‘IT’S JUST BUSINESS’ … OR IS IT? WHEN AN EFFICIENT BREACH OF CONTRACT BECOMES UNCONSCIONABLE CONDUCT UNDER THE AUSTRALIAN CONSUMER LAW

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In business it is sometimes more economically viable for a party to intentionally breach their contract with the other party and pay damages than it is to proceed with the agreement. The theory of efficient breach justifies this behaviour on the basis that the innocent party is adequately compensated and the party in breach is ‘better off’ as a consequence of abandoning the contract. There is limited judicial authority suggesting that such a breach may violate the statutory prohibitions against unconscionable conduct in trade or commerce contained in the Australian Consumer Law. *The point at which it may do so remains unclear. This article critically considers the relationship between the common law of contract and the* Australian Consumer Law *in this context and examines the relevant case law to identify when an efficient breach of contract may amount to statutory unconscionability.*

I INTRODUCTION

Central to the Anglo-Australian law of contract is the principle that contractual obligations should be honoured. This principle is often represented by the Latin maxim *pacta sunt servanda* (‘agreements are to be kept’) and has its roots in religion and philosophy.[1] In ancient times, as a matter of canon law, breaking a contract forged before God was seen as heretical; promises were sacred and their intentional violation tempted the wrath of the Almighty.[2] To the libertarian philosophers, on the other hand, it was commercially sensible to fulfil contractual obligations as a matter of utilitarianism; the legal enforcement of voluntary transactions ultimately maximised the wealth of individuals and, collectively, society.[3] Popular sentiment across the ages has also generally favoured the keeping of promises; it is universally considered reprehensible to promise to do something

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1 See Hans Wehberg, ‘Pacta Sunt Servanda’ (1959) 53(4) *American Journal of International Law* 775.

2 Ibid 775–6; Morris R Cohen, ‘The Basis of Contract’ (1933) 46(4) *Harvard Law Review* 553, 555.

3 Andrew Robertson and Jeannie Paterson, *Principles of Contract Law* (Thomson Reuters, 6th ed, 2020) 6–7.

to someone and, without good cause, fail to do it.[4]

Over many centuries, the principle of *pacta sunt servanda* ossified into a rule of common law: parties are not permitted to defeat their contractual obligations through wilful default.[5] That is, putting aside any conditional discretion contained within the agreement itself, the parties have no positive 'right' to violate their accord.[6] The 'faithful performance of bargains and promises freely made' is of 'central importance'.[7] It would be naïve, if not incorrect, however, to suggest that parties do not routinely breach their agreements to pursue more valuable commercial opportunities. The theory of efficient breach, as understood and advocated for in economic legal analysis, justifies such behaviour on the basis that the innocent party is adequately compensated and the party in breach is 'better off' as a consequence of abandoning the contract.[8] Ostensibly, no party is left in a worse position by virtue of the breach. The theory of efficient breach therefore butts heads with established common law principle by validating the intentional violation of a contractual promise without any legal basis for doing so.

Putting this theoretical conflict aside, there is some judicial authority[9] which suggests that such a breach, even if conducive to some form of 'economic equilibrium' whereby all parties end up in the same or a better position, may violate the prohibitions against unconscionable conduct in trade or commerce contained in the *Australian Consumer Law* ('*ACL*').[10] The point at which it does so, however, is unclear. This article seeks to identify when an efficient breach of contract crosses this blurry line. It does so in four parts. Part II provides important context by discussing both the common law basis for the obligation to honour contractual promises and the central concept of efficient breach. Part III outlines the relevant statutory framework governing unconscionable conduct. It then explores the relevant case law to highlight where the courts have offered guidance to distinguish a mere breach of contract giving rise to a right on the part of the innocent party to claim damages from a breach which contravenes the statutory prohibitions against unconscionable conduct in the *ACL*. Part IV extrapolates from the cases what appear to be the key criteria or indicia seemingly differentiating an efficient breach from an unconscionable one. Finally, Part V explains the merits of bringing a

4 Cohen (n 2) 571.

5 Wehberg (n 1).

6 *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239, 253 (Lord Lindley) ('*Glamorgan*').

7 *Barboza v Blundy* [2021] QSC 68, [166] (Bond J) ('*Barboza*'), quoting *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 285 FCR 133, 154–5 [89] (Allsop CJ, Besanko and McKerracher JJ).

8 Tareq Al-Tawil, 'The Efficient Breach Theory: The Moral Objection' (2011) 20(2) *Griffith Law Review* 449, 450 ('The Moral Objection').

9 This authority is discussed at length in Part III of this article.

10 *Competition and Consumer Act 2010* (Cth) sch 2 ss 20–1 ('*ACL*'). Section 130 of the *Competition and Consumer Act 2010* (Cth) ('*CCA*') stipulates that 'Australian Consumer Law' means Schedule 2 as applied under Subdivision A of Division 2 of Part XI.

consumer law action against a party who has committed an efficient breach of contract. It is explained how doing so opens the door to a far broader range of remedies that might more effectively placate the aggrieved party. As concluded in Part VI, this guidance provides a helpful resource for lawyers and the courts as they seek to further clarify the reach of the statutory unconscionability doctrine.

II MAKING AND (STRATEGICALLY) BREAKING CONTRACTUAL PROMISES

A *The Obligation to Honour Contractual Promises at Common Law*

The term *pacta sunt servanda* is a truncated version of a longer Latin maxim: *pacta conventa quæ neque contra leges neque dolo malo inita sunt omnimodo observando sunt* ('compacts which are not illegal, and do not originate in fraud, must in all respects be observed').[11] The maxim originates from Roman civil law where the Roman Praetor (military commander or magistrate), exercising the power of his office, would declare contracts legally valid and enforceable upon the parties to the agreement.[12] This authority emphasised the hallowed Roman notion of *fides* ('faith') and evolved into a general rule underpinning contractual relations: 'a man must keep his word'.[13] With very limited exceptions, parties were generally forbidden from unilaterally terminating a contract.

Owing to Rome's influence over England before the Reformation, this principle, as with many others, found its way into the English common law. It is therefore common to find numerous judicial statements from English judges certifying this principle. Lord Watson in *Sailing Ship 'Blairmore' Co Ltd v Macredie*, for example, remarked: '[t]he rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil'.[14] The common law position is unambiguous: putting aside any conditional discretion contained within the agreement itself, parties have no positive 'right' to violate their accord.[15] On the contrary, a party has an obligation to perform, and this obligation is complemented by a reciprocal right held by the other party to enforce the obligation.[16] If a party breaches a contract they are liable

11 Herbert Broom, *A Selection of Legal Maxims: Classified and Illustrated*, ed RH Kersley (Sweet & Maxwell, 10th ed, 1939) 476.

12 Carl Schmitt, *Constitutional Theory*, tr and ed Jeffrey Seitzer (Duke University Press, 2008) 120.

13 Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996) 577.

14 [1898] AC 593, 607.

15 'Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do that he must stipulate for an option to that effect': *Glamorgan* (n 6) 253 (Lord Lindley).

16 As Isaacs J said in *O'Keefe v Williams* (1910) 11 CLR 171, 211: '[e]very exclusive … right imports a negative, and the person who confers it impliedly enters into a negative undertaking to do nothing to contravene it'. See also *Zhu v Treasurer (NSW)* (2004) 218 CLR 530, 574 [128] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ) ('*Zhu*').

to compensate their innocent counterpart. As Windeyer J noted in *Coulls v Bagot's Executor & Trustee Co Ltd*:

> The primary obligation of a party to a contract is to perform it, to keep his promise. That is what the law requires of him. If he fails to do so, he incurs a liability to pay damages. That however is the ancillary remedy for his violation of the other party's primary right to have him carry out his promise. It is, I think, a faulty analysis of legal obligations to say that the law treats a promisor as having a right to elect either to perform his promise or to pay damages. Rather … the promisee has 'a legal right to the performance of the contract'.[17]

This position is justifiable on numerous bases. For a start, it accords with Charles Fried's renowned and persuasive 'promise theory' of contract. Fried suggests that an individual is morally bound to keep their promise because they have 'intentionally invoked a convention whose function it is to give grounds — moral grounds — for another to expect the promised performance'.[18] They are bound because they have autonomously chosen to be.[19] The legal institution of contract is thus seen as giving legal force to this moral duty. In Fried's words, 'since a contract is first of all a promise, the contract must be kept because a promise must be kept'.[20] Other commentators have similarly suggested that one's *legal* obligation to perform a contractual duty coexists with their *moral* obligation to do the same, and that the latter enforces the former.[21] All promises possess inherent moral force, and the enforcement of promises through contract is conducive to certainty in the social and legal order.[22]

Even those scholars who question the moral basis for keeping contractual promises acknowledge that the contract provides the framework through which this moral dynamic can develop.[23] Empirical evidence suggests that parties are quite sensitive

17 (1967) 119 CLR 460, 504 ('*Coulls*'), quoting *Alley v Deschamps* (1806) 13 Ves Jr 225; 33 ER 278, 279 [228] (Erskine LC).

18 Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981) 16.

19 In Warnock's view, the legal duty to perform authoritatively reinforces the general obligation to tell the truth and honour promises: GJ Warnock, *The Object of Morality* (Methuen, 1971) ch 7.

20 Fried (n 18) 17.

21 See, eg, Nina CZ Khouri, 'Efficient Breach Theory in the Law of Contract: An Analysis' (2002) 9(3) *Auckland University Law Review* 739, 759; Al-Tawil, 'The Moral Objection' (n 8) 453; John Rawls, *A Theory of Justice* (Belknap Press, 1971) 346–7. Economic theorists, on the other hand, would argue that economic interests should trump any subjective concepts of natural justice and that contractual obligations should be stripped of moral content. Repudiation should be encouraged where this results in a more profitable outcome which leaves no party worse off: see Robert L Birmingham, 'Breach of Contract, Damage Measures, and Economic Efficiency' (1970) 24(2) *Rutgers Law Review* 273, 292.

22 'The faithful observance of contracts … is … essential to the public welfare … Property rights, public and private morality, and liberty itself, are insecure, when the law encourages the nonobservance of contract obligations': *Citizens' Light, Heat & Power Co v Montgomery Light & Water Power Co*, 171 F 553, 561 (Jones DJ) (MD Ala, 1909).

23 See, eg, Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing, 2003) ch 3.

to the moral dimensions of contract breach.[24] They are somewhat tolerant of breaches committed in order to avoid losses but firmly opposed to breaches committed out of greed to pursue more beneficial arrangements.[25] Fried's promise theory appears, therefore, to underpin commercial practice.

The common law's insistence that parties perform their contractual obligations also finds support both in general logic and as a matter of practical sense. Cohen explains:

> Common law is commonly supposed to enforce promises. Why should promises be enforced? The simplest answer is that of the intuitionists, namely, that promises are sacred *per se*, that there is something inherently despicable about not keeping a promise, and that a properly organized society should not tolerate this.[26]

Accordingly, '[t]he demand for justice behind the law', Cohen submits, 'is but an elaboration of such feelings of what is fair and unfair'.[27]

The very purpose of parties entering into a contract is to forge exclusive legal relations between them and render their obligations legally enforceable, with the aim of enabling a mutually beneficial exchange. The contract is an instrument specifically designed to formalise and facilitate such agreements and the attendant allocation of risks. The law does not condone the intentional breach of a contractual agreement if and when a better opportunity arises for one of the parties. Non-performance of contractual obligations is excusable only in a limited range of situations, such as where a contract has been frustrated or entered into under duress.[28] If there were some general 'right' to abandon one's voluntarily assumed obligations and violate a contract at will, the concept of 'breach' would in fact be

24 Tess Wilkinson-Ryan and Jonathan Baron, 'Moral Judgment and Moral Heuristics in Breach of Contract' (2009) 6(2) *Journal of Empirical Legal Studies* 405.

25 Ibid 420–1.

26 Cohen (n 2) 571.

27 Ibid 581.

28 See Al-Tawil, 'The Moral Objection' (n 8) 469–70; Peter Linzer, 'On the Amorality of Contract Remedies: Efficiency, Equity, and the Second Restatement' (1981) 81(1) *Columbia Law Review* 111, 111. Friedmann expressed this point elegantly:

> [A] penny's worth of net gain does not justify the disregard of … the contract rights of others. … [C]ontract rights are not absolute and may be compromised in various ways under circumstances of genuine necessity. But it is a vast leap from the narrow confines of the necessity cases to the far broader proposition that there is some general right to violate … contract rights solely if there is some willingness to pay the owner's loss. The theory of 'efficient' breach cannot overcome that gap.

Daniel Friedmann, 'The Efficient Breach Fallacy' (1989) 18(1) *Journal of Legal Studies* 1, 18.

a fallacy. The law of contract clearly assumes a duty to perform.[29] To assert otherwise would undermine the general primacy and stability of contracts.[30]

From a rational perspective, a party cannot be taken to enter into a contract impliedly consenting to the other party making a strategic choice between performance and non-performance. The fact that the innocent party can seek damages from the breaching party through the courts is not an effective substitute for the performance they bargained for; it is a bitter consolation. As Eisenberg rightly states:

> Buyers do not contract for the expensive, emotionally draining, hassling game of chance that litigation constitutes. Instead, buyers contract for goods and services to be delivered when they are supposed to be delivered, and they want to *know* that those goods and services will be delivered and delivered on time.[31]

Contract law is concerned with the enforcement and performance of contractual obligations. In *Photo Production Ltd v Securicor Transport Ltd*,[32] Lord Diplock drew a distinction between *primary* obligations arising under a contract and *secondary* obligations arising from its violation. Whereas a party's primary obligation is to do whatever they promised to do, their secondary obligation is to pay compensation to the other party should they fail to honour their primary obligation to perform.[33] Efficient breach theory, as we will see, regards the secondary obligation to compensate for breach as superior to the primary obligation to perform where this results in a more economically efficient outcome. The problem is that performance is what the law of contract is concerned with, and performance is ultimately often what matters most to the innocent party.[34] The innocent party has a right to expect the breaching party to perform their primary obligations. As the High Court remarked in *Zhu v Treasurer (NSW)*, 'in Australian law each contracting party may be said to have a right to the performance of the

29 Tareq Al-Tawil, 'The Efficient Breach Theory: The False Assumptions and Reasons' (2011) 28(2) *Journal of Contract Law* 150, 167, citing Charlie Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26(1) *Oxford Journal of Legal Studies* 41, 46.

30 Robert A Hillman, *The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law* (Springer Science+Business Media, 1997) 223.

31 Melvin A Eisenberg, 'Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law' (2005) 93(4) *California Law Review* 975, 1008 (emphasis in original). See also Friedmann (n 28) 1, where the author notes that the remedy of damages does not substitute for the right of performance but rather *vindicates* that right. The mandated payment of damages does not wash away the wrong of breach: Gregory Klass, 'Efficient Breach' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 362, 368. Unsurprisingly, then, there is some evidence that parties prefer specific performance orders to compensatory orders: Steven Shavell, 'Specific Performance versus Damages for Breach of Contract: An Economic Analysis' (2006) 84(4) *Texas Law Review* 831, 875–6.

32 [1980] AC 827, 848–9.

33 Ibid 848–9.

34 Webb (n 29) 53–4.

contract by the other'.[35] In some cases '[c]omplete and perfect justice to a promisee may well require that a promisor perform his promise'.[36]

There are clearly numerous theoretical justifications for the common law's stance that parties to a contract should honour the obligations they have voluntarily assumed. Against this background, this article now turns to consider the concept of efficient breach, examining its potential origins and explaining when it might occur. The notion of efficient breach challenges many of the foregoing justifications for reverence of contracts and supports the view that contracts should instead be abandoned where a more valuable economic objective is at hand.

B *Emergence of the Concept of 'Efficient Breach'*

The theory of efficient breach is a feature of economic legal analysis and is controversial in nature. In basic terms, the theory posits that a party to a contract should be allowed, perhaps even encouraged, to intentionally breach their contract and provide compensation to the other party by way of damages where it is economically efficient to do so. This efficiency will manifest where the party in breach is able to pursue a more profitable or desirable venture and simultaneously offset the innocent party's losses through the payment of damages equivalent to their expectation losses. This breach is said to increase society's welfare on the basis it 'result[s] in the optimum (or a more efficient) use of goods and services'.[37] The genesis of efficient breach theory is debated, though one of the earliest mentions can be traced to Oliver Wendell Holmes in 1881. On the nature of contractual promises, Holmes stated:

> The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.[38]

Efficient breach theory has been described as 'a variation and systematic extension' of Holmes' perspective.[39] Other scholars[40] have attributed American academic Robert Birmingham as having pioneered — or, at least, accentuated — the theory

35 *Zhu* (n 16) 574 [128] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ).

36 *Coulls* (n 17) 503 (Windeyer J).

37 Al-Tawil, 'The Moral Objection' (n 8) 450.

38 Oliver Wendell Holmes, *The Common Law* (Belknap Press, 2009) 272. Holmes' original statement appeared in Lecture VIII on contractual elements in the original version of his book published in 1881 by Little, Brown and Company: Oliver Wendell Holmes Jr, *The Common Law* (Little, Brown and Company, 1881) 301. His view was repeated in a journal article published 16 years later: 'The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else': Oliver Wendell Holmes, 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 457, 462.

39 Friedmann (n 28) 1–2. For similar views, see Khouri (n 21) 739; Samuel Kang and James Nguyen, 'Equity's Obligation to Perform: Efficient Breach and the Inadequacy of Common Law Damages' (2014) 88(12) *Australian Law Journal* 874, 874.

40 See, eg, Jeffrey L Harrison, 'A Nihilistic View of the Efficient Breach' [2013] (1) *Michigan State Law Review* 167, 169; Klass (n 31) 366; Duong Anh Son and Gian Thi Le Na, 'Efficient Breach of Contract' (2020) 17(4) *Journal of US-China Public Administration* 147, 148.

in the 1970s.[41] Posner is also credited with popularising the notion of economically efficient breaches.[42] Irrespective of its true origin, the theory has been the subject of much academic literature in law and economics. A simple example will illustrate an efficient breach in practice. Assume that a farmer contracts with a market retailer to provide the retailer with $500 worth of grain. The cost for the farmer to reap, harvest and supply the grain is $470 and the cost to the retailer of obtaining equivalent grain from an alternative supplier is $530. If the farmer breached the contract at this point, they would, in accordance with established common law principle, be required to put the retailer in the position the retailer would have been had the contract been correctly performed.[43] The farmer would therefore be required to pay the difference between the contract price for the grain ($500) and the cost of obtaining the same or similar product from another supplier ($530). So, the retailer would receive $30 in damages.

If a second market retailer offered to buy the farmer's grain for $510 the farmer would have no incentive to breach the contract as their profit on the transaction with the first retailer would be $30 (contract price less cost of supply) whereas the profit on the transaction with the second retailer would only be $10 (offer price less cost of supply and $30 damages to the first retailer). If the second retailer offered $540 instead, however, the situation would be different as the farmer would stand to make a greater profit if they breached the contract with the first retailer and entered into another contract with the second retailer. This is because the farmer would pay their own supply costs ($470) and $30 damages to the first retailer before receiving $540 from the second retailer, resulting in a net profit of $40 and one $10 greater than that which would have been enjoyed under the first contract.

The transaction between the farmer and the second retailer is said to be 'Pareto efficient' — or, more accurately, 'Pareto superior' — because it leaves neither party worse off once compensation is paid and leaves at least one party (the farmer) better off than they would have been had they correctly performed the original contract.[44] In his highly influential tome *Economic Analysis of Law*, Richard Posner described how a competitive market can occasionally incentivise opportunistic behaviour amongst contracting parties — as with the farmer and the market retailers in the above scenario — and that the award of compensatory

41 Birmingham (n 21). For convenience, and for the purposes of this article, the theory will be presumed to have originated in Holmes' work and will intermittently be referred to as 'Holmesian' theory.

42 See, eg, Klass (n 31) 366.

43 *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365 (Parke B) ('*Robinson*'), approved by the High Court in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 286 [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ) ('*Tabcorp*'); *Clark v Macourt* (2013) 253 CLR 1, 6 [7] (Hayne J), 11 [26] (Crennan and Bell JJ), 19 [60] (Gageler J), 30 [106] (Keane J).

44 Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999) 119; Khouri (n 21) 740. The theory derives its name from the economist who invented it, Vilfredo Pareto. The theory was first expressed in his work Vilfredo Pareto, *Manuel D'Économie Politique* (Marcel Giard, 2nd ed, 1927) 617–18.

damages should not discourage this behaviour given it still results in net profit for the breaching party:

> [I]n some cases a party is tempted to break his contract simply because his profit from breach would exceed his profit from completing performance. He will do so if the profit would also exceed the expected profit to the other party from completion of the contract, and hence the damages from breach. So in this case awarding damages will not deter a breach of contract. It should not. It is an efficient breach.[45]

Other proponents of efficient breach theory emphasise its economic benefits both to the contracting parties and to society generally. Efficient breaches are said to maximise social welfare by allowing the breaching party to profit, the innocent party to have all losses offset through compensation, and the breaching party to invest their 'net gains' into other economic opportunities 'resulting in increased production of goods and services at lower cost to society'.[46] It concurrently avoids the breaching party investing labour and resources into a less valuable transaction whilst ensuring that the innocent party to the original transaction receives damages equivalent to what they expected to receive through proper performance. In other words, efficient breach ensures that resources end up where they are most valued without leaving any party worse off because of the reallocation.[47]

Supporters of efficient breach theory also cite the rule that exemplary (or punitive) damages are not awarded in contract law[48] as evidence that the law does not seek to discourage efficient breaches.[49] Critics, however, argue that the existence of various remedies such as specific performance (which compels a party to perform their contractual obligations) and account of profits (which requires a party to account for any profits made through their breach), as well as certain doctrines such as economic duress and the tort of interference with contractual relations, evinces the law's aversion to intentional breaches of contract.[50]

45 Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer, 9th ed, 2014) 131.

46 Frank J Cavico Jr, 'Punitive Damages for Breach of Contract: A Principled Approach' (1990) 22(2) *St Mary's Law Journal* 357, 372. See also Linzer (n 28) 114. For a judicial comment to this effect, see *Patton v Mid-Continent Systems Inc*, 841 F 2d 742, 750 (Posner J) (7th Cir, 1988).

47 Ian R Macneil, 'Efficient Breach of Contract: Circles in the Sky' (1982) 68(5) *Virginia Law Review* 947, 948, quoting Richard A Posner, *Economic Analysis of Law* (Little, Brown and Company, 2nd ed, 1977) 89–90. The author goes on to make the counterpoint, however, that intentional breach is not necessary to facilitate the most efficient use of resources: the party seeking to breach the contract can simply negotiate a release with the other party. Of course, the efficiency of this and other remedies will be dependent upon the relative costs of each in the circumstances: Macneil (n 47) 954–60.

48 For Australian judicial statements to this effect, see *Butler v Fairclough* (1917) 23 CLR 78, 89 (Griffith CJ); *Gray v Motor Accident Commission* (1998) 196 CLR 1, 6–7 (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, 191 (Hill and Finkelstein JJ) ('*Hospitality Group*').

49 See, eg, Linzer (n 28) 115–16; Friedmann (n 28) 18–23.

50 See, eg, Friedmann (n 28) 18–20; Khouri (n 21) 744–6; Kang and Nguyen (n 39); Hillman (n 30) 223. The High Court made a statement to this effect in *Tabcorp* (n 43) 285–6 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ). Note, however, that the 'account of profits' remedy has not been favoured by the Australian courts given its ostensible incompatibility with the

It is also often said that expectation damages — to which innocent parties are entitled upon breach of contract — are an inaccurate measure of an innocent party's actual losses. Such damages offset the losses flowing directly from the breach, as well as any losses which arise in the ordinary course of events or which were in the contemplation of the parties at the time the contract was formed.[51] They do not, however, account for such things as the costs of litigating the matter, or the hassle and expense of obtaining substitute performance.[52] They also rarely include a sum representative of the measure of the plaintiff's disappointment and mental distress brought on by the breach.[53] And they certainly do not consider the subjective value of performance to the plaintiff, as opposed to the standard objective value determined by the courts and compensated by way of damages.[54] Such an analysis can therefore be seen as 'overlook[ing] the idiosyncratic values of real humans as opposed to rational economic actors',[55] though this might admittedly be better described as a general criticism of the accepted basis for the measurement of damages.

Some scholars also present a rarely discussed but compelling criticism of the concept of efficient breach. The market and its participants are imperfect, and the

compensatory rationale underpinning the award of damages in this jurisdiction: *Hospitality Group* (n 48) 196 (Hill and Finkelstein JJ). Moreover, orders of specific performance are rarely ordered and are generally reserved for situations where the consideration the plaintiff was otherwise due to receive under the contract is particularly unique and cannot be adequately substituted with damages: *Dougan v Ley* (1946) 71 CLR 142, 150 (Dixon J).

51 *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145, 151 (Alderson B).

52 Macneil (n 47) 951–8, 968–9; Richard Craswell, 'Contract Remedies, Renegotiation, and the Theory of Efficient Breach' (1988) 61(3) *Southern California Law Review* 629, 637; Friedmann (n 28) 24. See also John A Sebert Jr, 'Punitive and Nonpecuniary Damages in Actions Based upon Contract: Toward Achieving the Objective of Full Compensation' (1986) 33(6) *UCLA Law Review* 1565; Harrison (n 40) 176.

53 In *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, the High Court confirmed that damages for disappointment and distress were available in very limited circumstances, including: where physical injury is suffered as a result of the breach; where the disappointment and distress flows from the inconvenience caused by the breach; and where the contract specifically provided that the plaintiff would enjoy a relaxing or pleasant experience.

54 According to efficient breach theory, a party's losses incurred as a consequence of the other party's breach are compensable and therefore able to be offset through an award of damages, allowing the breaching party to pursue another more economically valuable opportunity. This view fails, however, to recognise that non-performance is itself a distinct form of 'loss' to the innocent party: Webb (n 29) 54. The foundational principle established in *Robinson* (n 43), which governs the award of damages, is premised on placing the innocent party in the position they would have been in had the breach not occurred; that is, had proper performance taken place. The fact that parties can be adequately compensated consequently overshadows what is the most fundamental notion underpinning contract and that is that parties do as they have promised to do: *pacta sunt servanda*. See also Stephen A Smith, 'Performance, Punishment and the Nature of Contractual Obligation' (1997) 60(3) *Modern Law Review* 360 where the author distinguishes between *tangible* harms (ie expectation losses) and *intangible* harms (ie bonds of trust between contracting parties). The author suggests that an award of damages can normally offset the tangible harms but cannot compensate for the intangible harms flowing from a breach of contract.

55 Khouri (n 21) 750.

courts are not economists, meaning that expectation damages might conceivably be overestimated. While the bulk of expectation loss can capably be calculated by reference to the relevant contract or invoice, the balance can be difficult, particularly where the balance comprises losses alleged to have arisen in the ordinary course of events or which should have been contemplated by the parties who are involved. Quantum can certainly be to the detriment of the plaintiff, but it is equally possible that it benefits them. Harrison explains:

> Another factor that makes the efficient breach idea elusive involves a different perspective altogether and focuses on the breaching party. Again, the party receives a check for damages and has no reaction — the check is as good as performance. The problem is that sometimes this may be better than performance — the breach is a blessing, and expectancy based on market value overcompensates. Here again the breach is not efficient because the amount internalized is too much.[56]

Setting aside the theoretical criticisms of efficient breach theory, it is also questionable whether a party who opportunistically breaches their contract, even if in pursuit of some more favourable commercial opportunity, might be said to have acted unconscionably under the *ACL*. To answer this question two things must be considered. First, as was alluded to earlier, although Holmesian ideology and efficient breach theory digress from established common law principle (which favours the performance of contractual obligations), they do agree that a party in breach should and must pay damages for their non-performance. Nonetheless, 'the law often fails to deter efficient breaches in commerce'[57] and so we are speaking of what is seemingly a common market practice. This alone warrants scrutiny of its legitimacy. Second, when one examines the sorts of behaviours which have been deemed to contravene the statutory proscriptions against unconscionable conduct in pt 2-2 of the *ACL*, it becomes immediately apparent that an efficient breach may fall foul of the same. The scope of these provisions will be discussed in Part III before the limited case law examining the issue of efficient breach in this statutory context is analysed. Some general guiding principles as to when an efficient breach may become statutorily unconscionable will then be offered in Part IV.

III THE STATUTORY FRAMEWORK AND HOW EFFICIENT BREACHES MIGHT BE CAUGHT

A *Unconscionable Conduct: The Statutory Framework*

Sections 20 and 21 of the *ACL* contain the statutory proscriptions against unconscionable conduct in trade or commerce.[58] It is important for parties seeking

56 Harrison (n 40) 182 (emphasis omitted). The author uses the term 'internalization' to describe the act of treating a loss incurred by the plaintiff as a cost: at 172.

57 Joseph M Perillo, 'Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference' (2000) 68(4) *Fordham Law Review* 1085, 1095.

58 Equivalent provisions are also contained within pt 2, div 2, sub-div C of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*'). These provisions relate specifically to the actual or possible supply or acquisition of financial services or products. Pursuant to s 131A of the *CCA* (n 10), the *ACL* (n 10) does not apply to contracts of this kind. Instead, ss 12CA and 12CB of the *ASIC Act* (n 58) replicate ss 20 and 21 of the *ACL* (n 10) respectively.

to bring an action under the *ACL* in respect of alleged unconscionable conduct to determine which of these provisions applies. In light of the wording of each provision, this choice will depend upon the nature of the transaction. Section 20(1) of the *ACL* provides:

> A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.

This provision provides a general prohibition against unconscionable conduct as defined by the 'unwritten law' which in this context refers to the principles of law and equity developed by the courts over time that comprise the common law of Australia.[59] Importantly, s 20(2) stipulates that s 20 'does not apply to conduct that is prohibited by section 21'. Section 21(1) reads:

> A person must not, in trade or commerce, in connection with: (a) the supply or possible supply of goods or services to a person; or (b) the acquisition or possible acquisition of goods or services from a person; engage in conduct that is, in all the circumstances, unconscionable.

Unlike s 20, this provision specifically concerns transactions facilitating the actual or possible supply or acquisition of goods or services. It is also not limited to the meaning of 'unconscionability' as understood at common law. Instead, s 22 provides a non-exhaustive list of factors to which the court may have regard in determining whether a party has breached s 21.[60]

Determining whether an efficient breach might amount to statutory 'unconscionability' requires consideration of the meaning of this term within the context of the *ACL*. This is particularly so in the case of s 20, which is restricted to the common law understanding of the term. Section 21 is not so restricted and in fact is complemented by a non-exhaustive list of factors (in s 22) to which the court may have regard in determining whether that provision has been breached. It is useful to begin with a discussion of the relevant case law, examining how the judiciary has interpreted the term 'unconscionable' in the context of the consumer law framework.

The authorities reveal no consensus as to the meaning of statutory 'unconscionability'. The term has been variously described as encompassing serious misconduct which is 'clearly unfair or unreasonable',[61] as well as conduct

59 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 62 (Gleeson CJ), 71–2 (Gummow and Hayne JJ) ('*Berbatis*'); *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 319 (Gray, French and Stone JJ) ('*Samton*').

60 Section 22(1) pertains to the supply or possible supply of goods or services between a supplier and a customer, whilst s 22(2) pertains to the acquisition or possible acquisition of goods or services between an acquirer and a supplier. The lists of factors in both s 22(1) and s 22(2) are identical.

61 *Cameron v Qantas Airways Ltd* (1995) 55 FCR 147, 179 (Beaumont J), quoted in *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253, 264 [30] (Sundberg J).

'irreconcilable with what is right or reasonable' and which demonstrates an obvious disregard for conscience.[62] Statutory unconscionability has also been said to involve the intentional violation of community standards and the tenets of public policy. In *Director of Consumer Affairs (Vic) v Scully* ('*Scully*'), Santamaria JA stated:

> [T]he intentional breach or reckless disregard of certain norms or standards amounts to statutory unconscionability. Those norms or standards must be more than those that happen to be personal to the court or tribunal charged with the responsibility of deciding whether conduct is unconscionable. Certainly, they will include norms of honesty and fair dealing and norms which exclude exploitation and deception. Some such norms and standards may be detected in the principles of public policy immanent in legislation such as the *Competition and Consumer Act* and the *Australian Consumer Law*.[63]

The court's task in respect of the statutory proscriptions against unconscionable conduct is to evaluate the facts of a case 'by reference to a normative standard of conscience'.[64] That standard is one 'permeated with accepted and acceptable community values', one of which is honesty and fairness, and an absence of deception or unfair pressure, in dealings with consumers.[65] The consumer law framework reflects and enforces these values. The court's evaluative task

> 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; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.[66]

62 *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd [No 2]* (2009) 253 ALR 324, 347 [113] (Foster J) ('*Allphones*').

63 (2013) 303 ALR 168, 186 [56] (Santamaria JA) ('*Scully*').

64 *Australian Competition and Consumer Commission v Lux Distributors* [2013] FCAFC 90, [23] (Allsop CJ, Jacobson and Gordon JJ) ('*Lux Distributors*').

65 Ibid.

66 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 274–5 [296] (Allsop JA, Besanko J agreeing at 289 [371], Middleton J agreeing at 295 [398]) ('*Paciocco*'). On appeal, the High Court did not provide any further guidance as to the precise meaning or scope of the term 'unconscionability' in the statutory sense: *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525.

Unconscionability also clearly encompasses behaviours prohibited by various equitable doctrines such as duress and undue influence.[67] Of course, as is explained immediately below, the doctrine's application under the traditional equitable formulation depends upon the existence of a special disability or disadvantage on the part of the plaintiff, which was evident to the stronger party (defendant) and which the stronger party took advantage of in circumstances which demonstrate that the transaction was not fair, just and reasonable.[68] This is likely what limits its prospects as a means of framing efficient breaches as unconscionable.

B *The Limited Scope of* ACL *s 20*

In *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* ('*Samton*'), the Federal Court suggested that the language of s 51AA of the *Trade Practices Act 1974* (Cth) ('*TPA*') (equivalently worded predecessor to *ACL* s 20) 'requires identification of conduct able to be characterised as unconscionable in a sense known to the unwritten law. In the context of that law as it presently stands, unconscionable conduct is that which supports the grant of relief on the principles set out in specific equitable doctrines'.[69] The Court gave examples such as the doctrines of unconscionability (as expressed in *Commercial Bank of Australia Ltd v Amadio* ('*Amadio*')), undue influence, promissory estoppel, unilateral mistake, and relief against forfeiture and penalties.[70]

The High Court in the earlier case of *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* ('*Berbatis*')[71] confirmed that *TPA* s 51AA (*ACL* s 20) was limited in this sense, adding force to the Federal Court's observation in *Samton* that 'equitable doctrine does not presently provide a remedy against conduct simply on the basis that it is unfair in the opinion of a judge' and 'cannot be applied to unconscionable conduct at large'.[72] The current position, then, appears to be that a party who is aggrieved by their counterpart's efficient breach of contract would have no recourse under *ACL* s 20 unless the defendant's behaviour was determined to fall within one of the accepted equitable classifications or categories of 'unconscionable conduct'. This is a somewhat narrow selection and so, as will be seen later, s 21 is a far more feasible option.[73]

67 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 244–5 [98]–[99] (Gummow and Hayne JJ), quoting *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd [No 2]* (2000) 96 FCR 491, 498 [14] (French CJ).

68 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 461 (Mason J), 474 (Deane J) ('*Amadio*').

69 *Samton* (n 59) 318 [49] (Gray, French and Stone JJ).

70 Ibid 317 [46] (Gray, French and Stone JJ).

71 *Berbatis* (n 59) 62–3 (Gleeson CJ), 71–2 (Gummow and Hayne JJ).

72 *Samton* (n 59) 319 (Gray, French and Stone JJ).

73 'Section 20 of the *ACL* is narrower in its application than s 21': *The Good Living Company Pty Ltd v Kingsmede Pty Ltd* (2019) 142 ACSR 221, 271 [197] (Markovic J).

The most commonly pleaded category of unconscionable conduct under *ACL* s 20 is the equitable doctrine of unconscionability explicated in *Amadio*.[74] This doctrine would be difficult to use as a means to police efficient breaches because its requisite elements are quite stringent. To establish unconscionability under the *Amadio* doctrine, the plaintiff must prove: (1) that they, as the weaker party, were affected by a special disadvantage; (2) that the stronger party (the defendant) was aware of this disadvantage; and (3) that the stronger party took advantage of the plaintiff's disadvantage in circumstances where the transaction was not fair, just and reasonable.[75] 'Special disadvantage' has generally been interpreted narrowly to mean characteristics placing the plaintiff in a markedly weaker position of power, such as infirmity of mind, seniority, and language difficulties.[76] Being in a state of unequal bargaining power, however, is not in itself sufficient to amount to special disadvantage.[77] Assuming the innocent party does not have compromised mental faculties or some other trait that makes them peculiarly vulnerable, the fact that the breaching party seized upon an opportunity to make greater profit elsewhere does not mean that the innocent party has been exploited. According to *Berbatis*, this is so even where the innocent party was more exposed, and the breaching party in a stronger position.[78]

'Exploitation is generally considered to be a moralized concept',[79] meaning it has a distinctively normative dimension.[80] It transcends hard bargaining and is characterised by a dominant party taking unfair advantage of a subservient party in circumstances where the former is morally bound to avoid doing so.[81] Having the choice to breach a contract and attain greater gain is not, Bigwood submits, sufficient to make the execution of that choice exploitative; the act must be carried out in a manner demonstrating intent to harm or ignorance as to this possibility.[82] Wertheimer similarly argues that an *exploitative* transaction is characterised by one party, X, taking *unfair* advantage of the other, Y.[83] A mere breach of contract is not unconscientious; it is always a foreseeable possibility. But exploitation requires

74 Mark Giancaspro and Colette Langos, *Contract Law: Principles and Practice* (LexisNexis, 2022) 251.

75 *Amadio* (n 68) 474 (Deane J).

76 *Blomley v Ryan* (1954) 99 CLR 362, 405 (Fullagar J), 415 (Kitto J).

77 *Berbatis* (n 59) 64 [11] (Gleeson CJ); *Thorne v Kennedy* (2017) 263 CLR 85, 112 [64] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), citing *Amadio* (n 68) 462 (Mason J).

78 *Berbatis* (n 59) 64 [14] (Gleeson CJ).

79 Rick Bigwood, *Exploitative Contracts* (Oxford University Press, 2003) 130 (emphasis omitted).

80 Ibid 129–32.

81 Robert E Goodin, 'Exploiting a Situation and Exploiting a Person' in Andrew Reeve (ed), *Modern Theories of Exploitation* (SAGE Publications, 1987) 166.

82 Bigwood (n 79) 150–5.

83 If X attains a benefit in their dealings with Y, even if X considers that the transaction is 'eminently fair' — which the defendant in an efficient breach scenario likely will, given they recognise and accept liability to compensate the plaintiff in damages — or is unaware of the extent of the impact upon Y, X can, in Wertheimer's view, be said to have exploited Y: Alan Wertheimer, *Exploitation* (Princeton University Press, 1996) 207–9.

something more; an identifiable air of culpability or blameworthiness on the part of the defendant. In any event, the innocent party is made whole through an award of damages. It would therefore be onerous to penalise efficient breaches through *ACL* s 20.

Forgetting, for a moment, the limited scope of *ACL* s 20, it is obvious that an efficient breach will be regarded as sufficiently unfair, unreasonable and against everything that is right or reasonable in the eyes of the injured party. Nonetheless, without yet engaging the applicable law, the various economic reasons proffered by proponents of efficient breach (discussed in Part II) militate against this conclusion. A party acting in an egoistic manner and intentionally breaching a contract to pursue a more profitable opportunity commits both a moral and a legal wrong. But where this wrong is committed in circumstances where the aggrieved party can be adequately compensated, and the resources the subject of the original contract can be more effectively allocated for the betterment of society, the argument that the defendant has acted unreasonably or against the grain of conscience begins to falter.

In any event, the innocent party's subjective views are discounted from the equation. According to the Australian authorities, purportedly unconscionable behaviour must be examined objectively and by reference to a normative standard of conscience. There is a case that members of society value the promotion of efficient economic activity and the subsequent maximisation of wealth.[84] Indeed, in the current economy — one ravaged by the COVID-19 pandemic — it is understandable (if not condonable) for market participants to be seeking out the most profitable and efficient opportunities available.[85]

C ACL *s 21 — A Wider Net*

At this point we should return to considering s 21 of the *ACL*. Given that cases of efficient breach will invariably arise in situations where parties have contracted with one another for the acquisition or supply of goods or services, s 21 seems the more likely statutory provision capable of rendering an efficient breach 'unconscionable'. It is also clearly more flexible than its s 20 counterpart. As mentioned, s 22 provides a lengthy and non-exhaustive list of factors to which the court may have regard in determining whether a party has breached s 21. These factors are not considered in isolation but rather cumulatively in the context of all the circumstances.[86] No one factor is determinative. Section 21 is *not* limited to the meaning of 'unconscionable conduct' prescribed by the unwritten law, as s 20

84 An efficient market invariably results in cost savings which are (ideally) passed onto consumers in the form of discounts for goods and services.

85 There is a compelling counterargument, however, that because the poor state of the global economy and pandemic-induced disruptions to supply chains and workforces has exacerbated consumer vulnerability, there is greater cause for market participants to be held to their agreements. Members of society might therefore value stability over economic efficiency in these challenging times.

86 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 61 [155] (Nettle and Gordon JJ) ('*Kobelt*').

is. Moreover, pursuant to *ACL* s 21(4)(c), where a contract results from the negotiations between the parties, any assessment of allegedly unconscionable conduct can include a consideration of both the terms of the contract and the manner in which and the extent to which it was carried out.

The factors in s 22, and which might be relevant when efficient breach is alleged to be unconscionable, include:

- the relative bargaining strengths of the parties;[87]
- the customer's (consumer's) ability to understand any documentation involved in the transaction;[88]
- the conduct of the parties in complying with the terms of the contract;[89]
- the parties' post-contractual conduct in connection with their commercial relationship;[90]
- the extent to which the parties have acted in good faith;[91]
- the extent to which the one of the parties unreasonably failed to disclose to the other party any intended conduct that might affect their interests and any risks to the other party arising from this conduct;[92]
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer.[93]

Several members of the High Court in *Australian Securities and Investments Commission v Kobelt* unhelpfully suggested that these factors are still to be considered against the general backdrop of the various common law understandings of unconscionability,[94] which clearly blurs the boundary between *ACL* ss 20 and 21. This confusion was perpetuated by the Victorian Court of Appeal's agreement with this view in *Jams 2 Pty Ltd v Stubbings*.[95] Accordingly, the current legal position appears to be that, alongside a consideration of the s 22 factors, there must also be a broader consideration as to whether the conduct in question was 'so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience'.[96]

87 *ACL* (n 10) s 22(1)(a).

88 Ibid s 22(1)(c).

89 Ibid s 22(1)(j)(iii).

90 Ibid s 22(1)(j)(iv).

91 Ibid s 22(1)(l).

92 Ibid s 22(1)(i).

93 Ibid s 22(1)(d).

94 *Kobelt* (n 86) 48–9 (Keane J), 78–80 (Nettle and Gordon JJ), 94 (Edelman J).

95 [2020] VSCA 200, [78] (Beach, Kyrou and Hargrave JJA).

96 *Kobelt* (n 86) 40 [92] (Gageler J).

Efficient breach of contract — or, indeed, any intentional breach — does not appear in the list of s 22 factors. It would seem, however, that the practice might fall within the ambit of several of the listed factors. Section 22(1)(d), for example, makes reference to the use of 'unfair tactics' against the customer by the supplier. Such tactics include making unreasonable and time-sensitive demands of parties, compelling accession to terms, making incessant requests for response in correspondence, and threatening commercial consequences for any failures to comply with stipulated terms.[97] An efficient breach is premised on the objective of obtaining greater profit elsewhere than would have been enjoyed under the contract being breached, and an attendant requirement that the innocent party's expectation losses be offset by the party in breach. As discussed earlier, Holmesian logic would suggest this is not an unfair tactic at all given the aggrieved party is compensated through damages, and as will be discussed later in this Part, the case law makes clear that a mere breach of contract is not itself unconscientious. Where an efficient breach might be seen as an 'unfair tactic', however, is where, for example, it is initiated to the complete surprise of the aggrieved party after the breaching party provided assurances that this would not occur.[98]

Section 22(1)(i) also allows the court to consider 'the extent to which the supplier unreasonably failed to disclose to the customer any intended conduct … that might affect the interests of the customer', and any attendant risks to the customer. It is highly unlikely that a supplier would be forthright with a customer when seeking to commit an efficient breach and pursue a more profitable opportunity with another party. The more likely scenario is that their intentions will be withheld until the point they are ready to, or proceed with committing, a breach, with little or no regard for the customer's interests and certainly none for the risks or consequences involved. Whereas efficient breach theory assumes that the customer's interest in performance is purely economic, s 22(1)(i) is of wider remit and could take into account the customer's *other* interests, such as their reputational interest in avoiding litigation or their personal interest in working with the breaching party.[99] This provision would therefore allow the aggrieved party to more easily highlight the full impact of the breaching party's intended but undisclosed conduct.

The extent to which the parties acted in good faith is another relevant factor, enshrined in s 22(1)(l). The authorities indicate that the obligation of good faith in contract law requires parties 'to act honestly and with a fidelity to the bargain' and to avoid 'undermin[ing] the bargain entered or the substance of the contractual benefit bargained for'.[100] However, a conscious decision to breach a contract and

97 See, eg, *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 ('*Coles Supermarkets*').

98 This might also support a claim in promissory estoppel or enliven other provisions of the *ACL*, such as the proscription against misleading or deceptive conduct under *ACL* (n 10) s 18.

99 Though, of course, this assessment would be difficult given such interests are difficult to quantify in monetary terms. Nonetheless, difficulty in assessment is no good reason to deny compensation for a contract breach. The courts will endeavour to quantify the plaintiff's losses no matter the difficulty in doing so: *Chaplin v Hicks* [1911] 2 KB 786.

100 *Paciocco* (n 66) 273 [288] (Allsop CJ).

abandon the bargain is not, without more, an act in bad faith.[101] In some cases, it might even be entirely commensurate with the tenets of good faith to commit an efficient breach, such as where you are reconciling the interests of other stakeholders dependent upon your business judgement.[102] Contrarily, if the decision to breach is made unreasonably or for inappropriate purposes, this may well be deemed bad faith.

Perhaps the most pertinent factor for the purposes of the present analysis is s 22(1)(j)(iii), which encourages consideration of 'the conduct of the supplier and the customer *in complying with the terms and conditions of the contract*'. This factor is complemented by another in s 22(1)(j)(iv), which invites consideration of the parties' post-contractual conduct 'in connection with their commercial relationship'. To facilitate an efficient breach, the breaching party must intentionally violate their contractual obligations. This non-compliance will naturally weigh in favour of the customer when evaluated under s 22(1)(j)(iii) and (iv). These provisions are not worded to specifically consider the parties' motives nor the consequences of the breach. This means that neither the economic justifications for the breaching party violating the contract, nor the fact that the customer is ultimately compensated for their losses, both of which might support the breaching party's defence to the allegation of unconscionability, will necessarily be considered.

Having made the point that *ACL* s 21 has better prospects than s 20 of rendering an efficient breach unconscionable, this article now turns to examining the relevant case law, focussing on those decisions speaking to the intersection between intentional contract breaches and the statutory proscriptions against unconscionability.

D *The Case Law*

Macdonald v Australian Wool Innovation Ltd ('*Macdonald*')[103] was a case concerning the departure of two long-serving senior employees ('the applicants') from a company called Amcor Ltd in 2002. The applicants were offered the opportunity to engage in a chancy but high-reward venture with the respondent, Australian Wool Innovation ('AWI').[104] AWI sought input from the applicants as to the development of wool fibre measurement and assessment technologies, and wool packaging materials.[105] The applicants submitted a proposal to undertake

101 *Bradley v Voltex Group Holdings Pty Ltd* [2016] FCA 1230, [197] (Jagot J) ('*Voltex*').

102 See, eg, *Barboza* (n 7) discussed later in this Part. Recent American authority similarly provides the example of company directors who have a statutory obligation to act in the best interests of shareholders. This obligation may justify a strategic decision to efficiently breach contracts where the benefits of doing so exceed the costs: see *The Frederick Hsu Living Trust v ODN Holding Corporation* (Del Ch, CA No 12108-VCL, 14 April 2017).

103 [2005] FCA 105 ('*Macdonald*').

104 Ibid [18]–[20] (Weinberg J).

105 Ibid [12]–[17].

relevant research and development, which AWI accepted.[106] AWI then resolved to seek board approval to hire the applicants and place them in a custom facility.[107] The applicants subsequently resigned from their positions with Amcor Ltd.[108]

A series of meetings between the parties took place, during and following which the applicants contended that they had formed a binding contractual agreement.[109] They further argued that AWI repudiated this agreement by refusing to proceed with the venture and sought damages for breach of contract and alternatively for various breaches of the *TPA*.[110] Specifically, the applicants alleged that AWI acted unconscionably in reneging upon the alleged promises made, contrary to s 51AC of the *TPA* (now s 21 of the *ACL*).[111] AWI alleged that there was no contractual agreement and that the parties remained in negotiations.[112] It further claimed that the applicants left their employ prematurely and at their own risk.[113] It denied liability for breach of contract or of the provisions of the *TPA*.[114]

The Federal Court held that, whilst the evidence demonstrated that a legally binding contract had been formed[115] and was repudiated by the respondent,[116] this act of repudiation did not in itself amount to unconscionable conduct under s 51AC of the *TPA* (s 21 of the *ACL*). Justice Weinberg first addressed the specific concept of unconscionability:

> The applicants [have] failed to make good their other alternative claim under s 51AC. There was nothing to suggest that they laboured under any special disability, or were placed in some special situation of disadvantage. They were both intelligent and experienced men, professional and highly educated, perfectly well able to look after their own interests. In hindsight, they acted with perhaps less prudence than they might have done. That is a far cry from making good a claim of unconscionability.[117]

His Honour then made some crucial observations regarding the applicants' claim that the respondent's act of withdrawing from the venture and repudiating the contractual agreement was unconscionable under s 51AC:

106 Ibid [19]–[23], [65]–[68].

107 Ibid [23]–[28].

108 Ibid [60], [68].

109 Ibid [37]–[55].

110 Ibid [98]–[101].

111 Ibid [100].

112 Ibid [102]–[103].

113 Ibid [104].

114 Ibid [102]–[111].

115 Ibid [211].

116 Ibid [234].

117 Ibid [279].

> It goes without saying that [the AWI Managing Director's] opinion that AWI had acted unconscionably towards the applicants by failing to discharge its obligations under the contract has no particular legal significance. Any promise that is deliberately broken could easily be characterised as 'unconscionable'. That is not the sense in which the term is used in s 51AC.[118]

This statement from Weinberg J is significant because it implies that the threshold for a claim of unconscionability founded upon an intentional breach of contract is high. This follows from his Honour's statement that any deliberate violation of such an obligation could easily be deemed 'unconscionable' in a general sense but not in the sense captured by s 51AC. If every intentional breach, however minor, was unconscionable under the *ACL*, then the statutory proscription would be prone to misuse.[119] It would also potentially replicate some of the remedies available.[120]

The later case of *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* ('*Body Bronze*')[121] provides further guidance on this point. The appellant, a franchisor of tanning salons, granted a franchise to the respondent for a salon in Chadstone, Victoria.[122] The arrangement was effected through two documents: a heads of agreement and a franchise agreement.[123] The heads of agreement contained a clause stipulating that Body Bronze International Pty Ltd ('Body Bronze') would lend Fehcorp Pty Ltd ('Fehcorp') additional funds if the salon fit-out costs exceeded $250,000 ('the finance arrangement').[124] This clause was not reflected in the subsequent franchise agreement, which contained an entire agreement clause superseding all prior representations and agreements.[125] Fehcorp's fit-out of the Chadstone tanning salon exceeded $250,000 and it sought financial support from Body Bronze.[126] Body Bronze paid some invoices but denied any obligation to do so based on the terms of the franchise agreement, before later refusing to lend any more money and demanding it be reimbursed the additional money loaned to Fehcorp.[127] Fehcorp refused to pay, prompting Body Bronze to serve a legal notice of breach of the franchise agreement before reclaiming possession of Fehcorp's salon.[128] Fehcorp commenced legal proceedings alleging, amongst other things,

118 Ibid [280].

119 This assumes, of course, that a plaintiff would seek to pursue such redress for a trivial breach. This might be conceivable where the action was brought out of spite. Alternatively, for larger scale contract claims, an action under the *ACL* could be 'added on' to strengthen the plaintiff's case.

120 But see Part V, where it is explained how the consumer law offers a broader variety of remedies that would not otherwise be available through a straightforward action for breach of contract.

121 (2011) 34 VR 536 ('*Body Bronze*').

122 Ibid 540 [8] (Macaulay AJA).

123 Ibid 540 [9].

124 Ibid 540 [11].

125 Ibid 540–1 [12].

126 Ibid 541 [14].

127 Ibid 541 [17].

128 Ibid 541 [18]–[19].

that Body Bronze had acted unconscionably contrary to s 51AC of the *TPA* (*ACL* s 21).[129]

Fehcorp succeeded on this ground at first instance.[130] The trial judge held that Body Bronze knew of the importance of the finance arrangement to Fehcorp in deciding to enter the franchise agreement, and it was obvious that Fehcorp lacked the bargaining strength of Body Bronze in light of its fewer financial resources and want of experience.[131] Moreover, Body Bronze's reasons for reclaiming possession of the salon, and its conduct in doing so, were not acceptable.[132] On appeal to the Supreme Court, the importance of the finance arrangement was not disputed[133] and it was found that there was no imbalance of bargaining strength between the parties.[134]

On the point of unconscionability based upon Body Bronze's conduct, Macaulay AJA (with whom Harper and Hansen JJA agreed) first considered the meaning of 'unconscionable conduct' under s 51AC of the *TPA* (*ACL* s 21). *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd [No 2]*, and the principles summarised in that case, were cited to assist in this determination. It was confirmed that *TPA* s 51AC (*ACL* s 21) was broader than s 51AA (*ACL* s 20) and was not limited to the meaning of 'unconscionability' as it is used in the latter provision.[135] It was further clarified that the 'ordinary or dictionary meaning of *unconscionable*, which involves notions of serious misconduct or something which is clearly unfair or unreasonable, is picked up by the use of the word in s 51AC [*ACL* s 21]'.[136] The expression was said to import a 'pejorative moral judgment'[137] and require 'a high level of moral obloquy'.[138] The Court then considered the application of these principles in the context of a breach of contract:

> In applying these principles to conduct which involves the breach of a contract, it should be recognised that not every breach of contract, even a deliberate breach, necessarily involves the moral obloquy that the authorities suggest needs be present for unconscionable conduct in breach of s 51AC [*ACL* s 21] to be made out. Although it may be true that for an act to have that moral character it will usually be conduct

129 Ibid 542 [24].

130 Ibid 552 [77], quoting *Fehcorp Pty Ltd v Body Bronze International Pty Ltd* [2009] VCC 1001, [108] (Judge Saccardo) ('*Fehcorp*').

131 *Body Bronze* (n 121) 552 [79] (Macaulay AJA), citing *Fehcorp* (n 130) [111] (Judge Saccardo).

132 *Body Bronze* (n 121) 552–3 [80] (Macaulay AJA), citing *Fehcorp* (n 130) [112] (Judge Saccardo).

133 *Body Bronze* (n 121) 552 [79] (Macaulay AJA).

134 Ibid 554 [84].

135 Ibid 555 [89], quoting *Allphones* (n 62) 346–7 [113] (Foster J).

136 *Body Bronze* (n 121) 555 [89] (Macaulay AJA), quoting *Allphones* (n 62) 347 [113] (Foster J).

137 *Body Bronze* (n 121) 555 [89] (Macaulay AJA), quoting *Allphones* (n 62) 347 [113] (Foster J).

138 *Body Bronze* (n 121) 555 [90] (Macaulay AJA), quoting *A-G (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121] (Spigelman CJ).

> that is intentional or at least reckless, it does not follow that any breach that is intentional necessarily has that moral character.[139]

The observations of Weinberg J in *Macdonald* were also cited, the Court noting that any contractual breach might be regarded as unconscionable when viewed generally.[140] The Court also appeared to lend support to the theory of efficient breach, identifying situations in which it was commercially sensible to breach a contract than to perform it:

> A decision may be taken to break a contract because, upon rational commercial considerations, the burden of performance may be greater and more onerous than the liability to be incurred if the conduct amounts to breach. The party committing the breach may know that it will deliver to the opposite party an opportunity to exercise rights both under and outside the contract that flow from the breach, and that the opposite party has the means to exercise and enforce those rights. Those rights may include seeking injunctive relief to restrain the breach, accepting a repudiation of the contract so as to terminate executory obligations and seeking damages, or keeping the contract on foot and merely seeking damages. There may be nothing offensive to conscience in a commercial participant taking such a commercial decision in given circumstances. Whether or not it amounts to unconscionable conduct does not simply flow from it being a deliberate breach; it must be evaluated in 'all the circumstances'.[141]

The Court then provided insight into when the line between efficient breach of contract and unconscionable conduct might be crossed:

> The real question is what 'more' is required than conscious breach to convert it into unconscionable conduct. The answer to that question must, at least in part, lie in the value judgment of the particular decision-maker. It means, of course, that minds can reasonably differ. However some guidance in the exercise of that judgment is to be found in the list of matters to which s 51AC(3) [*ACL* s 22] directs the court to have regard. That judgment is not to be informed merely by a sense of distaste for the impugned conduct.[142]

Like any normative evaluation, this process is perhaps susceptible to inconsistency. The wording of *ACL* s 21 permits discretion in a court's evaluation of the defendant's conduct. Nonetheless, the application of these provisions is unavoidably fact-specific and is not a licence for idiosyncratic determination. The process is to be guided by the factors outlined in *ACL* s 22. The courts are often tasked with applying normative standards in various contexts, such as the notion of 'reasonable foreseeability' in the tort of negligence.

In the present case, it was held that Body Bronze had *not* acted unconscionably in its interactions with Fehcorp. This was due primarily to the fact that the parties were balanced in terms of bargaining positions and power, Fehcorp understood the

139 *Body Bronze* (n 121) 555 [91] (Macaulay AJA).

140 Ibid 555 [91], citing *Macdonald* (n 103) [280] (Weinberg J).

141 *Body Bronze* (n 121) 556 [92] (Macaulay AJA).

142 Ibid 556 [93]–[94].

nature and effect of all relevant documents (including the heads of agreement and the franchise agreement), Body Bronze had not acted unfairly nor covertly and was under significant financial pressure, and Fehcorp had contractual remedies against Body Bronze, and did not rely upon Body Bronze to act in good faith in its strict reliance upon the terms of the franchise agreement.[143] Acting Justice of Appeal Macaulay stated thus:

> In my view, Body Bronze's conduct in declining to lend more money, issuing a notice of default, and taking the risk of breach by taking possession, is neither attended by a high degree of moral obloquy nor irreconcilable with what is right or reasonable, nor does it demonstrate that Body Bronze showed no regard for conscience. I say so particularly because of the looseness of the language of the promise to lend, the visibility (or lack of it) Body Bronze had of all the relevant information relating to the nature of Fehcorp's expenditure, the scope for debate about the character of all the payments, Body Bronze's own tight financial position, its concern about the workability of its relationship with Fehcorp, and that it foreshadowed its action to Fehcorp who it knew had access to legal advice and a demonstrated capacity to employ such advice effectively.[144]

The appeal was therefore allowed and the matter resolved in favour of Body Bronze.[145]

Further assistance may be drawn from the Victorian Supreme Court of Appeal's decision in *Scully*.[146] In that case, the defendants offered a range of residential home finance and brokerage programs to the public but failed to appropriately explain the mechanics or risks of these programs to participants.[147] Some participants were even presented with doctored financial information so as to secure their custom.[148] The Director of Consumer Affairs Victoria commenced proceedings against the defendants alleging they had breached the unconscionability prohibition contained in s 8(1) of the now repealed *Fair Trading Act 1999* (Vic).[149] This provision contained wording nearly identical to that contained in the subsequent s 21 of the *ACL* and was 'intended to extend the concept of unconscionable conduct beyond equitable principle, to include conduct which is unconscionable within the ordinary meaning of that word'.[150] Though the issue of efficient breach did not arise, the Court nonetheless considered such behaviour in its discussion of the scope of the doctrine of unconscionability under s 8(1) of the *Fair Trading Act 1999* (Vic) and, by analogy, *ACL* s 21.

143 Ibid 557 [96].

144 Ibid 557 [97].

145 Ibid 558 [104]–[105].

146 *Scully* (n 63).

147 Ibid 168 (Santamaria JA, Neave JA agreeing at 169 [1], Osborn JA agreeing at 170 [2]).

148 Ibid.

149 Ibid.

150 Ibid 177 [29], quoting *Director of Consumer Affairs Victoria v Scully [No 3]* [2012] VSC 444, [23] (Hargrave J).

The Court stated:

> A failure to fulfil a contractual promise may visit unwanted consequences on the innocent party. But, under s 8(1), it is the conduct of the contract breaker that must be shown to be unconscionable. That party may have had sound reasons for breaking the contract, reasons that involve no wish to exploit any vulnerability in the innocent party. While these sound reasons will be of no significance in defence of a claim for breach of contract, they may be highly relevant in a defence to a claim that conduct has been unconscionable.[151]

The Court's remarks here are intriguing. They suggest that, provided the party intentionally breaching the contract had 'sound reasons' for doing so, this may weigh against a finding of unconscionability. By its very nature, efficient breach is geared towards the pursuit of more favourable commercial opportunities. The attainment of greater benefits under a new contract and the dispensation of a less profitable contract would seemingly always represent a 'sound business decision'. The Court did, however, impliedly qualify this statement by noting that such 'sound reasons' must not include any desire to exploit the vulnerabilities of the innocent party.[152] If exploitation is characterised in Marxist terms, then the fact the innocent party has invested themselves into the contract that their counterparty has strategically breached (and thereby lost future potential gains from the arrangement while their counterparty attains greater benefits elsewhere) means they have been exploited.[153] If exploitation is equated with pursuit of self-interest to someone else's detriment, the detriment being the aggrieved party having to accept the breach, the same result is returned, even if the plaintiff is compensated through damages.

The Court in *Scully* went on to say that unconscionable conduct must be unethical and involve some degree of 'moral tainting';[154] mere unreasonableness or unfairness will not alone suffice.[155] This means that 'exploitation' requires more than simply abandoning the agreement to pursue a better deal. It may require additional elements, such as a complete disregard for the plaintiff's interests or even an intent to cause them harm through breach.

Similar views were expressed in *Wolfe v Permanent Custodians Ltd* ('*Wolfe*').[156] In that case Permanent Custodians Ltd ('Permanent Custodians') entered into an

151 *Scully* (n 63) 182 [47] (Santamaria JA, Neave JA agreeing at 169 [1], Osborn JA agreeing at 170 [2]).

152 Ibid.

153 Jon Elster, *An Introduction to Karl Marx* (Cambridge University Press, 1986) 79–80. See also above nn 72–5 and accompanying text, where the notion of 'exploitation' is discussed at length.

154 *Scully* (n 63) 183 [48] (Santamaria JA, Neave JA agreeing at 169 [1], Osborn JA agreeing at 170 [2]), quoting *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) 15 BPR 29,699, 29,766 [293] (Allsop P, Bathurst CJ agreeing at 29,706 [1], Campbell JA agreeing at 29,768 [303]).

155 *Scully* (n 63) 183 [48] (Santamaria JA, Neave JA agreeing at 169 [1], Osborn JA agreeing at 170 [2]).

156 [2012] VSC 275 ('*Wolfe*').

agreement with Richard Wolfe to stay proceedings to call up a mortgage on Wolfe's home following his default in making repayments.[157] Wolfe failed to correctly complete the relevant direct debit form and it could not be processed, so he consequently defaulted again.[158] The mortgage manager representing Permanent Custodians made feeble attempts to contact Wolfe but was unsuccessful.[159] The mortgage was called up and Wolfe's eviction was ordered.[160] Wolfe sued Permanent Custodians on a number of grounds, including unconscionability under s 8(1) of the *Fair Trading Act 1999* (Vic) and s 12CB of the *ASIC Act 2001* (Cth) (both of which mirror *ACL* s 21).[161] This was not a situation of efficient breach but rather a party's exercise of their general right to terminate upon the other party's breach of a condition. However, the Victorian Supreme Court usefully considered when a decision to break a contract might be deemed unconscionable under the statutory regime.

The Court stated, for statutory unconscionability to arise from an intentional termination of contract, there must be more than a general awareness that the innocent party will be adversely affected by the decision to breach the contract; the defendant must be shown to have taken *unconscientious advantage of the plaintiff's vulnerability*.[162] The Court considered Permanent Custodians' motives leading up to the decision to break the contract and deemed that it had no 'ulterior motive' for behaving in the manner it did.[163] This decision was made for legitimate business reasons and in accordance with its contractual rights.[164] This finding was not disturbed on appeal.[165] If, however, an ulterior motive existed — whatever *that* is — the result may well have been different.

Transerve Pte Ltd v Blue Ridge WA Pty Ltd ('*Blue Ridge*')[166] is another instructive example. To summarise, Blue Ridge WA Pty Ltd ('Blue Ridge') engaged Transerve Pte Ltd ('Transerve') under a subcontract to construct a series of accommodation units for miners working in Western Australia.[167] Blue Ridge then purported to

157 Ibid [1]–[7] (Zammit AsJ).

158 Ibid [57]–[62].

159 Ibid [63].

160 Ibid [57]–[62].

161 Ibid [81], [276].

162 Ibid [316].

163 Ibid.

164 '[T]he simple fact that Permanent did not have to execute the [warrant of possession] does not turn its decision to do so into an unconscionable one. It was a business decision to ensure that it obtained payment of its debts in the most economic fashion': ibid [321].

165 *Wolfe v Permanent Custodians* [2013] VSCA 331, [17] (Warren CJ, Neave and Whelan JJA). 'Permanent could, and in one sense perhaps should, have done more to alert [the plaintiff] to the mistakes he had made. But their failure to do so was not, in the circumstances here, unconscionable': see also at [42].

166 [2015] FCA 953 ('*Blue Ridge*').

167 Ibid [2] (Barker J).

terminate on the basis of Transerve's 'nonperformance and failure to meet the delivery schedule' and to complete the works itself under a fresh contract with Roy Hill (head contractor).[168] In response, Transerve alleged that Blue Ridge had acted unconscionably in various ways including making misleading statements to Roy Hill as to Transerve's finances, failing to make payments, and terminating without giving a 'show cause' notice under the subcontract.[169] According to Transerve, the primary purpose of Blue Ridge's termination was to enable it 'to take over the works for its own benefit and profit' and that it was therefore unconscionable under *ACL* s 21.[170]

As to Blue Ridge's breach, Barker J in the Federal Court held that this decision was made in the light of legitimate commercial concerns:

> In my view, as sharp and concealing as Mr Mackenzie's [Blue Ridge representative] conduct was at this point — ensuring that Transerve did not get any wind of his side-dealings with Roy Hill — that conduct was driven by … commercial concerns and the estimation made, rightly or wrongly, by Mr Mackenzie that unless he took the action he was proposing, the existing contractual arrangements that Blue Ridge had with Roy Hill and the subcontract arrangements that Blue Ridge had with Transerve would effectively collapse to Blue Ridge's financial and reputational disadvantage.[171]

Although this was ultimately not a situation of efficient breach (as alleged), the decision helpfully illustrates circumstances that might justify intentional contract breaches, efficient or otherwise. Here, it made sense for Blue Ridge to terminate because the contractual arrangement was projected to fail and would have seen the company incur considerable financial and reputational losses. There was an informed basis for this conduct, and it was not motivated purely by the allure of alternative commercial opportunities.

Despite succeeding in his claim for breach of contract, the plaintiff in *Bradley v Voltex Group Holdings Pty Ltd* ('*Voltex*') failed to convince Jagot J sitting alone in the Federal Court that this breach was unconscionable within the meaning of *ACL* s 21.[172] The case nonetheless provides further helpful commentary speaking to when a party's breach of contract may metamorphose into unconscionability. The dispute arose when the plaintiff, Matthew Bradley, did not receive the 20% shareholding in the defendant company that he was allegedly entitled to under the oral joint venture agreement between the parties.[173] The directors of the defendant company argued that Bradley had not satisfied the requirements of the agreement which would have triggered this entitlement.[174] They delayed their

168 Ibid [2], [9], [219].

169 Ibid [250].

170 Ibid [262].

171 Ibid [384].

172 *Voltex* (n 101).

173 Ibid [13]–[14], [59] (Jagot J).

174 Ibid [60].

communications to him in this regard.[175] Justice Jagot determined that Bradley was entitled to the shareholding but did not consider the defendant's breach to be unconscionable under *ACL* s 21.[176] Her Honour observed that '[c]onduct in breach of contract is not necessarily, for that reason alone, unconscionable conduct'.[177] She cited the Full Federal Court in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*, which stated:

> Notions of moral tainting have been said to be relevant, as often they no doubt are, as long as one recognises that it is conduct against conscience by reference to the norms of society that is in question. The statutory norm is one which must be understood and applied in the context in which the circumstances arise. The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty.[178]

Here, Jagot J noted, Bradley was 'an experienced businessman' and that the defendant company's directors had not acted unfairly towards him.[179] Their failures to respond to him in a timely manner 'were not due to a desire to dupe [him] into continuing to work' on the venture without intending to pay him his shareholding, but due to disagreement among the directors as to whether he had triggered his entitlement under the contract.[180] Moreover, the complexity of the joint venture agreement meant it was conducive to erroneous interpretation by the defendant company's directors, and the evidence demonstrated that they truly wished for their relationship with the plaintiff to work.[181] They did not exploit a position of unfair bargaining power nor apply any unfair tactics; they simply misread the contract.[182] Justice Jagot continued:

> There was no exploitation of Mr Bradley in a manner offensive to 'commercial conscience'. There was no dishonest, unreasonable or unfair attempt to deprive Mr Bradley of the benefit of the [joint venture agreement]. Rather, there was a mistaken belief that the [agreement] did not entitle Mr Bradley to have shares issued to him and that, the relationship having failed, the [agreement] could be terminated before the date on which Mr Bradley was willing to exit [the defendant company], no breach having been alleged against him. The conduct in question was not contrary to ordinary expectations of commercial decency; it was merely in breach of contract.[183]

175 Ibid [68].

176 Ibid [200].

177 Ibid [187], citing *Hurley v McDonald's Australia Ltd* (2000) ATPR ¶41-741, ¶40,586 (Heerey, Drummond and Emmett JJ).

178 *Lux Distributors* (n 64) [41] (Allsop CJ, Jacobson and Gordon JJ), quoted in *Voltex* (n 101) [188].

179 *Voltex* (n 101) [189].

180 Ibid [190]–[191] (Jagot J).

181 Ibid [191].

182 Ibid [194].

183 Ibid (citations omitted).

The plaintiff was paid his agreed salary while the joint venture agreement was on foot, and the failure to receive the shares resulted in no proven loss given they could not be sold for profit when the contract ended (given they had no value at the time).[184] Finally, Jagot J rejected the plaintiff's suggestion that the defendant's breach of contract undermined the bargain and constituted a failure to act in good faith. Her Honour stated: '[i]f that were so in the present case it would mean that a mere breach of contract, and no more, necessarily involves unconscionable conduct. I do not accept this proposition'.[185] The statutory provisions relating to unconscionable conduct did not take the matter any further.[186]

The New South Wales Supreme Court in *Realtek Holdings Pty Ltd v Wetamast Pty Ltd* ('*Realtek*')[187] affirmed the notion that an intentional breach of contract will rarely be unconscionable where the parties are of relatively equal bargaining power and one party has merely capitalised on position of strength at a given point in the commercial relationship.[188] Justice Robb commented:

> At least in general, the conduct of a party in breach of a contract, where the other party becomes entitled to ordinary contractual remedies, is unlikely to constitute statutory unconscionable conduct. That is not to say that conduct in performance of, or in breach of, a contract may never be judged as being unconscionable, as a contract may give one party power as to how the contract is to be performed that creates a state of vulnerability in the other. I suggest only that it is likely to be wrong to equate breach of contract with unconscionable conduct because of a judgment that the breach is offensive to commercial morality. Perhaps a large proportion of breaches of contract may to some degree be offensive to commercial morality, but it should rarely be the case that a party to a contract who acts in its own interests and thereby breaches the contract will, to use Gageler J's words … have engaged in 'conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience'.[189]

A final example from the case law, and what appears to be the most recent authority on point, is *Barboza v Blundy* ('*Barboza*').[190] The plaintiff abandoned her breach of contract claim in the appeal case, though the allegation of breach was still pertinent to the plaintiff's claim of unconscionability (which was pursued).[191] Essentially, the defendant was alleged to have breached the shareholder agreement to which the parties were privy by accelerating their company's (lingerie chain Honey Birdette (Australia) Pty Ltd ('Honey Birdette')) domestic expansion and

184 Ibid [195].

185 Ibid [197]. See also *Cargill Australia Ltd v Viterra Malt Pty Ltd* [2017] VSC 126, [181] (Daly AsJ): 'It is clear from the authorities, that, without more, a breach of contract, even an intentional breach, cannot amount to unconscionable conduct.'

186 *Voltex* (n 101) [195] (Jagot J).

187 [2019] NSWSC 1869 ('*Realtek*').

188 Ibid [239] (Robb J).

189 Ibid [238], quoting *Kobelt* (n 86) 40 [92] (Gageler J).

190 *Barboza* (n 7).

191 Ibid [143] (Bond J).

negatively impacting the plaintiff's entitlements.[192] This was accomplished, in part, by another company (BNT Holdco Pty Ltd) in which the defendant was majority shareholder exercising a call option to acquire the plaintiff's shares in Honey Birdette.[193] This act, the plaintiff claimed, was in violation of the requisite call option procedure.[194]

Justice Bond observed that the intentional failure to abide by the call option procedure was evidently a breach of contract but that, even if it had been pursued on appeal, this failure alone was not sufficient to establish unconscionability.[195] Indeed, the defendant was primarily motivated to acquire the plaintiff's shares due to the plaintiff's relationship breakdown with Honey Birdette's co-founder.[196] This 'led to an acrimonious working relationship, which played out in front of staff and to the detriment of the Company's business'.[197] The decision was therefore made in the company's best interests.[198] His Honour added that he was 'conscious of the central importance of the faithful performance of bargains and promises freely made' but also acknowledged, with reference to *Body Bronze*, that efficient breaches can be entirely acceptable, even condoned, in commerce.[199] 'There may be nothing offensive to conscience', his Honour remarked, 'in a commercial participant taking [a commercial decision to breach a contract] in given circumstances'.[200] Whether this becomes unconscionable is entirely dependent on the situation.[201]

This review of the case law reveals several indicia suggestive of when an efficient breach might become unconscionable in the sense prohibited by the *ACL*. This Part concludes with a summary of these indicia and guidance for commercial parties, lawyers and the courts as to where the line appears to be drawn.

IV DRAWING A LINE IN THE SAND?

Without expressly referring to the term 'efficient breach', some common law courts have implicitly accepted the practice. The well-known case of *Williams v*

192 Ibid [1]–[5], [143]–[144].

193 Ibid [1].

194 Ibid [161].

195 Ibid [184].

196 Ibid [118].

197 Ibid.

198 Ibid [126].

199 Ibid [183], quoting *Body Bronze* (n 121) 556 [92] (Macaulay AJA, Harper and Hansen JJA agreeing).

200 *Barboza* (n 7) [183], quoting *Body Bronze* (n 121) 556 [92] (Macaulay AJA, Harper and Hansen JJA agreeing).

201 *Barboza* (n 7) [183] (Bond J), quoting *Body Bronze* (n 121) 556 [92] (Macaulay AJA, Harper and Hansen JJA agreeing).

Roffey Bros & Nicholls (Contractors) Ltd[202] involved a cash-strapped subcontractor who disclosed his inability to complete the contracted work to the hiring contractor, the defendant.[203] Rather than try to find substitute workers, and to avoid triggering a penalty clause under their head contract (for delay), the defendant verbally agreed to pay the plaintiff additional money.[204] After substantially completing the work, and having received only one further progress payment, the plaintiff ceased work and sued to recover the balance owed.[205] The case was decided on the basis of the consideration doctrine, though Purchas LJ made a point relevant to the present discussion. His Lordship noted that it was 'open to the plaintiff to be in deliberate breach of the contract in order to "cut his losses" commercially'.[206] In other words, he could have made an entirely economic decision to intentionally break the contract and avoided further losses. A similar point was made in *Je Maintiendrai Pty Ltd v Quaglia*[207] in respect of a commercial tenant who sought to enforce a rent reduction promised by a landlord.[208] Rather than renegotiate the terms of the lease, White J observed, the tenant could have elected to abandon the let premises altogether and taken his chances being sued for breach of contract, or otherwise sought an assignment of the balance of the lease term.[209]

Clearly, opportunities to efficiently breach a contract arise in many different commercial situations such as these. Part III of this article worked through a selection of cases involving intentional breaches motivated by various economic considerations. In line with what appears to be the trend in Australian jurisprudence, there is seldom reference to the notion of 'efficient breach'. Accordingly, it should be conceded that these cases might not easily be characterised as instances of efficient breach in the precise sense described in legal economics.[210] Nonetheless, these cases, either directly or indirectly, speak to when a calculated breach of contract, including one undertaken for economic efficiency purposes, can become statutorily unconscionable. Therefore, the absence of the 'efficient breach' label does not detract from the relevance of these decisions. While the cases in isolation do not provide firm guidance as to when *ACL* s 21 might be violated in these situations, they do in the aggregate. The following indicia can be distilled.

202 [1991] 1 QB 1.

203 Ibid [1].

204 Ibid.

205 Ibid.

206 Ibid 23.

207 (1980) 26 SASR 101.

208 Ibid 102 (King CJ).

209 Ibid 115.

210 See above Part II.

First, *Macdonald* tells us that an intentional breach of contract is not sufficient to amount to unconscionability.[211] If it was, every breach, however trivial, would be contrary to statute. It might offend professional ethics and social mores, but it is not, without more, unconscionable. The bar is therefore set quite high; an efficient breach of contract must be of such gravity and committed in such circumstances that make it outwardly reprehensible. The pursuit of legitimate commercial interests will likely fall short. However, where that pursuit is accompanied by conduct that demonstrates a pernicious quality, such as a total disregard for the innocent party's interests or an intent to injure them through the breach, this will likely rise to the level of statutory unconscionability.

Second, according to *Body Bronze*, determining what 'more' is required to convert an efficient breach into an unconscionable one is a normative process combining the value judgement of the decision-maker with a careful examination of the impugned conduct against the factors contained in *ACL* s 22.[212] The latter guides the former. No matter how blameworthy the courts consider the conduct to be, this does not make it unconscionable. As discussed earlier in Part III, several of the s 22 factors would be relevant to an assessment of the conscionability of an efficient breach. Some of these factors more easily favour a plaintiff in such situations. For example, s 22(1)(j)(iii) invites consideration of the parties' compliance with the contract terms while s 22(1)(j)(iv) examines post-contractual conduct in connection with their commercial relationship. Clearly, a defendant would be on the backfoot from the outset given an efficient breach involves both an intentional violation of the agreement and opportunistic termination of the commercial relationship. Other factors, such as s 22(1)(d) (concerning any use of 'unfair tactics' against the customer by the supplier), will require careful analysis of the manner and circumstances in which an efficient breach is committed. It might not be unfair at all where, for example, the defendant is suffering commercially and must commit the breach to serve its own legitimate business interests.

Third, if a party wishes to commit an efficient breach, the cases suggest that they must have a sound or legitimate business reason for doing so. In *Blue Ridge*, for example, continuance with the existing contractual arrangements would have amplified the prospects of the entire deal failing and the defendant suffering significant financial and reputational losses.[213] It made economic sense to purposely violate the agreement and avoid inevitable and costly failure, even if that violation was committed in a sharp and clandestine manner. Similarly, in *Barboza*, it was critical to the company's interests to violate the contract because it was compromising its commercial reputation and revenue.[214] It is hardly unconscionable to try and salvage one's commercial position. In contrast, if a party has merely sought to exploit the innocent party's vulnerable position (if any) by committing an efficient breach, this may undermine the supposed commercial

211 *Macdonald* (n 103) [280] (Weinberg J).

212 *Body Bronze* (n 121) 556 [93]–[94] (Macaulay AJA).

213 *Blue Ridge* (n 166) [384] (Barker J).

214 *Barboza* (n 7) [126] (Bond J).

justifications for the breach. For example, the pursuit of a more favourable deal elsewhere is not sufficient to validate an efficient breach if the primary motivation is simply to part ways with the original counterparty (with whom relations may have soured). *Wolfe* tells us that such 'ulterior motives' could support a finding of unconscionability.[215]

Wolfe also clarifies that there must be more than a general awareness on the defendant's part that the innocent party will be adversely affected by the decision to breach the contract; the defendant must be shown to have taken unconscientious advantage of the innocent party's vulnerability.[216] This may translate, in practice, to a requirement for evidence of genuine attempts by the breaching party to balance the economic and practical efficiencies of intentional breach against the other party's circumstances and interests. This suggestion is entirely logical given that efficient breaches are inherently calculated to secure a more favourable deal for the breaching party, meaning they will know full well that the innocent party will suffer expectation losses. What *Wolfe* suggests is that the breaching party must transcend this knowledge and actively exploit the defendant. This might occur, for example, through the decision to withhold any mention of proposed plans to investigate alternative opportunities, or to delay committing the breach in circumstances where the breaching party knows that the innocent party's vulnerability will increase in time. There must be some notably unconscientious, unjust or unreasonable character to the defendant's efficient breach.

Fourth, according to *Realtek*, the characteristics of the parties themselves must colour the evaluative process undertaken by the courts. Thought certainly not conclusive, the New South Wales Supreme Court observed that a strategic contractual breach will not easily be classed as unconscionable where the parties are of relatively equal bargaining power and where the breaching party has merely capitalised on an advantageous position of strength during the commercial relationship.[217] This reflects the fact that the essence of equity is in the protection of the *vulnerable*.[218] It is trite to observe that the balance of power in contractual relationships can and often does shift with the passage of time. Rarely will the parties be on precisely level footing from the beginning through to the end of a contractual relationship. If the parties possess comparable business acumen, then one of them choosing to capitalise on any favourable shift in the balance of bargaining power is not unconscionable. This echoes the High Court's caveat in *Berbatis*, discussed earlier in this Part, that situational disadvantage which weakens bargaining strength is not a 'special disadvantage' for the purposes of the

215 In *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, it was held that the termination of a contract for reasons other than (but purportedly for) those permitted by the contract was, in the circumstances, contrary to the requirements of the implied duty of good faith that was said to exist in respect of the contract. In the present context, it is arguable that an efficient breach of contract committed for 'ulterior motives' might, in similar cases, conceivably fall foul of the unsettled obligation of good faith: *Wolfe* (n 156) [316] (Zammit AsJ).

216 *Wolfe* (n 156) [316] (Zammit AsJ).

217 *Realtek* (n 187) [239] (Robb J).

218 'Generally speaking, equity is more solicitous for the plight of the vulnerable': *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 352 [106] (Kirby J).

unconscionability doctrine in equity.[219] If the parties are not of relatively equal bargaining power from the outset, and the 'stronger' party has obviously better capacity to advantageously commit efficient breaches at any given time, this will clearly support the view that the breach was unconscionable. Even then, however, proof of some pejorative quality to the breach is essential.

Fifth, Jagot J's judgment in *Voltex* implies the need to carefully consider various factors when determining whether an intentional breach of contract (committed for whatever purpose) is unconscionable. These factors include the entire factual matrix of the case, the relevant knowledge and experience of the parties, the commercial practicality of proceeding with the contract, and whether the breaching party genuinely wished to maintain a working relationship with the innocent party but could not feasibly do so.[220] The second and third of these factors have already been addressed in the other cases discussed. The first factor seems entirely sensible given the normative nature of the inquiry under the *ACL* s 21. The s 22 factors are described as matters to which the court *may* have regard,[221] meaning, as noted in *Body Bronze*, that they are designed to inform a broader consideration of the factual matrix in each case.[222]

One final indicium, and one which militates against a conclusion that an intentional breach of contract is unconscionable, also comes from *Voltex* and concerns the innocent party's losses. It was confirmed in that case that if, at point of breach, the innocent party has not suffered any demonstrable loss, this will negate an allegation of unconscionability.[223] Damages are generally assessed at point of breach[224] though only nominal damages will be awarded where no actual losses have been incurred by the innocent party.[225] If the innocent party cannot prove any kind of loss, then they will naturally falter in establishing that they have been treated unconscionably. The scale of the innocent party's loss may therefore be quite influential in the court's assessment of an efficient breach.

Alongside the indicia extracted from the decided cases, it is probably necessary to add two more. One is the quality of the effort the party committing the efficient breach makes to mitigate impact upon the innocent party. This would serve to demonstrate genuine consideration for the innocent party's interests and downplay any supposedly unconscientious qualities about the conduct. Another is any reasonable attempts by the breaching party to consult with the innocent party prior

219 *Berbatis* (n 59) 64 [14] (Gleeson CJ).

220 *Voltex* (n 101) [189]–[198] (Jagot J).

221 *ACL* (n 10) s 22(1).

222 *Body Bronze* (n 121) 556 [93]–[94] (Macaulay AJA).

223 *Voltex* (n 101) [199] (Jagot J).

224 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 ('*Amann*'). However, if the court feels it is more appropriate to fix a different date for assessment of damages so as to avoid an injustice, it may do so: *Johnson v Perez* (1988) 166 CLR 351.

225 *Amann* (n 224) 118 (Deane J).

to the decision to efficiently breach the contract. If the act was sudden and entirely unanticipated, it would seem, objectively, to be predatory in nature and against the grain of conscience. Alternatively, endeavours to flag the possibility of contract termination with the innocent party would support the breaching party's case that it had not acted unconscionably. Indeed, this would also be a more commercially sensible option as it would ideally salvage the breaching party's reputation in the eyes of their counterpart and the wider market.

The line one can draw in the sand — differentiating an efficient breach from an unconscionable one — is thus jagged and perforated in parts. However, the indicia identified do offer firmer guidance as to how the amorphous unconscionability doctrine reflected in the *ACL* may apply to render efficient breaches unlawful. While the bulk expectedly place emphasis on the general conduct of the defendant and the factual matrix, others appear to highlight such matters as the nature and legitimacy of the defendant's commercial motivations (if any), the value in maintaining the broken contract, the scale and impact of the breach and any associated losses, the experience of the parties, and their relationship with one another. The *ACL* s 22 factors (appended to s 21) will seemingly be applied within the broader context of general equitable doctrine reflected in s 20. It is hoped this consolidation of indicia aids in the normative process undertaken by the courts when evaluating allegedly unconscionable efficient breaches and provides direction for commercial parties and lawyers as to when efficient breach may cross the line.

V WHY TAKE THE CONSUMER LAW ROAD?

At this juncture, it is worth explaining the value of engaging the consumer law to address instances of efficient breach, which would otherwise ordinarily be remedied under the common law of contract. There are, in fact, several good reasons that a plaintiff might elect to argue that an efficient breach is unconscionable under the *ACL*. The first reason is purely pragmatic; including an additional basis for complaint in one's statement of claim naturally broadens the range of potential bases upon which a court may decide in the plaintiff's favour. It is also quite conceivable that a straightforward action in breach of contract might fail for whatever reason. If, therefore, breach of contract was the sole basis upon which plaintiff made their case, they would be left without alternatives.

Another compelling benefit that comes with accessing the *ACL* to address efficient breaches of contract is that this instrument provides a broad range of remedies that the common law of contract does not. As explained in Part II of this article, the common law's answer to contract breaches is the imposition upon the defendant of an obligation to pay damages to their aggrieved counterpart. In rare cases, equitable remedies such as specific performance orders may be granted, but by and large, the compensatory rule expressed in *Robinson v Harman* is the one the courts habitually apply.[226] Damages are seen as an appropriate means by which any contract breaches can be remedied because they (supposedly) equate to their expectation losses. In contrast, the *ACL* offers an impressively wide range of

226 *Robinson* (n 43) 365 (Parke B).

remedies for the violation of its provisions. If a party is found to have engaged in unconscionable conduct within the meaning of *ACL* ss 20 or 21, the court may, for example, order any of all of the following:

- Damages (*ACL* s 236(1));
- Injunctions (*ACL* s 232(1));
- Pecuniary penalties (*ACL* s 224(1));
- Third party compensation orders (*ACL* s 237);
- Orders to vary or cancel all or part of any contract, or to direct the refund of money or return of property (*ACL* s 243);
- Non-punitive orders, such as probation orders or requirements to undertake education or compliance programs or publish advertisements (*ACL* s 246);
- Adverse publicity orders (*ACL* s 247); and
- Orders disqualifying persons from managing corporations (*ACL* s 248).

For the breach of some provisions of the *ACL*, criminal penalties may also apply. As such, it is clear the *ACL* offers more avenues by which to seek recourse for efficient breaches of contract.

One final and related benefit of using the A*CL* to address instances of efficient breach is that having a greater range of remedies to address instances of efficient breach means that the aggrieved party may be better able to attain justice through this statutory framework. As discussed, the common law entitles an aggrieved party to an award of damages if the other party breaches the contract between the parties. But damages are limited in effect; they are designed to offset the aggrieved party's expectation losses. They do not account for the breaching party's conduct[227] or to the subsequent benefits they have enjoyed as a consequence of their efficient breach.[228]

Conversely, utilising the consumer law, a court could order that same party to compensate not only their aggrieved counterparty but also any third parties that had suffered loss (*ACL* s 237). They might even prohibit the party from proceeding with the 'better' contract (*ACL* s 232(1)) or to place public advertising explaining details pertinent to their conduct (*ACL* ss 246–7). This might mean more to an aggrieved party than a mere compensatory order, because it more directly addresses the breaching party's conduct, rather than simply offsetting the consequences of that conduct. In *Australian Competition and Consumer Commission v Coles Supermarkets Pty Ltd*, for example, the defendant supermarket chain was required not only to pay hefty fines but to publish advertisements advising its customers that it had misled them with respect to

227 Save for the case of exemplary damages, which are rarely awarded for breaches of contract. See n 48 and the authorities therein cited.

228 Save for the case of accounts of profits, which the Australian courts do not favour. See n 50 and the authorities therein cited.

various marketing statements made about their baked goods.[229] For customers, the company having to pay a third party (the Commonwealth) for its wrongdoing is appropriate but impersonal. A mandatory advertisement admitting wrongdoing and apologising directly to affected customers, on the other hand, is likely to mean more to them and is something the consumer law makes possible.

VI CONCLUSION

The traditional view of the common law is that contractual promises must be kept.[230] The theory of efficient breach, which emerged out of the school of economic legal analysis, abruptly challenges this view. This theory sanctions the intentional breach of contract where the innocent party's expectation losses are offset by an award of damages and the breaching party can pursue a more favourable commercial opportunity, resulting in a more efficient allocation of resources and a net social gain. Whereas efficient breach theory sees this as a choice open to contracting parties, the common law rejects the notion of a 'right' to elect between performance and breach (with an attendant obligation to pay damages). Efficient breaches may be a known and common aspect of commerce, but this does not translate to lawfulness.

With reference to the case law, this article has sought to fill a considerable gap in the literature and bolden the line separating efficient breach from an unconscionable one, within the meaning of the *ACL* proscriptions against such conduct. A smorgasbord of indicia or criteria was constructed to aid the courts, lawyers and commercial parties in determining whether an efficient breach is likely to fall foul of the consumer law. It was demonstrated how sensitive such breaches are to the circumstances at play and how a voluntary decision to break a contract might result in more than common law liability to pay damages. In these challenging economic times, when parties might well be tempted to seek out more profitable opportunities outside of their current contractual arrangements with others, and when the unconscionability doctrine continues to morph from case to case, this advice is timely.

229 *Coles Supermarkets* (n 97).

230 For a detailed and insightful discussion on the various bases for the enforcement of contractual promises, and what constitutes such a promise, see Brian Coote, *Contract as Assumption: Essays on a Theme*, ed Rick Bigwood (Hart Publishing, 2010) ch 2.