asset-based loans secured by mortgages in circumstances where the lender, once satisfied with the borrower’s security, had no interest in, and made no enquiries regarding, the borrower’s capacity to service the loan.¹⁸² The system was ostensibly attractive to financially distressed individuals or entities who were otherwise ineligible to obtain loans in the ordinary way.¹⁸³ It typically resulted in the borrower having to pay interest at rates greater than would have been obtained when refinancing with a bank,¹⁸⁴ and it only ever involved loans to companies so as to avoid the application of the *National Credit Code*.¹⁸⁵ AJ Lawyers’ use of intermediaries was a deliberate tactic to distance itself from borrowers and knowledge of their financial circumstances.¹⁸⁶ The certificates of independent legal and financial advice that AJ Lawyers requested from Mr Stubbings were superficial and used solely to ‘immunise the loans it had organised from the reach of equitable remedies’.¹⁸⁷ Finally, AJ Lawyers were

¹⁷⁸ *Stubbings (HCA)* (n 1) 422 [55]. Her Honour cited *Kobelt* (n 21) 56 in support of these definitions. See also *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 362 ALR 66, 87 (*‘Unique International College Pty Ltd’*).

¹⁷⁹ [2012] FCA 1045, [91].

¹⁸⁰ See, eg, Michelle Sharpe, “‘More Than a Feeling’: Finding Statutory Unconscionable Conduct” (2019) 27(2) *Australian Journal of Competition and Consumer Law* 108, 116.

¹⁸¹ See, eg, *Unique International College Pty Ltd* (n 178) 99 (per curiam).

¹⁸² *Stubbings (HCA)* (n 1) 433 [111].

¹⁸³ *Ibid* 433 [113].

¹⁸⁴ *Ibid* 433 [114].

¹⁸⁵ *Ibid* 434 [115].

¹⁸⁶ *Ibid* 434 [117].

¹⁸⁷ *Ibid* 435 [123].

enriched through their system of conduct by way of various fees charged to the client.¹⁸⁸

Justice Gordon, despite agreeing with the joint judgment, wrote separately on account of her Honour's view that the respondent lenders' system of conduct was contrary to *ASIC Act* s 12CB.¹⁸⁹ That system was designed 'to hide from the lenders any information which might later be said to make the loan, the guarantee or the taking of security unconscionable'.¹⁹⁰ It shielded from them critical information about Mr Stubbings's circumstances that would have made it irrefutably clear that the loan they offered to him was potentially damaging to him. This system of conduct was 'not reasonably necessary to protect the lenders' legitimate interests'.¹⁹¹ Referring to the s 12CC factors, her Honour also felt that:

- Compared to what he *might* have been able to attain elsewhere, the financial product Mr Stubbings received was hazardous and poorly conceived;¹⁹²
- AJ Lawyers' system utilised unfair tactics and exploited Mr Stubbings;¹⁹³
- AJ Lawyers' system lacked good faith;¹⁹⁴
- A distinct power imbalance was built into AJ Lawyers' system;¹⁹⁵
- AJ Lawyers' system lacked transparency;¹⁹⁶
- The potential damage to Mr Stubbings on default was significant, and AJ Lawyers was cognisant of this;¹⁹⁷ and
- Mr Stubbings was unable to 'make any realistic assessment of the worth and consequences of the transaction'.¹⁹⁸

In sum, AJ Lawyers' system was unconscionable.¹⁹⁹ Justice Gordon's approach suggests that the relevant 'system of conduct' need not be strictly linear or precisely identifiable and can be comprised of numerous features and processes. That is, the relevant 'system' need not be self-contained but can have a number of physical and functional elements. So, in *Stubbings (HCA)*, not only was the financial product itself damaging and undesirable, the process by which it was marketed was also contrary to conscience. It would seem that, without evidence

¹⁸⁸ Ibid 435-36 [124].

¹⁸⁹ Ibid 422 [54].

¹⁹⁰ Ibid [80].

¹⁹¹ *ASIC Act* (n 23) s 12CC(1)(b).

¹⁹² Ibid ss 12CC(1)(e), (j)(ii).

¹⁹³ Ibid ss 12CC(1)(d), (l).

¹⁹⁴ Ibid s 12CC(1)(l).

¹⁹⁵ Ibid ss 12CC(1)(a), (c), (e), (i), (j)(i).

¹⁹⁶ Ibid ss 12CC(1)(c), (i), (j)(i).

¹⁹⁷ Ibid ss 12CC(1)(a), (d) and (l).

¹⁹⁸ *Stubbings (HCA)* (n 1) 428-29 [90]; *ASIC Act* (n 23) ss 12CC(1)(c).

¹⁹⁹ *Stubbings (HCA)* (n 1) 429-30 [94].

of AJ Lawyers' exploitative behaviour, the mere fact that the loan agreement Mr Stubbings entered into was blatantly inappropriate for him and potentially catastrophic to his finances would not have been enough to support a finding of unconscionability. Paterson and Bant note that the cases addressing *ACL* s 21 suggest that the courts 'will not typically draw an inference of an unconscionable system of conduct from an assessment of the nature of the product presented'.²⁰⁰ The system of conduct must be unconscionable not only in form but in substance.

Justice Steward similarly held that AJ Lawyers had acted unconscionably. His Honour engaged in a lengthy discussion of the facts and the decisions of the courts below before noting that AJ Lawyers 'acted unconscionably in accordance with equitable principles in failing to make necessary enquiries concerning the personal and financial circumstances of the appellant', meaning it was 'not necessary to consider the application of [*ACL*] s 21 or [*ASIC Act*] s 12CB'.²⁰¹ His Honour felt the case turned upon the 'narrow issue' of whether the solicitors' certificates precluded a finding of unconscionability. Justice Steward considered Mr Stubbings to be labouring under a 'special disadvantage'; namely, 'his lack of education and business experience, his lack of understanding of the transactions, and his relative impecuniosity'.²⁰² He received no warnings or explanations about his loan arrangement. The system of conduct employed by AJ Lawyers was a 'deliberate artifice'²⁰³ which strategically restricted the firm's knowledge of Mr Stubbings' circumstances.²⁰⁴ AJ Lawyers, Steward J added, had constructive knowledge of Mr Stubbings' special disadvantage²⁰⁵ and unconscientiously exploited him.²⁰⁶ The solicitors' certificates were defective and did not undo this finding of unconscionability.²⁰⁷

His Honour helpfully clarified that a 'system of conduct' may, and in this case did, advantage third parties.²⁰⁸ AJ Lawyers benefited from a range of exorbitant fees they charged against Mr Stubbings, and this was influential both in colouring the relevant system of conduct perpetuated by AJ Lawyers and in determining that it was unconscionable. Establishing a system of conduct (in whole or in part) by reference to benefits enjoyed by third parties complements the

²⁰⁰ Jeannie M Paterson and Elise Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44(1) *Journal of Consumer Policy* 1, 9.

²⁰¹ *Ibid* [153].

²⁰² *Ibid* [157].

²⁰³ *Ibid* [163].

²⁰⁴ *Ibid* [160].

²⁰⁵ *Ibid* [162]-[168].

²⁰⁶ *Ibid* [169].

²⁰⁷ *Ibid* [171]-[173].

²⁰⁸ *Ibid* [169].

principle stipulated in *ACL* s 21(4)(b) (*ASIC Act* s 12CB(4)(b)) that there need not be a particular individual identified as having been disadvantaged by the system of conduct. The system could conceivably benefit others and simultaneously cause no disadvantage to any particular person.

A question that arises organically is whether a ‘system’ must emerge over a prolonged period of time or whether it can arise in a single transaction or within a short period of time. An examination of the case law suggests that the latter view is correct. In *Stubbings (HCA)*, the relevant transaction – from finalisation of the loan to default – transpired between June and December 2015; some seven months.²⁰⁹ In other cases, the system has emerged or been operationalised over a longer term. In *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd*,²¹⁰ for example, the defendant, Quantum, was found to have engaged in an unconscionable system of conduct in contravention of *ACL* s 21 between February 2017 and July 2018. Quantum’s system pressured investors in the National Rental Affordability Scheme to terminate their contracts with their existing property managers and engage an alternative manager recommended by Quantum. What Quantum failed to tell the investors is that it had a commercial association with its preferred property managers. The unconscionable conduct perpetrated by the defendant in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)*²¹¹ occurred over a period of almost three years, from May 2013 to December 2015.²¹² What is clear is that the relevant system can emerge either through deliberate action on the part of the defendant or ‘naturally’ in the course of business and without ever having been expressly articulated,²¹³ and may involve the accumulation of minor and varied incidents.²¹⁴

Section s 21(4)(b) of the *ACL* (*ASIC Act* s 12CB(4)(b)) clearly provides that the provision can apply to a system of conduct or pattern of behaviour ‘whether or not a particular individual is identified as

²⁰⁹ See also *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132, where the unconscionable conduct in question (which concerned a share purchase scheme) occurred over a period of approximately two months.

²¹⁰ [2021] FCAFC 40.

²¹¹ [2019] FCA 1982.

²¹² The Australian Institute of Professional Education (AIPE) marketed online diploma courses as ‘free’ when in fact they attracted significant fees of between \$12,000 and \$20,000. The Institute also failed to properly screen applicants for suitability, offered material inducements and paid substantial commissions to third party recruiters to attract consumers, and enrolled vulnerable consumers who were unlikely to complete their courses.

²¹³ *Australian Competition and Consumer Commission (ACCC) v Unique International College* [2017] FCA 727, [757] (Perram J); *Australian Securities and Investments Commission v Westpac Banking Corporation (ACN 007 457 141) (No 2)* (2018) 357 ALR 240, 323 (Beach J).

²¹⁴ *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 2)* [2017] FCA 709, [66] (Beach J).

having been disadvantaged by the conduct or behaviour'. While there need not be an identified victim, it must still be possible to identify with reasonable certainty the potential *class* of consumers from which a victim may derive.²¹⁵ If there is an identified victim, or a small number of individual victims, their evidence can sufficiently establish an unconscionable system of conduct.²¹⁶ In *Stubbings (HCA)*, there was, of course, a single affected consumer in Mr Stubbings, and AJ Lawyers' system was deemed unconscionable on the basis of his evidence alone. This clearly reinforces the potential of *ACL* s 21 (*ASIC Act* s 12CB). Some cases prior to *Stubbings (HCA)* had implied that it would be quite difficult to establish an unconscionable system of conduct on the basis of evidence provided by an individual consumer or a small number of consumers.²¹⁷ Justice Bromwich in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd* thus stated: 'It may be observed that there are inherent difficulties in ... seeking to establish an overall system of conduct or pattern of behaviour based upon a relatively small sample of the alleged contravening conduct'.²¹⁸ However, it would seem that where there is strong evidence of specific conduct on the part of the defendant, and the more the allegedly unconscionable conduct depends upon the plaintiff's particular attributes, the more probative evidence from individual consumers will be.²¹⁹ *Stubbings (HCA)* ticked both boxes.

C *Is 'Moral Obloquy' Dead?*

In *Jams 2 Pty Ltd v Stubbings (No 3)*, the primary judge concluded that AJ Lawyers demonstrated a 'high level of moral obloquy' in its dealings with Mr Stubbings,²²⁰ which contributed to its overall finding that the firm had acted unconscionably.²²¹ The Victorian Court of Appeal in *Stubbings (VCA)* affirmatively rejected the 'arcane terminology' of 'moral obloquy',²²² noting the effect of *Kobelt*. In *Kobelt*, Gageler J sensationally intimated his Honour's 'regret' at having utilised this obscure expression, noting that it 'does nothing to elucidate the

²¹⁵ *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 2)* [2017] FCA 709, [59]-[66] (Beach J); *Guy v Crown Melbourne Ltd (ACN 006 973 262) (No 2)* (2018) 355 ALR 420, 530-533, 540 (Mortimer J). Their common relevant characteristics will also be influential: *Unique International College Pty Ltd* (n 178) 95 (per curiam).

²¹⁶ *Unique International College Pty Ltd* (n 178) 95.

²¹⁷ *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045, [91] (Reeves J); *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd* [2017] FCA 521, [11] (Bromwich J).

²¹⁸ [2017] FCA 521, [11].

²¹⁹ *Unique International College Pty Ltd* (n 178) 96.

²²⁰ [2019] VSC 150, [313].

²²¹ *Jams 2 Pty Ltd v Stubbings (No 4)* (2019) 59 VR 1, 14-15.

²²² *Stubbings (VCA)* (n 91) [91].

normative standard embedded in [s 12CB of the *ASIC Act*].²²³ His Honour noted that he meant to convey ‘that conduct proscribed by the section as unconscionable is conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience’.²²⁴ The Victorian Court of Appeal in *Stubbings (VCA)* endorsed Gageler J’s revised statement of principle, adding that it ‘should still be understood as requiring an evaluative judgment as to the morality of the allegedly unconscionable behaviour’.²²⁵

The High Court in *Stubbings (HCA)* made no mention of ‘moral obloquy’, except in reference to the primary judge’s findings.²²⁶ Implicit in this silence is affirmation of the VCA’s conclusion (supported by *Kobelt*) that the term inaccurately described the normative standard imposed by *ASIC Act* s 12CB (*ACL* s 21) and should be abandoned. It appears from this line of authority that moral obloquy is dead, and rightly so. As many commentators have observed, this nomenclature lacks all clarity, is inherently vague, and does not adequately delineate the applicable normative standard in the context of statutory unconscionability.²²⁷

What is interesting about the VCA’s approach in *Stubbings (VCA)* is that, while it clearly favoured a modernised approach in evaluating statutory unconscionability, it mentioned the need to assess the ‘morality’ of impugned conduct and defined this as requiring evaluating judgment. The court went further, suggesting that ‘while searching for a differently expressed criterion of liability for unconscionable conduct, the earlier cases concerning unconscionable conduct under statute ... continue to be relevant’.²²⁸ ‘In substance’, the VCA added, ‘the requisite criterion of liability has been rebadged in terms of the normative standard expressed in *Kobelt*’.²²⁹ This approach can be interpreted as reopening the door to moral obloquy,²³⁰ especially in light of Keane J’s approval of the concept in *Kobelt*.²³¹ and due to the curious

²²³ *Kobelt* (n 21) 39.

²²⁴ *Ibid* 40.

²²⁵ *Stubbings (VCA)* (n 91) [91].

²²⁶ *Stubbings (HCA)* (n 1) 416 [30], 440-41 [146].

²²⁷ See, eg, Sarida McLeod, ‘Statutory Unconscionable Conduct Under the *ACL*: The Case Against a Requirement for “Moral Obloquy”’ (2015) 23(2) *Competition and Consumer Law Journal* 123; Robert Baxt, ‘Continuing “Furore” Over Moral Obloquy and Unconscionability’ (2017) 91(10) *Australian Law Journal* 809; Andrew Eastwood, ‘Current Issues Concerning Unconscionable Conduct’ (2017) 32(3) *Australian Journal of Corporate Law* 382; Sharpe (n 180); Gabrielle Golding and Mark Giancaspro, ‘To Moral Obloquy or Not to Moral Obloquy? That is the Judicial Confusion Surrounding Statutory Unconscionable Conduct’ (2020) 34(1) *Commercial Law Quarterly* 3.

²²⁸ *Stubbings (VCA)* (n 91) [92].

²²⁹ *Ibid*.

²³⁰ See Gabrielle Golding and Mark Giancaspro, ‘Steering Statutory Unconscionability Out of a Jam at Last: *Stubbings v Jams 2 Pty Ltd*’ (2021) 43(8) *Law Society Bulletin* 42.

²³¹ *Kobelt* (n 21) 48-9.

use of the word ‘rebadge’, which suggests the mere rebranding of the *same* concept. That said, Gageler J’s express retraction of the expression in *Kobelt*, coupled with High Court’s silence on the matter in *Stubbings (HCA)* and tacit approval of the VCA’s rejection of the expression in *Stubbings (VCA)*, suggests that a revival of the moral obloquy standard is extremely unlikely.

D *Establishing ‘Predatory Exploitation’ of Special Disadvantage*

In *Kakavas v Crown Melbourne Ltd*,²³² the High Court controversially suggested that the equitable doctrine of unconscionability expressed in *Amadio* was enlivened only where the defendant was proven to have had a ‘predatory state of mind’ in procuring their bargain with the plaintiff.²³³ Inadvertence or indifference to the weaker party’s circumstances, it was said, fell short of the exploitation with which the equitable doctrine is concerned.²³⁴ That case concerned a heavy gambler who incurred net losses of \$20.5 million gambling in the defendant casino. The gambler sued the casino for unconscionability, arguing that they exploited his pathological gambling addiction by allowing him to gamble in their establishment. He was unsuccessful on the basis that his addiction was not a ‘special disadvantage’ that rendered him susceptible to exploitation by the casino. The evidence demonstrated that he was capable of making ‘rational decisions to refrain from gambling altogether had he chosen to do so’ and that he was certainly able to choose to refrain from gambling at the defendant’s establishment.²³⁵ Crown did not knowingly victimise the plaintiff by allowing him to gamble in their casino. He presented as a rational and wealthy individual who enjoyed playing casino games, and they merely facilitated his indulgence.

Subsequent High Court decisions addressing the unconscionability doctrine have made no conclusive reference to the need for a ‘predatory state of mind’ on the part of the defendant to be established.²³⁶ The same court in *Stubbings (HCA)* did not even mention the phrase when discussing the defendant’s actions and knowledge of the plaintiff’s special disadvantage. This would appear to be an indirect ratification of what appears to be the current legal position: that one does *not* need to establish that the plaintiff had a predatory state of mind when alleging unconscionability as understood in equity. Again, the High Court missed a valuable opportunity here to conclusively say whether or not

²³² (2013) 250 CLR 392.

²³³ *Ibid* 439.

²³⁴ *Ibid*.

²³⁵ *Ibid* 432.

²³⁶ See, eg, *Thorne v Kennedy* (2017) 263 CLR 85; *Kobelt* (n 21).

this was a requirement, saving inferences being drawn from the court's silence on the matter in cases since *Kakavas*.

It should, however, be acknowledged that neither the appellants nor the respondents in *Stubbings (HCA)* raised the point about the allegedly requisite 'predatory state of mind' in their submissions.²³⁷ It might therefore be argued, with persuasion, that it would have been inapposite for the High Court to digress from the parties' pleadings and scrupulously consider whether predatory exploitation of a plaintiff's special disadvantage is a requisite element of the equitable unconscionability doctrine. In an adversarial legal system, the parties' submissions are designed to frame the dispute and identify the issues to be addressed in the proceedings.²³⁸ The High Court is empowered to permit a party to amend their submissions,²³⁹ but it should otherwise be cautious about addressing issues that do not directly arise on the facts, in argument, or through the court documents filed.

E The Requisite Level of 'Knowledge' of Special Disadvantage

It was mentioned in Part II that proof of the defendant's 'constructive knowledge' of the plaintiff's special disadvantage was sufficient for the purposes of the unconscionability doctrine. If the defendant is aware of the plaintiff's special disadvantage, they naturally possess actual knowledge of the same. If, however, the defendant lacks actual knowledge but is aware of facts or circumstances which should have caused the defendant to contemplate the possibility of the plaintiff's special disadvantage, this will also suffice. This is constructive knowledge. It is deemed that the defendant ought to have known of the special disadvantage given the relevant setting and surrounding evidence and that further prudent enquiries would have led to them acquiring actual knowledge. Constructive knowledge has for well over 150 years been accepted as capable of satisfying the 'knowledge' element of the unconscionability doctrine.²⁴⁰ The High Court in *Kakavas*, however, appeared to go against the grain and hold that constructive knowledge was not sufficient; only actual knowledge or 'wilful ignorance' (sometimes termed 'wilful blindness') would satisfy the equitable doctrine.²⁴¹

Later High Court cases appear to have rejected this approach and reiterated the previously understood position that the plaintiff must

²³⁷ Jeffrey William Stubbings, 'Appellant's Submissions', Submission in *Stubbings v Jams 2 Pty Ltd*, M13/2021, 16 April 2021; Jams 2 Pty Ltd & Ors, 'Respondent's Submissions', Submission in *Stubbings v Jams 2 Pty Ltd*, M13/2021, 28 May 2021.

²³⁸ *Stewart v The Deputy Commissioner of Taxation* [2010] FCA 402, [35] (Perram J).

²³⁹ *High Court Rules 2004*, r 3.01.1.

²⁴⁰ *Owen & Gutch v Homan* (1853) 4 HL Cas 997; 10 ER 752.

²⁴¹ *Kakavas* (n 29) 437-9.

establish that the stronger party either knew of their special disadvantage or *ought to have known* of it.²⁴² In *Stubbings (HCA)*, the High Court clearly accepted that the defendant's 'knowledge' could be constructed from the surrounding circumstances and, indeed, this is what occurred in respect of AJ Lawyers.²⁴³ The court made repeated references to AJ Lawyers' 'wilful blindness' of Mr Stubbings' personal and financial circumstances.²⁴⁴ Some courts have suggested that wilful blindness is, for the purposes of the equitable unconscionability doctrine, equivalent to actual knowledge,²⁴⁵ which might suggest the High Court in *Stubbings (HCA)* was speaking to AJ Lawyers' actual knowledge. It is submitted that this position is plainly wrong. One either knows something or does not know it. If one turns a blind eye to the possibility that their counterparty is labouring under a special disadvantage, they literally do not know if this is true or not. It is presumed, if the circumstances should have alerted them to the possibility, that they knew of the special disadvantage, but this does not displace the fact that they did not know in the truest sense. AJ Lawyers in *Stubbings (HCA)* did everything in their power to *avoid* acquiring knowledge of Mr Stubbings' true financial position. It appears, therefore, that *Stubbings (HCA)* supports what must be seen as the current and correct legal position: that both actual and constructive knowledge suffice for the purposes of the equitable unconscionability doctrine.

F *The Worth of Certificates of Independent Advice*

The court in *Stubbings (HCA)* had much to say about the certificates of independent legal and financial advice that AJ Lawyers requested from Mr Stubbings.²⁴⁶ Since *Amadio*, it has become common practice for lenders to require such certificates of borrowers and guarantors, the principal aim being to demonstrate that the lender has been prudent and diligent in assessing those parties' fiscal capacity and understanding of the loan transaction.²⁴⁷ In *Stubbings (VCA)*, the VCA determined that AJ Lawyer's solicitation of the relevant certificates from Mr Stubbings

²⁴² See, eg, *Thorne v Kennedy* (2017) 263 CLR 85, 103; *Kobelt* (n 21) 58.

²⁴³ *Stubbings (HCA)* (n 1) 420 [49] (Kiefel CJ, Keane and Gleeson JJ), 446-47 [165]-[168] (Steward J). See also 426 [77], 426-27 [80]-[81] (Gordon J).

²⁴⁴ *Ibid* 420 [49] (Kiefel CJ, Keane and Gleeson JJ), 446-47 [165]-[168] (Steward J).

²⁴⁵ See, eg, *Owen v Homan* (1853) 4 HL Cas 997, 1035; *Kakavas*, 438.

²⁴⁶ As discussed in Part IV, although it was never expressly stated in the mortgage documentation, it was clear from the context that approval of the loans made to Mr Stubbings was conditional on the certificates being obtained from him. See *Stubbings (HCA)* (n 1) 414 [21].

²⁴⁷ 'Since *Amadio*, it has become increasingly common, and indeed now standard practice ... for lending institutions to require security providers to obtain independent legal advice, evidenced by a solicitor's certificate': Patrick Monahan and Georgina Orr, 'Unconscionable Conduct Since *Amadio*' (2002) *Law Institute Journal* 55, 57. See also Prompt Legal Services, *Solicitor Certificate Explained* (online, 5 July 2022) <<https://promptlegalservices.com.au/solicitor-certificate-explained/>>.

was fatal to the suggestion that he had been unconscientiously exploited.²⁴⁸ The certificates confirmed that Mr Stubbings had consulted a lawyer and accountant for advice and that he had read, been explained, and understood the relevant loan documents. Receipt of the certificates, according to the VCA, meant that AJ Lawyers could not be fixed with knowledge of Mr Stubbings' *actual* personal and financial circumstances and dispensed with any need for further inquiries as to how Mr Stubbings intended to, or whether he could in fact, service the loans.

Though the function and value of solicitors' certificates has long been debated,²⁴⁹ it has often been the case that the certified provision of independent advice has provided an answer to a claim.²⁵⁰ Some common law courts have historically placed much weight upon the existence of solicitors' certificates and viewed them as obviating the need for further enquiry on the part of the reliant party.²⁵¹ The VCA's decision appeared to consolidate this view. In the appeal case, the High Court refused to blindly accept that the presence of signed solicitors' certificates from Mr Stubbings undermined the argument that he had been unconscientiously exploited through his loan transaction with AJ Lawyers. As discussed in Part IV, the court felt that the certificates in that case were 'artificial' and 'mere window dressing'.²⁵² They did not reliably indicate that Mr Stubbings fully appreciated the nature and consequences of his loan arrangement.²⁵³

Obviously, the effect of a given certificate will depend on the facts of the specific case. The same certificate may be sufficient, in one set of circumstances, to prove that the plaintiff was appropriately advised, yet insufficient in another. Regardless, the value of certificates from a liability avoidance perspective is considerable²⁵⁴ and they retain crucial significance to dispel allegations of unconscionable exploitation in the wake of *Stubbings (HCA)*. What *Stubbings (HCA)* did, however, was shift emphasis from the mere *existence* of such certificates to their

²⁴⁸ *Stubbings (VCA)* (n 91) [132]-[133].

²⁴⁹ See, eg, Mark Sneddon, 'Lenders and Independent Solicitors' Certificates for Guarantors and Borrowers: Risk Minimisation or Loss Sharing?' (1996) 24(1) *Australian Business Law Review* 5; Charles YC Chew, 'Another Look at the Giving of Independent Advice to Sureties: Some Uncertainties and Evolving Concerns' (2006) 18(1) *Bond Law Review* 45.

²⁵⁰ See, eg, Felicity Maher and Stephen Puttick, 'Reconsidering Independent Advice: A Framework for Analysing Two-Party and Three-Party Cases' (2020) 43(1) *University of New South Wales Law Journal* 218, 218.

²⁵¹ See, eg, *Bank of Baroda v Rayaref* [1995] 2 FLR 376, 386; *GE Custodians v Bartle* [2011] 2 NZLR 31, 53.

²⁵² *Stubbings (HCA)* (n 1) 420 [48]-[49] (Kiefel CJ, Keane and Gleeson JJ).

²⁵³ Ibid 420 [48]-[49] (Kiefel CJ, Keane and Gleeson JJ), 425 [74], 429 [93] (Gordon J); 447-48 [171]-[173] (Steward J).

²⁵⁴ Maher and Puttick (n 250). But see Mark Sneddon, 'Unfair Conduct in Taking Guarantees and the Role of Independent Advice' (1990) 13(2) *University of New South Wales Law Journal* 302, where the author rightly caveats that solicitors' certificates will not always be exonerative in unconscionability cases and that their precise content and effect will be determinative.

precise content. It is arguable the High Court has never before been so emphatic in this respect. In the wake of *Stubbings (HCA)*, one can assume that far greater scrutiny will be levelled at solicitors' certificates in those cases where they feature and where unconscionability is alleged against the lender or an intermediary. This is a good thing; it reinforces the obligations of lenders and intermediaries to act prudently in brokering commercial transactions and ensures they do not hide behind the shield of token solicitors' certificates.

VI Conclusion

The doctrine of unconscionability was equity's answer to the rigidity of common law and the people's thirst for justice in the face of an arbitrary legal system. When it was finally enshrined (in numerous 'varieties') within the Australian consumer law framework in 1986, it was praised as a valuable inclusion among the other statutory protections designed to protect consumers and foster an efficient, productive, and trustworthy market economy. The statutory doctrine in its various guises has since been applied to an exceptionally broad variety of commercial situations and behaviours. *Stubbings (HCA)* was the most recent effort by the High Court of Australia in this regard. After decades of interpretation and application by appellate courts across the nation, including the High Court itself, several questions about the doctrine have arisen and continued to linger. Many hoped that the High Court would avail itself of the opportunity to clarify some of the doctrine's uncertainties in *Stubbings (HCA)*, but instead the uncertainties were perpetuated. This article has drawn together insights from the leading case law to attempt to answer the lingering questions plaguing the unconscionability doctrine.

The line between *ACL* ss 20 and 21 (*ASIC Act* ss 12CA and 12CB) has been blurred thanks to the High Court's decisions in *Kobelt* and *Stubbings (HCA)*. The Court in the latter case appears to have endorsed its own approach in *Kobelt* and that of the VCA in *Stubbings (VCA)* and suggested a closer relationship between the equitable principles underpinning the broader unconscionability doctrine and the doctrine's statutory varieties. *Stubbings (HCA)* has also left the door ajar (ever so slightly) for moral obloquy to return. It remained silent on the status of moral obloquy after the VCA had described it as having been 'rebadged'. It also did not address Keane J's approval of the concept in *Kobelt*. If it has been 'rebadged' and not conclusively abandoned, there remains the slimmest chance of its revival. *Stubbings (HCA)* also failed to affirmatively clarify whether one must establish that a defendant had a 'predatory state of mind' to support a claim of unconscionability. The High Court's silence indirectly affirms what appears to be the current position from other recent cases, which is that such proof is not

necessary. Finally, *Stubbings (HCA)* only *inferentially* supports the view that both actual and constructive knowledge suffice for the purposes of the equitable unconscionability doctrine.

Thankfully, other lingering questions appear less open following *Stubbings (HCA)*. For example, the case reiterates the capacity for a single affected consumer's experience to sufficiently establish an unconscionable 'system of conduct'. It also suggests, quite emphatically, that the mere existence of certificates of independent legal and financial advice is not sufficient to stave off allegations of unconscionable conduct; what is critical is the *content* of those certificates. The High Court's decision in *Stubbings (HCA)* has therefore shifted emphasis from form to substance, which is a favourable development. Regardless, the task remains with the High Court to offer concrete answers to all these questions in the next available and appropriate case. If it fails to do so, then the unconscionability doctrine will become illusory and unworkable, and the prolonged efforts to introduce it into the consumer law framework will have been in vain. This would be the most unconscionable outcome of all.