



## **EQUITY AND GOOD CONSCIENCE: THE JUDGE AS MORAL ARBITER AND THE REGULATION OF MODERN COMMERCE**

**Victoria Law Foundation Oration given by Justice Chris Maxwell, President,  
Victorian Court of Appeal**

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“Let your conscience be your guide.” If you are familiar with that phrase, you probably assume — as I did — that it comes from the Bible or from a moral philosopher like Aristotle. In fact, it was said by Jiminy Cricket to Pinocchio in the 1940 Disney film of the same name.

Nearly 80 years later, it is unusual to hear references to conscience as a guide, though most of us have a working sense of what it means for a person to have “a guilty conscience”.

It may seem surprising, therefore, that a rule expressly founded on conscience is at the heart of Australian consumer protection law. I am referring to the prohibition against unconscionable conduct, that is, conduct which is against conscience. My purpose is to investigate how this concept is understood in law, and what its implications are for judges, and lawyers, and those engaged in business.

Unconscionable conduct has a very long pedigree. For centuries, courts of equity have intervened to set aside contracts and other dealings because of unconscionable conduct, that is—

“conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience.”<sup>1</sup>

Conduct was deemed unconscionable if it was contrary to the dictates of good conscience. As Justice Keane noted in his 2009 lecture on “The conscience of equity”, by the 15<sup>th</sup> century the Chancellors were prepared “to satisfy the demands of conscience even though their action involved a dispensation with the rigid rules of law.”<sup>2</sup>

It was, of course, equity’s conception of unconscionability which gave Mr and Mrs Amadio their famous victory in the High Court against the Commercial Bank of Australia in 1983. What was said by Justices Mason and Deane in that case is still

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<sup>1</sup> *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 461.

<sup>2</sup> P A Keane, “The Conscience of Equity” (2010) 84 *Australian Law Journal* 92, 95.

regarded as the definitive statement of the criteria for equitable intervention.

Crucially for present purposes, that same equitable conception has been given a very modern expression in the national laws which regulate business dealings with consumers (and with each other). Thus, both the ASIC Act and the Australian Consumer Law contain express prohibitions against engaging in conduct which ‘is unconscionable within the meaning of the unwritten law’.<sup>3</sup> That has been interpreted to mean unconscionable according to equitable doctrines.<sup>4</sup>

Confusingly, there is in each case a companion provision prohibiting conduct “that is, in all the circumstances, unconscionable.”<sup>5</sup> In a deliberate effort to give these latter provisions a broader reach, Parliament has expressly declared that these prohibitions are *not* limited by the unwritten law on unconscionable conduct.<sup>6</sup>

My concern this evening is not to lead you through the case law on unconscionable conduct. Instead, I want to highlight the implications of our continued use, in the second decade of the 21<sup>st</sup> Century, of this powerful but elusive concept of good conscience.

That we set so much store by a quintessentially moral concept like unconscionability raises, I want to suggest, some unexplored questions about the role of the judge as moral arbiter, and moral reasoner, and about the tension between the moral aspirations of the law and the profit-driven dynamics of the market economy.

We should start by acknowledging that “unconscionable” is a word hardly ever encountered in ordinary usage. See if you can remember an occasion on which you have described — or heard someone else describe — a person’s conduct as “unconscionable”.

It is surely remarkable that the Commonwealth Parliament has, for the past three decades, relied on a term likely to be both unfamiliar and unintelligible to those whose conduct it is intended to regulate. And “unconscionable conduct” was retained despite the 1997 recommendation of a parliamentary committee that the term “unfair conduct” should be used instead.

As I have said, unconscionability is an explicitly moral concept, grounded in the notion of “good conscience”. The embedding of a moral concept at the centre of the substantive law on business regulation and consumer protection necessarily requires judges to make moral judgments.

That seems to me to raise questions about how those judgments are made, as follows:

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<sup>3</sup> *Australian Securities and Investments Commission Act 2001* s 12CA (“ASIC Act”); *Competition and Consumer Act 2010* (Cth) sch 2, s 20 (“ACL”).

<sup>4</sup> *ACCC v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 70–1 [37]–[38].

<sup>5</sup> *ASIC Act* s 12CB; *ACL* s 21. The *ASIC Act* prohibits unconscionable conduct “in connection with the supply or possible supply of financial services” and the Australian Consumer Law prohibits unconscionable conduct in connection with the supply of any goods or services other than financial services.

<sup>6</sup> *ASIC Act* s 12CB(4)(a); *ACL* s 21(4)(a).

1. Is it appropriate for a judge to be the moral arbiter of business dealings? (This is an issue of legitimacy);
2. Does the judge have the requisite skill to be a moral reasoner? (This is an issue of capability);
3. How can such an imprecise standard as “against good conscience” be reconciled with our commitment to the rule of law, which values certainty and predictability in the law in order for citizens to be able to arrange their affairs knowing in advance what is and what is not prohibited? (This is an issue of legal certainty.)

There are important related questions about whether these laws can make a positive difference, in advance, to the way business is conducted. They are:

1. Is it realistic to expect the moral aspirations of equity, of the law of good conscience, to be fulfilled, that is, to have a positive influence on behaviour in the market place, by creating moral self-awareness?
2. If we as a community remain committed to the maintenance of these moral standards, what more can the legal system do to advance them?

Before I address these questions, I wish to emphasise that both my initial interest in this subject and my more recent thinking about these questions have been stimulated and enriched by the work of four academic writers, namely:

- Professor Paul Finn (later a Justice of the Federal Court), whose 1989 article, “Commerce, The Common Law and Morality”, first set me thinking;<sup>7</sup>
- Professor Matthew Harding of Melbourne Law School, who has written extensively on the law of equity, and on equity and the rule of law;
- Dr Irit Samet, Reader in Private Law at King’s College London, whose 2018 book entitled “Equity – Conscience Goes To Market”<sup>8</sup> helped me to understand equity’s moral aspirations; and
- Dr Sinead Agnew, a lecturer in property law at University College London, whose 2018 article, “The Meaning and Significance of Conscience in Private Law”<sup>9</sup> illuminated the multiple ways in which the concept of conscience is brought to bear in private law doctrines.

I mention these academics not to cloak what I am about to say with any particular intellectual respectability but rather to underline a point which I find myself repeating quite often these days, namely, that the work of practising lawyers and judges is

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<sup>7</sup> Paul Finn, “Commerce, The Common Law and Morality” (1989) 17 *Melbourne University Law Review* 87.

<sup>8</sup> Irit Samet, *Equity — Conscience Goes to Market* (Oxford, 2018).

<sup>9</sup> Sinead Agnew, “The Meaning and Significance of Conscience in Private Law” (2018) 77 *Cambridge Law Journal* 479.

immensely enhanced by the work of legal academics.

The work of the Victorian Court of Appeal is, as you may know, dominated by criminal appeals. Fifty per cent of our work concerns appeals against sentence. Questions of private law doctrine arise, at best, intermittently. We had a special treat recently, with an appeal about the tort of conversion.<sup>10</sup> And there has been the merest sprinkling of unconscionability appeals in my 14 years at the Court of Appeal.

I find that when I am called on to adjudicate a particular case, it is of the greatest benefit to have the assistance of academics. Their systematic analysis of a body of law elucidates the governing principles, identifies trends in the development of the law and provides the essential context within which to approach the individual case. We need to ensure that, as judges, we are open to receiving that assistance and that, as practitioners, we are alert to draw relevant academic materials to the court's attention.

Let me begin with what I have called the aspirations of equity. Dr Samet argues that the function of equity is to ensure, so far as possible, that a person's legal liability should conform with "the pattern of moral duty in the circumstances to which the rules apply". In her view:

"The terminology of conscience also has an important *communicative* function in that it alerts people to the fact that Equity takes serious consideration of the interpersonal morality aspect of their relationship with other players in the market."<sup>11</sup>

More strongly still, she argues that:

"The use of a familiar term like conscience effectively communicates to the citizenry that they are expected to make full use of their capability as moral reasoners when they head off to market."<sup>12</sup>

And again:

"When it employs a term like 'conscience' which is universally associated with morally oriented deliberation as a foundation for legal liability, Equity builds on the expressive power of law to send a strong message: 'the law expects you to rise above narrow considerations of self-interest when dealing with other market participants'".<sup>13</sup>

Sinead Agnew argues that:

"The language of conscience has a valuable role to play in encouraging moral agency and contributing to the authority of private law."<sup>14</sup>

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<sup>10</sup> *Sell Your Gold Pty Ltd v Australian Diamond Trading Corporation Pty Ltd* [2018] VSCA 355.

<sup>11</sup> Samet, above n 8, 43.

<sup>12</sup> *Ibid* 62.

<sup>13</sup> *Ibid* 63.

<sup>14</sup> Agnew, above n 9, 480.

And further:

“The language of conscience suggests that if the defendant has knowledge of the relevant facts, this activates her capacity for moral reasoning. It is only through the process of moral reasoning — namely through the operation of her conscience — that she can work out what she ought, morally, to do in the circumstances.”<sup>15</sup>

Matthew Harding refers to this as the “expressive function” of law. In his view:

“Equitable doctrine may guide conduct by creating conditions in which citizens are encouraged and expected to engage in moral deliberation and take responsibility for their own actions in accordance with law.”<sup>16</sup>

As I indicated, the issue to which I will return is whether this is a realistic aspiration for the law. The shocking reports we have all read about large-scale and widespread unethical behaviour in the financial services industry would tend to suggest that not very much moral reasoning has been going on there. The dictates of good conscience do not appear to have held much sway when decisions have been made by service providers about what sorts of transactions to embark on, which sorts of customers to engage with or what marketing and selling techniques are to be adopted.

Is that a failing in the law, either as enacted or as applied? Even if it is not, could the law — meaning, in particular, judges and practitioners — do more? That is obviously an important question. Are lawyers sufficiently emphasising to their commercial clients the moral content of the laws with which they are required to comply? Are the courts applying these provisions as the legislature intended?

As the Royal Commission demonstrated, the question of whether, and when, regulators take legal action against market players is critical to the maintenance of proper standards of commercial conduct. Inevitably, for them, the question is: how will the judge respond to a claim of unconscionable conduct? (I note that ASIC has just commenced proceedings against ANZ in the Federal Court, alleging that the bank engaged in unconscionable conduct by charging certain fees when it knew that it was unlawful to do so or knew that there was a risk of its being unlawful.)

Let me pause to say a little more about the legal framework. In *Amadio*, as many of you will recall, the High Court held that the bank could not enforce a mortgage which Mr and Mrs Amadio had given in order to support an overdraft increase for their son’s failing business. It was held to be unenforceable because the bank’s conduct in the transaction was judged to have been unconscionable, since:

- the Amadios were in a situation of “special disadvantage”, which seriously affected their ability to make a judgment as to their own best interests;
- the bank knew, or ought to have known, of that special disadvantage; and had

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<sup>15</sup> Ibid 487.

<sup>16</sup> Matthew Harding, “Equity and the Rule of Law” (2016) 132 *Law Quarterly Review* 278, 295.

taken unfair advantage of it.

(It should be mentioned that the Court was split 3–2 on this question. I will return to the issue of uncertainty, and divergent judicial opinion, later).

In the more recent case of *Kakavas*, the Full High Court clarified the nature of the equitable test set out in *Amadio*:

“Essential to the principle stated by both Mason J and Deane J in *Amadio* is that there should be an *unconscientious taking advantage* by one party of some *disabling condition or circumstance* that *seriously affects the ability* of the other party to make a rational judgment as to *his or her own best interests*. ... [T]he abiding rationale of the principle is to ensure that it is *fair, just and reasonable* for the stronger party to retain the benefit of the impugned transaction.”<sup>17</sup>

The inability of a party to make a judgment as to their best interests is not, of itself, sufficient to set aside a transaction. It must also be the case that the stronger party had knowledge, or at least exhibited wilful ignorance, of the weaker party’s disability. In *Kakavas*, the High Court stated:

“Equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a predatory state of mind. Heedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose.”<sup>18</sup>

The latest word on statutory unconscionability is from the High Court’s decision in June this year, in *ASIC v Kobelt*.<sup>19</sup> In that case, ASIC brought proceedings alleging that Mr Kobelt had engaged in unconscionable conduct in the provision of credit to Indigenous Australians living in remote communities. By the narrowest of margins (4–3), the High Court held that his conduct was not “in all the circumstances, unconscionable”.

The Chief Justice and Justice Bell affirmed that the statutory standard prohibited “conduct that answers the description of being against conscience”.<sup>20</sup> It established “a statutory norm of conscience.”<sup>21</sup> Its application in that case required a determination of “whether, objectively, the supplier’s conduct involves such a departure from accepted community standards in the supply of the financial service as to warrant the characterisation that it is unconscionable.”<sup>22</sup> Their Honours concluded that the conduct was not unconscionable, as Mr Kobelt did not take “unconscientious advantage of the vulnerability” of his

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<sup>17</sup> *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 425 [118] (emphasis added).

<sup>18</sup> *Ibid* 439 [161].

<sup>19</sup> (2019) 368 ALR 1 (“*Kobelt*”).

<sup>20</sup> *Ibid* 15 [49].

<sup>21</sup> *Ibid* 16 [60].

<sup>22</sup> *Ibid* 18 [59].

customers.<sup>23</sup>

Keane J came to the same conclusion.<sup>24</sup> In explaining the test, his Honour said:

“The use of the word ‘unconscionable’ in s 12CB — rather than terms such as ‘unjust’, ‘unfair’ or ‘unreasonable’ which are familiar in consumer protection legislation — reflects a deliberate legislative choice to proscribe a particular type of conduct. In its ordinary meaning, the term ‘unconscionable’ requires an element of exploitation. The term imports the ‘high level of moral obloquy’ associated with the victimisation of the vulnerable.”<sup>25</sup>

Justice Gageler was the other member of the majority. He described the phrase “moral obloquy” as “arcane terminology” — a view with which I respectfully agree — and said, instead, that the conduct prohibited by the section was:

“conduct that is so far outside *societal norms of acceptable commercial behaviour* as to warrant condemnation as *conduct that is offensive to conscience*.”<sup>26</sup>

His Honour went on:

“The judgment required of a court exercising jurisdiction in a matter arising under s 12CB is a heavy one. For a court to pronounce conduct unconscionable is for the court to denounce that conduct as *offensive to a conscience informed by a sense of what is right and proper according to values which can be recognised by the court to prevail within contemporary Australian society*.”<sup>27</sup>

Nettle and Gordon JJ, who considered that the conduct was unconscionable, said:

“In any given case, a conclusion as to what is, or is not, against conscience may be contestable: so much is inevitable given that the standard is based on a broad expression of values and norms. However, efforts to address the ‘indeterminacy’ of the doctrine by way of further distillations, categorisations or definitions may risk ‘disappointment, ... a sense of futility, and ... the likelihood of error’. This is because evaluating whether conduct is unconscionable ‘is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules’.”<sup>28</sup>

Having said something about the moral underpinnings of the notion of unconscionability,

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<sup>23</sup> Ibid 6–7 [9], 21 [75]–[76], 22 [79].

<sup>24</sup> Ibid 30 [115]–[116].

<sup>25</sup> Ibid 31 [118].

<sup>26</sup> Ibid 25 [92] (emphasis added).

<sup>27</sup> Ibid 25 [93] (emphasis added).

<sup>28</sup> Ibid 39 [153].

let me turn to the questions about the function of the judge. As we have seen in the debate about the judicial role in adjudicating questions of human rights, there is a live question in our community about the legitimacy of a judge sitting in moral judgment on the conduct of others.

That question may be thought to be accentuated when what is in issue is not interpersonal morality, which might be thought to fall within the judge's own experience, but dealings in the market place, with which most judges have limited familiarity.

My contention is that, in fact, judges are constantly called on to perform the role of moral arbiter. I argue, moreover, that the community depends (whether consciously or unconsciously) on judges doing precisely that.

An obvious example is the judgment made every day by sentencing judges, and by the Court of Appeal when a sentence is challenged, on the "moral culpability" of an offender. We regularly debate with counsel the extent of "moral blameworthiness" which should properly attach to the offending conduct. That judgment has a direct bearing on the magnitude of the penalty.

In the same way, all sorts of legal rules depend for their application on the judge's assessment of what was "reasonable" in the circumstances or of how "the reasonable person" might have behaved when confronted by a state of affairs. Judgments of that kind are often infused with moral considerations. We need only think of the judgments made in the field of negligence about duty of care and breach.<sup>29</sup>

The late-lamented legal philosopher, John Gardner, described "the zone that the reasonable person occupies" as legally deregulated. "One could call it a zone of legally licensed adjudicative discretion."<sup>30</sup> The judge is here applying non-legal standards.

Public confidence in the court system would, I think, be enhanced if this moral dimension of judicial work were better understood. There is, as we are all aware, an abiding perception of the legal system as constrained by an overly rigid set of rules and administered by judicial officers who are out of touch. Those perceptions are more readily dispelled when more is known about what the job actually requires.

The example I always give is of Justice Paul Coghlan's sentencing of Arthur Freeman, who murdered his daughter by throwing her from the West Gate Bridge. It was a crime which had deeply shocked the Victorian community. Justice Coghlan's sentence exemplified moral reasoning, delivered calmly, dispassionately and seriously. Its public broadcast on morning radio served to reassure the community by demonstrating that the responsibility for that kind of moral judgment was in safe hands.

What then of capability? Why would we think that judges have the necessary equipment — intellectual or philosophical — to enable them to be moral reasoners? For that is

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<sup>29</sup> See, eg, *Shirt v Wyong Shire Council* (1980) 146 CLR 40, 47–8; *Tame v New South Wales* (2002) 211 CLR 317, 379 [185].

<sup>30</sup> See John Gardner, "The Many Faces of the Reasonable Person" <[https://www.law.nyu.edu/sites/default/files/upload\\_documents/The%20Many%20Faces%20of%20the%20Reasonable%20Person.pdf](https://www.law.nyu.edu/sites/default/files/upload_documents/The%20Many%20Faces%20of%20the%20Reasonable%20Person.pdf)> 34.



certainly what is required. In *Pitt v Holt*, the question was whether an innocent mistake was sufficient to justify the equitable rescission of a voluntary disposition. Lord Walker said that it was the task of the judge to “consult the demands of conscience ... with an intense focus on the facts of the particular case” and “make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected”.

There is, I think, a respectable view that judges have — or at least can develop — the requisite capability. Lord Goff, in a 1989 speech, described the judge’s function as reasoning upwards from the facts of the case and:

“searching for principles which accord with a professionally developed sense of justice and an intuitive sense of a just result in the case before the Court.”<sup>31</sup>

The Australian legal philosopher John Tasioulas argues that:

“In modern democratic societies, considerations such as the relative political insularity of judges and the piecemeal and discursive nature of their decisions mark them out as well suited to perform certain vital social tasks through ethical reasoning.”<sup>32</sup>

And Dr Samet argues that:

“Various attributes of the judiciary have a positive impact on the chances that its members get the answers to moral questions right. First, the procedure and etiquette of adjudication create a working environment in which risk factors, such as bias, are constantly controlled for ... Second, on the bench, judges become habituated to listening to both sides before making up their mind, gain proficiency at sifting truth from falsehood, and get accustomed to exercising a detached judgment. These executive virtues and skills are necessary in a good judge, but they also make it easier for them to excel as moral reasoners. The court room is thus a highly nurturing environment for straight thinking over problems in morality.”<sup>33</sup>

I turn to my third question, concerning the uncertainty said to follow from the use of such an imprecise concept as unconscionability. I mentioned earlier that *Amadio* was a 3–2 decision. So was the subsequent High Court decision on unconscionability in *Bridgewater*. I have already mentioned the 4–3 split in *Kobelt*. The different formulations in the judgments in that case demonstrate how much room there is for minds to differ on whether particular conduct is unconscionable.

In the field of statutory interpretation, I have — both in recent decisions<sup>34</sup> and in an article

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<sup>31</sup> Lord Goff, “The Future of the Law of Restitution” (1989) 12 *Sydney Law Review* 1, 3.

<sup>32</sup> John Tasioulas, “Legal Relevance of Ethical Objectivity” (2002) 47 *American Journal of Jurisprudence* 211, 233.

<sup>33</sup> Samet, above n 8, 206-7.

<sup>34</sup> *Ian Street Developer v Arrow International* [2018] VSCA 294; *Waterfront Place Pty Ltd v*

just published<sup>35</sup> — sought to emphasise the rule of law virtues of clarity, certainty and predictability. Those purposes are best served by giving primacy to the statutory text, that being the approach clearly prescribed by the High Court. In my view, neither citizens nor public officials should have to look beyond the statutory language to discover what their rights, powers and obligations are.

Why, then, should we accept an undefined — perhaps indefinable — concept like unconscionability? Doesn't a law which uses that language conflict with the value of certainty in commercial life?<sup>36</sup> Wasn't Professor Birks right when he said: "... 'unconscionable' is so unspecific that it simply conceals a private and intuitive evaluation. ... The law must be so stated as to facilitate prediction and advice".<sup>37</sup>

Here, I think, other values must prevail over the demand for certainty. Reading what Harding, Samet and Agnew have written has entirely persuaded me that it is a *virtue* of the equitable (and statutory) concept of conscience that it is *not* rule-like, that it *does* establish "open-ended standards" and that it *does* prevent unfair advantage being taken of the rigidity of rules.<sup>38</sup>

Matthew Harding puts the point well:

"... Indeterminacy in equity may promote moral purposes of other sorts'. For example, by formulating doctrine according to the vague concept of conscience, equity may demand of citizens that they sometimes work out for themselves what conscience demands as they act and plan."<sup>39</sup>

On this view, uncertainty in the application of the law should advance the high aspirations of equity — to promote and encourage moral awareness and moral agency in the market place. That is, the risk of conduct being found to be unconscionable, and uncertainty about where the limits might be drawn if the matter went to Court, should encourage a precautionary approach.

The bank officer might adopt a rule of thumb along the following lines: "If I have a concern that this might be unethical, or unfair, or that I might be taking advantage of a vulnerable person, I shouldn't do it". It is in this sense that Justice Keane in *Kobelt* spoke of unconscionability as "a statutory norm of conduct".<sup>40</sup>

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*Minister for Planning* [2019] VSCA 156.

<sup>35</sup> Chris Maxwell, "The Quest for Certainty and the Limits of the Judicial Role" in Jeffrey Barnes (ed), *The Coherence of Statutory Interpretation* (Federation Press, 2019).

<sup>36</sup> See M Harding, "Equity and the Value of Certainty in Commercial Life" in P Devonshire and R Havelock (eds) *The Impact of Equity and Restitution in Commerce* (Hart 2019) ch 7.

<sup>37</sup> Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) *Western Australian Law Review* 1, 17, 97.

<sup>38</sup> Samet, above n 8, 36, 42, Agnew, above n 9, 26.

<sup>39</sup> Harding, above n 16, 295.

<sup>40</sup> (2019) 368 ALR 1, 32 [122].

As Professor Horrigan noted,<sup>41</sup> for many years before the Royal Commission was announced the Banking Code of Practice contained an explicit promise of ethical conduct:

“We will act fairly and reasonably towards *you* in a consistent and ethical manner.

In doing so *we* will consider *your* conduct, *our* conduct and the contract between us.”<sup>42</sup>

On this question of certainty, you will be interested to hear that, in September 1992, the Victorian Law Reform Commission published a discussion paper entitled “An Australian Contract Code”. The proposed Code comprised 27 articles, and its touchstone was the requirements of conscience. For example:

**“Article 10**

The obligations of the parties are—

- to perform their promises exactly
- to do everything which conscience requires to ensure that each gets the benefit intended by their promises.

**Article 12**

A party may be excused from performance of a contract to the extent that it would be unconscionable for the other to insist on it.”

The “overriding principle” was proposed to be the following:

**“Article 27**

A person may not assert a right or deny an obligation to the extent that it would be unconscionable to do so.”<sup>43</sup>

I turn to deal with what appears, on the basis of what we have all been reading over the last eighteen months, to be the commercial reality. It would not be an overstatement to say that equity’s moral aspirations appear to remain largely unfulfilled. The pursuit of self-interest has seemly become so intense as to obscure “regard for others” and “respect for the vulnerable”.

This is not a new concern. As long ago as 1998, Lord Millett wrote in the *Law Quarterly*

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<sup>41</sup> Bryan Horrigan, “Unconscionability Breaks New Ground -- Avoiding and Litigating Unfair Client Conduct After the ACCC Test Cases and Financial Services Reforms” (2002) 7 *Deakin Law Review* 73, 85.

<sup>42</sup> Australian Bankers’ Association Inc, *Code of Banking Practice and Code Compliance Monitoring Committee Mandate* (2003) 10 <[https://www.ausbanking.org.au/wp-content/uploads/2019/04/2013\\_ABA\\_CODE.pdf](https://www.ausbanking.org.au/wp-content/uploads/2019/04/2013_ABA_CODE.pdf)>.

<sup>43</sup> Law Reform Commission of Victoria, *An Australian Contract Code* (Discussion Paper No 27, September 1992) 15–17.

*Review:*

“There has never been a greater need to impose on those who engage in commerce the high standards of conduct which equity demands. The common law insists on honesty, diligence, and the due performance of contractual obligations. But equity insists on nobler and subtler qualities: loyalty, fidelity, integrity, respect for confidentiality, and the disinterested discharge of obligations of trust and confidence. It exacts higher standards than those of the market place, where the end justifies the means and the old virtues of loyalty, fidelity and responsibility are admired less than the idols of ‘success, self-interest, wealth, winning and not getting caught’”.

We have all been exposed to the reports which emerged from the Royal Commission into Banking, about predatory behaviour, about the pressuring of customers to take loans, or buy insurance, in circumstances where they were not likely to be able to make a proper judgment as to their best interests. Commissioner Hayne put it bluntly in his interim report:

“Too often, the answer seems to be greed: the pursuit of short-term profit at the expense of basic standards of honesty.”

More recently, in July, we saw the report by ASIC on consumer credit insurance (“CCI”), entitled “Poor Value Products and Harmful Sales Practices”. This is insurance which provides cover for consumers if they are unable to meet their minimum loan repayments due to unemployment, sickness or injury. It is usually sold by lenders to consumers with a credit card, personal loan or home loan.

The section of the report headed “CCI sales practices cause consumer harm” lists the following types of conduct:

- “● CCI was sold to consumers who were *ineligible to claim or unlikely to benefit or need cover*.
- Sales staff used *pressure selling* and other *unfair sales practices*.
- Consumers were given *non-compliant personal advice* to buy unsuitable policies.
- Consumers were charged CCI premiums with *no current loan*.
- Many lenders did not have consumer-focused processes to help *consumers in hardship* who had a CCI policy to lodge a claim.”<sup>44</sup>

According to the report, ASIC is requiring lenders — including all of the major banks — to undertake “large scale remediations with over \$100,000,000 expected to be paid to 300,000 plus customers”. I note that this was the very topic on which, according to the evidence at the Royal Commission, the — then CEO of Commonwealth Bank (Ian Narev)

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<sup>44</sup> Emphasis in original.

told the now — CEO (Matt Comyn) that he should “temper his sense of justice”.<sup>45</sup>

There is an obvious tension between the drive for profit and competitive advantage which is at the heart of the market economy, and conscience-based regulation which calls for ethical self-awareness, restraint and sensitivity to the customer’s potential vulnerability or disadvantage. Justice Keane made the point in his 2009 lecture, as follows:

“In a market economy rivalry between participants is an essential and defining feature: rivalry in which each participant seeks to maximise its profit and market share at the expense of all other participants in that market.

In our law of contract, the right of self-interested action, even when it operates unreasonably or unfairly at the expense of others, is embodied in the ‘traditional common law approach’ conveyed by the maxim *caveat emptor*.”<sup>46</sup>

And again:

“Equity never set out to bring to heel what John Maynard Keane described as ‘the uncontrollable and disobedient psychology of the business world’.”<sup>47</sup>

In *Kobelt*, his Honour said:

“... it must be borne in mind that the purpose of s 12CB of the ASIC Act is to regulate commerce. The pursuit by those engaged in commerce of their own advantage is an omnipresent feature of legitimate commerce. *A trader does not, generally speaking, stand in a fiduciary relationship with his or her customers, and good conscience does not require a trader to act in the interests of others. To say that the respondent was pursuing his own commercial interests with a view to profit is to state the obvious, but also to say very little as to whether he engaged in unconscionable conduct.* In particular, it does not assist in discerning whether the conduct in question exhibits those features which distinguish unconscionable conduct from the legitimate pursuit of self-interest.”<sup>48</sup>

At the same time, in making decisions about whether to acquire financial products or services, most consumers are — inescapably — at a disadvantage. First, for most consumers decisions of this kind only arise relatively infrequently. Unlike the traders they are dealing with, consumers are not in the business of lending or investing or taking out insurance policies. That is the disadvantage of unfamiliarity.

Then there is the disadvantage of complexity, as anyone who has read a “product disclosure statement” or the terms and conditions of an insurance policy would understand. These are products and services which are not readily comprehensible to the

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<sup>45</sup> Adele Ferguson, *Banking Bad* (ABC Books, 2019) 298–9.

<sup>46</sup> Keane, above n 2, 92, 98.

<sup>47</sup> *Ibid* 111.

<sup>48</sup> (2019) 368 ALR 1, 30–1 [117].

lay consumer. Buying a car can be hazardous enough but, for most of us, we have a fair idea of what it is we are buying. Weighing up the risks and rewards of a financial product is an altogether different exercise.

### **The future**

Against that background, it is important to note what Commissioner Hayne said about the way forward. He made some very important statements about the culture of a financial services entity, as follows:

“The culture of an entity can be described as the ‘shared values and norms that shape behaviours and mindsets’ within the entity. It has been described as ‘what people do when no-one is watching’ and that description captures what might be called the essentially ‘internalised’ or ‘instinctive’ application of shared values and norms. The shared values and norms can be seen as both reflecting and constituting the culture of an entity. It is evident that culture can drive or discourage misconduct.

...

There is no single ‘best practice’ for creating or maintaining a desirable culture, but one necessary aspect of a desirable culture is adherence to the basic norms of behaviour that I have described elsewhere in this Report:

- obey the law;
- do not mislead or deceive;
- *act fairly*;
- provide services that are fit for purpose;
- deliver services with reasonable care and skill;
- when acting for another, act in the best interests of that other.”<sup>49</sup>

I refer also to what was said last week by Mr Wayne Byres, the chairman of APRA (The Australian Prudential and Regulatory Authority). The report in the Financial Review carried the headline, “APRA wants bankers to behave more like lawyers”, so I thought I should track down the speech! What he actually said was:

“A stronger foundation of professionalism, more akin to that for lawyers, accountants and actuaries, would no doubt help.”

More generally, he said:

“The buck may stop with boards in a legal sense, and it’s essential they set the right tone, policies and incentives, but as individuals we are faced with a myriad of decisions every day in which we are able to exercise our

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<sup>49</sup> Emphasis added.

discretion. The fact that misconduct or unethical behaviour may be possible, or even inadvertently incentivised, is not a licence to take advantage of it. Nor even to turn a blind eye to it.

...

There is nothing to fear, and much to gain, from having a workforce that serves all interests in good faith, completes hard but with honour, exercises ethical restraint in their choices, speaks out against wrongdoing, and takes accountability for their own actions.”

In that speech, Mr Byres expressed support for the Banking and Finance Oath. The Oath has been formulated and is being promoted by an independent organisation whose stated purpose is

“to improve our society by *raising the moral and ethical standards* of the Banking and Finance industry through the implementation of the BFO.”<sup>50</sup>

The Oath is in these terms:

**“The Oath**

Trust is the foundation of my profession.  
 I will serve all interests in good faith.  
 I will compete with honour.  
*I will pursue my ends with ethical restraint.*  
 I will help create a sustainable future.  
 I will help create a more just society.  
 I will speak out against wrongdoing and support others who do the same.  
 I will accept responsibility for my actions.  
 In these and all other matters;  
 My word is my bond.”<sup>51</sup>

Again very recently, I noticed a report in the Financial Review headed: “Hayne prompts rethink on ethics in MBA curriculum”. The story began:

“One year after rocking the banking industry, the Hayne commission has inspired a quiet revolution in the breeding ground of Australia’s next generation of corporate leaders: business schools.

Australian Graduate School of Management (AGSM) at UNSW has accelerated plans and introduced a mandatory course on ‘law, regulation and ethics’ for MBA students.”

The paper also reported that, in March this year, Dr Rosemary Sainty of the UTS Business School in Sydney convened a deliberative forum to consider the role of business schools in response to the Royal Commission Report. Dr Sainty subsequently reported that the

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<sup>50</sup> Emphasis added.

<sup>51</sup> Emphasis added.

themes which emerged included:

“the responsibility of business schools to cultivate critical reasoning and individual moral accountability in our students, and to challenge taken for granted amoral assumptions in traditional business school curriculum and practices. These include an overemphasis on cost/benefit analysis and the marketization of business school education itself.”

The question for this audience, I think, is whether we as judges and practitioners need to do more or do better. Should we be rethinking how we teach commercial law, or how we practise it, or how we adjudicate it?

In his dissenting judgment in *Kobelt*, Edelman J set out the legislative history of the unconscionability provisions. In his Honour’s view:

“This legislative history clearly demonstrates that although Parliament’s proscriptions against unconscionable conduct initially built upon the equitable foundations of that concept, over the last two decades Parliament has repeatedly amended the statutory proscription against unconscionable conduct *in continued efforts to require courts to take a less restrictive approach* shorn from either of the equitable preconditions imposed in the twentieth century, by which equity had raised the required bar of moral disapprobation.”<sup>52</sup>

Now, if that is right, why are courts taking a restrictive approach? Are we not understanding, recognising, enforcing the moral aspirations of this law? Are we not recognising that Parliament wants these provisions to apply with real force?

It may be that the training of lawyers in, or aiming for, commercial law practice should give much greater emphasis to these notions of good conscience. We would not be expecting lawyers to stand in moral judgment of their clients but rather to make sure that their clients have a good appreciation of the moral dimensions of the legal prohibition of conduct which is against conscience. Given the centrality of this moral concept in the framework of business regulation, commercial lawyers should be making sure that the moral dimension is quite explicit in the advice they give.

Are the courts still being too restrictive? Or is the problem with the standard? Adoption of fairness as a test might not be conducive to greater certainty. But it would certainly promote better understanding by all concerned — and, it might be hoped, higher standards of conduct — if we had a prohibition on conduct which was “in all the circumstances, unfair”.

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<sup>52</sup> (2019) 368 ALR 1, 295 [72] (emphasis added).