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Articles

The meaning and scope of the statutory prohibition on unconscionable conduct in s 21 of the Australian Consumer Law (and s 12CB of the Australian Securities and Investments Act) have proven consistently uncertain, particularly over the extent to which the prohibition is not 'limited by the unwritten law'. In its latest iteration, the majority decision of the High Court in *Stubbings v Jams 2 Pty Ltd* gives weight to a conservative model of statutory unconscionable conduct, based on the equitable doctrine of unconscionable dealing. This approach is perhaps unsurprising given the express invocation of the concept of unconscionability to describe the statutory standard of prohibited conduct. But it is also problematic because the approach neglects the guidance that may be gained from the very provisions of the statute in determining whether conduct is unconscionable. This means the potential of the statutory prohibition in addressing market misconduct, unlimited by the unwritten law, is stifled. In particular, the current conservative approach to statutory unconscionable conduct may be ill-suited to responding to businesses that use insights from their relationship with consumers, rather than an overt flexing of superior bargaining power, to influence outcomes in their favour. If it is thought appropriate to address these more subtle kinds of misconduct, then we suggest that, rather than accepting another round of reforms to the scope of the statutory prohibition, it may be time to recognise its limits.

This article considers whether there exists a law of 'lawful act' duress. I argue that the law of duress prohibits only pressure that is unlawful. The concept of 'lawful act' duress, as it is commonly understood, finds no support in the cases. Although there are many reported examples of duress involving threats of lawful action, in each of these cases the pressure was found to be illegitimate because the threatening party had acted unlawfully.

The assignment of debts and other legal choses in action is commonplace. The required formalities for a voluntary equitable assignment, before and after the introduction of the Judicature Act 1873, however, have long been the subject of controversy. This article seeks to ascertain why England and Australia have apparently diverged in relation to the required formalities for voluntary equitable

assignments of debts and other legal choses in action. This aim necessitates consideration of the principles relevant to voluntary equitable assignments prior to the introduction of the Judicature Act 1873. Consequently, this article will seek to establish that a voluntary equitable assignment may be effected orally in England, whereas signed writing is necessary in Australia today. After demonstrating that English and Australian law currently differ on this point, this article will attempt to explain why these jurisdictions have diverged, by reference to what is different about the English understanding of the law relating to voluntary assignments of debts and other legal choses in action.

New Zealand has recently conducted a comprehensive reform of its trust law, both reforming certain rules and restating others in the New Zealand Trusts Act 2019. Although the Law Commission intended to replace what it had, in earlier law reform efforts, described as a ‘tyre in a hazardous state of deflation’, it is unclear whether the provisions finally enacted by Parliament are an improvement on this position. This is because the Act contains significant innovations on the existing law which are nowhere defined or explained, such as the requirement for those interpreting the act to take into account a trust’s ‘terms and objectives’ and trustees to take into account a trust’s ‘context and objectives’ when carrying out their duties. Equally the provisions on information rights whilst intended to guide trustees as to when to provide information are so complex that they could provide a cloak for unscrupulous trustees to unreasonably refuse requests for information or even loot trust property. Additional issues are caused by creating a vague duty for the trustees to act honestly and in good faith and the codification of the duty of loyalty as merely a default rather than a mandatory provision. The present article aims to analyse these shortcomings and suggest means by which the courts may, in due course, patch the Act before it deflates altogether.