THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

OPENING OF LAW TERM ADDRESS

'LAW AS A REFLECTION OF THE "MORAL CONSCIENCE" OF SOCIETY'

WEDNESDAY 5 FEBRUARY 2020[*]

1. I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. They have cared for this land for many generations, long prior to settlement by Europeans. We must always recognise, remember and respect the unique connection which they have with this land under their ancient laws and customs.

2. We are here of course to celebrate the commencement of the new law year, although I have always wondered how a speech by me can assist celebrations. However, is it impossible to overlook the fact that this opening of the law year is taking place against the background of the most devastating fires that this country has ever experienced. There is no need for me to chronicle the death, destruction of property and impact on human lives which has resulted. I am pleased that the profession has responded so generously to the crisis and the cooperation which has taken place between the Law Society, the Bar Association and Legal Aid in providing pro bono assistance to those people affected. It is a mark of a country governed by the rule of law that such assistance is available to people at their most vulnerable.

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[*] I express thanks to my Research Director, Damian Morris, for his assistance in the preparation of this address.

3. Can I finally in this vein ask you all to stand and observe a minute's silence as a mark of respect, sympathy and empathy for those whose lives have been lost or tragically affected by the fires.

4. More so than ever before, our society is one which is defined and regulated by law. The demands of a complex and integrated economy and a diverse and multicultural community necessitate a sophisticated and extensive body of rules, administered by a professional corps of lawyers and judges. These rules control how power may be exercised in our society, and serve to prescribe standards of conduct by which we must abide in our everyday lives.

5. But these rules do not govern our behaviour as if we were automatons. Outside the law, our existence is more than just a legal abstraction. We also live our lives by the moral values learned from our family, friends, and society as a whole. Our society is also defined and regulated by these values just as much as it is by the law, but this often passes unnoticed beneath the surface, in the realm of private conscience. Unlike the law, these standards of conduct drawn from conscience are not written, but appear from patterns of behaviour we find in society.

6. However, these two concepts are not as distinct as they might at first seem. The idea of "conscience" has a long history in the law. As lawyers, we are most familiar with it as the touchstone for the historical development of equitable principles by the Court of Chancery.[1] While this notion of "conscience" was based on values influenced by the religious traditions of the early modern period, themselves ultimately traceable to concepts from Greek and Roman philosophy,[2] we now understand the same idea in a more secular sense. The "conscience" which underlies and animates equitable principles is now interpreted as

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1 See P A Keane, 'The 2009 W A Lee Lecture in Equity: The Conscience of Equity' (2010) 10 *Queensland University of Technology Law and Justice Journal* 106; F T Roughly, 'The Development of the Conscience of Equity' in J T Gleeson, J A Watson, R C A Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) 139.

2 Keane (n 1) 109–111; Roughly (n 1) 157–161.

a reflection of the moral values of our society as a political whole,[3] rather than any one tradition within that society. When courts apply equitable principles to resolve a dispute, we see them as upholding the standards of conduct prescribed by this fictional "conscience".

7. For example, if a plaintiff establishes an entitlement to relief in equity, say, for an injunction to restrain a threatened breach of contract,[4] then we express this conclusion by saying that the defendant was "bound on conscience" not to commit the breach.[5] A court will then seek to "relieve" the conscience of the defendant by making an injunction to restrain any threatened breach.[6] In this way, the court holds the defendant to the standard of a "properly formed and instructed conscience" through the application of equitable remedies.[7] In other words, equitable principles are assumed to represent the dictates and demands of a fictional "conscience".

8. While this notion of "conscience" has a unique historical connection with the equitable principles developed by the Court of Chancery, it is sometimes used as a metaphor which can be applied to the law more broadly. If it means nothing more than that a court will hold a person to a certain standard of conduct prescribed by the law, then why could we not see the enforcement of *any* standard of conduct prescribed by the law in terms of a court holding the defendant to the standard of a "properly formed and instructed conscience"? I don't think this is likely to win support from the equity purists in the room, but I think it makes some sense from a purely logical standpoint.

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3 Keane (n 1) 114, discussed in Roughly (n 1) 166–8.

4 See, eg, J D Heydon, M J Leeming, P G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5th ed, 2015) 738 [21-195] ff.

5 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 228 [46] (Gleeson CJ).

6 Ibid 227 [45] (Gleeson CJ).

7 Ibid; see also *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 325 [22] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

9. I will take an area of public law as an example. If a plaintiff establishes that they were not given a fair hearing before an administrative tribunal, then we express this conclusion by saying that the plaintiff was not given a hearing in accordance with the standards of "natural justice", or as it is now more commonly known, "procedural fairness". A court will then seek to remedy this failure by quashing the decision and remitting the matter to the tribunal to be determined in accordance with law.[8] In other words, the court will hold the tribunal to the standards of "procedural fairness". Here, we can see the analogy with how a court will hold a defendant to the standard of a "properly formed and instructed conscience" in equity.

10. Equally, we could take examples from private law. If a plaintiff establishes that they suffered damage as a result of the defendant's failure to take reasonable precautions against a reasonably foreseeable risk of harm, then we express this conclusion by saying that the defendant breached a duty of care which they owed to the plaintiff.[9] A court will then seek to remedy this failure by ordering the defendant to pay the plaintiff a sum of money sufficient to put them in the position they would have been in had the failure not occurred.[10] In other words, the court will hold the defendant to the standard of the "reasonable person". Again, we can see the analogy with how a court will hold a defendant to the standard of a "properly formed and instructed conscience" in equity.

11. At first, it is more difficult to see how this analysis applies in the case of contract law. After all, the terms of a contract are specified by the parties rather than by reference to any standard of conduct drawn from the moral values of society. But this difficulty can be avoided if we

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8 See, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 117–8 [84] (Gaudron and Gummow JJ).

9 See, eg, *Taylor v The Owners – Strata Plan No 11564* (2014) 254 CLR 185 at 240 [169] (Gageler J).

10 See, eg, *Todorovic v Waller* (1981) 150 CLR 402 at 412 (Gibbs CJ and Wilson J).

recognise that the law is not necessarily concerned with the particular terms which the parties have agreed will govern their relationship. Rather, the law is concerned to hold each party to perform their agreement, subject, of course, to certain exceptions. It is this concept of "freedom of contract" which reflects the moral values of society[11] and supplies the analogy with the idea of "conscience" equity.[12]

12. Of course, neither in the context of public or private law is the analogy with equity perfect. There are many points of distinction, and I am certainly not making an argument that these different areas ought to be merged as a matter of law. Instead, I am suggesting that there is underlying similarity between the idea of "conscience" in equity and the equivalent concepts which motivate other areas of law, such as the idea of "procedural fairness" in administrative law and the idea of a "duty of care" in negligence. Each prescribes a standard of conduct drawn from the moral values of our society, and courts are empowered to provide remedies to hold people to that standard. The remedies granted to enforce each standard may differ in form and in substance,[13] but the standards draw the values which underpin them from the same normative source.[14]

13. It may well be that these values change over time, and one only needs to look at the shift in the idea of a "duty of care" brought about by

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11 See *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 at 669 [31]–[32] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ); cf *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 64–5 [15]–[16] (Gleeson CJ).

12 The idea of "good faith" as an underlying concept in contract law may also supply an analogy, but its status in Australian law is uncertain: *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 195–6 [42] (French CJ, Bell and Keane JJ), 213–14 [104]–[107] (Kiefel J). See *Heydon on Contract* (Thomson Reuters, 2019) 845 [21.370] ff.

13 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101 [43] ff (Gaudron and Gummow JJ); cf *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 118–19, quoting *The Juliana* (1822) 2 Dods 504 at 521; 165 ER 1560 at 1567.

14 See, eg, Chief Justice Allsop, 'Values in Public Law' (Speech, James Spigelman Oration, 27 October 2015).

Donoghue v Stevenson[15] to see an example. While the full implications of the decision may not have been realised for some time,[16] it is now seen to have been responsible for unifying what were previously distinct legal duties into a single concept of a "duty of care" based on Lord Atkin's "neighbour principle".[17] Similar shifts in the moral values which inform the idea of "conscience" in equity,[18] or the idea of "procedural fairness" in administrative law have occurred,[19] although they perhaps have not acquired quite the same degree of notoriety.

14. In the end, the underlying similarity between these different concepts means that we may well be able to see the enforcement of *any* standard of conduct prescribed by the law in terms of a court holding the defendant to the standard of a "properly formed and instructed conscience" according to the values of society. We can extend the metaphor of "conscience" from its origins within Chancery to the broader idea that the law generally may be taken to reflect the "moral conscience" of society as a whole. Or, to use the more poetic language favoured by others, we could see the "law as an expression of the whole personality" of a society.[20]

15. We might find the idea that the law reflects the moral conscience of a society to be an attractive one for a number of reasons. To start with, we could say that it has a pleasing symmetry with the idea that the law reflects the will of the people as enacted through their representatives in

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15 [1932] AC 562.

16 Richard Buxton, 'How the Common Law Gets Made; *Hedley Byrne* and Other Cautionary Tales' (2009) 125 *Law Quarterly Review* 60, 61; cf *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387.

17 [1932] AC 562 at 580.

18 See, eg, *Nocton v Lord Ashburton* [1914] AC 932.

19 See, eg, *Ridge v Baldwin* [1964] AC 40.

20 Chief Justice Allsop, 'The Law as an Expression of the Whole Personality' (Speech, Sir Maurice Byers Lecture, 1 November 2017), quoting Sir Maurice Byers, 'From the Other Side of the Bar Table: An Advocate's View of the Judiciary' (1987) 10 *University of New South Wales Law Journal* 179 at 182.

the legislature.[21] But perhaps more importantly, it allows us to think of the law not as a dry, technical and abstract discipline, but one which is intimately connected with the living human experience. Thus, when we apply the law to resolve a dispute, we are not just applying arbitrary rules plucked from the entrails of history, tradition and politics. We are applying rules whose terms reflect the dictates of the "moral conscience" of society as a whole.

16. Now, I admit that this metaphor is not exactly in common use in wider society. Indeed, apart from a select few judges and practitioners, I daresay it is not even that common amongst lawyers. Thus, it may seem odd that I have chosen to make it the centrepiece of this address. However, I have done so because, increasingly, we think about the law in a way which echoes many of the same assumptions which underlie or are encouraged by the idea that the law reflects the "moral conscience" of society as a whole. In particular, when we come to debate changes to the law, we tend to conduct the debate on the footing that the proposed changes will represent a shift, sometimes a profound one, in the moral values endorsed by our society.

17. I think that a good example is the recent debate around same-sex marriage, culminating in the nation-wide postal survey a couple of years ago.[22] On one view, the issue in dispute was quite confined. The question ultimately put to the survey respondents was "Should the law be changed to allow same-sex couples to marry?"[23] It concerned substituting the phrase "a man and a woman" for the phrase "2 people" in the *Marriage Act 1961* (Cth), as well as consequential amendments in other legislation.[24] The practical legal effect of these changes would

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21 Cf *Singh v Commonwealth* (2004) 222 CLR 322 at 329 [5] (Gleeson CJ).

22 For a good introduction to the history of this issue in Australia, see <https://en.wikipedia.org/wiki/History_of_same-sex_marriage_in_Australia>.

23 Australian Bureau of Statistics, *1800.0 – Australian Marriage Law Postal Survey, 2017* (Web Page, 15 November 2017) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>.

24 See *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) sch 3.

have been limited, since the tangible consequences which would follow from the status of being a "party to a marriage" were, in many cases, already available to same-sex couples in de facto relationships.[25]

18. However, there can be no doubt that the debate was seen to have importance far beyond the mere technical effect of the amendments proposed. The debate was seen to be about the fundamental nature of the institution of marriage, and the moral values of society which it reflected. Should it be maintained as an institution which reflects moral values drawn from the Christian religious tradition? Or should it become an institution which reflects different, secular moral values which have emerged more recently, such as equality before the law?

19. These questions were of deep significance to a great number of people on both sides of the debate. For them, the debate was assuredly not about the mere technical effect of the proposed changes. Rather, it was about the moral values which they wanted the laws of their society to reflect. Or, to use the metaphor, the debate was one about the "moral conscience" of society. While not everyone might have used this language, I think that it remains a satisfying way of representing how these debates about the state of our law acquire a significance which reaches beyond their practical legal effect.

20. I do not think this is an isolated example, although it is a prominent one due to the significant media coverage which the debate received and the fact that a large proportion of the Australian public was directly involved in the debate through their participation in the postal survey.[26] Many other examples could also be given. These debates about which moral values ought to be reflected in the law illustrate why it can be beneficial to see the law as reflecting the "moral conscience" of society. The

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[25] Cf Hannah Robert and Fiona Kelly, 'Explainer: What Legal Benefits Do Married Couples Have That De Factor Couples Do Not?', *The Conversation* (Article, 21 September 2017) <https://theconversation.com/explainer-what-legal-benefits-do-married-couples-have-that-de-facto-couples-do-not-83896>.

[26] Just under 80% of the eligible respondents participated in the survey: see Australian Bureau of Statistics (n 23).

metaphor focuses our attention on how we ought to weigh these values, and offers a good description of what we are doing when we, as a society, decide which we find compelling enough to enact in law.

21. I would go so far as to say that this is an integral aspect of how we secure the rule of law in this country. When the law loses any connection with public debate about the moral values which animate it, the law ceases to reflect the "moral conscience" of society. It becomes a weapon to be wielded according to the desires of whichever majority happens to control the legislature. We become a society ruled *by* law, rather than a society with the rule of law. By contrast, when we, as a society, are encouraged to consider the moral values which underlie the laws we choose to live by, we reach beyond the concerns of our own narrow self-interest. We commit ourselves to shared fundamental principles which form the basis for the rule *of* law. Then, we can begin to see law as a reflection of the "moral conscience" of society.

22. But, while this metaphor and the concepts which underlie it are attractive, I think that we also have to be careful. It can be dangerous to use metaphors unthinkingly.[27] We must remain aware that they are fictions, and can be deceptive when they are pushed too far. To start with, the idea that the law reflects the "moral conscience" of a society tends to imply that there is a coherent and systematic motivation underlying the various laws enacted by the legislature. Many words might be used to describe the legislative programmes of the parliaments in this country, but "coherent" and "systematic" are not often among them. As has frequently been pointed out, legislation is usually just as much the product of pragmatic compromise as it is the product of principled development.[28] Equally, the idea tends to imply that it is possible to discern a singular and cohesive "moral conscience" in

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27 See, eg, *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 68 [97] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

28 Cf Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 31–3.

society. This is by no means an easy feat in a country as multicultural and diverse as our own.

23. More importantly, I think that it is possible to focus too much attention on the idea that the law reflects the "moral conscience" of society. Ultimately, this metaphor is only a conceptual rubric through which we can understand the relationship between the law and the moral values held by a society. A society is not a person, and does not have a conscience. A society does not hold or possess moral values. When we use metaphor to say the law reflects the "moral conscience" of society, we can obscure these simple, and important, truths. They are important because what matters in the end is how the members of a society treat one another in practice, not in the moral values which they may or may not choose to write into their laws.

24. If we take an example from Australian history, I think we can see why this distinction becomes important. In the eyes of the common law, when the Crown acquired sovereignty over this country, Indigenous Australians became "subjects of the Crown", and were entitled to the benefit and protection of those laws just as much as a subject of the Crown born in the United Kingdom.[29] In this limited sense, we could say that the common law embodied a moral value based on the equal dignity of every human being, without distinction based on colour or race. However, even before the enactment of discriminatory legislation which overturned this basic principle, we know that the truth was that Indigenous Australians rarely, if ever, received the benefit or protection of those laws, and were often subjected to violence by offenders who escaped with impunity.[30] There was a wide gulf between what was promised by the law and what occurred in practice.

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[29] See *R v Murrell* (1836) 1 Legge 72.

[30] The "Myall Creek Massacre" was arguably one of the few cases where there was condign punishment: see *R v Kilmeister (No 1)* [1838] NSWSupC 105; *R v Kilmeister (No 2)* [1838] NSWSupC 110.

25. In a case like this, I find it hard to see how the law could be said to meaningfully reflect the "moral conscience" of the society when the behaviour and conduct of the members of a society bore no relationship with the values supposedly embodied in their laws. There is no doubt that the many people who either supported or were indifferent towards the violence against Indigenous Australians might have disagreed with us later observers about which moral values the laws they lived under purported to reflect. But what matters is that we do not really judge them based on the values which their laws reflected. We judge them based on what they did, and what this says about the moral values which they held.

26. To be sure, this is an extreme example. Nevertheless, I think it illustrates the principal danger present in placing too much weight on the idea that the law is a reflection of the "moral conscience" of society. We start to treat the law as an end in itself, rather than a means to an end. We start to be more concerned with the law as a reflection of our "moral conscience" than with the practical legal effect that it will have on society. Ultimately, the law exists to achieve real outcomes by providing an incentive to comply with the moral values which it reflects. If it fails to achieve this, then, no matter how well it might appear to reflect those values, we ought to question whether it is adapted to achieve this purpose.

27. Increasingly, I feel that we focus too much on the idea that the law is or ought to be a reflection of the "moral conscience" of society than on its practical legal effect. Sometimes, an issue *can* be important primarily because it raises a question about the moral values which we wish our laws to reflect. As I have pointed out, same-sex marriage is a good example. But, more often than not, an issue is important because of the practical legal effect it has on the lives of the people concerned. When we focus too much on the idea of law as a reflection of the "moral conscience" of society, this can sometimes be forgotten.

28. I do not think there could be a clearer example of this phenomenon than the statutory prohibitions on "conduct that is, in all the circumstances,

unconscionable" which have become increasingly common in Australian law. Most notably, this prohibition applies to any supply or acquisition of goods and services, including financial services, in "trade or commerce".[31] The breadth of conduct which could be covered by such a prohibition, and the generality of the standard by which that conduct is to be judged, should be immediately apparent. In the end, it is left to the court to determine whether the conduct in a particular case is "against conscience by reference to the norms of society",[32] or more prosaically, whether it was contrary to "accepted community standards",[33] taking into account a sizeable number of factors stated in the legislation.[34]

29. These prohibitions have a complex legislative history in Australia, with their scope and application shifting in response to the development of policies underlying trade practices legislation.[35] However, I think something of their purpose can be discerned by a comparison with related provisions which only prohibit conduct which is "unconscionable, within the meaning of the unwritten law from time to time".[36] This provision seems to have been intended to refer to the idea that, under the general law, it is necessary to prove the existence of some "special disadvantage" of which unfair advantage has been taken to establish that certain conduct was against the "conscience" of equity.[37]

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31 See, eg, *Competition and Consumer Act 2010* (Cth) sch 2 ("*Australian Consumer Law*") s 21(1); *Australian Securities and Investments Commission Act 2001* (Cth) ("*ASIC Act*") s 12CB(1).

32 *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [41] (Allsop CJ, Jacobson and Gordon JJ); *ACCC v Medibank Private Ltd* [2018] FCAFC 235 at [239] (Beach J); *ASIC v Kobelt* [2019] HCA 18 at [57] (Kiefel CJ and Bell J), [87] (Gageler J).

33 *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15 at [195] (Bathurst CJ); ASIC v Kobelt [2019] HCA 18 at [59] (Kiefel CJ and Bell J).

34 *Australian Consumer Law* s 22(1); *ASIC Act* s 12CC(1).

35 See *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 at [279]–[295] (Edelman J).

36 *Australian Consumer Law* s 20(1); *ASIC Act* s 12CA(1).

37 Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447 at 461–2 (Mason J), 474 (Deane J); *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 424–5 [117]–[118] (French

30. By contrast, the statutory prohibitions which I have highlighted concern "conduct that is, in *all* the circumstances, unconscionable". It is fairly clear to me that this is intended to be a broader concept than that under the unwritten law. While a form of "special disadvantage" will no doubt be a relevant circumstance, and depending upon the facts, possibly a weighty one, it is by no means essential.[38] Other circumstances could suffice to reach the threshold. Thus, rather than relying on the narrow and "hardened" conscience of equity,[39] these provisions invite the judges to rely on their impression of the values forming part of the "moral conscience" of society more broadly.

31. Now, it could be possible to take objection to legislation of this form on a number of grounds. It could be said that the legislation is contrary to constitutional principle, since it vests a wide and unconfined power in the judiciary to proscribe conduct which they deem to be "unfair" or "unjust".[40] It could be said that it has a deleterious effect upon commerce because it generates uncertainty about whether or not particular conduct will be found to be "unconscionable".[41] Both of these objections have been the subject of much discussion in the cases and academic literature, and I do not intend to rehearse those debates here. Instead, the point I wish to make is a different, but related, one about the purpose which these provisions are intended to achieve.

CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); cf *Australian Consumer Law* s 20(2); *ASIC Act* s 12CA(2).

38 See *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 at [48] (Kiefel CJ and Bell J), [89] (Gageler J), [121]–[122] (Keane J), [144], [232] (Nettle and Gordon JJ) [295] (Edelman J).

39 Ibid [282] (Edelman J).

40 *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 583 [120] (Spigelman CJ); cf *ACCC v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 64 [11] (Gleeson CJ).

41 Justice A S Bell, 'An Australian International Commercial Court – Not a Bad Idea or What a Bad Idea? (Speech, ABA Biennial International Conference, 12 July 2019) [66]–[78]; cf Mark Leeming, 'The Role of Equity in 21st Century Commercial Disputes' (2019) 47 *Australian Bar Review* 137, 151–5.

32. In a broad sense, it may be accepted that a statutory prohibition on unconscionable conduct is intended to express disapproval of conduct which, while not necessarily contrary to any other rule of law, is "against conscience by reference to the norms of society". It provides an incentive for those who supply or acquire goods and services in "trade or commerce" to conduct themselves in accordance with that standard. In other words, it might be said to be an example of the legislature using the law as a tool to encourage those entrepreneurs to conform to the particular moral values prevailing in that society. In other words, it is an attempt to defend and reinforce the "moral conscience" of the society.

33. If we accept that this is the case, then we should also be concerned to assess how well a statutory prohibition on unconscionable conduct achieves this aim in practice. Does this prohibition affect the decision-making of those to whom it would apply? Does it incentivise them to consider whether they are conducting themselves in a way which is "against conscience by reference to the norms of society"? It may be said that, even some years after these provisions were introduced, there is little empirical research which would support an answer one way or another. We are left to rely on our intuition, which is a dangerous, but necessary, step.

34. For myself, I must confess that I remain pessimistic about whether a general statutory prohibition on unconscionable conduct has any appreciable effect on how an individual decides to carry on their business. Primarily, this is because I think it can often be very difficult to predict with any certainty whether particular conduct could be said to be "against conscience by reference to the norms of society", especially in novel or unforeseen circumstances. This is not to say that I believe that it is inappropriate for judges to be asked to determine whether conduct is "unconscionable", or that this will have a deleterious effect on commercial activity. I only make the more limited point that it is somewhat difficult to see how such provisions could have much effect on how an individual carries on their business at all.

35. I would like to illustrate this point by reference to the recent decision of the High Court of Australia in *Australian Securities and Investments Commission v Kobelt*,[42] where the Court was called upon to determine whether Mr Kobelt had engaged in conduct which was "unconscionable" by reason of the terms on which he provided an informal system of credit known as "book-up" to his Indigenous customers. Mr Kobelt operated a general store in rural South Australia, and his customers used the credit to purchase second-hand vehicles from him.[43] In broad terms, the credit arrangements involved the customer giving Mr Kobelt a debit card linked to the account into which their wages would be paid and authorising him to use the card to deduct repayments on the loan from their wages.[44] After deducting a repayment from their wages, Mr Kobelt would only make the balance of the wages available to the customer as in-store credit, while retaining their debit card for the next repayment.[45]

36. This simple description of the system of credit provided by Mr Kobelt ignores the wider circumstances which were relevant to the reasoning of each judgment on whether the system was unconscionable "in all the circumstances".[46] And, while there may have been some slight differences in the approach taken by each of the judgments to the relevant statutory provisions,[47] it is clear that the principal distinction between the four judges who formed the majority and the three judges who formed the minority was whether Mr Kobelt's conduct in these wider circumstances fell short of what the "norms of society" or "accepted

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42 [2019] HCA 18.

43 Ibid [20] (Kiefel CJ and Bell J).

44 Ibid [21] (Kiefel CJ and Bell J).

45 Ibid [23] (Kiefel CJ and Bell J).

46 *ASIC Act* s 12CB(1).

47 See n 49.

community standards" actually required.[48] In short, the judges disagreed about the content of the relevant "norms of society" or "accepted community standards".

37. I do not think it is necessary to attempt to unpack the precise reasoning of each judgment in order to understand the significance of this point. Put simply, if this is indeed the basis upon which the majority and minority differed, then I think that it means that the difference of opinion in the case ceases to be unexpected, and perhaps, becomes inevitable.[49] While many questions of statutory construction can give rise to disagreements amongst judges, normally, these disagreements can be resolved over time through the gradual application and elucidation of the legislation in the circumstances of particular cases.[50] However, I have grave doubts about whether it will ever be possible to resolve the uncertainty inherent in ascertaining the "norms of society" or "accepted community standards" for the purpose of determining whether particular conduct is "unconscionable" through a similar process.

38. The principal difficulty is that the sphere of conduct to which the statutory prohibition applies is so wide and the circumstances so variable. It may take a very long time, if ever, to be able to discern any principles in the decided cases which might help to resolve the uncertainty.[51] In the ordinary course, a judge will be able to rely on a process of interpretation which draws upon the policy and purpose of a provision to resolve a difficult question of statutory construction.[52]

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48 *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 at [75]–[79] (Kiefel CJ and Bell J), [101]–[111] (Gageler J), [124]–[129] (Keane J), [235]–[240] (Nettle and Gordon JJ), [296]–[302] (Edelman J).

49 Ibid [95] (Gageler J).

50 *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at 436–7 [58]–[59] (Allsop CJ), 442–3 [85]–[87] (Edelman J);

51 Cf *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 at [267]–[268] (Edelman J).

52 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 (Dixon CJ), quoted in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

Often, this will disclose something akin to what I have described as the "moral values" which the law was intended to reflect. These values can help clarify how a provision ought to be applied. However, when the legislature refrains from identifying any relevant values, this important interpretive tool is unavailable.

39. If we turn back to Mr Kobelt, we can see how this is problematic. As Justice Gageler pointed out, with respect, correctly, it was not difficult to find circumstances which were relevant and which pointed either way in relation to a finding of unconscionable conduct.[53] On the one hand, Mr Kobelt clearly had a stronger bargaining position relative to his Indigenous customers,[54] there were other, less restrictive means available to protect his interests as a creditor of his Indigenous customers than the terms which he adopted,[55] and those terms were discriminatory since there was evidence that he did not apply them to his non-Indigenous customers.[56] On the other hand, there was no question that the credit transactions were anything but voluntary when they were initially entered into,[57] and it was clear that Mr Kobelt did not act systematically in bad faith.[58] How these matters were to be taken into account to reach an ultimate conclusion on whether his conduct was "unconscionable", or what the "norms of society" or "accepted community standards" required, was not at all clear.

40. Of course, the mere fact that such an issue is finely balanced does not deprive a judge of the responsibility to make a final decision, and I do not suggest that any of the members of the Court failed to fulfil this

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53 *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 at [97]–[100] (Gageler J).

54 *ASIC Act* s 12CC(1)(a).

55 Ibid s 12CC(1)(b).

56 Ibid s 12CC(1)(f).

57 Ibid s 12CC(1)(d).

58 Ibid s 12CC(1)(l).

obligation. Rather, my concern is that it means that there is no effective incentive for those subject to the statutory prohibition on unconscionable conduct to attempt to comply with its terms. If the "norms of society" or "accepted community standards" are so subtle and esoteric in their application to a particular set of circumstances that even some of the most experienced legal minds in the country cannot agree, then how are we to expect lay individuals like Mr Kobelt to take these matters into account as part of their everyday decision-making?

41. It is useful to think about the issue from the perspective of Mr Kobelt. There is demand from his Indigenous customers for credit to purchase the second-hand vehicles which he has for sale, and it is unlikely that they would be willing or able to obtain credit elsewhere.[59] He has a number of choices to make. He will need to decide upon the effective interest rate, how the repayments will be made, and what security he will be prepared to accept. In certain respects, he may decide upon terms which go beyond what might strictly be necessary to protect his interests,[60] but upon proposing those terms to his customers, he finds that they understand them and are willing to accept them in exchange for credit.[61] While he knows that these arrangements give him a significant amount of control over the finances of his customers through their debit cards,[62] both he and his customers are also aware of the limitations of the debit cards as a means of security, and that, overall, the continued operation of the system largely depends upon the goodwill of both parties.[63]

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59 *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 at [28], [34] (Kiefel CJ and Bell J).

60 Ibid [74] (Kiefel CJ and Bell J), [98] (Gageler J), [226]–[227] (Nettle and Gordon JJ).

61 Ibid [33], [40], [64] (Kiefel CJ and Bell J), [107] (Gageler J), [128] (Keane J), [169]–[170] (Nettle and Gordon JJ), [278] (Edelman J).

62 Ibid [193] (Nettle and Gordon JJ), [277] (Edelman J).

63 Ibid [30] (Kiefel CJ and Bell J), [106] (Gageler J), [174] (Nettle and Gordon JJ).

42. In these circumstances, I find it almost impossible to see how Mr Kobelt or any lawyers which he cared to retain could have determined whether or not the terms upon which the system of credit was provided were "unconscionable". Just as with the factors noted by Justice Gageler, these circumstances could be seen to point in both directions. Even so, I daresay that most people in the position of Mr Kobelt would instinctively rely on the fact that the arrangements were voluntary and, in fact, largely supported by his customers as the primary touchstone for determining whether they were somehow "against conscience", particularly where there is no suggestion of any unfair pressure or undue influence on his part.

43. Again, I am not saying that this means that, as a matter of law, it ought not to have been possible to make a finding of unconscionable conduct. I can certainly see the force of the arguments relied upon by the minority to reach their conclusion that Mr Kobelt's conduct was unconscionable, and with slightly different facts, their view may have prevailed. Rather, I am pointing out that this is unlikely to make much difference to the individuals making these kinds of choices "on the ground". I think that it is unlikely that these people would be able to come to the same conclusion as to whether their conduct was contrary to the "norms of society" or "accepted community standards" as the regulators and judges who are charged with enforcing them.

44. Now, it is here that my doubts about the efficacy of statutory prohibitions on unconscionable conduct become clear. If the content of the "norms of society" or "accepted community standards" are so uncertain that they are unlikely to be clarified by a process of judicial interpretation, and yet will also remain opaque to those individuals who are required to comply with them, then how can we expect penalising such conduct to provide any incentive to align their values with those norms or standards? Penalties rely on certainty to be an effective deterrent.[64] If this is

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[64] See Daniel S Nagin, 'Deterrence in the Twenty-First Century' (2013) 42 *Crime and Justice* 199, 205–6.

lacking, then I find it difficult to see how these statutory prohibitions are to achieve their goal of defending and reinforcing the "moral conscience" of society.

45. In my opinion, this suggests that we have made the mistake of taking the metaphor of law as a reflection of the "moral conscience" of society too seriously, and forgotten what it is supposed to represent. It describes the fact that the law prescribes standards of conduct reflecting the moral values held by the society, and that the law exists to provide an incentive for those who are subject to it to behave in accordance with these standards. It does not mean that a judge has privileged access to a fully-formed "moral conscience" of society which is capable of being directly applied to the circumstances of a particular case. This "conscience", if it could be said to exist at all, simply refers to the standard of conduct which a law is found to prescribe through the application of an ordinary process of interpretation.

46. I think that this points to the need for a degree of specificity in how to frame legislation if it is to be effective.[65] It would be difficult to find a statutory provision which is more general than a prohibition on "conduct that is, in all the circumstances, unconscionable". As I have already noted, it provides no guidance about what values, "norms of society", or "accepted community standards" might be relevant to a particular type of conduct, and this is largely the source of its problems. The checklist of matters in, for example, s 22 of the Australian Consumer Law (schedule 2, *Competition and Consumer Act 2010* (Cth)) provides some assistance to the Court in reaching this conclusion. However, it does not provide certainty except in the most obvious of cases. It would be better for the legislature to take a more active role in prescribing the standards of conduct which it expects individuals to meet. This could well avoid

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[65] However, there are limits to the degree to which specificity is desirable: see Mark Leeming, 'The Role of Equity in 21st Century Commercial Disputes' (2019) 47 *Australian Bar Review* 137, 156–7; T F Bathurst, 'The Role of the Commercial Bar in the Mid-21st Century' (Speech, 2018 Australian Bar Association Conference, 16 November 2018) [42]–[50].

many of the difficulties I see with the general prohibition on unconscionable conduct.

47. If we once again turn back to Mr Kobelt, we can see the advantages of such an approach. Mr Kobelt was also prosecuted for breaches of section 29(1) of the *National Consumer Credit Protection Act 2009* (Cth), which prohibits a person from engaging in a "credit activity" if they do not have a licence authorising them to engage in that activity. It was clear that Mr Kobelt never held a licence at the relevant times,[66] and that he had provided "credit" to his customers.[67] However, in order for him to be liable for a breach of section 29(1), it also had to be shown that he had imposed a "charge" on his customers for the provision of credit.[68] This formed the main issue on this aspect of the case.

48. For present purposes, it is unnecessary to go into the detail of the reasoning on this issue. It suffices to point out that it was unanimously resolved against Mr Kobelt at trial in the Federal Court[69] and on appeal to the Full Court of the Federal Court,[70] where the question was dealt with in a matter of paragraphs, rather than pages.[71] It does not appear that Mr Kobelt ever sought special leave to appeal to the High Court on this issue.[72] I think that these circumstances alone highlight the contrast between the level of analysis required to resolve the question of the application of section 29(1) and the level of analysis required to resolve the question of whether Mr Kobelt had engaged in unconscionable

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66 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [112] (White J).

67 Ibid [117] (White J).

68 See *National Consumer Credit Protection Act 2009* (Cth) ("*NCCP Act*") s 6(1), when read with s 5 (definition of "credit contract"). This refers to s 4 and s 5(1)(c) of the *National Credit Code* contained in sch 1 to the *NCCP Act*.

69 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327.

70 *Kobelt v Australian Securities and Investments Commission* [2018] FCAFC 18.

71 Ibid [197]–[205] (Besanko and Gilmour JJ), [320]–[326] (Wigney J).

72 Cf *Australian Securities and Investments Commission v Kobelt* [2018] HCATrans 153.

conduct. The greater specificity of section 29(1) meant that it was easier to identify the standard of conduct which it prescribed and to apply this to the circumstances of the case.[73]

49. As a practical matter, this means that section 29(1) is much better equipped to provide for a certain penalty for those who fail to comply with its terms. And, I might add, this penalty is no less severe than that available for engaging in unconscionable conduct.[74] It forms part of a law which clearly expresses the desire of society to hold credit providers to a certain standard of conduct through a licensing regime which, in conjunction with the National Credit Code which is a schedule to the legislation, imposes detailed obligations on credit providers in dealing with their customers with both civil and criminal sanctions. In doing so, it reflects the moral values of society in a way which does not require direct reliance on indeterminate and vague notions of society's "moral conscience".

50. I think these pragmatic reasons for preferring to rely on provisions which are more specific like section 29(1) are compelling. But I think there is also something more fundamental. When we pass a law which gives clear expression to a particular set of moral values, we affirm our commitment to making important decisions about these values through the democratic process, rather than leaving them to be resolved later by the judiciary. As I said earlier, I think this process is an integral part of ensuring that we live in a society with the rule of law based on clear principles which, in the view of the elected representatives of the community, reflect the accepted standards of society at the time.

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73 This was aided by s 11 of the *National Credit Code* contained in sch 1 to the *NCCP Act*, which further explained what constituted a "credit charge".

74 At the relevant times for the proceedings against Mr Kobelt, the penalty for a contravention of either *NCCP Act* s 29(1) or *ASIC Act* s 12CB(1) was 2,000 penalty units: see *Australian Securities and Investments Commission v Kobelt* [2017] FCA 387 at [4], [6] (White J). As a result of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth), the penalties have been increased to 5,000 penalty units.

51. If we focus too much on the metaphor of law as a reflection of the “moral conscience” of society, we can sometimes forget why this is important. We can become too enamoured by the idea, at the expense of how it works in reality. It seems to me that if we are to navigate the complex relationship between the norms of the law and those of conscience successfully, then we need to bear this in mind. If we do not, we run the risk of increasing legal uncertainty which will ultimately detract from, rather than support, the rule of law.

52. Thank you.