Unconscionable bargains in equity and under statute

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This article considers the relationship between the equitable doctrine of unconscionable dealing, the statutory prohibition on unconscionable conduct in the Australian Consumer Law, and the power to reopen unjust contracts under the Contracts Review Act 1980 (NSW). In so doing it seeks to explore the influence of the equitable doctrine on the courts' interpretation of the power to give relief against unconscionable conduct and unjust contracts under these statutes, and also the possibility of a reciprocal relationship, with statute influencing the development of the equitable doctrine.

Introduction

The national uniform scheme of consumer protection legislation in Australia, the Australian Consumer Law¹ and, for financial products, the Australian Securities and Investments Commission Act 2001 (Cth),² contain a broad prohibition on a person engaging in conduct 'in trade or commerce' that is in all the circumstances 'unconscionable'.³ The statutory prohibition invokes a central concern of equity, preventing unconscientious conduct, which informs the equitable doctrine of unconscionable dealing, as well as a range of other equitable doctrines.⁴ It is clear as a matter of statutory interpretation that the statutory prohibition is not limited by the 'unwritten law'⁵ and this is now expressly confirmed in the legislation.⁶ Thus, conduct by a party that does not amount to unconscionable dealing in equity may still contravene the statutory prohibition on unconscionable conduct.⁷ Nonetheless, there is a clear area of overlap between statutory and equitable unconscionability.

Cases in which the courts have found unconscionable conduct under statute commonly mirror the factual pattern of cases involving unconscionable dealing in equity. Equity will set aside a bargain as procured by unconscionable dealing where one party has taken unconscionable advantage

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1 Australian Consumer Law (ACL) contained in Sch 2 of the Competition and Consumer Act 2010 (Cth).
2 For ease of reference this article focuses on the ACL.
3 ACL s 21.
6 ACL s 21(4)(a).
of a special disadvantage affecting the other party. Contraventions of the statutory prohibition on unconscionable conduct commonly involve a stronger party who has taken advantage of the vulnerable position of the weaker party with whom it is dealing. This overlap in the courts’ response to requests for relief against unconscionable bargains in equity and under statute is not surprising. Equity has a long history of dealing with victimisation, predation and exploitation in a transactional setting. It makes sense that a central example of the type of conduct that will offend the accepted community values so as to breach the statutory prohibition on unconscionable conduct will be found in the type of conduct condemned by equity as unconscionable. It is equally understandable that courts will look to equitable doctrine for guidance in distinguishing unconscionable conduct from the consequences of a merely inopportunity bargain.

There are also emerging differences between unconscionable dealing in equity and unconscionable conduct under statute. These differences do not arise from new and novel forms of regulation under the statute. Rather they are more subtle, arising from the courts’ approach to the elements of the equitable claim, in particular in finding disadvantage or vulnerability experienced by the weaker party in the transaction, the degree of knowledge required by the stronger party of the weaker party’s position of disadvantage, and the need to prove a predatory state of mind on the part of the stronger party. Differences in the courts’ approach to statutory and equitable unconscionability are consistent with the legislative direction to the courts not to be constrained by ‘the unwritten law’ in applying the statutory prohibition. However, it is also possible that they might prompt courts to look again at the parameters of the elements of the equitable doctrine, with the possibility of statutory unconscionability influencing the development of the equitable doctrine.

This article considers the ongoing relationship between ‘equitable unconscionability’, namely, the equitable doctrine of unconscionable dealing and ‘statutory unconscionability’, primarily the prohibition on unconscionable conduct in the ACL. It also compares the power to grant relief under the Contracts Review Act 1980 (New South Wales) (CRA), which is commonly relied upon in this context in New South Wales. Part II outlines the scope of the statutory prohibition on unconscionable conduct. Part III considers the doctrine of unconscionable dealing in equity. The article then compares the courts’ approach to assessing statutory unconscionability in Part IV, and to

10 See also Director of Consumer Affairs Victoria v Scully (2013) 303 ALR 168; [2013] VSCA 292 at [40] per Santamaria JA (Neave and Osborn JJA agreeing) (Scully).
12 ACL s 21(4)(a).
giving relief under the CRA in Part V. Part VI considers the possibility of a reciprocal relationship of influence, with decisions under the relevant statutes influencing the development of unconscionable dealing in equity.

Unconscionable conduct under statute

Consumer protection law in Australia has included a statutory prohibition on unconscionable conduct since 1986, although the scope of the regime has expanded considerably over this period. Under the ACL, there are two forms of prohibited unconscionable conduct. Section 20 prohibits unconscionable conduct ‘within the meaning of the unwritten law’ occurring in ‘trade or commerce’, making available to a plaintiff a wider range of remedies than may be obtained under the common law. Section 20 does not apply to conduct that is prohibited by s 21. Section 21 prohibits conduct that is, ‘in all the circumstances’, unconscionable. Until recently this general prohibition distinguished between business-to-consumer and business-to-small-business transactions. However, in 2012 the distinction was removed and the prohibition now applies to all transactions in ‘trade or commerce’ regardless of the identity of the parties, other than not applying to protect listed public companies.

The prohibition on unconscionable conduct acts as a broad and flexible ‘safety net standard’ to catch wrongful or offensive conduct not picked up by other more specific consumer protection provisions. Unconscionable conduct under s 21 is not defined and leaves much to the discretion of the court in the circumstances of the case. The prohibition is accompanied by provisions that provide some indication of its intended scope. Section 21(4) contains a set of interpretative principles. The principles state that the ‘section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour’, a point that had already been confirmed by courts. The interpretative principles also state that the statutory prohibition is not confined by the unwritten law, which had also already been confirmed by courts.

Section 22 contains a list of considerations to which the court may

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15 See ACL ss 236, 237 and 238.
16 ACL s 20(2).
17 See the Trade Practices Act 1974 (Cth) ss 51AB and 51AC.
18 Competition and Consumer Legislation Amendment Act 2011 (Cth).
19 ACL s 21(1).
20 Compare H Collins, ‘Harmonisation by example: European laws against unfair commercial practices’ (2010) 73 MLR 89.
21 ACL s 21(4)(b).
23 ACL s 21(4).
have regard in determining whether conduct is unconscionable. The considerations address issues of both procedural fairness, relating to the manner in which the transaction was procured, and substantive fairness, relating to the substance of the contract. Most cases have been decided on the basis of a combination of these concerns rather than purely on grounds of substantive fairness. The mix of relevant considerations is consistent with what has been termed the ‘sliding scale’ of unconscionability whereby the court weighs up the combined effect of all of the factors of the case. Nonetheless, to be more than merely a list with little predictive value, the considerations need to be informed by some agreed understanding of the principles or values that inform the inquiry into whether there has been a contravention of the prohibition.

It is fair to say that courts have struggled to articulate guiding principles for identifying unconscionable conduct. For some time courts commonly described statutory unconscionability as ‘a concept, which requires a high level of moral obloquy’. More recently courts have distanced themselves from this formulation, and the high standard of moral wrongdoing it appears to envisage. Courts have stated that the inquiry must adhere closely to the words of the legislation and on substituted phrases.

An approach possibly reinforced by the presence in the ACL of a specific regime addressing unfair terms at least in consumer contracts.

29 See, eg, ACL ss 22(1)(c) and (d).


32 see eg, ACL ss 22(1)(c) and (d).

33 See, eg, ACL ss 22(1)(c) and (d).


that the phrase ‘unconscionable conduct’ merely connotes ‘moral fault’, 34
‘unethical’ conduct 35 or something ‘not done in good conscience’. 36

Unconscionability is a moral standard informed by norms and values. 37 In
ACCC v Lux Distributors Pty Ltd, Allsop JA linked this normative standard of
conscience to the values of the community in which the conduct occurs, as
opposed to some abstract or historical view about the moral values
underpinning the law. Allsop JA stated that ‘[t]he task of the Court is the
evaluation of the facts by reference to a normative standard of conscience.
That normative standard is permeated with accepted and acceptable
community values’. 38 In Lux, the court drew on existing legislation as a source
of these norms and values. 39 They might also be found in equity. 40

The High Court has repeatedly emphasised that statutory interpretation
must begin with the words of the statute and not concepts drawn from the
common law. 41 However this does not mean that courts should abandon any
reliance on insights from the common law. Courts have acknowledged that
common law analogy may be useful in applying the prohibition on misleading
or deceptive conduct and associated remedial provisions. 42 The statutory
prohibition on unconscionable conduct operates in a field where there is a
well-established equitable doctrine, based on a standard expressed in similar
language to the statutory prohibition. 43 Courts may legitimately be expected to

Tamberlin, Finn and Conti JJ; PT Ltd v Spuds Surf Chatswood Pty Ltd [2013] NSWCA 446
at [103] per Sackville AJA (McColl and Leeming JJA agreeing); Scully (2013) 303 ALR
168; [2013] VSCA 292 at [59] per Santamaria JA (Neave and Osborn JJA agreeing).
34 Violet Home Loans (2013) 300 ALR 770; [2013] VSCA 56 at [62] per Warren CJ,
Covanough and Ferguson AJJA.
35 Scully (2013) 303 ALR 168; [2013] VSCA 292 at [48] per Santamaria JA (Neave and
Osborn JJA agreeing).
Tamberlin, Finn and Conti JJ.
37 Paciocco [2015] FCAFC 50 at [262] per Allsop CJ (Besanko and Middleton JJ agreeing).
See also Tonto (2011) 15 BPR 26,699; [2011] NSWCA 389 at [291] per Allsop P
(Bathurst CJ and Campbell JA agreeing); Scully (2013) 303 ALR 168; [2013] VSCA 292
at [56] per Santamaria JA (Neve and Osborn JJA agreeing); Paciocco [2015] FCAFC 50
at [278]–[279] per Allsop CJ (Besanko and Middleton JJ agreeing).
39 This accepted influence raises questions about how the courts might approach the question
of accepted community standards in cases where the legislation varies between jurisdictions.
40 See also P D Finn, ‘Statutes and the Common Law’ (1992) 22 WALR 7.
41 See, eg, Shi v Migration Agents Registration Authority (2008) 235 CLR 286; 248 ALR 390;
[2008] HCA 31; Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250
CLR 503; 293 ALR 257; [2012] HCA 55 at [39] per French CJ, Hayne, Crennan, Bell and
Gageler JJ.
42 See, eg, Henville v Walker (2001) 206 CLR 459; 182 ALR 37; [2001] HCA 52 at [18] per
Gleeson CJ. See also Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494; 158 ALR
333; [1998] HCA 69 at [41] per McHugh, Hayne and Callinan JJ, [102]–[103] per Gummow
415; 163 ALR 611; [1999] HCA 25 at [128]–[129] per Kirby and Callinan JJ; Travel
Compensation Fund v Tambree (2005) 224 CLR 627; 222 ALR 263; [2005] HCA 69 at [45]
per Kirby J.
43 See also J Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’

The equitable doctrine may, in any event, be seen as incorporated into the ACL through
s 20, which refers to the standard of unconscionable conduct contrary to the unwritten law,
look to the equitable doctrine for insights into the types of conduct that offend accepted community values to such an extent as to be unconscionable. Unconscionable dealing in equity is a form of equitable fraud that responds to the ‘victimisation’ or ‘exploitation’ by one party of another’s position of special ‘disadvantage’ or ‘disability’. This type of transactional victimisation involves denying the essential personhood of the vulnerable party and instead treating that person as a mere means to an end. The presence in equity of the doctrine of unconscionable dealing expresses a long-standing social distain for such conduct. Courts may also be expected to look to equity for the elements of analysis that can be used to distinguish unconscionable conduct from the unobjectionable conventions of contracting. As Santamaria JA stated in *Director of Consumer Affairs Victoria v Scully*:

> equity’s exploration over the years of the manifold and novel ways in which the strong can exploit the weak, in trade and commerce or otherwise, will usually be of assistance in assessing whether it should be said that conduct has been unconscionable.

### Unconscionable dealing in equity

Equity does not give relief against unconscionable dealing merely on the basis that there is some inequality of bargaining power between the parties, the weaker party has suffered some hardship, or the transaction is improvident. ‘The plaintiff must be able to point to conduct on the part of the defendant, and which s 21 encompasses and moves beyond: *Paciocco* [2015] FCAFC 50 at [283] per Allsop CJ (Besanko and Middleton JJ agreeing).

44. Earl of Chesterfield v Janssen (1751) 2 Ves Sen 125 at 155–6; (1751) 28 ER 82 at 100 per Lord Hardwicke LC, quoted in *Kakavas* (2013) 250 CLR 392; 298 ALR 35; [2013] HCA 25 at [17] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

45. *Louth v Diprose* (1992) 175 CLR 621 at 638 per Deane J; 110 ALR 1; *Kakavas* (2013) 250 CLR 392; 298 ALR 35; [2013] HCA 25 at [18], [158], [161] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.


Beyond the ordinary conduct of the business, which makes it just to require the defendant to restore the plaintiff to his or her previous position,\textsuperscript{53} As set out by Deane J in *Commercial Bank of Australia Ltd v Amadio*, the jurisdiction to set aside a contract or gift procured by unconscionable dealing arises where:

(i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or “unconscientious” that he procure, or accept, the weaker party’s assent to the impugned transaction in the circumstances in which he procured or accepted it.\textsuperscript{54}

Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was "fair, just and reasonable".\textsuperscript{55}

**Unconscionable dealing in equity and the requirement of a special disadvantage**

In considering the element of special disadvantage required for relief against unconscionable dealing, courts commonly refer to the statement of Fullagar J in *Blomley v Ryan* listing ‘poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary’.\textsuperscript{56} Fullagar J prefaced the list with the statement that ‘[t]he circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified’.\textsuperscript{57} Consistently, courts\textsuperscript{58} have recognised that special disadvantage may extend beyond ‘constitutional’ disadvantage, stemming from any inherent infirmity or weakness or deficiency, to encompass ‘situational disadvantage’\textsuperscript{59} deriving from ‘particular features of a relationship between actors in the transaction such as the emotional dependence of one on the other’.\textsuperscript{60}

It is important that the requirement of a special disadvantage is not reduced to a formulaic inquiry into whether a particular person is ‘in’ or ‘out’ of a predetermined category.\textsuperscript{61} The underlying principle is the inability of one

\textsuperscript{53} Ibid, at [20] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

\textsuperscript{54} (1983) 151 CLR 447 at 474 per Deane J; 46 ALR 402; [1983] HCA 14. See also CLR 462 per Mason J.

\textsuperscript{55} Ibid, at CLR 474 per Deane J.

\textsuperscript{56} (1956) 99 CLR 362 at 405 per Fullagar J. See, eg, *Alex Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1983] 1 WLR 87 (Ch D) at 94, 95 per Peter Millett QC (appeal dismissed: [1985] 1 WLR 173 (CA)).

\textsuperscript{57} *Blomley v Ryan* (1956) 99 CLR 362 at 405 per Fullagar J.


\textsuperscript{59} *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301; [2002] FCA 62 at [64] per Gray, French and Stone JJ.


\textsuperscript{61} See also *Berbatis* (2003) 214 CLR 51 at 64 per Gleeson CJ; 197 ALR 153; [2003] HCA 18.
party to judge his or her own best interests in the transaction in question.\(^{62}\) This state can only be assessed by reference to the transaction in question and the circumstances of the case. Thus, as the High Court has reiterated, an assessment of unconscionable conduct:

> calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the [parties concerned].\(^{63}\)

In some cases the High Court has itself neglected to follow this direction.\(^{64}\) In *Kakavas v Crown Melbourne Ltd* the court gave a number of examples of situations where there might be victimisation by a casino of a gambler at a special disadvantage, including where the gambler is ‘evidently intoxicated, or adolescent, or senescent, or simply incompetent’.\(^{65}\) In these scenarios the gambler is affected by circumstances that necessarily impair his or her decision-making capacity. The court also included in these examples ‘a widowed pensioner who is invited to cash her pension cheque at the casino and to gamble with the proceeds’.\(^{66}\) Here we see the court straying into stereotypes, that of the poor widow. It is not clear why a widowed pensioner should be any more or less capable of making a decision to gamble than any other member of the community. Nor is there any necessary reason why a widow would be more susceptible than any other individual to a casino pursuing its core business strategy of encouraging ordinary people to gamble and providing conducive faculties for them to do so.

**Unconscionable dealing in equity and the knowledge of the stronger party**

The second element required for relief against a transaction procured by unconscionable dealing concerns knowledge; the special disability of the weaker party must be ‘sufficiently evident to the stronger party to make it prima facie unfair or “unconscientious” [to] procure, or accept, the weaker party’s assent to the impugned transaction’.\(^{67}\) Prior to *Kakavas*, the kind of
knowledge required to satisfy this element had been a matter of some uncertainty: does the stronger party require actual knowledge or is it sufficient for the stronger party to have merely the means of knowledge? The judgment of Mason J in Amadio seemed to suggest the second option might suffice. Justice Mason stated that unconscionable dealing in equity might be found in circumstances where:

instead of having actual knowledge of [the weaker party’s special disability], [the stronger party] is aware of the possibility that [the special disability] may exist or is aware of facts that would raise that possibility in the mind of any reasonable person . . .

In referring to the knowledge that a reasonable person would have in the circumstances, Mason J seemed to be endorsing a form of constructive notice or knowledge as sufficient to establish unconscionable dealing in equity. This possibility was rejected in Kakavas. The High Court held that the constructive notice doctrine applied ‘to the resolution of disputes as to priority of interests as between a legal interest and a prior competing equitable interest’ and was inapplicable to the scenario addressed by unconscionable conduct. The High Court stated that Mason J should not be understood as suggesting anything different:

It is apparent from what Mason J said in relation to the transaction under consideration in Amadio that his Honour was speaking of wilful ignorance, which, for the purposes of relieving against equitable fraud, is not different from actual knowledge.

It would therefore appear that actual knowledge, including the ‘wilful ignorance’ that occurs where the stronger party simply closes his or her eyes to the vulnerability of the other party, is required to establish unconscionable conduct in equity. This approach is consistent with what is usually understood to be the moral basis for the intervention of equity, albeit a narrow conception of that basis. Unconscionable dealing is concerned with conduct of the stronger party to a transaction taking advantage of the special disadvantage

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70 On this difference see Bigwood, above n 48, at 501–2.


72 Ibid, at [155] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

73 Ibid, at [156] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

74 Ibid, at [157] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

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of weaker party with whom it is dealing. The element of unconscionability is usually understood as being grounded in the stronger party’s decision to proceed with the transaction in the face of the weaker party’s evident position of disadvantage. Duggan points out that this rationale starts to erode once courts accept a lesser degree of knowledge than actual knowledge may satisfy the requirements of the doctrine. Thus, in *ACCC v Radio Rentals Ltd*, Finn J explained that:

The more attenuated is the level of knowledge required, it is said, the more the doctrine itself becomes disconnected from its animating purpose of proscribing advantage taking or exploitation, the more it becomes a device for correcting defective consent or contractual imbalance...

There are other plausible conceptions of the moral basis for relief against unconscionable dealing, which might extend beyond the knowing exploitation of a person unable to protect his or her interests. Bigwood has argued for the recognition of a principle of ‘transactional neglect’, which describes ‘D’s corrective liability for a failure to take reasonable precautions against the risk of transactional harm to P, when D and P were, sufficiently knowingly to D at the time, bargaining under conditions that would have made exploitation possible’. Applying this concept of transactional neglect, it might be considered unconscionable for a stronger party to take the benefit of a transaction in circumstances where the stronger party had access to information that ought to have alerted him or her to the inability of the weaker party to protect his or her own interests and failed to take any precautions to safeguard those interests. Such a possibility appears currently to be ruled out by the decision in *Kakavas*. The High Court stated that:

The principle is not engaged by mere inadvertence, or even indifference, to the circumstances of the other party to an arm’s length commercial transaction. Inadvertence, or indifference, falls short of the victimisation or exploitation with which the principle is concerned.

**Unconscionable dealing in equity and a predatory state of mind**

In addition to clarifying the type of knowledge required on the part of the stronger party for relief in equity for unconscionable dealing, the High Court in *Kakavas* indicated that there may be a further requirement of a ‘predatory

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77 Amadio (1983) 151 CLR 447 at 489 per Dawson J; 46 ALR 402; [1983] HCA 14; Blomley v Ryan (1956) 99 CLR 362 at 415 per Kitto J.

78 Bigwood, above n 48, at 477.


82 Bigwood, above n 48, at 501.

state of mind’. 84 The court stated that ‘[e]quitable 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’. 85 This statement suggests that, for conduct to be unconscionable in equity, not only must the stronger party know of the special disadvantage of the weaker party to the transaction, the stronger party must also have made some active decision to exploit that disadvantage. 86 If such a requirement does exist, it is inconsistent with earlier judicial statements recognising that relief on grounds of unconscionable dealing may be given in response to the ‘active extortion of a benefit’ and also ‘the passive acceptance of a benefit in unconscionable circumstances’. 87

In cases of ‘passive’ exploitation 88 the stronger party may not have intended to act wrongfully by exploiting the special disability of the weaker party to the transaction. Instead, the unconscionable element of that party’s conduct is found in the decision to proceed with a transaction in circumstances where, to the knowledge of the stronger party, the weaker party was in need of assistance to protect his or her own interests. 89 There are a number of illustrations of this category of ‘passive’ exploitation amounting to unconscionable conduct in Australian case law. In Amadio Deane J noted ‘in fairness’ that ‘there is no suggestion that Mr Virgo [the bank’s officer] or any other officer of the bank has been guilty of dishonesty or moral obliquity in the dealings between Mr and Mrs Amadio and the bank’. 90 The moral fault lay in the fact that Mr Virgo ‘simply closed his eyes to the vulnerability of Mr and Mrs Amadio and the disability which adversely affected them’. 91 In Bridgewater v Leahy the court considered that it was unconscionable for Neil York to proceed with a financially improvident transaction without some steps to protect the interests of his uncle, Bill York. 92 While Neil York ‘appreciated the high regard his uncle felt for him’, 93 a factor giving rise to Bill York being in a position of special disadvantage in the transaction, there was no suggestion that Neil York set out to exploit his uncle. 94 Rather, the equity to set aside the deed could be ‘enlivened not only by the active pursuit of the benefit it conferred but by the passive acceptance of that benefit’. 95 These cases cannot comfortably be accommodated within the idea of a predatory

84 Ibid, at [161] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.
85 Ibid.
86 See Bodapati v Westpac Banking Corporation [2015] QCA 7 at [75] per Peter Lyons J (Holmes and Gotterson JJA agreeing).
89 Bigwood, above n 48, at 491.
91 Ibid, at CLR 478 per Deane J.
93 Ibid, at CLR 492 per Gaudron, Gummow, Kirby JJ.
94 Ibid, at CLR 493 per Gaudron, Gummow, Kirby JJ.
95 Ibid, at CLR 493 per Gaudron, Gummow, Kirby JJ.
state of mind as a central element of the claim for relief against unconscionable dealing. As we shall also see, this requirement has not been required as a condition of statutory relief.

Interpretation and application of the statutory prohibition

It is apparent that the equitable doctrine has exercised a considerable influence on the courts’ interpretation and application of the statutory prohibition on unconscionable conduct under statute. As in equity, the courts have stated that mere inequality of bargaining power, resulting in a less than beneficial outcome for one of the parties, is not sufficient for finding unconscionable conduct contrary to statute.96 As in equity, unconscionable conduct under statute has most commonly been found in cases where a stronger party has exploited the vulnerable position of the weaker party.97 However, as we shall see, the elements of knowledge and a predatory state of mind necessary in establishing unconscionable dealing in equity are not accorded the same significance under statute.

Statutory unconscionability and vulnerability

While there is no requirement under the statutory prohibition for the weaker party to occupy a position of special disadvantage, it is clear that ‘vulnerability or lack of understanding’98 are often central to a finding of unconscionable conduct. In making this assessment courts have, as directed in considering unconscionable dealing in equity, been sensitive to the nuanced interplay of factors that may affect the ability of a weaker party to protect his or her own interests in the transaction. A good example of the approach is provided by Lux.99 The case involved a challenge by the Australian Competition and Consumer Commission to the sales strategy utilised by Lux for the sale of vacuum cleaners. The strategy involved a representative from Lux calling homeowners and offering a free maintenance check of their existing vacuum cleaner. If the offer was taken up, a Lux representative, who was not a trained maintenance technician but a sales person, would visit the householder. During the visit to the householder’s home, the sales representative would perform a very perfunctory check of the existing vacuum cleaner and then attempt to sell to the householder a new Lux vacuum cleaner, often staying at the premises longer than permitted under relevant door-to-door sales provisions. The sales method was well established100 and consumers had cooling off rights under their contracts.101 Nonetheless, the Full Court of the Federal Court held that by utilising this strategy Lux had

100 Ibid, at [28] per Allsop CJ, Jacobson and Gordon JJ.
contravened the statutory prohibition on unconscionable conduct. This finding was primarily based on the grounds that the sales strategy was premised on a ‘deceptive ruse’, which breached consumer protection laws on door-to-door sales, and had the effect of taking advantage of elderly consumers living alone.102

Importantly, it was not simply the fact of the advanced age of the consumers that led to the finding that Lux’s sales strategy was unconscionable. The consumers, although elderly, did not lack contractual capacity and were still living independently in their own homes at an advanced age. Rather the court considered that the sales strategy manipulated the emotions and preferences of the consumers in order to create a ‘subtle but real sense of obligation to buy’.103

The court explained that:

> The vulnerability of the consumer to the salesperson in her or his own home arises from the difficulty in putting an end to the sales process once the salesperson is in the home, especially after that person has spent time and undertaken persuasive effort in a sales process or ‘pitch’. . . . Ingratiating solicitude, just as much as high-pressure bullying sales tactics, may lead to a feeling of necessitous acceptance, especially by a polite and accepting person.104

Courts applying the statutory prohibition on unconscionable conduct have recognised that in certain contexts the inexperience of one party may place them at a relevant disadvantage in their dealings with a business.105 In *ASIC v National Exchange Pty Ltd*, National Exchange sent unsolicited off-market offers to members of a demutualised company to buy their shares at a price substantially less than the market price.106 In the Full Court of the Federal Court, Tamberlin, Finn and Conti JJ held that National Exchange had engaged in unconscionable conduct. The conduct of National Exchange could properly be described as predatory and against good conscience because it was designed to take advantage of inexperienced offerees.107

Their Honours explained that:

> National Exchange set out to systematically implement a strategy to take advantage of the fact that amongst the official members there would be a group of inexperienced persons who would act irrationally from a purely commercial viewpoint and would accept the offer.108

This approach might appear to go beyond the rubric of special disadvantage in equity. However, it echoes one of the core concerns in the early

102 Ibid, at [27], [34], [40], [42] per Allsop CJ, Jacobson and Gordon JJ.
107 Ibid, at [43] per Tamberlin, Finn and Conti JJ.
108 Ibid.
formulations of the equitable doctrine in granting relief against an unconscionable dealing. As Kay J explained in *Fry v Lane*:

The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.\(^{109}\)

In a time when ordinary individuals are entering into increasingly complex transactions — such as rent to buy schemes, reverse mortgages and margin lending — ‘ignorance’, like special disadvantage, becomes more obviously relative. A person may not be ‘ignorant’ in their ordinary day-to-day dealings, but may be relevantly vulnerable in a one off, complex transaction due to inexperience. Substitute the word ‘inexperienced’ for ‘poor and ignorant’ in this statement and the circumstances of cases such as *National Exchange*\(^{110}\) are nicely encapsulated.\(^{111}\)

Courts have also been prepared to draw support for the inference that advantage was being taken of parties not in a position adequately to safeguard their own interests for the purposes of finding unconscionable conduct contrary to statute from the patent imprudence of the transaction.\(^{112}\) In *National Exchange* the significant discrepancy between the price offered for the shares and their market value supported the court’s inference that the transaction was designed to take advantage of inexperienced consumers.\(^{113}\)

Once again this approach has echoes in the equitable jurisdiction. In Australia, it is not necessary for there to be a lack of proportionality between price and value to find that a transaction has been procured by unconscionable dealing in equity.\(^{114}\) However, courts have long treated inadequacy of consideration as a factor raising the suspicions of equity.\(^{115}\) In *Blomley v Ryan*, Fullagar J explained that:

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109 (1888) 40 Ch D 312 at 322.


111 See also *Crosswell v Potter* [1978] 1 WLR 255 at 257 per Megarry J (suggesting ‘less highly educated’ might be substituted for ‘ignorant’ in this formulation).


Inadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specially important element in cases of this type. It may be important in either or both of two ways — firstly as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion.\textsuperscript{116}

Equally, an inference of unconscionable conduct may be prompted by the combination of a highly risky transaction entered into with an inexperienced party in circumstances where those risks are not transparent. In \textit{Scully}, the Victorian Court of Appeal found unconscionable conduct in circumstances where the trader utilised arrangements for a home ownership scheme that were ‘far from straightforward’, ‘complex’ and ‘hazardous to the participants’.\textsuperscript{117} The trial judge held that given these unusual and complex arrangements, ‘not to highlight the risks for home buyers, and the potential benefits for Key Result . . . was immoral conduct, which deserves the opprobrium of a finding of unconscionability’.\textsuperscript{118} The Court of Appeal dismissed the appeal from this decision on the ground that the trial judge had not applied a test that was plainly wrong.\textsuperscript{119} The difficulty of the documentation in a product offered to consumers was enough to support an inference that unconscionable advantage had been taken of those consumers, contrary to the statutory prohibition.\textsuperscript{120}

\textbf{Statutory unconscionability and the knowledge of the stronger party}

There is some authority suggesting that knowledge on the part of the stronger party of the position of disadvantage of the weaker party is an essential element in finding unconscionable conduct contrary to statute.\textsuperscript{121} \textit{Tonto Home Loans Australia Pty Ltd v Tavares} involved loan agreements under which consumers borrowed money to invest in commercial property.\textsuperscript{122} The lender had engaged an intermediary to find and introduce borrowers to it. The intermediary was related to the company from which consumers were encouraged to use finance in order to invest. The intermediary engaged in fraudulent conduct in committing borrowers to the transaction. It misled borrowers as to the identity of the lender and the viability of their investment and inserted incorrect information on their application forms. The NSW Court of Appeal held that the lender could not be held to have engaged in unconscionable conduct contrary to statute because, although the lender had contributed to the structural risk of fraud by the intermediary, it did not actually know that the fraudulent conduct had occurred.\textsuperscript{123} President Allsop, with whom Bathurst CJ and Campbell JA agreed, stated that the kind of

\begin{footnotesize}
\begin{enumerate}
\item [(116)] (1956) 99 CLR 362 at 405 per Fullagar J.
\item [(118)] Ibid, at [55] per Santamaria JA (Neave and Osborn JJA agreeing).
\item [(119)] Ibid, at [60] per Santamaria JA (Neave and Osborn JJA agreeing).
\item [(120)] Ibid, at [43] per Santamaria JA (Neave and Osborn JJA agreeing).
\item [(122)] (2011) 15 BPR 26,699; [2011] NSWCA 389 (\textit{Tonto}).
\item [(123)] Ibid, at [226] per Allsop P (Bathurst CJ and Campbell JA agreeing).
\end{enumerate}
\end{footnotesize}
‘moral tainting’ necessary to permit ‘the opprobrium of unconscionability to characterise the conduct of [the lender]’ could not be found in the absence of ‘a finding of some knowledge or complicity’ on the part of the lender.124

In most cases, however, the role of knowledge in finding unconscionable conduct contrary to the statute has not been addressed by the courts. It is unclear whether this is because the element of knowledge is not essential to the action, or because it could easily be satisfied in any event. Many of the cases involve a stronger party in a face-to-face dealing with vulnerable parties125 or an highly importune transaction being presented to patently vulnerable126 or inexperienced127 parties. The facts of these cases may have been sufficiently strong to support a finding that the stronger party had actual knowledge of the vulnerable position of the weaker party with whom it was dealing.128 They would certainly support a finding that the stronger party had constructive knowledge, in the sense of an awareness of facts that would ‘raise that possibility in the mind of any reasonable person’.129

ASIC v The Cash Store Pty Ltd (in liq) involved the sale of credit insurance by Cash Store.130 The loans were provided to a high percentage of financially vulnerable consumers who were on Centrelink payments,131 and the insurance offered was unsuitable for consumers in these circumstances.132 Justice Davies found that the sale of the insurance in these circumstances amounted to unconscionable conduct because the terms of that insurance were ‘self-evidently unsuited to needs of most customers and were most unlikely ever to confer a benefit’.133 Justice Davies’ reference to the ‘self evidentially’ unsuitable nature of the transaction suggests that the Cash Store either knew or ought to have known of the vulnerable position of many of the consumers

124 Ibid, at [293] per Allsop P (Bathurst CJ and Campbell JA agreeing). See also A v B1 (No 2) (2012) 271 FLR 122; [2012] WASC 383 at [322] per Edelman J (carelessness by lender and, to a lesser extent, the creation of structural risk by the lender ‘will rarely be unconscionable conduct’).

To the extent that knowledge is an essential element in finding statutory unconscionability, it seems probable that, as with the equitable doctrine, wilful ignorance will be equated with actual knowledge: see Violet Home Loans (2013) 300 ALR 770; [2013] VSCA 56 at [62] per Warren CJ, Cavanough and Ferguson AJJA (the requisite degree of ‘moral fault’ could be found in the lender turning a ‘blind eye’ to the irregularities in the loan application).


128 On the process of attributing knowledge see Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] 1 SLR(R) 502; [2005] SGCA 2 at [35], [40] and [41] per Yong Pung How CJ, Chao Hick Tin JA and Kan Ting Chau J.


130 [2014] FCA 926 (Cash Store).

131 Ibid, at [91] per Davies J.

132 Ibid, at [90] per Davies J.

133 Ibid, at [94] per Davies J.
with whom it was dealing and chose to take advantage of that position.\(^{134}\)

The decision of the High Court in *Kakavas*, dismissing constructive notice as sufficient to establish unconscionable dealing in equity and emphasising the role of actual knowledge, may prompt a closer consideration of the degree of knowledge required to find unconscionable conduct under statute.\(^{135}\) There is nothing in the statutory prohibition that requires actual knowledge as an element of the action and the requisite degree of moral fault might be found in other ways. While the High Court in *Kakavas* affirmed that mere ‘indifference’ was not sufficient for a finding of unconscionable dealing in equity,\(^{136}\) it would be possible to take the view that the statutory doctrine moves beyond the equitable prohibition in this regard.\(^{137}\) Thus, it might be possible to find unconscionable conduct contrary to statute where the vulnerability of the weaker party should reasonably have been apparent to the stronger party, due to the combination of the circumstances of the weaker party and the unusual or risky features of the transaction, or other risks that the stronger party is responsible for creating. In these scenarios the requisite degree of moral fault on the part of the stronger party might be found in its indifference to the risks faced by the weaker party to the transaction.\(^{138}\) As we will see, there are suggestions of this approach in some cases where relief has been granted against an unjust contract under the Contracts Review Act 1980 (New South Wales).

### Statutory unconscionability and a predatory state of mind

Proof of a predatory state of mind, suggested in *Kakavas* as necessary to establish unconscionable dealing in equity, has not been required to find statutory unconscionability. In many cases, this element is in any event present, as the stronger party has deliberately and directly targeted vulnerable consumers.\(^{139}\) For example, in *National Exchange* the court characterised the strategy of National Exchange as ‘predatory’ conduct ‘designed to take

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\(^{134}\) Cases involving a course of dealing also raise the question of the content of the knowledge required; is it enough that the stronger party knew that a significant proportion of its customers were likely to be vulnerable or must it know of their actual circumstances? See J Dietrich, ‘The Liability of Accessories Under Statute, in Equity, and in Criminal Law’ (2010) 34 *MULR* 106 at 118.

\(^{135}\) See above n 71.


\(^{138}\) See Bigwood, above n 81; J M Paterson, ‘Knowledge and Neglect in Asset Based Lending: When is it Unconscionable or Unjust to Lend to a Borrower Who Cannot Repay’ (2009) 20 *JBFLP* 18.

advantage of inexperienced offerees'. Equally there are cases where the idea of a predatory intent does not fit well with the facts. In *Violet Home Loans Pty Ltd v Schmidt* the actions of a lender, found to amount to unconscionable conduct, were ‘deliberate and attended by moral fault and lack of moral responsibility’. The deliberateness lay in turning a blind eye to irregularities in the loan application that should have alerted it to the vulnerable position of the borrower. However, this type of conduct is not normally equated with the active decision to exploit suggested by the phrase ‘predatory state of mind’. As with the cases of unconscionable dealing in equity involving ‘passive’ exploitation, the lender’s fault was in taking the benefit of the bargain without regard for the obvious risk that the consumer was not in a position to safeguard his or her own interests.

The need to show a particular state of mind in establishing unconscionable conduct contrary to statute was rejected in *PT Ltd v Spuds Surf Chatswood Pty Ltd*. The case concerned the conduct of a shopping centre lessor who failed to comply with its own guidelines about the placement of kiosks. This led to the visibility of a lessee’s shop being reduced. When the lessee raised this issue with the lessor, the lessor refused even to discuss the issue, and then changed the relevant guidelines. The lessor was found to have engaged in unconscionable conduct contrary to the Retail Leases Act 1994 (New South Wales). The lessor argued that this finding was not open in a case where the employees who dealt with the matter had been genuinely mistaken in their interpretation of the guidelines, and thus had acted in good faith. The Court of Appeal rejected this argument. The court did not consider that conscious wrongdoing was required to infringe the statutory prohibition on unconscionable conduct. Acting Judge of Appeal Sackville, with whom McColl and Leeming JJA agreed, explained that:

*a corporation can engage in what a reasonable observer might properly regard as unethical behaviour even though no individual officer or employee acts with conscious impropriety. Moral obtuseness can be one reason, but there may be many others, such as sheer inefficiency, discontinuity in decision-making or internal disagreements resulting in ‘collateral damage’ to third parties. The ethical quality of a corporation’s behaviour must be assessed by reference to the actions of the corporation itself.*

**The Contracts Review Act 1980 (NSW)**

In New South Wales, claims for relief against transactions procured by exploitative or predatory conduct are most commonly pursued under the
CRA. The CRA applies to all contracts other than those entered into in the course of or for the purpose of a trade, business or profession. The CRA grants courts extensive powers to avoid an unjust result where it 'finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made'. 'Unjust' under the CRA is defined to include 'unconscionable, harsh or oppressive'. In assessing whether a contract is unjust, courts are directed to have regard to 'the public interest and to all the circumstances of the case'. The CRA also sets out a list of matters to which a court may consider in deciding whether a contract is unjust. In most cases contracts have been set aside on the basis of a combination of procedural and substantive injustice, rather than purely substantive injustice.

In the courts' approach to granting relief under the CRA we can again see parallels with unconscionable dealing in equity, and also with the statutory prohibition on unconscionable conduct in the ACL and similar legislation. This is not surprising given the definition of 'unjust' under the CRA includes 'unconscionable' and, moreover, the CRA was enacted to promote a 'doctrine of unconscionability suitable to present and future business and community needs and standards'. As with both equitable and statutory unconscionability, mere inequality of bargaining power is not conclusive in establishing an unjust contract. Equally, a contract will not be unjust merely because it is burdensome or inopportune. The assessment as to whether a contract is unjust has been said to involve balancing the interest in holding people to their freely entered contracts, against the public interest in protecting 'those not able fully to protect themselves and . . . those preyed upon by dishonesty, trickery and other forms of predation'. These are

148 An equivalent provision power is also contained in the National Credit Code s 76, contained in Sch 1 of the National Consumer Credit Protection Act 2009 (Cth) s 76.
149 The Contracts Review Act 1980 (NSW) (CRA) s 6(2). The CRA will also apply to a farming undertaking in NSW: s 6(2). The Crown, public or local authorities and corporations cannot claim relief under the Act: s 6(1).
150 CRA s 7(1).
151 CRA s 4(1).
152 CRA s 9(1).
153 CRA s 9(2).
154 West v AGC (Advances) Ltd (1986) 5 NSWLR 610 at 620 per McHugh JA (Hope JA agreeing).
156 CRA s 4(1).
158 Crowe v Commonwealth Bank of Australia [2005] NSWCA 41 at [80] per Tobias JA (Sheller and Bryson JJA agreeing).
160 Baltic Shipping Co v Dillon 'Mikhail Lermontov' (1991) 22 NSWLR 1 at 9 per Gleeson CJ.
familiar themes from the unconscionability jurisdiction.\textsuperscript{162} The role of community standards in assessing what amounts to an unjust contract has also been recognised.\textsuperscript{163}

**CRA and vulnerability**

The injustice against which relief is granted under the CRA is most commonly found in circumstances where advantage has been taken of a more vulnerable party, unable to protect his or her own interests in the transaction in question.\textsuperscript{164} In assessing whether a party is relevantly vulnerable, courts have been prepared to consider the whole of the circumstances of the case, recognising that disadvantage is often relative and transaction specific. A good example is \textit{Gray v Latter}.\textsuperscript{165} This case involved a property transaction between two couples, who shared some degree of friendship. The vendors had purchased the property for $145,000. Two months later they sold the property to the purchasers for $240,000. Vendor finance was provided on terms that the purchasers would make repayments of $300 per week and that they would have to repay the outstanding principal after 2 years. Because of the disparity between the purchase price and the value of the property the purchasers were unable to refinance the loan. They defaulted. The vendors sought possession and judgment in the amount of the purchase price.

Relief was given to the purchasers under the CRA on the ground that the circumstances of the transaction made the contracts of sale and mortgage unjust. Justice Adamson noted that the purchasers were subject to a number of circumstances that constrained their ability to promote their own best interests in the transaction: they were relatively unsophisticated, they needed housing and their finances were constrained.\textsuperscript{166} The purchasers trusted the vendors to ask a fair price for the property and not to exploit the relationship.\textsuperscript{167} The vendors were aware that the purchasers trusted them and considered the transaction to be proceeding on a ‘closer than arms length basis’ because of the personal relationship.\textsuperscript{168} The vendors exploited this relationship\textsuperscript{169} by insisting on a purchase price for the property that ‘they had no basis for believing would be other than grossly in excess of its value having regard to what they had paid for it . . .’.\textsuperscript{170} Because of the exorbitant price, the prospects


\textsuperscript{163} \textit{Perpetual Trustee Co Ltd v Khoshaba} (2005) 14 BPR 26,639; [2006] NSWCA 41 at [131] per Basten JA.

\textsuperscript{164} See \textit{Riz v Perpetual Trustee Australia Ltd} [2007] NSWSC 1153 at [70] per Brereton J. Also \textit{Perpetual Trustee Co Ltd v Khoshaba} (2005) 14 BPR 26,639; [2006] NSWCA 41 at [131] per Basten JA.

\textsuperscript{165} \textit{McColl} JJA agreeing); \textit{Provident Capital Ltd v Papa} (2013) 84 NSWLR 231; [2013] NSWCA 36; at [7] per Allsop P (Sackville AJA agreeing) \textit{Dunwoodie v Teachers Mutual Bank Ltd} [2014] NSWCA 24 at [65] per McColl JA.

\textsuperscript{166} Ibid, at [81] per Adamson J.

\textsuperscript{167} Ibid, at [91] and [113] per Adamson J.

\textsuperscript{168} Ibid, at [121] per Adamson J.

\textsuperscript{169} Ibid, at [90] per Adamson J.

\textsuperscript{170} Ibid, at [121] per Adamson J.
of the purchasers refinancing the property were ‘illusory’ and, accordingly, default after 2 years was ‘nigh inevitable’. 171

This analysis is consistent with the principle underlying the category of special disadvantage in equity, namely, the inability of one party to make a judgment as to his or her own best interests. 172 The purchasers’ vulnerability arose from their trust in the vendors rather than in any ongoing or ‘constitutional’ disadvantage 173 within the categories identified in Blomley v Ryan. 174 However, the influence of a personal relationship has been recognised as a factor that may lead to a party being in a position of special disadvantage so as to obtain relief in equity. 175 In this case the purchasers’ trust in the friendship affected their ability to assess the objective merits of the transaction. It is also clear, largely from the imprudence of the transaction, that the vendors knowingly took advantage of the purchasers. This type of predatory conduct might compensate for the ‘situational’ nature of the purchasers’ disadvantage and provide a sufficient level of moral taint for the vendors’ conduct to be found unconscionable. “To borrow the words of Fullagar J in the passage from Blomley v Ryan . . . “an unfair use was made of the occasion” by the [vendors].’ 176

The CRA and the knowledge of the stronger party

A requirement that the stronger party know of the weaker party’s position of disadvantage or vulnerability has not been insisted upon under the CRA. As already noted, in Tonto the NSW Court of Appeal (Allsop P, Bathurst CJ and Campbell JA agreeing) held that the loan contracts induced by the fraud of an intermediary could not be set aside on the basis of unconscionable conduct by the lender contrary to the statutory prohibition in the absence of knowledge by the lender of that fraud. 177 By contrast, the court held that relief could be granted under CRA. 178 The contracts were unjust because the lenders were responsible for putting in place a business structure that created an inherent and systematic risk of misconduct by the intermediary, 179 and yet failed to follow their own guidelines for protecting the interests of borrowers. 180 The power to reopen unjust contracts under the CRA and the statutory prohibition on unconscionable conduct are expressed in different terms. Nonetheless, it is not at all clear that this difference in terminology justifies the different degree of knowledge required for relief given the legislative regimes operate in a very similar context.

171 Ibid.
172 See above n 62.
173 Gray v Latter [2014] NSWSC 122 at [99] per Adamson J.
174 (1956) 99 CLR 362.
175 See, eg, Louth v Dyonne (1992) 175 CLR 621; 110 ALR 1
176 Gray v Latter [2014] NSWSC 122 at [113] per Adamson J.
177 See above text at n 122.
180 Ibid, at [259] per Allsop P (Bathurst CJ and Campbell JA agreeing).
The CRA and a predatory state of mind

As with statutory unconscionability, there has not been any requirement for a predatory state of mind under the CRA. Indeed, as we have just seen, there are a number of cases in which the injustice of the contract is found in the stronger party’s indifference to the risks presented by the transaction to the interests of the weaker party, of which it should reasonably have been aware or was even implicated in creating.181

The influence of statute on unconscionable dealing in equity?

Courts awarding relief against unconscionable conduct under statute have looked to the structure for assessing wrongdoing provided by the equitable doctrine. Thus, as in equity, statutory unconscionability commonly involves a stronger party who has taken advantage of the position of disadvantage or vulnerability of the weaker party with whom it is dealing. At the same time the statutory prohibition is not, as Dietrich has observed, bound by ‘the shackles of those doctrines and their technical limits’.182 The statutory prohibition potentially moves beyond the equitable doctrine in its consistently nuanced and contextual approach to assessing vulnerability. It remains to be seen whether courts will extend the statutory prohibition beyond the equitable doctrine to cases where the moral fault is not based in the knowledge of the stronger party of the circumstances of the weaker party, but in its neglecting to respond to information that should have made this position apparent. It seems unlikely that under statute courts will insist on a requirement of a predatory state of mind by the stronger party as a precondition for relief for the weaker party.

These possible divergences between statutory and equitable unconscionability might lead us to ask whether a reciprocal relationship of influence is possible. Different views have been expressed about whether courts should use statute as a source of analogical reasoning in developing the common law.183 Ultimately, the appropriateness of this development in any particular context must come down to the nature and purposes of the statute in question and the legal doctrine potentially influenced. Those who take the view that common law and statute are ‘oil and water’184 might argue that any reliance on statutory analogy to inform unconscionable dealing in equity would disrupt the well-established parameters of the equitable regime. However, it is not being suggested that analogy from statute should be used radically to abrogate or reform established equitable doctrine. Rather, the

181 See in particular Perpetual Trustee Co Ltd v Khoshaba (2005) 14 BPR 26,639; [2006] NSWCA 41 at [92] per Spigelman CJ (Handley JA agreeing).
184 The phrase was coined by Professor Beatson, see J Beatson ‘Has the Common Law a Future?’ (1997) 56 Cam LJ 291 at 308.
suggestion is that the courts’ interpretation and application of unconscionable conduct under statute should be capable of influencing the courts’ approach to the elements of the equitable doctrine. Given the overlapping purposes and scope of equitable and statutory unconscionability, some cross influence between jurisdictions seems difficult to avoid and there seems little real case for quarantining the development of the equitable doctrine from insights into unconscionability arrived at under statute.185

The equitable jurisdiction to give relief against an unconscionable bargain is based in the ‘conscience of equity’. This conscience is ‘a construct of values and standards’ against which the conduct of individuals is to be judged.186 The conscience of equity must at some level reflect accepted community values, which are not fixed and immutable but will change over time. One expression of these evolving community values can be found in the courts’ application of the statutory prohibition on unconscionable conduct.187 The case for using analogical reasoning drawn from the CRA in applying the equitable doctrine might be thought somewhat weaker. The CRA is directed at unjust contracts, not conduct that is unconscionable. However, there remains a considerable overlap with both the equitable and statutory bases for relief. As with both equitable and statutory unconscionability, a primary concern of courts in granting relief against unjust contracts is with interpersonal victimisation and exploitation in a transactional context. Courts must draw on some similar sense of community values in assessing the normative standard set by concepts of ‘unjust’ or ‘unconscionable’.188

The statutory prohibition on unconscionable conduct is found in uniform legislation applying throughout Australia.189 It is capable of responding to most concerns about transactional advantage taking, victimisation and exploitation, applying to all transactions in trade or commerce whether or not involving consumers, precluding only listed companies as claimants,190 and accompanied by a broad range of remedies,191 including the possibility of damages.192 Reliance need only be placed solely on equitable doctrine in transactions that are not ‘in trade or commerce’,193 primarily gifts and private

190 ACL s 21(1).
191 ACL ss 237 and 238.
192 ACL s 236.
193 Cf Bodapati v Westpac Banking Corporation [2015] QCA 7 (applying equitable principles to a finance dispute). The prohibition on unconscionable conduct will also not apply where the claimant is a publically listed company: ACL s 21(1).
In New South Wales the need for parties to rely on the equitable jurisdiction to give relief against an unconscionable bargain is even narrower than in other parts of the country, primarily being restricted to disputes about gifts. There is no requirement under the CRA for the stronger party’s conduct to occur in trade or commerce. Accordingly, unlike the statutory prohibition on unconscionable conduct, the CRA will apply to regulate private sales. There does not seem to be a compelling reason why these types of private transaction should be insulated from developments in assessing unconscionable conduct in transactions occurring in trade and commerce that fall under the statutes.

Cases exploring the right to relief under the statutory prohibition on unconscionable conduct and the power to reopen unjust contracts under the CRA may provide insights into the combinations of circumstances that may place one party in a position of vulnerability or special disadvantage in a transaction that are highly relevant to private sales and gifts. It is clear from cases decided under these statutes that courts are prepared to rely on more than a one dimensional caricature of the type of person who may be vulnerable to victimisation in a dealing. Rather courts consistently consider the whole of the circumstances, including the nature of the transaction and the relationship between the parties, before determining whether the ability of the weaker party to assess the merits of the transaction is impeded. Cases such as National Exchange and Scully act as a reminder that in some circumstances vulnerability in this sense may be inferred from the sheer improvidence of the transaction or the complexity of the product, combined with the probable inexperience of the weaker party. In private dealings any requirement that the stronger party actually know of the vulnerability or disadvantage of the weaker party may typically not present any difficulty. The face-to-face element of such transactions will usually ensure that the stronger party is aware of the decision-making capacity of the person with whom they are dealing. What may be lacking is a predatory state of mind, stated in Kakavas to be a requirement of relief for unconscionable dealing in equity. Particularly in family based transactions, it is entirely possible that the stronger party may act with ‘pure’ motives, yet have engaged in unconscionable conduct in the sense of accepting the benefit of an improvident bargain from a person in a position of special disadvantage.

In Aboody v Ryan, Mr Ryan was the recipient of a veteran’s disability pension. He lived in a home owned by him and had three children. One daughter had spent time and effort caring for and assisting Mr Ryan, who had fallen out with his other children. Mr Ryan was fond of this daughter. He also held an irrational fear that, should the Labor Party win the 2007 election, they

194 A sale by an individual in his or her private capacity will not be ‘in trade or commerce’ as required for the application of the ACL/ASIC Act prohibitions. See, eg, O’Brien v Smolenevov (1983) 53 ALR 107; (1983) NSW ConvR 55-155; (1983) V ConvR 54-115
198 Johnson v Smith [2010] NSWCA 306 at 1 per Allsop P; [100] per Young JA. Also Nichols v Jessup [1986] 1 NZLR 226 at 234 per McMullan J.
would take his pension and his home. As a result, Mr Ryan transferred his interest in his home to the daughter and her husband, the Aboodys, by way of gift. Two years later, he changed his mind and asked for a reconveyance of the property, eventually commencing proceedings to set aside the gift on grounds of unconscionable conduct. The NSW Court of Appeal upheld the decision of the trial judge setting aside the transaction on grounds of unconscionable dealing in equity.

There was no suggestion that the Aboodys had acted with a predatory motive. The primary judge accepted that the Aboodys did not pressure Mr Ryan to make the gift and attempted to obtain independent legal advice for him as well as to dissuade him as to his fears regarding the Labor Party. The primary judge also found that, despite being 94 years old at the time of the gift, the respondent was not labouring under any mental impairment, although he did suffer from the physical effects of various medical conditions and had told his solicitor that he wished to make the gift due to his health. Nonetheless, Allsop P (Bathurst CJ and Campbell JA agreeing) explained that the Aboodys knew about the characteristics of Mr Ryan that left him vulnerable in the transaction and that the gift would leave him financially exposed to their charity or the support of the state. Accepting and retaining the improvident gift in these circumstances was to take advantage of the known weakness and amounted to unconscionable dealing. At least without the legal adviser knowing of Mr Ryan’s irrational fear and also inquiring into his financial position, the presence of legal advice was not sufficient to ensure that the transaction was fair, just and reasonable.

It is possible that the authority of Kakavas would not extend to this sort of case. The High Court’s statement that unconscionable conduct required proof of a predatory state of mind on the part of the stronger party was stated to apply in an ‘arm’s length commercial transaction’. It may therefore be argued that evidence of a predatory state of mind should not be required in establishing unconscionable dealing in different sorts of transactions, such as in private sales or gifts. The strong statements in PT Ltd v Spuds Surf Chatswood Pty Ltd as to why this requirement is not necessary in finding unconscionable conduct under statute should be relevant in supporting this position.

Conclusion

Unconscionable dealing in equity, unconscionable conduct under the ACL and conduct giving rise to an unjust contract under the CRA are similar but different. The mathematically minded might see these actions as overlapping circles on a Venn diagram. The statutory actions may go beyond the equitable jurisdiction, and also differ from each other in some respects, but in their

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201 Ibid, at [68]-[69] per Allsop P (Bathurst CJ and Campbell JA agreeing).
202 Kakavas (2013) 250 CLR 392; 298 ALR 35; [2013] HCA 25 at [161] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ. Compare Humphreys v Humphreys [2004] EWHC 2201 (Ch) at [105]-[107] per Rimer J (‘the party benefiting from the transaction must have imposed the objectionable terms in a morally reprehensible manner’).
203 [2013] NSWCA 446 at [110] per Sackville AJA (McCull and Leeming JJA agreeing).
primary field of operation there is a considerable overlap. The equitable doctrine of unconscionable dealing has influenced the courts' interpretation and application of the statutory prohibition on unconscionable conduct and the statutory power to reopen unjust contracts for the simple reason that equity has a long history of dealing with issues of victimisation and exploitation in a transactional setting. Statutory relief is now potentially available in a considerable part of the area traditionally addressed by unconscionable dealing in equity. The challenge is whether the courts can draw on the growing body of case law under statute to enrich the development of the equitable doctrine. Certainly, it can be argued that some degree of dialogue with developments under statute is essential in ensuring that the equitable doctrine remains relevant and responsive to contemporary community values.