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"Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models

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Abstract Consumer advocates and regulators in Australia have long been concerned about prevalent business models that prey upon vulnerable consumers. This paper considers both the types of factors that might justify consumer protection legislation responding to business models that take advantage of the reduced ability of consumers to protect their own interests in the transaction in question and the type of legislative response that might be utilized. In particular, the paper explores the role of standard-based "safety net" prohibitions on unconscionable or unfair conduct. The paper considers the approach taken by Australian courts to the prohibition on "unconscionable conduct" in the *Australian Consumer Law* and compares this provision with the general prohibition in the *Directive on Unfair Commercial Practices*. The paper argues that, while Australian courts have made effective use of the prohibition on unconscionable conduct in responding to predatory business models, a safety net provision based on the Directive would have merit in the Australian context as providing better guidance to consumers and businesses alike as to the limits of acceptable market conduct.

Keywords Vulnerable consumers · Predatory business models · Unconscionable conduct · Unfair business practices

Consumer advocates and regulators in Australia have long been concerned about prevalent business models that prey upon vulnerable consumers.[1] This paper considers both the types of factors that might justify consumer protection legislation responding to such conduct and the types of legislative response that might be utilized. The concern here is not with scams in

[1] See http://consumeraction.org.au.

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which a fraudster tricks consumers, takes their money, and disappears.[2] Nor is it with rogue traders who apply overt pressure to coerce consumers into unpalatable transactions.[3] The concern is with something subtler, and yet also more systematic, namely business models whose very operating premise relies upon taking advantage of the reduced ability of the consumers with whom it deals to protect their own interests in the transaction in question. In Australia, some of the most notorious cases involve the sale of unsuitable education materials and insurance products to indigenous communities dependent on social security payments.[4] There are also numerous other, less extreme but still unsavoury, examples of predatory business models, including some variations of in-home sales, consumer leasing for household goods and motor vehicles, consumer credit insurance, funeral insurance and payday lending.[5]

Any proposal to regulate these types of predatory business models must begin by considering what it is about the practice that raises concerns. It is suggested in this paper that the unacceptable features of predatory business models typically arise from the relationship between consumers and the business. Unacceptable predatory conduct lies in the business model targeting vulnerable consumers who, in the circumstances of the transaction, are not reasonably able to protect their own interests and then taking advantage of that relative position of vulnerability, such as by utilizing a manipulative marketing strategy, by relying, without explanation, on a complex and unusual contract structure or even by ignoring the risk the transaction in question presents to the financial well-being of its target consumer group.

There are many possible legislative responses to predatory business models of this kind, ranging from bans on certain practices, to "bright line" rules that regulate specific kinds of conduct, and then to "standard-based" regulation that prohibits misleading, aggressive, unfair, or unconscionable conduct. The merits of bright line rules in terms of certainty and clarity are fairly obvious. This paper focuses on general standard-based prohibitions. It argues that, in a comprehensive and effective consumer protection regime, prohibitions based on generalized moral standards of fairness or conscience provide an important "safety net" response to predatory and other offensive market practices not caught in some other way by more specific forms of regulation.

Australian consumer law contains a general safety net prohibition on "unconscionable conduct."[6] Although there has been some ongoing uncertainty about the scope of this provision, it has recently been used very effectively by Australian courts to respond to a range of predatory business models. There have also been suggestions that Australian policymakers should consider the introduction of a prohibition on unfair commercial practices[7] based on the European Union's *Directive on Unfair Commercial Practices* (the Directive).[8] Accordingly, this paper also compares the different approaches to formulating safety net consumer

[2] See http://www.scamwatch.gov.au/content/index.phtml/itemId/693900.

[3] See, e.g., *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2003] FCA 350 (18 April 2013). Also *Lampropoulos v Kolnik* [2010] WASC 193 (30 July 2010).

[4] See, e.g., *Australian Competition and Consumer Commission v Keshow* (2005) ATPR ¶42-076.

[5] Discussed below in "Business Models That Prey upon Vulnerable Consumers."

[6] *Competition and Consumer Act 2010* (Cth) Schedule 2 ("*Australian Consumer Law*") ("ACL") Sections 20–21. Equivalent provisions applying to financial services and products are found in the *Australian Securities and Investments Commission Act 2001* (Cth) Sections 12CA, 12CB, 12CC. See also the power to reopen an unjust contract in the *Contracts Review Act 1980* (NSW); and the *National Credit Code*, contained in Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth) ("*National Credit Code*") Section 76.

[7] See below "Comparing the Unfair Commercial Practices Directive."

[8] *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council* [2005] OJ L 149, p. 22 ("*Unfair Commercial Practices Directive*").

protection standards evident in these two regimes and considers the case for a provision based on the Directive in Australia.

The paper begins in "Business Models That Prey upon Vulnerable Consumers" with a discussion of some of the business models operating in Australia that are of concern to regulators and consumer advocates. The section "Consumer Vulnerability and Business Advantage Taking" considers the relationship between consumer vulnerability and business advantage taking that may warrant a legislative response. The section "Legislative Responses" considers the different legislative strategies that might be used to respond to predatory business models, with reference to the recent reforms to consumer law in Australia. The section "The Australian Prohibition on Unconscionable Conduct" considers the statutory prohibition on "unconscionable" conduct in Australia, and the way in which it has been used by Australian courts to respond to predatory business models that take advantage of the reduced ability of vulnerable consumers to protect their own interests in the transaction in question. The section "Comparing the Unfair Commercial Practices Directive" compares a different model of safety net consumer protection based on the *Directive on Unfair Commercial Practices*. It argues that in the Australian context, the merits of a safety net standard based on the Directive are likely to lie in the greater degree of guidance it would provide to consumers and businesses alike as to the limits of acceptable market conduct.

Business Models That Prey upon Vulnerable Consumers

There are numerous business models that, at one time or another, have caused concern to regulators and consumer advocates in Australia because of their impact on vulnerable and disadvantaged consumers. Some of these models are discussed below. In each of the business models discussed the concern relates to a real and foreseeable risk that vulnerable consumers will enter into a transaction they do not fully understand and end up with a product that is unsuitable for their needs or which they cannot afford, and that the business model has itself contributed to this risk. The models operate in areas that have been subject to increasingly specific regulation in Australia. Their ability to continue to thrive illustrates the ingenuity of the business models and, as suggested, underscores the need for a safety net prohibition on unconscionable or unfair conduct, complementing the rule-based regime.

In-Home Sales

In-home sales differ from the more familiar form of direct selling, "door-to-door" sales, because the model relies on the sales person being invited into consumers' homes for the sales presentation. The in-home sales technique is used for a variety of products, including encyclopaedias, mobility aids, vacuum cleaners, and educational software. Consumer advocates have expressed concern that a number of in-home sales models rely on highly manipulative sales techniques to promote products that do not necessarily suit and often require considerable financial commitment from consumers (Consumer Affairs Victoria 2012; Office of Fair Trading 2012, p. 23).

A good example of the type of model that may cause concern is the sale of educational software. The programmes are relatively expensive, ranging between $4000 and $8000, and high interest credit is sometimes offered along with the products, which, moreover, are often sold to households with low incomes (Harrison et al. 2010, pp. 13–16; Harrison et al. 2014, p. 197). Research commissioned by the Consumer Action Law Centre found that some providers of these products relied upon carefully orchestrated sales techniques designed to influence

consumer behaviour, primarily through the combination of the sense of obligation that comes with the presence of a visitor in the home, artificially manipulated, poor diagnostic test scores by the children in the household and the parents' sense of anxiety and guilt about their children's educational success (Harrison et al. 2010, pp. 66–72, 129; Harrison et al. 2014).

Consumer Leases

Consumer leasing arrangements allow consumers to hire goods for a fee over a fixed or unlimited time period. Consumer advocates have identified a number of concerns about the consumer leasing arrangements used for household goods[9] and motor vehicles[10] (see also Ali et al. 2013b). Concerns about motor vehicle leasing arise from the practice by some businesses of targeting low-income consumers, using high-pressure sales techniques, charging high costs for low value vehicles and a lack of clarity about the consumer's rights in respect to the product.[11] A number of motor vehicle leasing companies market their product to low-income consumers who are excluded from mainstream finance.[12] For example, one company advertises its products on the basis of "we say yes" to the "self employed, credit defaulters, unemployed and pensioners."[13] Often the lease arrangements offered to low-income consumers are expensive relative to the quality of the car provided, even accounting for the cost of credit that is factored into the transaction. The Consumer Action Law Centre gives an example of a contract that required the consumer to pay $26 200 over 42 Months for a car worth $8000, $18 200 extra for the car.[14] Motor vehicle leasing arrangements often do not give consumers a right to purchase the car they are paying for, often only allowing consumers to make an offer to purchase the car.[15] In many cases, consumers do not understand this feature of the model, and some consumers may have been misled about their rights to purchase the car at the end of the lease term.[16]

Leasing and rental arrangements for household goods raise similar concerns. Marketing for such products typically focuses on the weekly price rather than the overall cost for the term of the contract, which may make the goods extremely expensive, potentially three or four times the cost of buying the goods outright (Consumer Action Law Centre 2013). Consumers may also be required to pay significant termination fees if they exit the contract before the end of the specified term (Consumer Action Law Centre 2013). As with motor vehicle leasing, the rights of consumers to purchase or own the goods at the end of the contract term are often unclear and even misleading (The Micah Law Centre 2007).

[9] See https://www.moneysmart.gov.au/borrowing-and-credit/other-types-of-credit/consumer-leases; http://www.fairtrading.nsw.gov.au/ftw/Consumers/Using_credit/Leasing_or_renting_goods.page; The Micah law Centre (2007).

[10] See http://consumeraction.org.au/media-release-bulk-complaint-made-against-motor-finance-wizard-to-the-credit-ombudsman-service/; http://consumeraction.org.au/asic-grants-licence-to-misleading-deceptive-and-unconscionable-trader/.

[11] See http://consumersfederation.org.au/mass-complaint-made-against-motor-finance-wizard/.

[12] Department of Treasury (2011, p. 30); Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 117.

[13] http://www.mfw.com.au/ (Accessed 15 April 2013).

[14] http://consumeraction.org.au/motor-finance-wizard-general-information/.

[15] http://consumeraction.org.au/motor-finance-wizard-general-information/.

[16] See, e.g., *Walker v DTGV1 Pty Ltd* [2011] VCAT 880 (12 May 2011). Also concerns expressed about misleading claims by Carboodle at http://consumeraction.org.au/asic-raises-concern-about-carboodles-potentially-misleading-representations/.

Consumer Credit Insurance

Consumer credit insurance (also termed "payment protection insurance") is a policy that insures a consumer's capacity to repay amounts due under a credit contract in case of death, disability, injury, illness, or unemployment (see generally ASIC 2011). There have been ongoing complaints about consumer credit insurance in the UK (see, e.g., Financial Times 2014). Regulators and consumer advocates in Australia have also raised concerns. Typically, concerns about consumer credit insurance relate to the sales techniques used for the product, the mis-selling of unsuitable products, and a lack of transparency in what is being provided (ACCC 1998; ASIC 2011, p. 5; Renouf et al. 1991).

The sale process used for some products has been problematic, with "consumers being sold [consumer credit insurance] products without their knowledge or consent" and "pressure tactics and harassment being used to induce consumers to purchase [consumer credit insurance] products" (ASIC 2011, p. 5). The basic utility of the product for consumers has been doubted. The Australian Securities and Investments Commission has reported that "a large proportion of [consumer credit insurance] claims are denied—for example, in 2010, 13% of claims on [consumer credit insurance] products were denied compared with 2% of all personal general insurance claims" (ASIC 2011, p. 5). There is evidence that consumer credit insurance has been sold to consumers for which it is clearly unsuitable.[17] The Australian Securities and Investments Commission has identified cases where consumers were sold consumer credit insurance that they were not eligible to make a claim under, because of age, pre-existing medical condition, or unemployment (ASIC 2011, p. 22). The Consumer Action Law Centre reports an example involving a payday lender selling a 2 week loan with consumer credit insurance which only paid out the amounts required to repay her small amount loan if the consumer lost her job (she was a disability pensioner), or if she suffered a stroke, heart attack, catastrophic illness, or died in the 2 week loan period (Consumer Action Law Centre 2010). In many cases, consumers may not even need the level of protection provided by consumer credit insurance because consumers have rights to request hardship variations to their credit contracts under Australia's *National Credit Code*.[18]

Funeral Insurance

Funeral insurance requires consumers to pay a regular premium towards a policy payment in the event of death. Consumer advocates have identified a number of concerns arising from the marketing and sales of these products to consumers, including misleading advertising, poor disclosure, and a lack of consumer understanding about funeral insurance products and alternatives.[19] Funeral insurance is commonly promoted through marketing campaigns that target consumers' sense of responsibility to their families (ASIC 2012, p. 6).[20] Advertising has, at least until recently, also emphasized the affordability of the product. For example, the promotion for one product stated:

[17] See *Australian Securities and Investments Commission v The Cash Store Pty Ltd* (*in liq*) [2014] FCA 926 (26 August 2014).

[18] *National Credit Code* Section 72. See also http://consumeraction.org.au/media-release-the-numbers-show-consumer-credit-insurance-is-a-poor-deal-for-consumers/.

[19] See http://consumeraction.org.au/media-release-time-to-end-the-funeral-insurance-rip-off-say-consumer-advocates/; http://www.choice.com.au/reviews-and-tests/money/insurance/personal/funeral-insurance.aspx. Also http://www.theaustralian.com.au/business/wealth/dig-deep-before-buying-funeral-insurance-plan/story-e6frgac6-1226349115711.

[20] See also Australian Seniors Insurance Agency brochure, April 2013, available online at http://www.finalexpensesinsurance.com.au/why-its-important.aspx (Accessed June 2014).

"Peace of mind from about the cost of a cup of coffee*
Call now for a $6,000 Funeral Plan from just $3.41* a week..."[21]

The document in which this promotion was contained later revealed that premiums increase to $25.08 per week for an 80 Year old.[22]

Some funeral insurance products are a relatively high cost method of covering funeral expenses, as compared to other options such as prepaid funerals. The Consumer Action Law Centre gives the example of a policy reviewed which was marketed at a low weekly premium of $3.41 a week (for a 44 Year old). Weekly premiums increased to $9.48 by the time someone was 65, and $25.08 a week for those over 80.[23] The Consumer Action Law Centre has calculated that if someone purchased this policy at age 50, they would have paid over $15 700 by the time they had reached 81 for a policy that paid out $6000 for funeral expenses.[24] Choice has also reported that under some insurance plans, consumers pay considerably more than would be needed to cover the cost of a funeral.[25] A study by the Australian Securities and Investments Commission suggested that funeral insurance is often sold to low socio-economic status consumers who do not understand the premium structure or consequences of failing to continue to pay premiums (ASIC 2012, p. 30).

Payday Lending

Payday loans are small amount, short-term loans designed to be repaid in full at the end of the loan period, for which borrowers are charged a fee rather than interest (see: Banks et al. 2012; Department of Treasury 2011; Gillam 2010). Payday loans are a form of "fringe" or "non-mainstream" credit in Australia, being provided almost exclusively by non-bank lenders. Such loans might in some circumstances perform a useful function of providing short-term credit to those consumers who lack access to more tradition forms of credit, such as bank loans, overdrafts, or credit cards, and also to those who choose not to utilize these options (Duggan and Ramsay 2012; Mann 2009). Nonetheless, consumer advocates and regulators have frequently expressed concerns about the business model utilized by payday lenders. The core concern is with the willingness of payday lenders to advance high cost, short-term credit to consumers who are unlikely to be able to repay the debt incurred.[26] As we shall see, it is this concern that has led to regulatory measures specifically targeting small amount (primarily payday) loans (see Ali et al. 2014).

Payday loans are commonly made to low-income (Banks et al. 2012, p. 23; Department of Treasury 2011, pp. 13–16) or otherwise vulnerable (Banks et al. 2012, pp. 23–28) consumers with few other credit options available to them (Banks et al. 2012, p. 31; Department of Treasury 2011, pp. 16–17). Consumers with disabilities, consumers who are unemployed, and consumers who are single parents are over-represented among payday borrowers (Banks et al. 2012, pp. 23–24). Studies have found that many borrowers use payday loans to pay for

[21] Insuranceline, *Funeral Plan Product Disclosure Statement*, p. 1, available online at http://www.insuranceline.com.au/funeral/funeral-insurance (Accessed 13 April 2013). In 2014 this feature was removed.
[22] After raising concerns about the potentially misleading character of some advertising for funeral insurance, and an overall lack of clarity about the structure of the product, the Australian Securities and Investments Commission recently negotiated changes to the way products of at least some providers were promoted (see ASIC 2013a, 2014).
[23] http://consumeraction.org.au/tag/funeral-insurance/.
[24] http://consumeraction.org.au/tag/funeral-insurance/.
[25] http://www.choice.com.au/reviews-and-tests/money/insurance/personal/funeral-insurance.aspx.
[26] Compare the concern shown by courts with predatory asset-based lending: Paterson (2009).

essential items, including food, accommodation, electricity, refrigerators, and car-related costs (Banks et al. 2012, pp. 32–34; Department of Treasury 2011, pp. 17–18).

Consumer advocates and regulators have expressed concern that payday lending risks locking already vulnerable consumers into an unsustainable cycle of frequent borrowing and increasing debt (Department of Treasury 2011, pp. 20–22. See also Ali et al. 2014 p. 426; Consumer Action Law Centre 2011, p. 14; Howell et al. 2008). The fees and charges associated with payday loans are often considerable, and even under current regulation, the fees may amount to the equivalent of an annual percentage rate of 290% on a 1 Month loan.[27] A recent report looking at the use of short-term cash loans showed half of borrowers interviewed had taken out more than 10 loans in the previous 2 Years, and many members of this group had taken out over 20 loans (Banks et al. 2012, p. 36).

Consumer Vulnerability and Business Advantage Taking

It is fairly uncontroversial to suggest that one purpose of consumer protection law is to protect vulnerable consumers from predatory or exploitative business practices.[28] Respect for individual autonomy and the dignity of consumers as members of a democratic society dictate that businesses should not take advantage of consumers' reduced ability to protect their own interests in a transaction (see Bigwood 2003, see also Colombi Ciacchi 2010, p. 7). Such motivations overlap with economic welfare considerations that seek to preserve the opportunities for free and informed consent by consumers in making purchasing decisions in order to promote competition in the market. These objectives are undermined if, in a particular transaction, consumers are unable to make decisions that promote their own best interests and the business in question has contributed to that position of relative disadvantage.[29] Yet beyond this apparently unassailable policy objective lies a host of difficult questions (Duggan 1991a, b). What types of disadvantage should be required to find consumers relevantly vulnerable? What types of behaviour should be relevant in characterizing a business practice as predatory? Of course, these questions raise matters of judgment, policy, and values for which no formulaic answer can be given. However, they can be unpacked a little further better to understand when it might be appropriate to regulate particular business models on the ground that they involve the exploitation of vulnerable consumers.

Mere inequality of bargaining power between consumer and business is unlikely to be a sufficient reason for legislation setting aside an otherwise valid transaction. There is almost always an inequality of bargaining power between consumers and the businesses with whom they deal. Businesses usually have more information and experience in the transaction in question and will usually have drafted the standard form contract presented to consumers (Hillman and Rachlinski 2002). Moreover, it is increasingly acknowledged that all consumers lack the capacity to act with the perfect rationality assumed by classical economic theory (Fineman 2010, p. 259) and are instead constrained by a variety of cognitive biases identified by studies in behavioural economics (see Eisenberg 1995; Korobkin 2003). If we treat all consumers as inevitably vulnerable for these reasons, then we risk losing sight of the qualitatively different constraints on decision-making faced by some consumers in some market dealings (Fineman 2010).

[27] See further Department of Treasury (2011, pp. 25–28); Consumer Action Law Centre (2011, pp. 7–8).
[28] See, e.g., Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 454, Paragraph 23.8.
[29] On these themes, see generally: Trebilcock (1997).

Conversely it is inappropriate to label particular groups of consumers, such as the elderly, those living in regional areas, or the poor, as necessarily vulnerable without regard to the circumstances surrounding the transaction in question. Such an approach risks locking the members of that group into an identity of inevitable vulnerability, when in many contexts they may be entirely competent and capable. An approach that links vulnerability to particular groups of consumers may also reinforce the unrealistic expectation that all other consumers will be relatively capable in all of their dealings (Fineman 2012, esp. pp. 85–86). Yet consumers who are well able to look after their own interests in one context may find themselves in a position of considerable disadvantage in a different transaction. The consumers involved in the transactions discussed above in "Business Models That Prey upon Vulnerable Consumers" were not necessarily intrinsically foolish, weak, or gullible. Rather, their circumstances at the time of the transaction combined to put them in a position of disadvantage; they had limited resources, they lacked experience in the transaction in question, and in some cases, the transaction raised some form of emotional anxiety (e.g., children's education, death, access to much needed credit).

These insights suggest that vulnerability for the purposes of consumer protection law should not be conceived as a fixed category of existence but rather as a fluid and contextual state that is highly dependent on the circumstances of consumers at the time of the transaction and the market in which they find themselves dealing (Chen-Wishart 2006; Consumer Affairs Victoria 2004, pp. 1–23; Wightman 2010).[30] All consumers may at some time experience the condition of vulnerability as the result of sudden unexpected life events, particularly when affected by disruptive life events, such as the death of a family member, illness, or the loss of a job (Consumer Affairs Victoria 2004, p. 16). Consumers may also experience vulnerability because of ongoing circumstances (Consumer Affairs Victoria 2004, p. 15. See also ACCC 2011; Burden 1998), such as a disability (e.g., an intellectual, psychiatric, or physical disability),[31] a serious or chronic illness, poor literacy or numeracy skills,[32] or non-English speaking backgrounds.[33] A shared condition of many vulnerable consumers is that they are operating within the constraints of a low income,[34] which can reduce the choices available to them (see also Wilson 2012). Importantly, the market in which consumers are dealing may amplify a state of vulnerability (Consumer Affairs Victoria 2004, pp. 7–9). Where consumers are acting under constraints of reduced choice[35] or are dealing with products that fall well outside their personal experience or expertise,[36] the inevitable information asymmetry between businesses and consumers may be exponentially increased (Consumer Affairs Victoria 2004, p. 1). Consumers in these circumstances may be in a position of relative vulnerability because they do not have access to information relevant to the transaction or because they are unable to use or act on that information.[37]

[30] European Parliament Resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)); Committee on the Internal Market and Consumer Protection, Report of 8 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)), Rapporteur: María Irigoyen Pérez.

[31] See, e.g., *Lampropoulos v Kolnik* [2010] WASC 193 (30 July 2010).

[32] See, e.g., *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR ¶42-447.

[33] See, e.g., *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Ribchenkov v Suncorp-Metway Ltd* (2000) 175 ALR 650.

[34] *Cook v Permanent Mortgages Pty Ltd* (2007) ASC 155–085.

[35] See, e.g., *Cook v Permanent Mortgages Pty Ltd* (2007) ASC 155–085.

[36] See, e.g., *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168.

[37] See, e.g., *Perpetual Trustee Company Ltd v Khoshaba* (2006) 14 BPR 26,639.

A similarly contextual inquiry is required in thinking about when a business model has engaged in predatory or exploitative behaviour that justifies a regulatory response. The mere fact consumers have entered into a transaction they later regret or that the business has done a "good deal" does not make the conduct of the business exploitative.[38] Dealing with consumers who are experiencing some form of disadvantage also does not necessary taint a business model as predatory. From a welfare perspective, such approaches would undermine incentives for consumers to take care in their purchasing decisions and for businesses to deal with a different consumer groups without increasing prices to account for the risk that the transaction may be set aside.

To conclude that a business model has crossed the line from hard bargaining to exploitation, the business will usually need to be in some way implicated in the vulnerable position of the consumers with whom it is dealing. Essentially, the question is whether the business model shares some significant degree of moral responsibility for the consumers' reduced ability to protect their own interests in the transaction (Engel and McCoy 2002, p. 1260). This responsibility is most easily found where a business has made false or misleading representations or engaged in undue harassment or coercion. However, even more subtle forms of misconduct may implicate a business in the vulnerable position of consumers. The business models discussed in "Business Models That Prey upon Vulnerable Consumers" illustrate some of the mechanisms through which a nexus between consumer vulnerability and business advantage taking might be found. Common features of the predatory business models that have caused concern to consumer advocates and regulators in Australia include: advertising and other promotional material that targets vulnerable consumers, sales strategies that manipulate the decision-making process of already vulnerable consumers, the use of difficult or unusual product structures that make it more likely that consumers will not make an informed assessment of the merits of the transaction, and even in the case of payday lending, being prepared to enter into transaction that risks undermining the already precarious financial position of the consumers with whom the business deals, without taking any steps to protect the interests of those consumers.

Legislative Responses

Having identified the types of concerns that may justify intervention to regulate predatory business models, possible legislative strategies for responding to these concerns need to be considered. The range of possibilities is illustrated by the recent reforms to consumer protection law in Australia. These reforms introduced a number of highly specific "bright line" rules regulating specific business practices considered to present a high risk to consumer well-being, and which were not considered to be adequately addressed through more general provisions (Wilson et al. 2009). This trend was particularly apparent in the regulation of payday, or small amount, loans (Howell 2013). Providers of small amount loans have been made subject to stringent and prescriptive requirements covering disclosure,[39] responsible lending,[40] fee caps,[41] and bans on certain types of loans.[42] Prescriptive bright line rules are also found in the general consumer law, particularly in respect to door-to-door or unsolicited sales.[43] These

[38] *Kakavas v Crown Melbourne Ltd* (2013) 298 ALR 35, 39 [20].
[39] See *National Consumer Credit Protection Act 2009* (Cth) Section 133CB; and *National Consumer Credit Protection Regulations 2010* (Cth) Regulations 28XXA, 28XXB, 28XXC.
[40] See, e.g., *National Consumer Credit Protection Act 2009* (Cth) Sections 130(1A), 131(3A), 133(3A), 133CC.
[41] *National Credit Code* Section 31A.
[42] *National Consumer Credit Protection Act 2009* (Cth) Section 133CA.
[43] *Australian Consumer Law* Part 3-2 Division 2.

bright line rules are complemented by more general provisions promoting substantive fairness in the terms of consumer contracts through mandatory minimum standards of quality in the provision of goods and services[44] and a regime that renders void unfair terms in standard form consumer contracts.[45] At the highest level of generality, the Australian consumer law contains prohibitions on misleading or deceptive conduct,[46] undue harassment and coercion,[47] unconscionable conduct,[48] and powers for courts to reopen unjust contracts.[49]

Standard-based prohibitions, particularly those based on generalized moral values such as conscience or fairness, are sometimes criticized as introducing undue uncertainty into the law and, for this reason, as providing inadequate protection for consumers (Duggan 1997, p. 73. See also Carlin 2001, p. 136; Terry 1982, p. 325). This type of criticism losses much of its bite on a proper understanding of the role that standard-based prohibitions play in complementing more focused, bright line, rules (Black 2008, p. 6). Bright line rules have the attraction of being targeted at the specific practices considered detrimental to consumer interests (Wilson et al. 2009, pp. 128–129). However, over-reliance on rule-based regulation can also be problematic. The use of rules targeting of specific forms of conduct may introduce a degree of fragmentation into the consumer protection regime and encourage regulatory arbitrage by businesses (Duggan and Lanyon 1999, p. 511; Fleischer 2010). There are almost always gaps in the scope of coverage provided by rules that can be used by businesses to avoid regulation. For example, while unsolicited sales are regulated under the *Australian Consumer Law*, with requirements about the circumstances in which such sales can be made, disclosure and cooling off periods,[50] in-home sales where the consumer invites the sales person into their home for the purpose of considering purchasing the product are not covered by this regime (Harrison et al. 2010, pp. 4, 11–12).[51] Recent reforms in Australia have introduced a more stringent and consistent approach to consumer leasing (Department of Treasury 2011, p. 29) in respect of conduct and responsible lending requirements,[52] but short-term and indefinite leases are exempt from the provisions.[53] Further reforms to the regulation of small amount loans have been proposed due to concerns that lenders in Australia are already avoiding the prescriptive regime regulating the circumstances in which this type of product may be provided.[54]

In this context, standards of prohibited conduct based on generalized moral values of fairness or conscience have an important role to play in complementing the rule-based regime. The articulated standards can provide a strong statement of the type of behaviour that is

[44] *Australian Consumer Law* Part 3-2 Division 1; *Australian Securities and Investments Commission Act 2001* (Cth) Part 3-2.
[45] *Australian Consumer Law* Part 2-3; *Australian Securities and Investments Commission Act 2001* (Cth) Part 2-3.
[46] *Australian Consumer Law* Section 18; *Australian Securities and Investments Commission Act 2001* (Cth) Section 12DA.
[47] *Australian Consumer Law* Section 50.
[48] See, e.g., *Australian Consumer Law* Sections 20–22; *Australian Securities and Investments Commission Act 2001* (Cth) Sections 12CA, 12CB, 12CC. Also *National Credit Code* Section 78 (unconscionable interest and other charges).
[49] *Contracts Review Act 1980* (NSW); *National Credit Code* Section 76. See also *National Consumer Credit Protection Act 2009* (Cth) Section 180A (orders to redress unfair or dishonest conduct by credit service providers).
[50] *Australian Consumer Law* Sections 69–99.
[51] However, a consumer who contacts a supplier for a reason other than initiating negotiations for a sale will also be covered by the legislative provisions, see *Australian Consumer Law* Section 69(1A).
[52] See the *Consumer Credit Legislation Amendment* (*Enhancements*) *Act 2012* (Cth).
[53] Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) 119. For a proposal to regulate these products, see the (now lapsed) National Consumer Credit Protection Amendment (Credit Phase 2) Bill 2012 (Cth). See further Ali et al. (2013a).
[54] Consumer Credit Regulations Exposure Draft 2014, at http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Consumer-credit-regulations.

unacceptable in the market place and a theme to unite an otherwise disparate set of rules. Instances of noncompliance with technical rules may have little resonance with businesses, whereas a finding of unfair or unconscionable conduct may prompt a greater degree of self-reflection. Standards of prohibited conduct can encourage innovation in both regulatory and compliance strategies (Black 2008, p. 3). The standards do not dictate any particular compliance requirements, but allow businesses themselves to develop their own strategies.

Importantly, standards of prohibited conduct can perform an important function as a regulatory "safety net." Thus, Hugh Collins has suggested that one advantage of the *Directive on Unfair Commercial Practices Directive* is that it "should catch a number of unsavoury practices that somehow slipped through the consumer net or were inadequately deterred by existing provisions" (Collins 2010, p. 109). The open textured nature of "safety net" standards of this kind allows courts a flexible response to changing business practices (Peden 1976, p. 14; Pottow 2007, p. 406; Williams and Hare 2010, p. 381). In focusing on the effect rather than the form of conduct, safety net standards may be harder for businesses to evade than technical rules (Duggan and Ramsay 2012, p. 124). They can also accommodate changing community values, particularly as the paradigm of the informed and self-reliant consumer loses its dominant rhetorical force (see, e.g., King and Smith 2010) and the community develops a greater understanding of the impact of different types of vulnerability and disadvantage.[55]

The Australian Prohibition on Unconscionable Conduct

In Australia, a prohibition on unconscionable conduct has been part of the consumer protection regime since 1986.[56] Section 21 of the *Australian Consumer Law*, provides that a person must not, in "in trade or commerce," engage in conduct that is,"in all the circumstances," unconscionable.[57] In its current form, this prohibition is not limited to consumer transactions, although the protection will not apply to a listed public company.[58] Unconscionable conduct is not defined in the legislation.

Section 21 of the *Australian Consumer Law* contains a set of interpretative principles to guide courts in their application of the prohibition. These confirm that the "section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour,"[59] a point that had already been confirmed by courts.[60] Australian courts have repeatedly confirmed that the statutory prohibition on unconscionable conduct is not limited by the "unwritten" or general law,[61] and this is now also expressly stated in the interpretative principles accompanying the prohibition.[62]

[55] Compare *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR ¶42-429 and *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR ¶42-447.
[56] For an overview of the earlier versions of the prohibition, see: Lees (2001, p. 101ff).
[57] *Australian Consumer Law* Section 21.
[58] *Australian Consumer Law* Section 21(1).
[59] *Australian Consumer Law* Section 21(4)(b).
[60] *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132.
[61] *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292, 299 [24]; *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132, 140 [30]; *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd* (*No 2*) (2009) 253 ALR 324, 346–347 [113]. Also *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* (2011) 34 VR 536, 554 [86]–[87]; *Trans Petroleum* (*Australia*) *Pty Ltd v White Gum Petroleum Pty Ltd* (2012) 268 FLR 433, 461 [171]; *Attorney-General* (*NSW*) *v World Best Holdings Ltd* (2005) 63 NSWLR 557, 566 [21]; *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 180 [38].
[62] *Australian Consumer Law* Section 21(4).

Section 22 contains a list of factors to which the court may have regard in determing whether a person has engaged in conduct that is unconscionable.[63] These factors address both procedural and substantive concerns. They include, for example:

- Whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services[64]
- Whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services[65]
- The amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier[66]
- The terms and conditions of the contract[67]; and
- The extent to which the supplier and the customer acted in good faith[68]

Australian courts have held that the list of factors to which a court may have regard in determining whether a business has engaged in unconscionable conduct should not be treated as a checklist[69] but as a benchmark for identifying and assessing conduct likely to offend the prohibition.[70]

The Meaning of Unconscionable Conduct Under Statute

Australian courts have been somewhat slow to develop a coherent and consistent approach to assessing when there has been a contravention of the statutory prohibition on unconscionable conduct. This is not altogether surprising. Australian private law has a well-developed equitable doctrine of unconscionable dealing. Unconscionable dealing in equity is traditionally seen as a response to the knowing "victimization"[71] or "exploitation"[72] by one party of "another's position of special disadvantage."[73] The prohibition on unconscionable conduct in the *Australian Consumer Law* adopts terminology familiar from the equitable jurisdiction and also directs courts to go beyond this area of "unwritten law." There is little direction given to courts in how to mediate between these different possible understandings of what amounts to unconscionable conduct (Bant, 2014, forthcoming) and little explanation of how a breach of the statutory prohibition might be assessed.

In giving content to the prohibition, case law suggests that courts have drawn on the equitable framework for assessing whether a business has engaged in unconscionable dealing, in the sense of looking at both the position of vulnerability of the consumer and any exploitation

[63] *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132, 142 [40]. Also *Australian Competition and Consumer Commission v Simply No-Knead* (*Franchising*) *Pty Ltd* (2000) 104 FCR 253, 265 [31].
[64] *Australian Consumer Law* Section 22(1)(c).
[65] *Australian Consumer Law* Section 22(1)(d).
[66] *Australian Consumer Law* Section 22(1)(e).
[67] *Australian Consumer Law* Section 22(j)(ii).
[68] *Australian Consumer Law* Section 22(l).
[69] *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 181 [41].
[70] *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 181 [42].
[71] *Kakavas v Crown Melbourne Ltd* (2013) 298 ALR 35, 57 [117].
[72] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474 (Deane J). See also *Bridgewater v Leahy* (1998) 194 CLR 457.
[73] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474 (Deane J), 462 (Mason J).

of that position by the business.[74] Courts have then assessed this relationship against the "normative standard of conscience" invoked by the statute.[75] Courts have been clear that some degree of "moral tainting"[76] is required for a finding of unconscionable conduct; after all, the conduct must offend the conscience to be unconscionable. The issue of uncertainty has been what standard of wrongdoing is required.

Australia is a federal system, and courts in all States and Territories and at the Federal level have a jurisdiction to apply the statutory prohibitions on unconscionable conduct. Different courts have at times arrived at slightly different interpretations of the prohibition. At one time, the New South Wales Court of Appeal required a relatively high degree of moral wrongdoing, holding that unconscionable conduct under statute "is a concept which requires a high level of moral obloquy[77] a standard now suggested to be "too stringent."[78] By contrast, the Federal Court has consistently emphasized the need to give effect to the "ordinary and natural interpretation" of the statutory prohibition.[79] This has lead to an interpretation of the statutory prohibition as simply being concerned with conduct that "should not be done in good conscience."[80] More recently, all courts have emphasized adherence to the words of the section. In *Tonto Home Loans Australia Pty Ltd v Tavares*, Allsop P (with whom Bathurst CJ and Campbell JA agreed) suggested that:

"What is required is some degree of moral tainting in the transaction of a kind that permits the opprobrium of unconscionability to characterise the conduct of the party."[81]

In *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*, the Full Federal Court clearly linked the unconscionable conduct not with some abstract moral standard accessible only to the courts but with the values of the community in which the conduct occurs. Thus, Allsop CJ, Jacobson, and Gordon JJ stated that:

> The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers.[82]

Applying the Prohibition on Unconscionable Conduct

The statutory prohibition on unconscionable conduct in Australian consumer law has at times been criticized as incapable of addressing "systemic or widespread issues" (ASIC 2013b,

[74] Also *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 180 [40].
[75] *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR ¶42-447, 43 076 [23].
[76] *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 (21 December 2011) [293]. Also *Violet Home Loans Pty Ltd v Schmidt* (2013) 300 ALR 770, 787–788 [62].
[77] *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121]. Also *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 (21 December 2011) [292]; *Violet Home Loans Pty Ltd v Schmidt* (2013) 300 ALR 770, 785–786 [58].
[78] *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 (21 December 2011) [293]. Also *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 174 [22]; *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446 (18 December 2013) [105].
[79] *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132, 140 [33], 142 [39], 144 [50].
[80] *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132, 140 [33].
[81] *Tonto Home Loans Australia Pty Ltd v Tavares* [*2011*] *NSWCA 389* (*21 December 2011*) [293].
[82] [2013] ATPR ¶42-447, 43 463 [23]. See also *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 186 [56]; *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446 (18 December 2013) [115].

Paragraph 11), particularly involving vulnerable consumers preyed upon by exploitative business models (Wilson et al. 2009). The developing trend for Australian courts to ground their assessment of unconscionable conduct in community values means that there is a significant potential for the section to fulfil its safety net function. The courts' approach in recent cases has shown considerable sensitivity to the varied circumstances that may create a relationship of vulnerability between consumers and the business with which they are dealing, which is then open to exploitation by the business.

The spectrum of wrongdoing that might be invoked by a predatory business model is illustrated in *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd*.[83] In this case a company was found to have infringed the prohibition on misleading or deceptive conduct through its sales strategy, which included false statements about the extent of coverage available in remote regional areas of Australia under the mobile phone plans it was selling. The company was found to have infringed the prohibition on undue harassment or coercion through its debt collection practices, which involved sending intimidating letters and phone calls,[84] including the threat to involve a (fictitious) highly aggressive lawyer who was a "killer in front of a judge" and the (false) claim that this lawyer would repossess all of the consumer's assets, even the children's toys.[85] The court also found that the company had engaged in unconscionable conduct through its telemarketing sales strategy that aimed to commit consumers to a mobile phone plan with unusual and onerous terms, unsuitable for most telephone users, and in which consumers were given little opportunity to understand or reflect upon the merits of the transaction.[86]

Not all predatory business models will involve blatantly misleading assertions or aggressive harassment of consumers. The finding in this case that the combination of onerous terms, a product of limited utility to consumers and a high-pressure sales technique may amount to unconscionable conduct illustrates the potential for the prohibition to respond to central operating premises of many predatory business models. In *Walker v DTGV1 Pty Ltd*,[87] unconscionable conduct was found in the combination of manipulative marketing, a lack of transparency in the transaction structure, and a highly vulnerable consumer. In this case, a woman with mental illness on a disability pension entered into finance lease she did not understand for a low value vehicle that she was unable to afford. These factors were or ought to have been known to the lessor company, providing a ground for discharging the transaction as unjust or unconscionable. In the Victorian Civil and Administrative Tribunal, Senior Member Mackenzie was highly critical of "the length of the stay at the dealership, the delay in clearly explaining what the nature of the transaction was, the speed and inadequacy of explanations of the transaction given, the lack of real choice in car selection, and the lack of real opportunity given to read or understand the consumer lease."[88]

Australian Competition and Consumer Commission v Lux Distributors Pty Ltd[89] involved a manipulative marketing strategy for the sale of "Lux" vacuum cleaners, combined with a misleading initial premise, and the breach of door-to-door sales provisions about the length of time a business was entitled to remain in a consumer's premises. The business model involved a representative from Lux calling householders and offering a free maintenance check. The

[83] [2013] FCA 350 (18 April 2013) [184]–[185].
[84] *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350 (18 April 2013) [208]–[210].
[85] *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350 (18 April 2013) [43].
[86] *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350 (18 April 2013) [172]–[178].
[87] [2011] VCAT 880 (12 May 2011).
[88] *Walker v DTGV1 Pty Ltd* [2011] VCAT 880 (12 May 2011) [130].
[89] [2013] ATPR ¶42-447.

representative was not a trained maintenance technician. During the visit to the householder's home, the sales representative would perform a very perfunctory check of the existing vacuum cleaner and then attempt to sell a new Lux vacuum cleaner.

The Full Court of the Federal Court held that the sales strategy infringed the statutory prohibition on unconscionable conduct. The court referred to the sales strategy as a "deceptive ruse" that took advantage of elderly people living alone.[90] Importantly, it was not the simple fact of the advanced age of the consumers that leads to the finding; these consumers where highly capable and living independently. The Court was sensitive to the combination of factors that combined to produce the situation where the business could exploit the circumstances of the elderly consumers. The court explained that:

> The vulnerability of the consumer to the salesperson in her or his own home arises from the difficulty in putting an end to the sales process once the salesperson is in the home, especially after that person has spent time and undertaken persuasive effort in a sales process or "pitch." … Ingratiating solicitude, just as much as high-pressure bullying sales tactics, may lead to a feeling of necessitous acceptance, especially by a polite and accepting person.[91]

These factors are also present in some other forms of in-home sales, discussed in "Business Models That Prey upon Vulnerable Consumers" above, such as education supplies where the results of a diagnostic test are manipulated to produce a high sense of anxiety in prospective parent purchasers of the product (Harrison et al. 2014).

In *Director of Consumer Affairs Victoria v Scully*,[92] the Victorian Court of Appeal upheld a finding of unconscionable conduct in a case of what might be termed "unfair surprise," arising where the business model relied on unusual and complex arrangements that were "hazardous to participants" and yet failed adequately to explain those arrangements to the financially vulnerable consumers with which it dealt. The Court of Appeal approved the findings of the trial judge that in these circumstances: "not to highlight the risks for home buyers, and the potential benefits for [the business] … was immoral conduct, which deserves the opprobrium of a finding of unconscionability."[93]

These factors of complex documents and/or an unusual transaction structure presented to inexperienced consumers are found in a number of the examples of business models discussed above in "Business Models That Prey upon Vulnerable Consumers." Concerns about the sales of funeral insurance and credit insurance, for example, are often premised on the consumers' lack of familiarity with the product being purchased in circumstances where there is a high risk that the product will not be suitable for their needs and situation.[94]

In *Australian Securities and Investments Commission v National Exchange Pty Ltd*, the finding of unconscionable conduct was triggered by the promotion of a product to a group that included vulnerable consumers and the existence of a significant discrepancy between the price and value of the product in question.[95] It is not necessary for there to be a discrepancy of between price and value to find that the transaction has been procured by unconscionable

[90] *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR ¶42-447, 43 465 [27], 43 466 [34], 43 467 [40], [42].
[91] *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR ¶42-447, 43 461 [10], also [64].
[92] (2013) 303 ALR 168.
[93] *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 186, [55]. See also *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [203] FCA 350 (18 April 2013).
[94] See *Australian Securities and Investments Commission v The Cash Store Pty Ltd* (*in liq*) [2014] FCA 926 (26 August 2014) (consumer credit insurance).
[95] (2005) 148 FCR 132, 140 [33].

conduct.[96] However, it has long been treated by courts as a factor indicating that there may have been some problem in the procurement of the transaction.[97] This factor may also to be relevant in supporting a finding of unconscionable conduct in other cases concerning the business models discussed in "Business Models That Prey upon Vulnerable Consumers," including some motor vehicle and consumer goods leasing arrangements. In *Australian Securities and Investments Commission v The Cash Store Pty Ltd* (*in liq*), Davies J found that the sale of consumer credit insurance to customers of a payday loan business amounted to unconscionable conduct because the terms of that insurance were "self-evidently unsuited to needs of most customers and were most unlikely ever to confer a benefit."[98]

Unconscionable conduct contrary to Australian consumer law has also been found in cases of what is sometimes called "passive" exploitation.[99] This arises where the business model does not actively engage in manipulative marketing or promote an unusual or complex product structure, but the transaction nonetheless presents significant and foreseeable risks for consumers, which the business did nothing to address. In these types of cases, the requisite degree of moral fault on the part of the business comes from its "reckless indifference" to the interests of the obviously vulnerable consumers with whom it is dealing (Bigwood 2003, 2013). The problem has most commonly been seen in cases of lending secured on the family home, sometimes termed "asset-based lending" (Paterson 2009). In this context, it was been held in *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd* that:

> if a loan was advanced to [a consumer] with knowledge that she would be unable to meet the repayments and that her home would be lost then this would be unconscionable [in equity].[100]

It is only a small step to suggest that unconscionable conduct might be found in some payday lending practices where an unsecured loan is advanced to consumers in circumstances where there is no reasonable likelihood of the consumers being able to repay, and the probable consequence is therefore escalating financial hardship.

Comparing the Unfair Commercial Practices Directive

While Australian courts made very effective use of the prohibition on unconscionable conduct in responding to a range of predatory business models, there has been some discussion of the possibility of introducing in Australia a prohibition on unfair commercial practices modelled on the *Directive on Unfair Commercial Practices* (see Productivity Commission 2008, Volume 2, Chapter 7.2). In 2013, a meeting for Australian Commonwealth State and Territory and New Zealand Ministers for Consumer Affairs supported research to consider whether the *Australian Consumer Law* should be amended to include a prohibition on unfair commercial practices,[101] indicating a potentially new direction for safety net consumer protection in Australian law.

[96] *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292, 296 [12].
[97] *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292, 296 [12]; *Australian Consumer Law* Sections 21(1)(e) and 21(2)(e). See also Waddams (2010, pp. 33–34).
[98] [2014] FCA 926 (26 August 2014) [94].
[99] *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292, 296 [11].
[100] *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd* (2012) 287 ALR 693, [212]. Also *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413, [59] and compare *Perpetual Trustee Company Ltd v Khoshaba* [2006] NSWCA 41, [128].
[101] Meeting for Australian Commonwealth State and Territory and New Zealand Ministers for Consumer Affairs, Friday 5 July 2013, which can be viewed at http://www.consumerlaw.gov.au/content/CAF/meetings/downloads/004.pdf.

Unfair Commercial Practices

The Directive uses a tiered structure, starting with a general prohibition on unfair commercial practices.[102] The Directive then provides that a commercial practice is also unfair if it is a misleading action,[103] a misleading omission,[104] or is aggressive.[105] These provisions are accompanied by definitions of key concepts and are backed up by a "blacklist" of practices deemed unfair under any circumstance,[106] which identify common forms of "deception and trickery" by businesses (Collins 2010, p. 97).

In the UK, the Directive is enacted through the *Consumer Protection from Unfair Trading Regulations 2008*.[107] Annual Reports of the Office of Fair Trading[108] indicate that enforcement action has typically relied on the prohibitions on aggressive and misleading practices rather than the more general prohibition on unfair commercial practices (see, e.g., Office of Fair Trading 2011, p. 22 (gold buying services); Office of Fair Trading 2012, p. 23 (mobility aids)). It can be predicted that this pattern is likely to continue with most cases proceeding under the more specific provisions and the general prohibition providing a safety net "means by which enforcement authorities can attack novel forms of unfair commercial practices that have not been foreseen by the legislation" (Collins 2010, p. 97).

Unfair Commercial Practices and Predatory Business Models

If introduced in Australia, a provision modelled on the Directive would seem likely to catch most of the business models found to involve unconscionable conduct discussed in "The Australian Prohibition on Unconscionable Conduct," possibly through the more specific prohibitions on misleading omissions or aggressive practices, and at least through the general prohibition on unfair commercial practices.

Under the Directive, a commercial practice will involve a misleading omission if:

> in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.[109]

The reference to omitting "material information" in this clause might extend the reach of the Directive to those cases where a business model relies on an element of "unfair surprise," such as where a tightly scripted sales process is designed to distract attention from onerous terms, as in *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* (telemarketing

[102] *Unfair Commercial Practices Directive* Article 5(1).
[103] *Unfair Commercial Practices Directive* Article 6; *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 5. Compare *Australian Consumer Law* Section 18.
[104] *Unfair Commercial Practices Directive* Article 7; *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 6.
[105] *Unfair Commercial Practices Directive* Article 8; *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 7. Compare *Australian Consumer Law* Section 50.
[106] *Unfair Commercial Practices Directive* Annex I.
[107] *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277.
[108] The Office of Fair Trading closed on 1 April 2014. Its responsibilities in regard to consumer protection have been passed to the Competition and Markets Authority and the Financial Conduct Authority.
[109] *Unfair Commercial Practices Directive* Article 7(1); *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 6(1).

for mobile phone sales)[110] and *Walker v DTGV1 Pty Ltd* (motor vehicle leasing)[111] and also where the transaction involves unusual and complex arrangements that are not adequately explained to consumers without experience in the type of transaction in question, as in the *Director of Consumer Affairs Victoria v Scully* (home ownership scheme).[112]

A practice will be aggressive if:

> in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.[113]

The use of the term "aggressive" and the reference to "physical force" in this definition might suggest that the prohibition on aggressive practices is directed at overt pressure or coercion. This inference is supported by the types of prohibited conduct in the blacklist of unfair practices in Annex I, which include, for example, "[c]reating the impression that the consumer cannot leave the premises until a contract is formed."[114] Certainly, the prohibition on "undue harassment or coercion" in Australian consumer law[115] has been interpreted to require persistent and disproportionate "disturbance or torment" and "force or compulsion," respectively.[116] These concepts would cover the threats of aggressive debt collection in *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd*,[117] but not less forceful but nonetheless manipulative conduct of the kind illustrated in the examples of predatory conduct discussed in "Business Models That Prey upon Vulnerable Consumers" (see also Willett 2010, p. 264).

The definition of an aggressive practice in the Directive also refers to "undue influence." Undue influence is defined as "exploiting a position of power in relation to the consumer so as to apply pressure, even without using physical force, in a way which significantly limits the consumer's ability to make an informed decision."[118] This definition might extend to manipulative marketing that plays on the vulnerabilities of the target consumer group, such as found in *Walker v DTGV1 Pty Ltd*,[119] which involved the highly egregious combination of a high pressure sales strategy and a complex transaction structure for the lease of a low value/high cost motor vehicle to a low-income consumer, and perhaps even *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*,[120] discussed above, which involved a highly manipulative strategy for selling vacuum cleaners to elderly consumers in their homes.

The Directive provides that in assessing whether a practice is aggressive, account should be taken of the "exploitation by the trader of any specific misfortune or circumstance of such

[110] [2013] FCA 350 (18 April 2013) [172]–[178]. See also further below examples in "The Australian Prohibition on Unconscionable Conduct."
[111] [2011] VCAT 880 (12 May 2011).
[112] (2013) 303 ALR 168.
[113] *Unfair Commercial Practices Directive* Article 8; *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 7.
[114] *Unfair Commercial Practices Directive* Annex I, [24].
[115] *Australian Consumer Law* Section 50.
[116] **See, e.g., *Australian Competition and Consumer Commission v Maritime Union of Australia* [2001] FCA 1549 (5 November 2001) [62]–[64].**
[117] [2013] FCA 350 (18 April 2013) [172]–[178], discussed above in "The Australian Prohibition on Unconscionable Conduct."
[118] *Unfair Commercial Practices Directive* Article 2(j); *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 7(3)(b).
[119] [2011] VCAT 880 (12 May 2011), discussed above.
[120] [2013] ATPR ¶42-447, 43 463. See also the similar example of potentially aggressive practices in doorstop sales given in Collins (2010, p. 109).

gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product."[121] This threshold knowledge requirement might not be met in cases where the business deals primarily with a group likely to include vulnerable consumers, but lacks the requisite knowledge of any "specific misfortune."

For business models whose predatory behaviour failed to fall within the definitions of an aggressive practice or misleading omission, recourse might be made to the general prohibition on unfair commercial practices. Under the Directive, a commercial practice is unfair, contrary to this general prohibition, if:

> (a) it is contrary to the requirements of professional diligence,
> and
> (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.[122]

The Directive provides that "professional diligence" means:

> the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.[123]

To "materially distort the economic behaviour of consumers" means:

> using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.[124]

These definitions of the key concepts involved in an unfair commercial practice would seem to capture the core issues of concern with predatory business models, namely manipulating or "distorting" vulnerable consumers' already reduced ability to protect their own interests, or to make "an informed decision." Thus, for example, the general prohibition on unfair commercial practices appears capable of catching the (mis) selling of unsuitable consumer credit insurance to inexperienced and low-income consumers, such as seen in *Australian Securities and Investments Commission v The Cash Store Pty Ltd* (*in liq*).[125] The sale of products that are patently unsuitable for those who are purchasing them might well be considered inconsistent with the level of "skill and care" that a business may reasonably be expected to exercise towards consumers and certainly distorts the "economic behaviour" of the target group.[126] These concepts might even extend to sanction the conduct of payday lenders

[121] *Unfair Commercial Practices Directive* Article 9(c); *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 7(2)(c). Cf the equitable concept of undue influence explained in *Royal Bank of Scotland plc v Etridge* (*No 2*) [2002] 2 AC 773, 795 [8].
[122] *Unfair Commercial Practices Directive* Article 5(2); *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 3.
[123] *Unfair Commercial Practices Directive* Article 2(h); *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 2(1).
[124] *Unfair Commercial Practices Directive* Article 2(e); *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 2.
[125] [2014] FCA 926 (26 August 2014), discussed above. See also the discussion of emotional manipulation in the sale of insurance products in Willett (2010, p. 260).
[126] *Unfair Commercial Practices Directive* Article 5(2); *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 3.

who extend credit to consumers already in debt and highly unlikely to be able to repay the loan without financial hardship.[127]

Predatory Business Models and the "Average" Consumer

Commentators have criticized the emphasis in the Directive on the "average" consumer used to assess whether a business practice is unfair. The benchmark "average" consumer under the Directive is, following jurisprudence developed in the European Court of Justice,[128] a consumer who is "reasonably well-informed and reasonably observant and circumspect."[129] Few real consumers are likely to meet the demands of this primary standard (Fineman 2010, p. 262), which assumes a high level of cognitive and interpersonal competence (Incardona and Poncibò 2007).[130] However, the Directive qualifies the benchmark standard where the practice falls within two further categories, which may be relevant in assessing the effect of predatory business models.

If a commercial practice is directed to a "particular" group of consumers, the average consumer is the average consumer of that group.[131] The Directive accordingly specifically addresses the problem of conduct targeted at vulnerable consumers, which is the case with many of the predatory business models discussed above. For example, some payday loans and consumer leasing arrangements are specifically marketed to consumers who are excluded from mainstream finance and may be in a vulnerable position in that transaction through the combination of financial need, limited alternative credit options, and a low household income.

The Directive also provides that:

> Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.[132]

This qualification to the standard of the average consumer in assessing whether a commercial practice is unfair relies on a somewhat arbitary set of characteristics for identifying consumers who are particularly vulnerable without identifying any underlying principle linking the categories (Trzaskowski 2013). As a result it risks reducing the state of vulnerability to a simplistic all or nothing inquiry. In *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*,[133] the consumers were elderly, so falling within the category of "age" as a characteristic leading to particular vulnerability. However, it was not this

[127] See discussion above in "Business Models That Prey upon Vulnerable Consumers" and "Legislative Responses."

[128] *Gut Springenheide and Tusky v Oberkreisdirektor des Kreises Steinfurt* (C-210/96) [1998] ECR I-4657. See also, e.g., *Verbraucherschutzverein v Sektkellerei Kessler* (C-303/97) [1999] ECR I-513; *Estée Lauder Cosmetics v Lancester Group* (C-220/98) [2000] ECR I-117.

[129] *Unfair Commercial Practices Directive* Recital 18. Also *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 2(2).

[130] See also European Parliament Resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)); Committee on the Internal Market and Consumer Protection, Report of 8 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)), Rapporteur: María Irigoyen Pérez.

[131] *Unfair Commercial Practices Directive* Article 5(2)(b); *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 3.

[132] *Unfair Commercial Practices Directive* Article 5(3); *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 2(5).

[133] [2013] ATPR ¶42-447.

factor alone that lead to the consumers in question being vulnerable to exploitation. The much richer analysis demonstrated by the court recognized that it was the combination of the consumers' age, their lack of experience with other products, the circumstances of the sale, and the marketing strategy of the business that created a condition of vulnerability.[134] The protection provided by the Directive to "clearly identifiable" groups of particularly vulnerable consumers might nonetheless be useful in responding to the marketing of products that have a clear potential to be misunderstood by inexperienced and therefore "credulous" consumers, which has occurred in Australia with some funeral and credit insurance products, as illustrated in *Australian Securities and Investments Commission v The Cash Store Pty Ltd* (*in liq*).[135]

In order for the standard of an average consumer to be qualified by reference to the perspective of a group of consumers who are particularly vulnerable to the practice, the Directive requires the impact of the practice to be one that "the trader could reasonably be expected to foresee." Some Australian courts have held that for a business be found to have engaged in unconscionable conduct contrary to the *Australian Consumer Law*, the business must have known about the position of disadvantage of the target consumer or group of consumers.[136] These requirements of "reasonable foreseeability" and "knowledge" perform a similar function of linking the business's conduct to the vulnerable circumstances of the consumers in question. The test under the Directive is probably easier to apply, as it looks to the objectively foreseeable consequences of a business practice and avoids the difficult inquiry into what subjectively the business knew or ought to have known.

Going Beyond Unconscionable Conduct?

While a provision modelled on the Directive seems likely to catch the kinds of predatory business models found to have engaged in unconscionable conduct contrary to the *Australian Consumer Law*, it is unclear whether such a regime, if introduced in Australia, would also extend the protection currently provided to consumers. Some Australian courts have distinguished unconscionable conduct, which involves morally tainted conduct, from conduct that is merely unfair[137] or unjust,[138] making unfairness a broader category of sanctioned conduct. Whether this perceived difference between the standards will be sustained in the face of an approach that treats unconscionability as 'permeated with accepted and acceptable community standards' remains to be seen.[139] In any event, the prohibition on unfair commercial practices under the Directive does not apply to "unfairness" at large, but is contained by the definitions within the regime. Even if the scope of the standards of unfair commercial practices and unconscionable conduct are likely to be similar, there may be a number of benefits in introducing a provision based on the Directive into Australian law.

For a consumer protection regime to provide an effective incentive for business to avoid certain types of unacceptable conduct, it must be accessible to those businesses. A regime based on the Directive might be more successful than the existing prohibition on

[134] [2013] ATPR ¶42-447, [64].
[135] [2014] FCA 926 (26 August 2014).
[136] *Tonto Home Loans Australia Pty Ltd v Tavares* [*2011*] *NSWCA 389* (*21 December 2011*) [293]. This requirement of knowledge can include "wilful blindness" see *Violet Home Loans Pty Ltd v Schmidt* (2013) 300 ALR 770.
[137] *Attorney-General* (*NSW*) *v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121]; *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 183 [48].
[138] See *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 (21 December 2011); *Perpetual Trustee Company Ltd v Khoshaba* (2006) 14 BPR 26,639.
[139] See also *Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR ¶42–447, 43 463 [23].

unconscionable conduct in indicating to all stake holders the line over which business conduct must not cross, both because of the language in which the general prohibition is expressed and the structure that the Directive employs.

In terms of language, a prohibition on "unfair" practices may have greater resonance in the broader community, outside the sphere of courts and lawyers, than one based on "unconscionable" conduct. In *Attorney-General (NSW) v World Best Holdings Ltd*, Spigelman CJ expressed the view that unconscionability is a concept with which judges have particular experience, stating:

> The original statutory scheme recognised that judges who have had the experience of serving on the Supreme Court or the Federal Court are used to approaching questions of "unconscionability," including in a statutory context, with an appropriate level of restraint.[140]

But this is perhaps precisely the problem. Business people deciding whether to pursue a particular marketing strategy should not have to delve into case law to discover whether that strategy will operate within the limits of the law. It is much better if they can make at least a general assessment of the likely lawfulness of the conduct themselves. Yet "unconscionable" is not a word commonly used in ordinary conversation.[141] Consumers and business people alike may have to think hard about what it means. These parties may be more familiar with the ideas of "unfair" conduct. Studies in behavioural economics have shown that we have an intuitive understanding of standards of fair dealing and that this is an important value in our interactions with other people (see Akerlof and Shiller 2009, Chapter 2). Even an intuitive view provides a starting point for self reflection by businesses about whether a proposed course of conduct is likely to offend community values and the statutory safety net prohibitions.

A related attraction of the Directive lies in its structure. The *Australian Consumer Law* does not define unconscionable conduct and instead provides a list of factors that courts may take into account in making the assessment. The list of factors contains a somewhat arbitrary mix of procedural and substantive concerns (Duggan 1997, p. 73. Also Carlin 2001, p. 136; Terry 1982, p. 325). This mix of considerations is consistent with what has been termed the "sliding scale" of unconscionability, where the court weighs up the combined effect of all of the factors of the case (see Lonegrass 2012). However, there is a risk that the presence of too many diverse specified factors may make the standard of prohibited conduct less rather than more comprehensible to businesses and consumers. The structure of the Directive—with its tiered approach to the prohibitions, its use of definitions, and the illustrative black list of prohibited conduct—may provide a better level of guidance to affected parties. In 2008, the Australian Productivity Commission expressed the view that "introducing a general provision against unfairness might be more conceptually neat than practically useful for consumers" (see Productivity Commission 2008, Volume 2, Para 7.2). This conceptual neatness may be of great practical benefit to consumers by allowing the businesses with which they deal better to predict the likely parameters of acceptable market conduct.

Conclusion

An effective legislative consumer protection regime will usually rely on a mix of provisions, including bans, bright line rules, and prohibitions based on generalized moral standards of

[140] (2005) 63 NSWLR 557, 583–584 [122].
[141] *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 174 [22].

unfair or unconscionable conduct. While some business practices with a high risk of harm to consumers may justify a prescriptive regulatory response, not every form of potentially unacceptable business conduct can or should be met with a bright line rule. Standard-based prohibitions can perform an important role as a safety net to catch misconduct not addressed by more specific rules. In responding to the problem of predatory business models, safety net standards have the advantage of being sufficiently broadly framed to allow courts to investigate the rich mix of contextual factors that may place consumers in a position of vulnerability in the transaction in question and indicate predatory advantage taking by the business model of that position of vulnerability. The use made by courts of the prohibition on unconscionable conduct in the *Australian Consumer Law* illustrates the efficacy of safety net standards in addressing predatory business models and the flexibility built into such standards in responding to changing social values and community expectations.

This paper has suggested that, for safety net standards to be most effective, they should be expressed in terms that resonate with the whole community and should provide some accessible guidance as to how a contravention of the standard is to be assessed. For these reasons, in Australia, a provision based on the *Directive on Unfair Commercial Practices* might have provided a more effective safety net standard than the current statutory prohibition on unconscionable conduct, and there is certainly a case for considering the introduction of such a provision into the Australian consumer protection regime.

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