Federal Court of Australia

Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd [2021] FCAFC 40

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| Appeal from: |  |
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| File number: |  |
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| Judgment of: | **ALLSOP CJ, BESANKO AND MCKERRACHER JJ** |
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| Date of judgment: | 19 March 2021 |
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| Catchwords: | **CONSUMER LAW –** where company admitted to unconscionable conduct by a system or pattern of behaviour in contravention of s 21 *Australian Consumer Law* (ACL)– where penalties and declarations agreed with regulator – where primary judge found the majority in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 considered s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) requires exploitation of some disadvantage or vulnerability by a stronger party and therefore s 21 of the ACL also requires those features to be present in the conduct – primary judge not satisfied investors, to whom the company’s conduct was directed, could be characterised as vulnerable or exploited – primary judge found no contravention of s 21 – whether judge found exploitation of a special disadvantage in the equitable sense is required under s 21 – whether *Kobelt,* precedent or statutory interpretation requires that exploitation or taking advantage of some pre-existing vulnerability, disadvantage, or disability is a necessary element of statutory unconscionability under s 21 ACL – appeal allowed. |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth)ss 12CA, 12CB, 12CC  *Competition and Consumer Act 2010* (Cth) Schedule 2 (*Australian Consumer Law*) ss 20, 21, 22  *Trade Practices Act* *1974* (Cth) ss 51AA, 51AB, 51AC, 52A |
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| Cases cited: | *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90; ATPR 42-447  *Australian Competition and Consumer Commission v Medibank Private* *Ltd* [2018] FCAFC 235; 267 FCR 544  *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; 267 CLR 1  *Australian Securities and Investment Commission v National Exchange Pty Ltd* [2005] FCAFC 226; 148 FCR 132  *Colin R Price & Associates Pty Ltd v Four Oakes Pty Ltd* [2017] FCAFC 75; 251 FCR 404  *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; 151 CLR 447  *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; 249 FCR 421  *Guy v Crown Melbourne Ltd (No 2)* [2018] FCA 36; 355 ALR 420  *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15; 356 ALR 440  *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* [2008] FCAFC 60; 167 FCR 372  *Jenyns v Public Curator (Qld)* [1953] HCA 2; 90 CLR 113  *Kakavas v Crown Melbourne Ltd* [2013] HCA 25; 250 CLR 392  *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2002] FCAFC 197; 122 FCR 110  *National Australia Bank Ltd v Meeke* [2007] WASC 11  *Paciocco* v *Australia & New Zealand Banking Group Ltd* [2015] FCAFC 50; 236 FCR 199  *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446  *QNI Resources Pty Ltd v Sino Iron Pty Ltd* [2016] QSC 62; [2017] 1 Qd R 167  *Secure Funding Pty Ltd v Stark* [2013] NSWSC 1729  *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; 224 CLR 193  *Tameeka Group Pty Ltd v Landan Pty Ltd (No 3)* [2016] FCA 733  *The Good Living Company Pty Ltd ATF the Warren Duncan Trust No 3 v Kingsmede Pty Ltd* [2019] FCA 2170; 142 ACSR 221  *Thorne v Kennedy* [2017] HCA 49; 263 CLR 85  *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389  *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155; 266 FCR 631 |
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| Number of paragraphs: | 99 |
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| Date of hearing: | 1-2 February 2021 |
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| Counsel for the Appellant: | Ms N Sharp SC, Ms D Forrester with Mr A Mossop |
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| Solicitor for the Appellant: | Corrs Chambers Westgarth |
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| Counsel for the First Respondent: | The First Respondent did not appear |
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| Counsel for the Second Respondent: | The Second Respondent did not appear |
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| Counsel being Intervener and Contradictor: | Dr R Higgins SC with Mr C Tran |
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| Solicitor for the Intervener and Contradictor: | Australian Government Solicitor |
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ORDERS

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|  | | WAD 157 of 2020 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Appellant | |
| AND: | QUANTUM HOUSING GROUP PTY LTD (ACN 141 554 798)  First Respondent  CHERYL ANNE HOWE  Second Respondent | |
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| order made by: | ALLSOP CJ, besanko and MCKERRACHER JJ |
| DATE OF ORDER: | 19 MARCH 2021 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The declaration set out below be read as 4A in the orders made on 9 June 2020 in WAD 229 of 2019.
3. Order 5 of the orders made on 9 June 2020 in WAD 229 of 2019 be amended such that it reads: The second respondent (Ms Howe) was a person knowingly concerned in QHG's contraventions, as declared in paragraphs 1 to 4A.

**THE COURT DECLARES THAT:**

1. In the period February 2017 to July 2018, in trade or commerce, in connection with the supply or possible supply of services to investors, QHG engaged in an unconscionable system of conduct in contravention of s 21 of the ACL by devising the Roll Up Plan being a plan to encourage investors to transfer the management of properties that qualified for incentives under the National Rental Affordability Scheme (NRAS) to property managers who were related to, or preferred by Mr Fenn, who had a commercial association with QHG, and then implementing it in a planned, deliberate and sustained way including by:
   1. knowingly taking advantage of its superior bargaining position relative to the investors as a result of the investors' reliance on QHG to receive the NRAS incentive and because they could not change to another approved participant;
   2. issuing escalating rounds of letters in which deliberately false representations were made to at least 450 investors and which unduly pressured those investors to switch property managers; and as the rounds of correspondence progressed, the pressure on investors increased;
   3. not disclosing to investors its commercial associations with the approved property managers;
   4. unilaterally imposing the accreditation guidelines on investors and their property managers, including a requirement that a $10,000 security deposit be paid by property managers not approved by QHG, without any legitimate justification for the purpose of excluding property managers who were not approved by QHG;
   5. threatening investors who had not changed to a QHG preferred property manager by issuing notices stating that they were in default under their agreement with QHG which governed their entitlement to the incentive under the NRAS;
   6. when there was a refusal by a property manager to pay the security deposit, using that refusal as a basis to refuse to renew Portfolio Management Agreements with property managers and then pressuring investors to appoint a QHG approved property manager; and
   7. causing the investors of at least 260 properties to cease using their existing property managers and switching to a QHG approved property manager,

in the circumstances identified in paragraphs 8 and 51(1) to (10) of the trial judgment, including:

* 1. QHG was in a superior bargaining position relative to the Investors as a result of the Investors' reliance on QHG to receive the NRAS incentive and because they could not change to another approved participant;
  2. the security deposit requirement was not reasonably necessary to protect the legitimate interests of QHG and investors would not be protected financially by the property manager paying the security deposit;
  3. investors using existing property managers were not at risk of losing their incentives;
  4. there was no legitimate reason why the existing property manager could not continue to manage the property; and
  5. QHG had commercial associations with the approved managers associated with Mr Fenn including Tebter Property Pty Ltd, Ethan Residential Pty Ltd and Quantum Property Australia Pty Ltd and failed to disclose to the investors those commercial associations.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. This appeal raises an important issue as to the meaning and application of statutory provisions that call for a standard of business conduct in Australia that is not, in all the circumstances, unconscionable, in this case s 21 of the *Australian Consumer Law* being Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (the **ACL** and the **CC Act**, respectively).
2. The issue is whether, for conduct to be unconscionable, there is required to be present vulnerability or disadvantage in the person or persons to whom the conduct can be seen as directed and that such was exploited or taken advantage of. That vulnerability or disadvantage was expressed in argument in two alternative ways, although in both the vulnerability or disadvantage was necessarily something more than an attribute or feature of the relationship, whether contractual or commercial. At its highest, the vulnerability or disadvantage had to be a special disadvantage as would be required in the equitable doctrine of unconscionability in setting aside a transaction: see generally *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; 151 CLR 447; *Kakavas v Crown Melbourne Ltd* [2013] HCA 25; 250 CLR 392; and *Thorne v Kennedy* [2017] HCA 49; 263 CLR 85. Alternatively, if the equitable requirement of the taking advantage of a special disadvantage was not required to be shown, at least the taking advantage or exploitation of some vulnerability, disability or disadvantage of the person or persons was a necessary aspect of the character or structure of the conduct apt to attract a conclusion of unconscionability.
3. As is discussed below, contrary to the primary complaint of the appellant, the Australian Competition and Consumer Commission (the **ACCC**), the primary judge did not approach the matter by reference to a requirement of special disadvantage in the sense of the equitable doctrine. His Honour did, however, approach the matter on the basis of the alternative argument expressed above. This can be seen in how his Honour expressed himself at [35] and [53] of the reasons, to which we will come.
4. For the reasons that follow, we respectfully consider that this approach is erroneous. Whilst some form of exploitation of or predation upon some vulnerability or disadvantage of people will often be a feature of conduct which satisfies the characterisation of unconscionable conduct under s 21, such is not a necessary feature of the conception or a necessary essence in the embodied meaning of the statutory phrase. The circumstances of this case reveal why this must be so. Here the facts that were agreed for the penalty hearing are such as to permit the conclusions (substantially drawn by the primary judge) that the respondents engaged in deliberate systematic conduct of misusing their superior bargaining position by dishonestly misleading commercial counterparties (referred to as the **investors** of no proven particular vulnerability other than from their place in the relevant commercial circumstances) and pressuring the investors by imposing entirely unjustified and unnecessary requirements upon the investors as their contractual counterparties, thereby clearly exhibiting a dishonest lack of good faith, all in order to extract for at least one of them financial benefits which were surreptitious and undisclosed to the investors.
5. The primary judge considered himself bound to reach the view he did by the reasons for judgment of the members of the High Court in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; 267 CLR 1. With respect, that conclusion was in error. *Kobelt* does not dictate that conclusion; neither does a consideration of precedent otherwise, principle or statutory interpretation.

## The proceeding below

1. The ACCC brought proceedings against the respondents Quantum Housing Group Pty Ltd (**QHG**) and **Ms** Cheryl **Howe**its sole director and secretary at the relevant time, alleging conduct that involved misleading representations in contravention of ss 18(1), 29(1)(l) and 29(1)(m) of the ACL and that was unconscionable in contravention of s 21 of the ACL.
2. The hearing before the primary judge was consequent upon agreement by the parties that there had been misrepresentations and unconscionable conduct by QHG in which contraventions Ms Howe was knowingly concerned. There was a detailed body of facts agreed. Penalties were agreed for consideration by the Court.
3. The orders made by the primary judge included declarations as to the contraventions of ss 18(1) and 29(1) of the ACL, the imposition of penalties of $700,000 on QHG and $50,000 on Ms Howe, disqualification of Ms Howe from managing a corporation for three years, publication orders and costs.
4. The primary judge did not reduce the agreed penalties despite his refusal to conclude and to declare that the conduct was unconscionable. Rather, his Honour indicated that if there had been the exploitation of some vulnerability or disadvantage of the investors, the suggested penalties would have been inadequate.
5. Neither QHG nor Ms Howe sought to appeal against the orders. The ACCC appealed the failure of the primary judge to make a declaration as to unconscionable conduct. The ACCC did not seek any other variation of the orders made.
6. Neither QHG nor Ms Howe participated in the appeal. Anticipating this course by them, the Court requested the ACCC to organise counsel to fulfil the role of a contradictor. Arrangements were made for this and Dr Higgins SC and Mr Tran instructed by a lawyer from the Australian Government Solicitor appeared as contradictors. May we say at the outset that the Court was assisted greatly by, and was and is grateful for, the quality of the assistance provided by the contradictors and by counsel and solicitors who appeared for the ACCC, Ms Sharp SC, Ms Forrester and Mr Mossop and Corrs Chambers Westgarth.

## The facts

1. Prior to its liquidation, QHG was in the business of arranging investments in properties that qualified for incentives under the National Rental Affordability Scheme (**NRAS**) established by the Commonwealth Government in 2008. Through the NRAS, financial incentives were offered to **Approved Participants** to build and offer rental accommodation to low and middle income earners by way of a subsidy. From at least August 2011, QHG was an Approved Participant in the NRAS. It proceeded to enter into agreements with the investors who were private investors wishing to be involved in the NRAS by purchasing rental properties from an Approved Participant such as QHG. Whether and to what extent the financial incentives of the NRAS were to be passed on to the investors was a matter to be negotiated between each such investor and QHG. Generally speaking, the agreements between the investors and QHG were in a standard form and it was commonplace for the appointment of a property manager to manage the investor’s property in a manner that ensured ongoing qualification for the NRAS incentive.
2. From 2017, following an agreement entered into for the sale of the business, QHG’s management devised a plan, described as the **Roll Up Plan**, the execution of which constituted the conduct which the ACCC alleges was unconscionable in contravention of s 21 of the ACL. Ms Howe, was the sole director and secretary of QHG at the time that the Roll Up Plan was devised. However, the conduct was being driven by **Mr** Ashley **Fenn** who controlled another company that had been an Approved Participant for the purposes of the NRAS prior to its liquidation. He also controlled entities involved in the operation of the business that provided management services to investors who had purchased properties under the NRAS. Ms Howe is a former director of one of Mr Fenn’s companies and had been employed in various capacities in entities controlled by Mr Fenn since 2013.
3. The parties agreed that, between February 2017 and July 2018, QHG’s conduct in implementing the Roll Up plan had the following characteristics (taken from [8] of the reasons):
4. QHG was in a superior bargaining positioning in dealing with investors by reason that it was the Approved Participant in the NRAS and received the incentives.
5. Under the arrangements for the NRAS, investors were dependent on QHG in order to receive their incentive because if QHG did not lodge a statement of compliance for their property it would be in breach under the NRAS and the incentive would not be paid.
6. The bargaining position of QHG was enhanced by the fact that under the arrangements for the NRAS at the relevant time, investors could not change to another Approved Participant.
7. QHG took advantage of the fact that investors relied upon QHG in order to continue receiving their NRAS incentive by formulating and implementing the Roll Up Plan.
8. The aim of the Roll Up Plan was to pressure all of the investors who had agreements with QHG to arrange to obtain property management services from property managers identified as approved by QHG.
9. QHG did not disclose to investors its commercial associations with the approved property managers.
10. QHG issued rounds of misleading correspondence to at least 450 investors that were designed to interfere with the contractual relationships between the investors and their property managers by unduly pressuring investors to terminate their relationships with the property managers and change to a property manager approved by QHG.
11. As the rounds of correspondence progressed, the pressure on investors increased.
12. As part of the implementation of the Roll Up Plan, QHG unilaterally imposed **Accreditation Guidelines** on its investors.
13. Amongst other things, the Accreditation Guidelines required the property manager of an investor to pay a security deposit of $10,000 if the investor did not transfer the management of their property to a QHG approved property manager.
14. The imposition of the security deposit was directed to excluding property managers who were not approved by QHG.
15. The security deposit was without any commercial justification or purpose. It only protected QHG in circumstances where QHG required no further protection because it had the benefit of an indemnity in the agreements with investors as well as insurance maintained by the property managers.
16. In its communications with investors, QHG justified the requirement for the security deposit on the basis that QHG would suffer loss and damage if an investor did not receive its incentive under the NRAS because it had provided assurances to investors that would require full reimbursement from the property manager when that was not true.
17. QHG also maintained that the security deposit would protect investors when that was not true.
18. Eventually investors who had not changed to a QHG preferred property manager were issued with notices stating that they were in default under their agreement with QHG which governed their entitlement to the incentive under the NRAS.
19. A number of the property managers who managed properties for the investors who were not QHG approved property managers objected to providing the required security deposits.
20. When there was a refusal by a property manager to pay the security deposit, QHG used that refusal as a basis to refuse to renew agreements and then to pressure investors to appoint a QHG approved property manager.
21. During the period of the conduct, the management of at least 260 properties was transferred by individual investors to a QHG approved property manager.
22. The fact that the conduct by which the Roll Up Plan was implemented caused a number of investors to change the management of their property to a QHG preferred property manager (being the aim of the conduct) is not disputed.
23. The parties agreed before the primary judge that the implementation of the Roll Up Plan by the respondents constituted unconscionable conduct within the meaning of s 21. They specified the features of the Roll Up Plan which they said should give rise to that conclusion as follows, as set out in [18] of the reasons:
24. QHG took advantage of its superior bargaining position relative to investors as a result of the investors' reliance on QHG to participate in the NRAS and receive their incentive.
25. QHG formulated and implemented the Roll Up Plan, which had as its aim to unduly pressure all of QHG's investors to accept property management services from an approved (QHG‑related) property manager.
26. To that end, QHG unilaterally imposed the accreditation guidelines.
27. The imposition of the security deposit in particular was directed to excluding property managers who were not approved by (related to) QHG.
28. The security deposit was not otherwise required as it only protected QHG and QHG was otherwise protected from loss by an indemnity in its agreements with the investors and by insurance maintained by the property managers.
29. In furthering the Roll Up Plan, QHG also made the misleading representations to investors, in order to unduly pressure them to terminate their relationships with existing property managers and change to a property manager from a small panel including one or more QHG-related property managers.
30. The primary judge recorded the key factors which were of significance for assessing the appropriate penalty for QHG. These factors included certain matters on which there was no (or not sufficient) evidence. These factors (taken from [51] of the reasons) can be seen to illuminate the nature of the conduct for the task of characterisation of unconscionability or not, for the purposes of s 21.
31. The conduct was planned, deliberate and sustained over a considerable period.
32. The conduct was blatant and involved a concerted effort to trick investors into switching property managers to a QHG approved property manager. It was conduct about which there could not be any reasonable uncertainty as to its propriety. (That is, we interpolate, the conduct of QHG and Ms Howe was plainly improper to the participants in it, QHG and Ms Howe.)
33. The conduct escalated and involved the implementation of further strategies and in that sense it is not accurate to view the conduct as a single course of conduct. There was a single overall plan that was implemented by a strategy that developed over time and deployed different representational conduct that was false and misleading in order to secure the outcome of investors switching to a QHG approved property manager.
34. The conduct exploited the circumstances of the NRAS, a government scheme designed to provide affordable rental properties, not the conferral of economic power to secure control of the appointment of property managers.
35. The conduct involved misleading and false representations being made to at least 450 investors.
36. The property managers for at least 260 properties were changed during the period of the contraventions.
37. It may be inferred that the conduct caused a number of investors to switch property managers, but there is no evidence, by admission or otherwise, that enables a conclusion to be reached as to the full extent to which this was the case.
38. The parties agreed that the transfer by investors of their property management services resulted in loss for the property manager in the form of lost fees that varied because the extent of the loss was dependent upon the rent paid for the property.
39. The extent of the loss suffered is difficult to estimate.
40. The loss suffered may have included a loss of the investor’s ability to choose freely a property manager and loss of convenience and service quality, but no evidence was led as to whether this was the case.
41. There is no evidence of the nature or extent of the financial advantage secured by the conduct.
42. It is unnecessary to set out further the detailed agreed facts. They justify, however, as was common ground at the appeal, that the facts amply support the conclusion that the impugned conduct would be aptly summarised as we have at [4] above.

## The primary judgment

1. The primary judge’s reasons for concluding that there was no unconscionable conduct are contained in [18] to [35] of the reasons.
2. The conclusion as to lack of unconscionability was derived from the primary judge’s reading of the various judgments in *Kobelt* in the High Court. At [20] and [21] of the reasons, the primary judge referred to [14] and [15] of the judgment of Kiefel CJ and Bell J and concluded (at [21]) as follows:

… Therefore, in the view of their Honours an essential part of the provision was the protection of the vulnerable and the conduct had to involve taking advantage of that vulnerability in a manner that might be characterised as predatory or exploitative.

1. At [22] of the reasons, the primary judge referred to the judgment of Gageler J in particular at [87], [88], [92] and [93] and emphasised what his Honour saw as the significance of Gageler J’s description of unconscionable conduct as “being worthy of condemnation because of its gravity in the sense that it was far outside what was acceptable”.
2. At [23] of the reasons, the primary judge referred to [115], [116], [118] and [119] of the judgment of Keane J, in support of the proposition that unconscionable conduct under the statute “required an element of exploitation, variously described as exploitation, victimisation, unconscientious conduct or a predatory state of mind.”
3. At [24] to [26] of the reasons, the primary judge referred to the judgment of Nettle and Gordon JJ, especially at [157] and [234], and said (at [26]) that:

Therefore, Nettle and Gordon JJ appear to describe a standard that may not have the characteristics of predation or victimisation described by Kiefel CJ, Bell and Keane JJ or of the gravity described by Gageler J. However, their Honours did describe unconscionability in terms that required that there be vulnerability and an exploitation of that vulnerability.

1. At [27] of the reasons, the primary judge referred to the judgment of Edelman J (who agreed with the reasons of Nettle and Gordon JJ). That agreement and the expression of view of the primary judge at [26] as to the content of Nettle and Gordon JJ’s views meant that the primary judge said (at [27]) that Edelman J “must also be taken to accept that unconscionable conduct requires that there be a taking advantage or exploitation of a vulnerability of another a party”.
2. At [28] of the reasons, the primary judge recognised that the approach of the minority in *Kobelt* (Nettle, Gordon and Edelman JJ) “did not favour an interpretation of the standard that required a high degree of moral disapprobation”. His Honour then continued as follows about the majority:

… Kiefel CJ, Bell and Keane JJ emphasised the need for victimisation, exploitation or a predatory state of mind. Kiefel CJ and Bell J referred, with apparent approval, to the view of the Full Court of this Court that moral obloquy had a role to play but was not a substitute for the statutory words: at [60]. Keane J found that the statute 'imports the "high level of moral obloquy" associated with the victimisation of the vulnerable': at [118]. Gageler J recanted the use of the term moral obloquy for the reason that it 'has the potential to be misleading to the extent that it might be taken to suggest a requirement for conscious wrongdoing': at [91]. However, as noted above, his Honour expressed the view that for conduct to be unconscionable it must be so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience.

1. The primary judge then drew from the majority the following at [29]:

[T]he majority view supports the adoption of a standard that requires exploitation of disadvantage by a party in a stronger position by conduct that is well outside the bounds of what is generally seen to be moral, right or acceptable commercial behaviour. It is not every instance where a person in a stronger commercial position gains an advantage by reason of that position over a person in a weaker or disadvantaged position that is unconscionable. It is not enough that the dealing might be described as unfair or unreasonable. Rather, unconscionable conduct involves dealing with those who are vulnerable in a manner that exploits that vulnerability by engaging in conduct that may be plainly or obviously criticised when viewed through the lens of an understanding of proper commercial behaviour according to prevailing norms and standards.

1. Although at [28] the primary judge ascribes to Nettle and Gordon JJ (and so also Edelman J by his agreement with the reasons of their Honours) a view that unconscionability requires there be exploitation of vulnerability, the primary judge recognised that such exploitation may not necessarily carry a “high degree of moral disapprobation”. Thus although the primary judge identified exploitation of vulnerability as a requirement of unconscionable conduct from *all* the judgments in *Kobelt*, his Honour identified only the majority as requiring that the exploitation of vulnerability be of a more serious kind, as described in [29].
2. The primary judge then, after referring to s 22 of the ACL explained at [32]–[35] why there was no unconscionable conduct in this case:

[32] The conduct as described concerns dealings by QHG with its investors. There is no description of the financial or other circumstances of the investors that would enable them to be characterised as being vulnerable or in a position of disadvantage of a kind that might expose them to being exploited or victimised. It may be inferred from the facts as admitted that they are each of sufficient financial standing and sophistication to be undertaking an investment in a residential property of a kind that qualifies for the incentives provided for by the NRAS. There is no indication that any of the investors were incapable of looking after their own interests or understanding the nature of their dealings with QHG.

[33] The consequence of the conduct of QHG is that investors were persuaded to switch to a QHG preferred provider of management services. There is no suggestion that there was any financial disadvantage suffered by an investor as a result. The financial burden of the conduct appears to have fallen on the property managers whose services were terminated. That consequence is not one which is relevant to whether the dealings by QHG with the investors were unconscionable.

[34] It may be accepted that the nature of the NRAS and the position of QHG as the Approved Provider who was required to certify compliance in order for investors to be entitled to ongoing incentives meant that QHG had a degree of power in its dealings with individual investors.

[35] However, the operative conduct by which the Roll Up Plan was implemented was the making of false representations about the nature of the arrangements for the NRAS and the imposition of the accreditation guidelines requiring the security deposit. The conduct did not depend upon being able to exploit identified vulnerability or disadvantage on the part of the investors. Rather, it involved taking advantage of the power conferred by the nature of the NRAS. The conduct of QHG did not depend for its success on the vulnerability of the investors. It depended upon leveraging the power afforded by the control that QHG had over the continuation of the flow of incentives under the NRAS to investors.

## The Notice of Appeal

1. The Notice of Appeal had initially three grounds:
2. The trial judge erred at TJ [29], [32] and [35], based on the reasoning in TJ [19]-[28], in finding that unconscionable conduct within the meaning of s 21 of the Australian Consumer Law **(ACL)** requires, in every case, exploitation by the stronger party of a special disadvantage (or "vulnerability") on the part of the weaker party.
3. The trial judge erred to the extent that he found at TJ [33] that unconscionable conduct within the meaning of s 21 of the ACL requires financial disadvantage to be suffered as a result of the impugned conduct by the person to whom the service was supplied (referred to in the judgment as "investors"); and he erred at TJ [33] in holding that it was irrelevant that financial disadvantage was suffered by third parties (namely, the persons referred to in the judgment as "property managers").
4. The trial judge erred in T J [31]-[36] in failing to find on all of the facts as admitted that the impugned conduct was, in all the circumstances, unconscionable within the meaning of s 21 of the ACL, and that Ms Howe was knowingly concerned in the resulting contravention.
5. After argument of the appeal and consequent upon decision during argument, the appellant was granted leave to file an amended notice of appeal containing a fourth ground (ground 1A), as follows:

1A. The trial judge erred at TJ [29], [32] and [35], based on the reasoning in TJ [19]-[28] to the extent that he held that unconscionable conduct within the meaning of s 21 of the Australian Consumer Law (**ACL**) requires, in every case, exploitation of some vulnerability or disadvantage.

## Grounds 1 and 2

1. These grounds may be dealt with shortly because both involve, with respect, a misreading of the primary judge’s reasons.
2. Ground 1 identifies an error based on a reading of the reasons that the primary judge required in every case exploitation of a special disadvantage in the sense required for the engagement of the equitable doctrine as discussed in cases such as *Amadio*. This was said to be drawn from the primary judge’s analysis of, and conclusion from, the judgments in *Kobelt*. As more fully discussed below, with the exception of the judgment of Keane J, the judgments in *Kobelt* do not express such a proposition and the primary judge did not conclude that they did. It will be necessary to say something more of what his Honour did derive from the judgments in *Kobelt*, but we do not read the reasons as requiring for the contravention of the statutory prohibition of unconscionable conduct the exploitation of a special disadvantage of the weaker party as recognised and required by the equitable doctrine of unconscionability as the ground of setting aside a transaction.
3. Importantly, the contradictor submitted that ground 1 should be dismissed for the reasons, first, that the primary judge did not decide that special disadvantage in the equitable sense is necessary to ground a contravention of s 21, and secondly, if he did so decide, although a majority of the High Court in *Kobelt* did not require him to so decide and although Full Court authority of this Court was to the contrary, as a matter of principle it is required and any error by the primary judge was not material. We deal with this second, substantive submission below.
4. Ground 2 has two aspects. First, it complains that the primary judge concluded that unconscionable conduct under s 21 requires financial disadvantage to be suffered as a result of the conduct by the person to whom the service or goods is or are supplied. We do not read the primary judge as saying that at [33]. The fact was relevant; that is accepted. Financial disadvantage is not *necessary*; s 21(4)(b) makes that clear. We read [33] in this respect as stating a relevant fact not in stating (erroneously) a statutory requirement.
5. Ground 2 contains a second complaint: that the primary judge held that financial disadvantage to third parties was necessarily irrelevant in the analysis of conduct in all cases. Again, we do not consider that the primary judge was stating any such question of principle in [33]. His view that, in the circumstances before him, any harm to the property managers and real estate agents whose services were terminated was irrelevant can be accepted as a statement of fact in the evaluation that was open. On the agreed facts and the lack of any apparent relationship between the investors and the property managers, other than one of retainer for property management services, the statement at [33] can be understood as one of a relevant fact not as a statement of general principle of all third parties in any possible circumstances. Thus, there is no call to consider the reach or correctness of *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2002] FCAFC 197; 122 FCR 110 or the cases that have cited it: *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* [2008] FCAFC 60; 167 FCR 372 at 398 [91]; *QNI Resources Pty Ltd v Sino Iron Pty Ltd* [2016] QSC 62; [2017] 1 Qd R 167 at 182–183 [101]; *The Good Living Company Pty Ltd ATF the Warren Duncan Trust No 3 v Kingsmede Pty Ltd* [2019] FCA 2170; 142 ACSR 221 at 261–262 [162]–[118]; *Tameeka Group Pty Ltd v Landan Pty Ltd (No 3)* [2016] FCA 733 at [166]–[169]; or distinguished it: *Secure Funding Pty Ltd v Stark* [2013] NSWSC 1729 at [73]–[77] and on appeal [2015] NSWSC 223; 293 FLR 453 at 463 [52]–[53]; *National Australia Bank Ltd v Meeke* [2007] WASC 11 at [506]; *Guy v Crown Melbourne Ltd (No 2)* [2018] FCA 36; 355 ALR 420 at [529]–[530].
6. Thus, given the way we read the primary judge’s reasons we would dismiss grounds 1 and 2. We deal, however, with the contradictor’s substantive submissions as to requirement of special disadvantage in the equitable sense below.

## Ground 1A and the submission of the contradictor as to materiality of any error in ground 1: the central issue of principle on the appeal

1. The central issue of principle that was argued and that determines the proper approach to the characterisation of the respondents’ conduct in this case, and thus the proper approach to ground 3 of the appeal, is whether pre-existing vulnerability, disability or disadvantage (of some kind, and if so what kind) and the exploitation or taking advantage of such is a *necessary* element of statutory unconscionability in s 21 of the ACL and cognate provisions such as s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**). We use the word “pre-existing” to distinguish the position from some aspect of vulnerability or disadvantage as may be a feature of the circumstances of the conduct of which complaint is made.

### The judgments of the High Court in Kobelt

1. It is convenient to begin with an examination of the five judgments in *Kobelt* in the High Court. The contradictor drew from the judgments the necessity for some exploitation of vulnerability, although Dr Higgins did not submit that any judgment, other than that of Keane J, required a special disadvantage in the equitable sense.
2. The facts in *Kobelt* concerned a storekeeper, Mr Kobelt, in Mintabie, South Australia, who sold food, groceries, fuel and used cars to residents of remote communities in the Anangu Pitjantjatjara Yankunytjatjara Lands (the APY Lands) on credit using a so-called “book-up” system. Under that system credit was advanced to residents if they supplied Mr Kobelt with their bank debit cards into which the customers’ wages or welfare payments were credited, together with PIN numbers to access the accounts for payments. The whole or nearly all of the funds when credited would be taken by Mr Kobelt, in payment of purchases to date and on account of future purchases. The record keeping of Mr Kobelt was rudimentary and difficult to understand, though there was no suggestion of dishonesty in that regard. The customers had a basic understanding of the system; many were satisfied with the arrangement. There was evidence as to the advantages of the system by eliminating “boom and bust” spending and avoiding social demands of others to share resources. The members of the community were characterised by features of poverty, low levels of literacy, of numeracy, and of “financial literacy”.
3. For the purpose of the analysis of the High Court judgments, it is important to recognise that the case made by the Australian Securities and Investments Commission (**ASIC**) against Mr Kobelt was that he took unconscionable advantage of the special disadvantages of the members of the community. Given the nature of the circumstances that can be readily understood, not merely as some forensic choice, but as a natural consequence of the facts and circumstances as they presented themselves.

#### The Chief Justice and Bell J

1. At [10] to [12] of their reasons, Kiefel CJ and Bell J concisely explained how the matter had reached the High Court:

[10] The primary judge found that Mr Kobelt's conduct in connection with the supply of credit under the book-up system was unconscionable: Mr Kobelt had chosen to maintain a system which, while it provided some benefits to his Anangu customers, took advantage of their poverty and lack of financial literacy to tie them to dependence on his store. His Honour declared that Mr Kobelt, by his conduct in providing credit under the book-up system at least since 1 June 2008, had contravened s 12CB of the ASIC Act. Mr Kobelt was ordered to pay the Commonwealth a pecuniary penalty in the sum of $100,000.

**The Full Court**

[11] Mr Kobelt appealed against the primary judge's orders to the Full Court of the Federal Court of Australia (Besanko, Gilmour and Wigney JJ). The appeal was allowed in part, and the Full Court set aside the primary judge's orders arising from the finding of unconscionable conduct. In their joint reasons, Besanko and Gilmour JJ accepted that Mr Kobelt's Anangu customers' poverty and lack of financial literacy made them vulnerable in their dealings with Mr Kobelt. Their Honours were not persuaded, however, that Mr Kobelt's conduct in supplying credit on his book-up terms was unconscionable. The conclusion took into account the primary judge's findings that Mr Kobelt's Anangu customers had a basic understanding of the book-up system, voluntarily entered into book-up credit contracts with Mr Kobelt and understood that they could frustrate the agreement either by cancelling their keycard or by directing that future payments be credited to a different bank account. The conclusion also took into account the primary judge's finding that Mr Kobelt acted without dishonesty and with a degree of good faith and that ASIC did not submit, and the primary judge did not find, that Mr Kobelt exerted undue influence on his Anangu customers to enter into book-up credit contracts with him.

[12] Wigney J agreed with their Honours' analysis and, in separate reasons, his Honour additionally held that the primary judge had given insufficient consideration to anthropological evidence of the cultural practices of the Anangu, which differentiate them from mainstream Australian society, and which serve to explain why Anangu customers chose to engage in book-up arrangements with Mr Kobelt.

1. At [14] of their reasons, Kiefel CJ and Bell J stated the following:

[14] The term "unconscionable" is not defined in the ASIC Act and is to be understood as bearing its ordinary meaning. The proscription in s 12CB(1) is of conduct in connection with the supply of financial services that objectively answers the description of being against conscience. The values that inform the standard of conscience fixed by s 12CB(1) include those identified by Allsop CJ in *Paciocco v Australia & New Zealand Banking Group Ltd*: certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made, and:

"the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage"

1. The part of the reasons of Allsop CJ in *Paciocco* v *Australia & New Zealand Banking Group Ltd* [2015] FCAFC 50; 236 FCR 199 at 274 [296] that their Honours quoted can be seen as relevant given the way the case was put, and given the nature of the circumstances of the community.
2. At [15] of their reasons, Kiefel CJ and Bell J, directed attention to the “last-mentioned value with which the appeal is concerned”. This makes plain that their Honours’ reasons were directed to the resolution of the appeal before them. This part of their Honours’ reasons ([15]) was not a statement of general principle in all cases:

[15] It is the application of the last-mentioned value with which the appeal is concerned. In *Kakavas v Crown Melbourne Ltd* and *Thorne v Kennedy* it was said that a conclusion of unconscionable conduct requires not only that the innocent party be subject to special disadvantage, but that the other party must also unconscientiously take advantage of that special disadvantage. This has variously been described as requiring victimisation, unconscientious conduct or exploitation.

1. ASIC’s central submission in the system case that was run was set out by their Honours at [16]:

[16] ASIC's central submission, underlying each of its grounds, is that:

"[T]he factors that made Mr Kobelt's customers vulnerable and that therefore led them to be willing to voluntarily enter into the book-up arrangement, contrary to their interests, were wrongly treated by the Full Court as excusing what would otherwise have been unconscionable conduct anywhere else in modern Australian society."

1. The absence of unconscionable advantage being taken is clear from [17]–[19] of their Honours’ reasons, which are not statements of principle in all cases as to the operation of (there) s 12CB (here, s 21):

[17 ] The submission takes as a given that entry into book-up credit arrangements with Mr Kobelt was objectively contrary to the interests of his Anangu customers. It is a submission that accords with the primary judge's analysis that:

"The freedom of the Anangu to make decisions concerning their own lives must of course be respected. However, regard must be had to the limited education, disadvantages, and limited financial literacy of the Book-up customers generally, to which I referred earlier. These placed them in a particularly disadvantageous position relative to Mr Kobelt and diminish the significance which can be attached to the voluntariness of their conduct. Accordingly, the Anangu customers' own subjective views are not conclusive of the conscionability of Mr Kobelt's conduct."

[18] The alternative analysis, favoured by the Full Court, is encapsulated by Wigney J's observation that it is not that Mr Kobelt's book-up system took advantage of his Anangu customers' vulnerability but rather that Mr Kobelt, like the proprietors of other establishments in remote communities who provide book-up credit, was fulfilling a demand. The observation takes into account factors that are the subject of challenge in each of ASIC's grounds of appeal: acting with a degree of good faith; absence of undue influence or dishonesty; and the customers' satisfaction with the terms of book-up credit.

[19] As will appear, determinative of the appeal is the absence of unconscientious advantage obtained by Mr Kobelt from the supply of credit to his Anangu customers under his book-up system. The Full Court did not err in holding that Mr Kobelt's conduct did not contravene s 12CB(1) of the ASIC Act and it follows that the appeal must be dismissed. It is necessary to refer in some detail to the evidence and the primary judge's findings to explain why that is so.

1. The way the case was put by ASIC, and the importance of such was described by Kiefel CJ and Bell J at [48]:

[48] The first feature is that ASIC's case, below and in this Court, is that unconscionable conduct involves "the existence of a special [dis]advantage of which someone takes ... [u]nconscientious advantage" and that Mr Kobelt's conduct in supplying credit under his book-up system took unconscientious advantage of the vulnerability of his Anangu customers. In the circumstances, the appeal does not provide the occasion to consider any suggestion that statutory unconscionability no longer requires consideration of (i) special disadvantage, or (ii) any taking advantage of that special disadvantage.

1. The last sentence of [48], does not carry with it any different conclusion about any requirement of (i) disadvantage or vulnerability (less than “special”) or (ii) any taking advantage of such. Their Honours were dealing with the case as run and the appeal as argued.
2. There was an unsuccessful attempt by ASIC during argument in the High Court to reframe the appeal in respect of exploitation and predation at [61]:

[61] On the hearing, ASIC did not press that part of its second ground that contends that the Full Court erred in overturning the primary judge's findings of exploitation and predation. The argument now put is that a supplier may fall below the standard of conscionability fixed by s 12CB(1) without engaging in predatory or exploitative conduct. The primary judge's findings in these respects are said to "really … mean nothing much more than taking advantage of the disadvantage". There is no warrant for treating the primary judge's reasons in these respects as mere surplusage. They were findings which informed his Honour's conclusion that Mr Kobelt took *unconscientious* advantage of the vulnerability of his Anangu customers and were consistent with what had been said in *Kakavas* and *Thorne v Kennedy*, referred to earlier in these reasons.

1. It can be accepted that Kiefel CJ and Bell J rejected any conclusion that the terms of the arrangement did not take unconscientious advantage of the vulnerability of the customers or of their lack of education or financial acumen. That ratio, however, was not founded upon an express or implicit statement of principle applicable to all cases, but was a response to the case propounded and the case to which ASIC was kept.
2. Thus, we do not consider there to be any basis to extract from their Honours’ reasons general principle applicable to all cases about provisions such as s 12CB (or s 21).

#### Justice Gageler

1. The reasons of Gageler J commenced (at [81] to [93]) with important general statements that were intended for general application. First, unlike the Chief Justice and Bell J, who saw the undefined word “unconscionable” as “bearing its ordinary meaning” (see 267 CLR at 17 [14]), Gageler J referred to “unconscionable” as an “obscure English word” which by centuries of equity administration has been “transformed into a legal term of art”: 267 CLR at 36 [81], identifying the “central concern” of equity:

… in identifying conduct as unconscionable has long been understood to be to relieve against a stronger party to a transaction exploiting some special disadvantage which has operated to impair the ability of a weaker party to form a judgment as to his or her interests.

1. That doctrine of equity was the province of s 12CA of the ASIC Act (s 20 of the ACL): “unconscionable within the meaning of the unwritten law”: 267 CLR at 36 [82].
2. His Honour recognised (at 267 CLR at 37 [83]) that unconscionable under s 12CB (s 21) was “not limited by the unwritten law… relating to unconscionable conduct”: s 12CB(4)(a) (s 21(4)(a)) and a court assessing conduct for the purposes of s 12CB is to be informed by the considerations in s 12CC (s 22). At [84], Gageler J posited two different ways of seeing what s 12CB (s 21) does:

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

1. His Honour thought (see [84]) some of the discussion in the Federal Court (*Australian Securities and Investment Commission v National Exchange Pty Ltd* [2005] FCAFC 226; 148 FCR 132 at 140 [30] and *Paciocco* 236 FCR at 266–67 [262]–[263]) had intertwined these perspectives. His Honour considered that the legislative history gave no indication of any legislative intention to adopt one view in preference to another. The distinction between these two views was expressed at [85] as that between “a judicially developed standard” (the first view) and “a statutory standard developed judicially” (the second view). His Honour recognised that such distinction could be fine.
2. At [87], Gageler J identified the correct view or perspective as the second: a statutory standard to be developed judicially as stated by the Full Court in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90; (2013) ATPR 42-447 at [23] and [41]. Justice Gageler expressed the matter at 267 CLR at 38 [87] as follows:

The correct perspective is that s 12CB operates to prescribe a normative standard of conduct which the section itself marks out and makes applicable in connection with the supply or possible supply of financial services. The function of a court exercising jurisdiction in a matter arising under the section is to recognise and administer that normative standard of conduct. The court needs to administer that standard in the totality of the circumstances taking account of each of the considerations identified in s 12CC if and to the extent that those considerations are applicable in the circumstances.

1. If we may say at this point, with respect, we agree with this expression of the matter. It is drawn from *Lux.* The reasons in *Paciocco* at 236 FCR 266–67 [262]–[263] should not be taken to have been intended to express the standard otherwise.
2. At [88], Gageler J explained the significance of the choice by Parliament of the word “unconscionable” in the expression of the statutory normative standard: it “serves to signify the gravity of the conduct necessary to be found… to be satisfied of a breach of that standard”. In a passage important for consideration as to the relevance of disadvantage, Gageler J said at [89]:

Parliament's appropriation of that terminology in s 12CB shorn of the constraints of the unwritten law is indicative of an intention that conduct of the requisite gravity need not be found only in a fact-pattern which fits within the equitable paradigm of a stronger party to a transaction exploiting some special disadvantage which operates to impair the ability of a weaker party to form a judgment as to his or her best interests. The requirement to administer the standard in the totality of the circumstances taking account of the considerations identified in s 12CC is a further indication that the standard has potential application within a range of factual scenarios not all of which would be recognised in equity as giving rise to relief on the basis of unconscionable conduct.

1. A recognition of necessary gravity can be seen to be central to his Honour’s view as to the meaning and content of “unconscionable”. However, that does not carry with it any conclusion of the necessity for some pre-existing disadvantage or special disadvantage to exist. Indeed the rejection of the first view (in [87]) and the width of the provision (s 12CB) beyond a “fact-pattern… within the equitable paradigm” ([89]) reinforces the rejection of the necessity to find pre-existing disadvantage or special disadvantage.
2. At [90]–[92], Gageler J emphasised necessary gravity, eschewing phrases such as “moral obloquy”. In [90] his Honour put the matter negatively by explaining that such gravity should not be diluted by permitting a court:

… to adopt a process of reasoning which starts with the equitable conception of unconscionable conduct, involving exploitation of a special disadvantage, and then uses considerations identified in s 12CC to water down the court's assessment of what amounts to a special disadvantage or to allow the court to arrive more easily at an assessment that conduct amounts to exploitation.

1. At [92]–[93], his Honour put the matter positively as follows:

[92] What I meant to convey by the reference was that conduct proscribed by the section as unconscionable is conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience. To that view of the statutory standard I adhere.

[93] The judgment required of a court exercising jurisdiction in a matter arising under s 12CB is a heavy one. For a court to pronounce conduct unconscionable is for the court to denounce that conduct as offensive to a conscience informed by a sense of what is right and proper according to values which can be recognised by the court to prevail within contemporary Australian society. Those values are not entirely confined to, or entirely removed from, the values which historically informed courts administering equity in the development of the unwritten law of unconscionable conduct. They include respect for the dignity and autonomy and equality of individuals. They include respect for the cultural diversity of communities.

1. The discussion by Gageler J at [88]–[93] of the nature of the statutory normative standard, the significance of the choice of the word “unconscionability”, the necessary gravity of the conclusion drawn from all the circumstances and the values that informed equity contains no basis to conclude that part of the meaning of “unconsionability” in its statutory context is a pre-existing disadvantage, disability or vulnerability of some kind of which advantage must be taken.
2. After considering the competing considerations in the facts as they presented themselves (see [94]–[100]), Gageler J dealt with the case as pleaded (see [101]–[112]). Nowhere in that discussion is there a proposition or the basis for a proposition that in all cases for there to be statutory unconsionability there must be some pre-existing disadvantage, disability or vulnerability of which advantage is taken. Paragraphs 104 and 111 can be seen to make that clear.

#### Justice Keane

1. At [118]–[122], Keane J made clear his view that the word “unconscionable” in s 12CB (s 21) imports a “high level of moral obloquy” involved in the exploitation or victimisation of the vulnerable. At [119] his Honour said that this flowed from the “ordinary meaning” of the word. The legislative choice of the word “unconsionability” as the “key statutory concept” necessarily (as a matter of statutory construction and meaning) introduced “moral obloquy involved in the exploitation or victimisation that is characteristic of unconscionable conduct”, citing *Kakavas* 250 CLR at 425 [118]: see 267 CLR at 48 [119]. At [120] his Honour said:

…The ultimate issue under the statute is whether the conduct in question is rightly to be characterised as unconscionable. In determining that issue, s 12CB calls for a judgment as to whether the impugned conduct exhibits the level of moral obloquy associated with predatory conduct.

#### An important point of distinction between the views of Gageler J and Keane J as to the choice by Parliament of the word “unconscionable”

1. The significance drawn by Gageler J from the choice of language was as to the necessary gravity of the conduct. For Keane J the significance was not just “moral obloquy” generally, but what was involved in exploitation or victimisation of those with a disability or disadvantage or vulnerability, or involved in predatory conduct, as a *necessary* element of the character of the conduct.
2. The contradictor’s argument drew a common element from the two judgments: at least the necessity for the taking advantage of some (pre-existing) disability. We do not agree, for the reasons that we have given in the discussion of the reasons of Gageler J above.

#### Justices Nettle and Gordon

1. Their Honours’ discussion of s 12CB commenced with its terms and, importantly, s 12CB(4)(a) (s 21(4)(a)) as not limited by the unwritten law, saying at [144]:

… As will be explained, the non-exhaustive list of factors set out in s 12CC necessarily implies that the statutory conception of unconscionability is more broad-ranging than that of the unwritten law. Nevertheless, the unwritten law has a significant part to play in ascribing meaning to the term "unconscionable" under s 12CB(1) .

1. In this respect the unwritten law plays the part described in *Paciocco* 236 FCR at 271 [283] which their Honours cite:

By the incorporation of the unwritten law into the ASIC Act, Parliament can be taken to have adopted, for the operation of the Act and arising out of its text, the values and norms that inform the living Equity in that doctrine. Section 12CB(4)(a) makes it plain that the operation of s 12CB is not limited by the unwritten law referred to in s 12CA. That is not to say, however, that the values and norms that underpin the equitable principle recognised within s 12CA do not have a part to play in the ascription of meaning to, and operation of, s 12CB, notwithstanding s 12CA(2).

1. Their Honours then turned at 267 CLR 57–60 [145]–[153] to the unwritten law. It is unnecessary to comment upon, if we may respectfully say, the helpful discussion of equitable principle, beyond saying that a reading of it assists in recognising the danger in this area of discourse in resorting to aphorism, deductive logic, reductive distillation, categorisation or definition.
2. Their Honours then turned to s 12CC as the express guidance of the statute to the relevant informing norms and values of unconscionability. In this discussion at 267 CLR 60 [154], Nettle and Gordon JJ expressly referred to what was said in *Paciocco* 236 FCR at 270 [279], 272 [285] and 276 [304] and [306], and *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; 249 FCR 421 at 436 [58] and 442–43 [87].
3. Their Honours then turned at 267 CLR 61–63 [156]–[162] to voluntariness, which necessarily focused discussion on the taking advantage and exploitation of vulnerability as the explanation for how that voluntary willingness or intention of the customers came about: see especially 267 CLR 61–62 [157] and [160].
4. After a detailed discussion of the factual circumstances of the arrangements at 267 CLR 63–77 [163]–[229], Nettle and Gordon JJ expressed why they considered Mr Kobelt’s system was unconscionable. Their Honours recognised, at 267 CLR 77 [231], that ASIC’s case was rooted in the predatory and exploitative nature of the conduct. If we may also say such was not just a pleading choice; it arose from the nature and character of the facts.
5. At 267 CLR 77–78 [232]–[234], Nettle and Gordon JJ expressed the view that s 12CB(4)(b) (s 21(4)(b)) meant that a special disadvantage of an individual is not a necessary component of the prohibition (c*ontra* Keane J at 267 CLR 49–50 [121]). The focus of s 12CB (s 21) was on the conduct of the stronger party. The discussion in these paragraphs, in particular 267 CLR 78 [234], is important in that in the expression of general principle, their Honours did not state some necessary element of taking advantage of some pre-existing disadvantage, disability or vulnerability. Their Honours’ reference at 267 CLR 78 [234] to *Lux* (2013) ATPR 42-447 at [23] and the content of that paragraph in *Lux* is contrary to the implication or requirement of a paradigm drawn from the taking advantage of a special disability in the unwritten law or of the need for the taking advantage of some disadvantage, disability or vulnerability; as are their Honours’ references to *Paciocco* 236 FCR 199 at 267 CLR 60 [154] earlier in their reasons.
6. Justices Nettle and Gordon thereafter, in the context of the resolution of the pleaded case before the Court, discussed “vulnerability or special disadvantage” (267 CLR at 78–79 [235]–[236]) and said that Mr Kobelt “unconscientiously took advantage of his customers’ vulnerability” (267 CLR at 79–87 [237]–[264]). This, however, says nothing in support of a proposition that as part of the statutory meaning of the word “unconscionable” there must be or exist some pre-existing disadvantage, advantage of which is taken.

#### Justice Edelman

1. Justice Edelman agreed with the reasons of Nettle and Gordon JJ and gave additional reasons. After discussing Mr Kobelt’s system at 267 CLR 89–94 [269]–[278], Edelman J discussed the approach to unconscionability required by s 12CB (and so s 21) at 267 CLR 94–102 [279]–[295]. In that discussion, Edelman J sought to point out that the statutory proscription of unconscionable conduct cannot be understood “other than against its background in equitable doctrine and the repeated responses by parliaments to that equitable doctrine”: 267 CLR at 94 [279].
2. At 267 CLR 94–96 [280]–[282], Edelman J outlined what he saw as the hardening of equity from the 19th century from a proscription of unfairness or unreasonableness to one of taking advantage of a special disadvantage, requiring “victimisation” or “exploitation”, and at least in England, conduct that is “morally reprehensible” or that “shocks the conscience of the court”.
3. Justice Edelman then proceeded at 267 CLR 96–102 [283]–[295] to examine the various attempts by the legislature to build on and later widen the nature of the proscribed conduct. The building upon equity came in the form of s 52A of the *Trade Practices Act 1974* (Cth), and later s 51AA of the same Act. The attempt to widen the nature of the conduct could be seen in s 51AB (for consumers) and s 51AC (for small business) of that Act. Justice Edelman discussed in this part of his reasons the secondary material in Parliamentary debates and Explanatory Memoranda and the broader reach intended for “unconscionability” in ss 51AB and 51AC, and their later incarnations in ss 12CB and 12CC of the ASIC Act (ss 21 and 22 of the ACL), concluding at 267 CLR 102 [295] as follows:

This legislative history clearly demonstrates that although Parliament’s proscriptions against unconscionable conduct initially built upon the equitable foundations of that concept, over the last two decades Parliament has repeatedly amended the statutory proscription against unconscionable conduct in continued efforts to require courts to take a less restrictive approach shorn from either of the equitable preconditions imposed in the 20th century, by which equity had raised the required bar of moral disapprobation. In particular, statutory unconscionability permits consideration of, but no longer requires (i) special disadvantage, or (ii) any taking advantage of that special disadvantage. Like other open-textured criteria, such as “unfair” or “unjust”, there is no clear baseline moral standard for what constitutes “unconscionable” conduct within s 12CB of the ASIC Act. Nevertheless, the history of development of that statutory proscription demonstrates a clear legislative intention that the bar over which conduct will be unconscionable must be lower than that developed in equity even if the bar might not have been lowered to the “unreasonableness” and “unfairness” assessments in the various categories in 19th century equity.

1. With respect to the primary judge, it is not possible to take from the reasons of Edelman J any distilled requirement for there to exist some form of pre-existing disadvantage, disability or vulnerability of which advantage is taken for the meaning of unconscionable conduct in s 12CB to be satisfied or engaged. That Edelman J’s conclusions at 267 CLR 106–107 [311]–[313] focused on the taking advantage of vulnerability under both the “broad” or “narrow” view of unconscionability (expressed in the alternative) flowed from the specifically pleaded issue and the nature of the facts from which the controversy before the Court in *Kobelt* arose.

#### Conclusion from Kobelt in the High Court

1. From the above we reject the proposition that *ratio* or seriously considered *obiter dicta* of a majority of the High Court, indeed, of any justice of the Court in *Kobelt* (other than Keane J) requires *in any case* that for conduct to be unconscionable by reference to ss 12CB and 12CC of the ASIC Act (or ss 21 and 22 of the ACL) there must be found some form of pre-existing disability, vulnerability or disadvantage of which advantage was taken.
2. The notion of what is a “pre-existing” vulnerability or disadvantage as we described it at [36] above introduces a requirement that the so-called victim of the conduct brings to the relationship an attribute of vulnerability in some factor and to some degree. Such vulnerability or disadvantage will often exist: as it did in the Anangu people in *Kobelt.* But their Honours’ reasons in *Kobelt* (other than Keane J) do not express that requirement as a matter of principle as to the meaning of s 12CB (s 21).

## *The judgments of the Full Court of this Court and other intermediate appellate courts*

1. The judgments of this Court are contrary to the proposition that the taking of advantage of a special disability is an essential ingredient of statutory unconscionability. The same authorities deny a similar proposition conditioned on some form of pre-existing disadvantage, vulnerability or disability of which advantage is taken: *National Exchange* 148 FCR at 140 [30]; *Lux* (2013) ATPR 42-447 at [23] and [41]: *Paciocco* 236 FCR at 266–276 [262]–[306], 289 [371] and 295 [398]; *Kojic* 249 FCR 421 at 434–437 [54]–[60], 438–439 [69]–[72] and 441 [84]; *Colin R Price & Associates Pty Ltd v Four Oakes Pty Ltd* [2017] FCAFC 75; 251 FCR 404 at 416–419 [50]–[58]; *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155; 266 FCR 631 at 654 [104] and 666–668 [154]–[157]; and *Australian Competition and Consumer Commission v Medibank Private Ltd* [2018] FCAFC 235; 267 FCR 544 at 569 [102] and [103], and 601–609 [229]–[255].
2. This approach is supported by the approach of other intermediate appellate courts: *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [291]; *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446 at [101]; and *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15; 356 ALR 440 at 475–481 [181]–[217], 494 [268] and 494–496 [269]–[278].

### The question as a matter of principle and statutory construction

1. We do not intend to restate at length what was said in *National Exchange, Lux, Paciocco*, *Kojic*, *Colin Price*, *Unique* and *Medibank*.
2. The legislature has expressly stated that s 21 is not limited by the unwritten law: s 21(4)(a). That alone is sufficient to deny the proposition that a special disability or vulnerability as recognised in equity of which advantage is taken with sufficient knowledge or predatory state of mind (if that be required in equity) is an essential requirement of statutory unconscionability.
3. Likewise, some lessened through real disadvantage, disability or vulnerability of which advantage is taken cannot be seen to be, as a matter of statutory construction (for that is what the proposition must be founded on) an essential requirement of statutory unconscionability.
4. Given that the considerations in s 22 are available (but not necessary or essential) considerations, and given the absence of any expression of a necessary or essential consideration of this character, it is a work of implication that is unjustified and contrary to the text of the legislation.
5. We recognise, respectfully, that this last proposition is directly contrary to the views of Keane J in *Kobelt*. Justice Keane extracts the requirement for there to be a special disability or vulnerability of which advantage must be taken from Parliament’s choice of the word “unconscionable”. But, with respect, that is to give the word only the meaning it bears in a particular equitable context: the unwritten law referred to in s 20. Section 21(4)(a) and the secondary material discussed by Edelman J in *Kobelt* reveal the intended, *express*, unmooring of the statutory standard from unconscionable conduct as framed in the equitable doctrine to set aside transactions.
6. The word, “unconscionable”, was, however, chosen by Parliament. As the Full Court said in *National Exchange* 148 FCR at 140 [33], unconscionable conduct “on its ordinary and natural interpretation, means doing what should not be done in good conscience”. The words “unconscionable” and “conscionable” may not be frequently used in everyday parlance, but they have an ordinary meaning, derived from the inner human sense of doing right. At least some of the human values that inform an Australian *business* conscience were set out in *Paciocco* 236 FCR at 274 [296]. Some of these, and not limited to protection of the vulnerable from victimisation or predation, were adopted by Kiefel CJ and Bell J in *Kobelt* 267 CLR at 17 [14].
7. As the Full Court said in *Unique* 266 FCR at 667 [155], an allegation of unconscionability is a serious allegation. It is sufficient to warrant censure for the purpose of deterrence by the imposition of a civil penalty. Being penal in character tends against too loose or diffuse a construction: *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; 224 CLR 193 at 210–211 [45]; *Paciocco* 236 FCR at 275 [300]. That assists in recognising an element of seriousness of the finding and the quality of the departure from the relevant standards of conduct that is required. As the Full Court said in *Unique* at [155]:

… **To behave unconscionably should be seen, as part of its essential conception, as serious,** often involving dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worth of criticism. None of these terms is definitional. The *Shorter Oxford Dictionary on Historical Principles* (1973) gives various definitions including “having no conscience, **irreconcilable with what is right or reasonable**”. The *Macquarie Dictionary* (1985) gives the definition “unreasonably excessive; not in accordance with what is just or reasonable”. (The search for an easy aphorism to substitute for the words chosen by Parliament (unconscionable conduct) should not, however, be encouraged: see *Paciocco* at [262]). These are descriptions and expressions of the kinds of behaviour that, viewed in all the circumstances, may lead to an articulated evaluation (and criticism) of unconscionability. **It is a serious conclusion to be drawn about the conduct of a business person or enterprise. It is a conclusion that does the subject of the evaluation no credit. This is because he, she or it has, in a human sense, acted against conscience. The level of seriousness and the gravity of the matters alleged will depend on the circumstances.** Courts are generally aware of the character of a finding of unconscionable conduct and take that into account in determining whether an applicant has discharged its civil burden on proof.

(emphasis added)

1. As the Chief Justice sought to explain in *Paciocco* 236 FCR 199 especially at 274–276 [296]–[299] and [304]–[306] the values and considerations that inform the answer to a question whether conduct is against business conscience will be drawn from the values and considerations that one finds in the text, structure and context of the statute, in particular those in s 22, from statutes relevant to consider in the context of the conduct in question: *Lux* (2013) ATPR 42-447 at [23] and *Medibank* 267 FCR at 605 [241], and from the informing norms of equity and the common law, many of which need no restating by any Parliament, nor by any honest business person to another in their dealings. The Chief Justice sought to set some of these out in *Paciocco* 236 FCR at 274–75 [296]–[298]. These are not considerations outside the statute. They are basal values and considerations of equity and the common law in which the statute sits. Most are matters which honest business people understand and do not need expressly to require of each other (*Paciocco* [296]):

The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing…

1. The judicial technique involved is not definitional, nor is it exemplified by aphorism or reductive logic. The human conceptions involved concern relational human activity the evaluation of which involves the technique of equity described in *Jenyns v Public Curator (Qld)* [1953] HCA 2; 90 CLR 113 at 118–119; see *Paciocco* 236 FCR at 268–69 [271]–[274], 270–271 [281] and 276 [304]–[306].
2. Predation on vulnerability, taking advantage of disability or disadvantage and victimisation may be found in business, as in other fields of human life. Such behaviour does not, however, exhaust the meaning of against conscience. The kinds of consideration in s 22 and the kinds of circumstance to which the Chief Justice referred in *Paciocco* 236 FCR at 274–75 [296]–[298] are apt to inform evaluations about business standards that the courts are required by Parliament to make. They may be contestable judgments; they may be by reference to a standard that is not definable; but they are evaluative judgments that Parliament commands be made. That they are the subject of a civil penalty requires that the boundary of impugned conduct be reasonably known to the subject. This last factor reinforces the proposition that it is no light matter, indeed it is a serious matter, to have one’s conduct impugned as against or as offending conscience. Business people understand such things, as do ordinary people. They need no definition to assist them. “Unconscionable” is the language of business morality and unconscionable conduct is referable to considerations expressed and recognised by the statute. The word is not limited to one kind of conduct that is against or offends conscience. Surely to predate on vulnerable consumers or small business people is unconscionable. But why is it not also unconscionable to act in a way that is systematically dishonest, entirely in bad faith in undermining a bargain, involving misrepresentation, commercial bullying or pressure and sharp practice, using a superior bargaining position, behaving contrary to an industry code, using significant market power in a way to extract an undisclosed benefit that will harm others who are commercially related to the counterparty? The proposition that such conduct (not all of which might be seen to be present here) is not unconscionable by an Australian statutory business standard of conscience because the counterparty to the business transaction suffered from no relevant pre-existing disadvantage, disability or vulnerability (other than, perhaps, having a decent degree of trust and faith in its business counterparty’s honesty and good faith) is difficult to accept, unless one posits a narrow defined meaning of “unconscionable” that remains hinged in some way to the structural form of the equitable doctrine as expressed in cases such as *Kakavas* 250 CLR at 439–440 [161]. The history, text and structure of the Act is contrary to such a conclusion. It is not to be derived from the meaning of the word “unconscionable”.
3. The expression of the matter by Gageler J in *Kobelt* 267 CLR at 40 [92] (see [59]–[60] above) may be seen to be similar to the expression of the matter by the Full Court in *Unique* 266 FCR at 667 [155] (see [88] above). We would respectfully venture to suggest that the strength of the qualifying or descriptive language (“so far outside”, “warrant condemnation”, “offensive to the conscience”) should be seen as indicative of the quality of the departure from right commercial behaviour, explicated and articulated case by case over time, rather than be taken as definitional of some measurable departure from conscionable business conduct. Perhaps little is to be gained by quibbling over adjectives, adverbs and verbs to express the notion, as long as it is recognised that unconscionable conduct is not limited to the worst kind of unconscionable conduct. There may be more and less serious examples. That will reflect in penalty. The task is an evaluation of the impugned conduct to assess whether it is to be characterised as a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience and so be characterised as unconscionable. In any particular case, it should be recognised that if the evaluative answer be “no: it is not unconscionable”, the court is concluding that by an Australian business conscience the conduct was conscionable and is not to be deterred by penalty.
4. In conclusion, the primary judge did not decide that special disadvantage in the equitable sense is necessary to ground a contravention of s 21 of the ACL. Had his Honour done so, that would have been an error. His Honour did hold that the taking advantage or exploitation of some vulnerability, disability or disadvantage of the person or persons to whom the conduct was directed was a necessary aspect of unconscionability within s 21 of the ACL. For the reasons we have given that was an error.
5. Ground 1A of the appeal is upheld.

## Ground 3

1. Approaching the question of unconscionable conduct under s 21 on the above basis we would conclude that the respondents engaged in conduct that was unconscionable and that there was no legal consideration impeding the acceptance of the agreed position of the ACCC and the respondents to that effect.
2. An understanding of the agreed facts as described and summarised at [4] and [14]–[16] above amply permits, indeed requires, the conclusion that the conduct sufficiently departed from acceptable business standards as to be against or to offend conscience, not because the respondents took advantage of or exploited vulnerability, disability or disadvantage of the investors, but rather because they behaved in a way which we summarised at [4]. Conduct by a commercial entity which, as here, systematically misuses its superior bargaining position by dishonestly misleading its counterparties and pressuring them by unjustified and unnecessary commercial requirements in a way that reflects a dishonest lack of good faith in undermining bargains previously reached in order to extract surreptitious and undisclosed financial benefits is against and offends an Australian business conscience. None of this is idiosyncratic or personal. It is an offence to honesty (upon which the ACL, the common law and equity are based) and is referable to considerations in paras 22(1)(a), (b), (d), and (l).
3. For these reasons we would allow the appeal and make a declaration to be read as declaration 4A in the orders of 9 June 2020 and an additional declaration as to the conduct of the first respondent. With respect to the terms of this declaration, we would add this. The declaration we will make is based on a proposed declaration put forward by the ACCC during the hearing and after short debate about how specific and detailed a declaration should be in terms of reflecting the substance of the unconscionable conduct. The terms of the declaration we will make were understandably not the subject of submissions by the contradictor. We are satisfied the declaration we propose to make is based on the agreed facts and is appropriate in the circumstances of this case. However, we would not wish to preclude an argument in an appropriate case that something other than listing individual factors in a way that does not indicate their interrelatedness (or interconnectiveness) or that a shorter declaration highlighting the key features of the unconscionable conduct may better achieve the purposes of this Court’s power to make declarations in this area. The declaration will be in the following terms:
4. In the period February 2017 to July 2018, in trade or commerce, in connection with the supply or possible supply of services to investors, QHG engaged in an unconscionable system of conduct in contravention of s 21 of the ACL by devising the Roll Up Plan being a plan to encourage investors to transfer the management of properties that qualified for incentives under the National Rental Affordability Scheme (NRAS) to property managers who were related to, or preferred by Mr Fenn, whom had a commercial association with QHG, and then implementing it in a planned, deliberate and sustained way including by:
   1. knowingly taking advantage of its superior bargaining position relative to the investors as a result of the investors' reliance on QHG to receive the NRAS incentive and because they could not change to another approved participant;
   2. issuing escalating rounds of letters in which deliberately false representations were made to at least 450 investors and which unduly pressured those investors to switch property managers; and as the rounds of correspondence progressed, the pressure on investors increased;
   3. not disclosing to investors its commercial associations with the approved property managers;
   4. unilaterally imposing the accreditation guidelines on investors and their property managers, including a requirement that a $10,000 security deposit be paid by property managers not approved by Quantum, without any legitimate justification for the purpose of excluding property managers who were not approved by QHG;
   5. threatening investors who had not changed to a QHG preferred property manager by issuing notices stating that they were in default under their agreement with QHG which governed their entitlement to the incentive under the NRAS;
   6. when there was a refusal by a property manager to pay the security deposit, using that refusal as a basis to refuse to renew Portfolio Management Agreements with property managers and then pressuring investors to appoint a QHG approved property manager; and
   7. causing the investors of at least 260 properties to cease using their existing property managers and switching to a QHG approved property manager,

in the circumstances identified in paragraphs 8 and 51(1) to (10) of the trial judgment, including:

* 1. QHG was in a superior bargaining position relative to the Investors as a result of the Investors' reliance on QHG to receive the NRAS incentive and because they could not change to another approved participant;
  2. the security deposit requirement was not reasonably necessary to protect the legitimate interests of QHG and investors would not be protected financially by the property manager paying the security deposit;
  3. investors using existing property managers were not at risk of losing their incentives;
  4. there was no legitimate reason why the existing property manager could not continue to manage the property; and
  5. QHG had commercial associations with the approved managers associated with Mr Fenn including Tebter Property Pty Ltd, Ethan Residential Pty Ltd and Quantum Property Australia Pty Ltd and failed to disclose to the investors those commercial associations.

1. We would vary order 5 made on 9 June 2020 by replacing “4” with 4A.
2. No other variations to the orders need be made.

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| I certify that the preceding ninety-nine (99) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop and Justices Besanko and McKerracher. |

Associate:

Dated: 19 March 2021