# PRIVATE LAW, CONSCIENCE AND MORAL REASONING: THE ROLE OF THE JUDGE

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*In this article, we focus on private law doctrines that invoke conscience to set standards for citizens in their dealings with each other. We argue that such conscience-based doctrines can — and should — provide guidance to transacting parties, so as to minimise the risk of unconscionable conduct arising in transactional settings. We argue that conscience-based doctrines might effectively achieve this objective by provoking moral reasoning on the part of transacting parties. We also argue that judges necessarily engage in moral reasoning when applying conscience-based doctrines in evaluating past conduct. When they do so, we contend, they should explain their decisions in terms that expose their own moral reasoning, thereby making clear the need for moral engagement on the part of transacting parties.*

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## I Introduction

Conscience figures as an organising idea in private law in a variety of ways.[1] For the purposes of this article, our interest lies in those private law doctrines that, in one way or another, explicitly invoke conscience to set standards for citizens in their dealings with each other. Such invocations of conscience are most closely associated with equity, where conscience informs a range of doctrines that apply in contractual and other settings.[2]

In recent decades, the language of conscience has also been adopted by the Commonwealth Parliament in statutory provisions defining standards of business conduct. For example, s 20(1) of the *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') provides that '[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'. And s 21(1) of the same law states that, in transactional settings that entail the provision of goods or services, '[a] person must not … engage in conduct that is, in all the circumstances, unconscionable'.[3] In what follows, we use the term 'conscience-based doctrines' to refer to both equitable and statutory doctrines which explicitly invoke conscience to set standards for transacting parties.

In this article, we argue that conscience-based doctrines can — and should — provide guidance for parties who are transacting with one another, so as to minimise the risk of unconscionable conduct arising in transactional settings. We argue that conscience-based doctrines might effectively achieve this objective by provoking moral reasoning on the part of transacting parties.

[1] See generally Sinéad Agnew, 'The Meaning and Significance of Conscience in Private Law' (2018) 77(3) *Cambridge Law Journal* 479.

[2] On an expansive view, all of equity is composed of conscience-based doctrines. However, in this article, we focus only on those equitable doctrines that explicitly invoke conscience in some way. Thus, for example, we do not address the complex superstructure of technical rules that makes up much of the law of trusts, even though the trust is, in a fundamental and general sense, an application of equity's conscience in property settings.

[3] *Competition and Consumer Act 2010* (Cth) sch 2 s 21(1) ('*Australian Consumer Law*'). These provisions have been transplanted into the financial services context in ss 12CA and 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*').

We also argue that judges necessarily engage in moral reasoning when applying conscience-based doctrines in evaluating past conduct. When they do so, we contend, they should explain their decisions in terms that expose their own moral reasoning, thereby making clear the need for moral engagement on the part of transacting parties.

Our analysis proceeds in four parts. In Part II, we consider conscience-based doctrines themselves, emphasising the desirability of such doctrines provoking moral reasoning in transactional settings. In Part III, we consider some threshold questions that arise once the role of the judge in giving effect to conscience-based doctrines is in view; these threshold questions concern judicial legitimacy and capability. In Part IV, we consider how judges might best ensure that conscience-based doctrines are fit to provoke moral reasoning, paying special attention to the communicative function of those doctrines. Part V concludes by placing judicial contributions to the operation of conscience-based doctrines in wider context, noting the important roles that lawyers, regulators and the business community itself must play if conscience-based doctrines are to be truly effective.

## II Conscience-Based Doctrines and Moral Reasoning in Transactional Settings

Conscience-based doctrines are often analysed and evaluated with reference to the contributions they make to the resolution of disputes by adjudication. In such remedial settings, conscience-based doctrines enable judges to engage in fact-sensitive assessments often focused on a defendant's conduct, and thereby achieve outcomes in justice that would not be available otherwise.[4] Characterised less benignly, conscience-based doctrines are said to invite judges to interfere with the rights, duties, powers and liabilities of parties to private law disputes in ways that ought to be of concern in light of rule of law values.[5]

[4] See PA Keane, 'The 2009 WA Lee Lecture in Equity: The Conscience of Equity' (2010) 10(1) *Queensland University of Technology Law and Justice Journal* 106, 114; Justice James Allsop, 'Statutes and Equity' [2019] *Federal Judicial Scholarship* 16 <http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/FedJSchol/2019/16.html>, archived at <https://perma.cc/P7QH-86N5>; *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 118–19 (Dixon CJ, McTiernan and Kitto JJ) ('*Jenyns*'). Note that the demands of conscience might also apply to a plaintiff's conduct in appropriate cases: *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 400 [16] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ) ('*Kakavas*').

[5] See, eg, Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *Western Australian Law Review* 1, 16–17; Rohan Havelock, 'Conscience and Unconscionability in Modern Equity' (2015) 9(1) *Journal of Equity* 1, 20–4; Justice AS Bell, 'An Australian International Commercial Court: Not a Bad Idea or What a Bad Idea?' (Speech, ABA Biennial International Conference, 12 July 2019) 27 [71].

From time to time, key cases — usually but not invariably arising in equity — provide focal points for debate about this remedial operation of conscience-based doctrines. The decision of the Court of Appeal of England and Wales in *Pennington v Waine*, in which the Court invoked the demands of conscience to perfect an imperfect gift, was one such case.[6] The decision of the Supreme Court of the United Kingdom in *Pitt v Holt*, in which Lord Walker adopted a broad conscience-based approach to the question whether a mistaken gift should be set aside in equity, was another.[7]

Our starting point in this article is that, while conscience-based doctrines perform an important remedial service in the setting of adjudication, they should also have a forward-looking operation, beyond adjudicative settings, helping to set standards and expectations for parties transacting with each other. To understand why, we need only reflect on recent Australian developments.

In February 2019, Commissioner Kenneth Hayne submitted his final report in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.[8] The report documented widespread predatory behaviour in the provision of banking and financial services. Such behaviour included pressuring customers to enter into loan or insurance arrangements in circumstances where those customers were not likely to be able to make proper judgments as to their best interests;[9] it also included charging fees for financial adviser services in cases where advisers were not allocated or customers were dead.[10]

2019 also saw the publication of an equally concerning report by the Australian Securities and Investments Commission ('ASIC'), *Consumer Credit Insurance: Poor Value Products and Harmful Sales Practices*.[11] That report described a range of harmful conduct prevalent in the consumer credit insurance industry, including selling consumer credit insurance to consumers who were ineligible to claim for or unlikely to need such insurance,[12] pressure selling and

[6] [2002] 1 WLR 2075, 2090–2 [64]–[66] (Arden LJ, Clarke LJ agreeing at 2105 [117], Schiemann LJ agreeing at 2105 [118]).

[7] [2013] 2 AC 108, 156–8 [124]–[128] (Lord Walker for the Court).

[8] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019) ('*Royal Commission Final Report*').

[9] Ibid vol 1, 280–2.

[10] Ibid vol 1, 150–1.

[11] Australian Securities and Investments Commission, *Consumer Credit Insurance: Poor Value Products and Harmful Sales Practices* (Report No 662, July 2019).

[12] Ibid 13.

other unfair sales practices,[13] and charging premiums even though consumers had no credit arrangements in place.[14] Following the publication of the report, ASIC exercised its enforcement powers to secure remediation for affected consumers, and in May 2020 it reported that it had secured over $160 million for the benefit of over 434,000 consumers.[15]

The bleak Royal Commission and ASIC reports of 2019 raise serious questions about conduct in the Australian business community, especially among parties that enjoy considerable market power. Indeed, as Commissioner Hayne put it in an interim report, when asking about the motivations underpinning the practices in question, '[t]oo often, the answer seems to be greed — the pursuit of short term profit at the expense of basic standards of honesty'.[16] Such widespread, even systemic, abuses call for legal responses that go beyond the application of legal rules and principles in the resolution of disputes. They call for regulation. There are numerous potential sources of such regulation; for present purposes, our interest is in the potential of equitable and statutory conscience-based doctrines to operate beyond adjudicative settings and help to set standards and expectations of conduct that might contribute to a business culture in which exploitative practices have no place and in which litigation following unconscionable conduct is minimised as a result.

At times, an objective of guiding conduct is explicit in conscience-based doctrines. For example, s 20(1) of the *Australian Consumer Law* is expressed in imperative language, directed at transacting parties, that clearly reflects a legislative purpose to impose standards on those parties and thereby influence their behaviour: 'A person *must not* … engage in conduct that is unconscionable'.[17] To use the language of Keane J of the High Court of Australia in the recent case of *Australian Securities and Investments Commission v Kobelt* ('*Kobelt*'), this provision articulates 'a statutory norm of conduct'.[18]

[13] Ibid 15.

[14] Ibid 14.

[15] Australian Securities and Investments Commission, '20-115MR ASIC Secures over $160 Million in Remediation for Junk Consumer Credit Insurance' (Media Release, 13 May 2020) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-115mr-asic-secures-over-160-million-in-remediation-for-junk-consumer-credit-insurance/>, archived at <https://perma.cc/A92M-L4AM>.

[16] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 28 September 2018) vol 1, xix.

[17] *Australian Consumer Law* (n 3) s 20(1) (emphasis added). See also s 21(1). Compare the remedial focus of s 90K(1)(e) of the *Family Law Act 1975* (Cth): 'A court may make an order setting aside a financial agreement … if, and only if, the court is satisfied that … a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable'.

[18] (2019) 267 CLR 1, 50 [122] ('*Kobelt*').

At other times, an objective of guiding the conduct of transacting parties is not explicit in conscience-based doctrines: for example, in the case of equitable doctrines under which a decision-maker may set aside a contract on the basis that one party to it has, in some legally significant way, exploited the other.[19] But even in remedial settings where conscience-based doctrines do not explicitly aim to guide transacting parties, there are reasons to think that, to some degree, they might be deployed to provide such guidance. After all, even where conscience-based doctrines are applied in adjudication, their application is explained and justified in written statements of judicial reasoning that can function as sources of guidance to parties in analogous cases.[20]

Conscience-based doctrines might guide conduct in transactional settings in various ways. The guidance offered might be specific and tailored to particular circumstances. To illustrate, consider *Garcia v National Australia Bank Ltd* ('*Garcia*'), in which the High Court set aside a guarantee given by a wife in respect of her husband's business debts.[21] The majority found that it would be unconscionable for the creditor to take the benefit of the guarantee in light of the guarantee's voluntary character, the relationship of trust and confidence between the wife and the husband, and — critically for present purposes — the fact that the creditor took no steps to explain the transaction to the wife or to ensure that such an explanation had been provided by a third party.[22] In its reasoning, the majority thus laid out a 'roadmap' for creditors seeking guarantees in circumstances analogous to those in *Garcia*. According to the roadmap, the creditor who provides or procures an explanation of the transaction in which the guarantee is sought may minimise the risk of liability on the grounds of conscience. As Kirby J put it in his separate judgment in *Garcia*, by following this roadmap, '[b]anks and other credit providers can protect themselves from this result. Most already do so'.[23]

[19] For example, consider the doctrine of unconscionable dealing developed by the High Court of Australia in landmark cases such as *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 ('*Amadio*'), *Kakavas* (n 4), *Thorne v Kennedy* (2017) 263 CLR 85 ('*Thorne*') and *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409 ('*Stubbings*'). Exploitation is considered legally significant where an innocent party is subject to special disadvantage, and another party unconscientiously takes advantage of that special disadvantage: *Kakavas* (n 4) 439–40 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[20] Matthew Harding, 'Equity and the Rule of Law' (2016) 132 (April) *Law Quarterly Review* 278, 292–4.

[21] (1998) 194 CLR 395, 411–12 [42]–[46] (Gaudron, McHugh, Gummow and Hayne JJ, Kirby J agreeing at 436 [84], Callinan J agreeing at 443 [113]) ('*Garcia*').

[22] Ibid 409 [31], 411–12 [42]–[43] (Gaudron, McHugh, Gummow and Hayne JJ).

[23] Ibid 435 [82]. See also the very detailed roadmap laid out in the judgment of Lord Nicholls in *Royal Bank of Scotland plc v Etridge [No 2]* [2002] 2 AC 773, 804–6 [50]–[57], 811–12

The guidance supplied by the Court in *Garcia* involved the applicable conscience-based doctrine being distilled into a definitive statement of what should, or should not, be done in a transaction of a particular kind in order to avoid the charge of unconscionability. Scholars with an interest in equity have sought, however, to defend the more ambitious claim that conscience-based doctrines might guide the conduct of parties in transactional settings in some generalised way. This idea was recurrent in the seminal work of Paul Finn, who viewed conscience as a source of overarching standards governing transactional life.[24] In earlier work, one of us has emphasised the sense in which equity's conscience-based doctrines are expressive, signalling to commercial parties what is expected of them when dealing with one another.[25]

Similarly, Irit Samet has argued that equity's conscience-based doctrines perform an important communicative function, 'alert[ing] people to the fact that Equity takes serious consideration of the interpersonal morality aspect of their relationship with other players in the market',[26] and 'effectively *communicat*[*ing*] to the citizenry that they are expected to make full use of their capability as moral reasoners when they head off to market'.[27] And Sinéad Agnew has argued that

> the language of conscience has a valuable role to play in encouraging moral agency … [It] suggests that if the defendant has knowledge of the relevant facts, this activates her capacity for moral reasoning [so] … that she can work out what she ought, morally, to do in the circumstances.[28]

These arguments identify a general sense in which conscience-based doctrines might guide the conduct of transacting parties by provoking moral reasoning on the part of such parties when deciding how to act in respect of counterparties to transactions. The arguments also suggest a conduct-guiding role for conscience-based doctrines that largely escapes the criticisms often directed at such doctrines. Such criticisms typically proceed from rule of law values and target

[79]–[80] ('*Etridge*'). But note that, in some circumstances, not even procuring independent legal advice about a transaction will protect a party from the demands of conscience-based doctrines as they apply to that transaction: *Thorne* (n 19) 128–9 [123] (Gordon J); *Etridge* (n 23) 798 [20] (Lord Nicholls); *Stubbings* (n 19) 420 [47]–[49] (Kiefel CJ, Keane and Gleeson JJ).

24 See, eg, Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17(1) *Melbourne University Law Review* 87, 87–90; Paul Finn, 'Unconscionable Conduct' (1994) 8(1) *Journal of Contract Law* 37, 47–50.

25 Harding, 'Equity and the Rule of Law' (n 20) 286, 295.

26 Irit Samet, *Equity: Conscience Goes to Market* (Oxford University Press, 2018) 43.

27 Ibid 62 (emphasis in original).

28 Agnew (n 1) 480, 487.

conscience-based doctrines on the basis that conscience is a vague notion; thus, for example, Peter Birks famously argued that '"unconscionable" is so unspecific that it simply conceals a private and intuitive evaluation. … The law must be so stated as to facilitate prediction and advice'.[29]

Such rule of law objections might have traction to the extent that conscience-based doctrines aim to guide conduct by spelling out rules and principles designed to influence the behaviour of transacting parties.[30] It seems to us, however, that these objections have much less traction against the proposition that conscience-based doctrines should be deployed to provoke moral reasoning. Here, indeed, it is arguable that the very vagueness of conscience-based doctrines is what might enable them to be effective. Because of the vagueness of conscience, those who would refer to conscience-based doctrines in deciding how to act cannot do so by simply following legal rules or applying legal principles. Rather, they must think for themselves about how to act, and they must do so by looking beyond the demands of law to the demands of morality in the specific factual settings in which they are situated.[31]

We should emphasise that we are not here concerned with giving a descriptive or interpretive account of conscience-based doctrines. Hence we say nothing further about whether such doctrines seek to provoke moral reasoning on the part of transacting parties, nor about the extent to which such doctrines do in fact provoke moral reasoning. It will suffice to underscore that Commissioner Hayne's findings suggest that, at the present time in Australia, conscience-based doctrines do not do enough on either front.

Instead, we make an avowedly normative claim. We contend that conscience-based doctrines *can* and *should* seek to provoke moral reasoning in business settings. By that means, we argue, these doctrines can contribute to a business culture in which the likelihood of exploitative business practices is reduced. More particularly, we suggest, what a judge says in a judgment about conduct against conscience should be understandable and applicable in the marketplace as a source of tools for ethical conduct.

Assuming, then, that conscience-based doctrines should be oriented in this regulatory way, our interest in this article is in the role of the judge in ensuring

[29] Birks (n 5) 17, 97.

[30] That said, such objections are not usually sensitive to the institutional settings in which conscience-based doctrines are administered: Harding, 'Equity and the Rule of Law' (n 20) 290–1. Nor should we too easily assume that the rule of law is the only pertinent virtue of law: see John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012) 218–20.

[31] On why it is desirable, in light of democratic values, for the legal system to provoke moral reasoning on the part of citizens, see generally Seana Valentine Shiffrin, 'Inducing Moral Deliberation: On the Occasional Virtues of Fog' (2010) 123(5) *Harvard Law Review* 1214.

that the doctrines succeed in provoking moral reasoning and thereby contribute to a desirable business culture. We address that topic squarely in Part IV. First, however, we turn to some threshold questions that must be explored before we are in a position to evaluate the practices of judges in administering conscience-based doctrines. These threshold questions focus on judicial legitimacy and capability.

## III Judicial Legitimacy and Capability

When reflecting on the role of judges in giving effect to conscience-based doctrines, two threshold questions quickly emerge. The first is whether the practice of judges resolving disputes by invoking the demands of conscience is a legitimate practice. The second is whether, even if the practice is legitimate, judges have the capability to carry it out, in the sense of being well suited to doing so.

These questions of judicial legitimacy and capability have not always been viewed as problematic. Successive lord chancellors, sitting in a 'court of conscience', harboured no doubts about their authority, or their suitability, to decide questions of conscience. In *The Earl of Oxford's Case*,[32] Lord Ellesmere said:

> The Office of the Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts … [and] Wrongs … [W]hen a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgment, but for the hard Conscience of the Party.[33]

Similarly, modern Australian statutes that enact conscience-based doctrines both confer authority on judges to interpret and apply those doctrines and assume that judges are sufficiently qualified to do so.[34] That those authorising provisions have survived successive legislative reviews over several decades suggests that there is both legislative and community acceptance of the appropriateness of this being a judicial function.

Such acceptance does not, of course, foreclose debate on questions of legitimacy and capability. Since adjudicating questions of conscience entails the application of moral reasoning and the making of moral judgments on the facts of a case, this practice seems to raise questions of legitimacy and capability that

[32] (1615) 1 Ch R 5; 21 ER 485.

[33] Ibid 486–7. For a recent discussion placing this and similar dicta in their historical context, see generally Geoffrey Nettle, 'Trust and Commerce in Historical Perspective' (2021) 15(1) *Journal of Equity* 2.

[34] See, eg, *Australian Consumer Law* (n 3) ss 21–2. See also Explanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2011 (Cth) 23 [2.27]–[2.29].

have been much debated in respect of judicial decision-making in other settings. For example, such questions have been hotly contested in relation to the adjudication of human rights claims, with persistent complaints about the democratic illegitimacy of judges bringing their own moral, political and cultural convictions to bear on the task, and concerns about judges' lack of qualification to carry out the task.[35]

When considering concerns about judicial legitimacy and capability with respect to conscience-based doctrines, it is important to do so in a wider perspective. The popular conception of the judicial function owes much to legal formalism and the related idea that the task of the judge is to find the legal rule that covers the case at hand and to arrive at the result dictated by application of the rule.[36] On this view, the law is administered by a method of deductive reasoning.[37] While the specific implications of this method may be debated, legal formalists tend to maintain that there is no room within the method for the moral beliefs and sensibilities of the judge.[38]

A survey of a range of legal materials reveals, however, that much of what judges do necessarily involves moral reasoning and judgment.[39] In this light, the application of moral reasoning and judgment in the setting of conscience-based doctrines seems hardly remarkable or unusual. Putting the matter a different way, the wider perspective suggests that if judges should refrain from moral reasoning and judgment when administering conscience-based doctrines, then there are reasons to question judicial practice in a range of other areas as well.

[35] Antonin Scalia, 'Mullahs of the West: Judges as Moral Arbiters' (Speech, Warsaw, 24 August 2009) 14–15 <https://bip.brpo.gov.pl/pliki/12537879280.pdf>, archived at <https://perma.cc/AU63-MQXJ>, quoted in Samet (n 26) 205. See also Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999) 184–5; James Allan, 'The Three "Rs" of Recent Australian Judicial Activism: *Roach*, *Rowe* and (No)'riginalism' (2012) 36(2) *Melbourne University Law Review* 743, 746.

[36] See Brian Naylor, 'Barrett, an Originalist, Says Meaning of Constitution "Doesn't Change over Time"', *NPR* (online, 13 October 2020) <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time>, archived at <https://perma.cc/99N2-SVQD>. See generally Justice EW Thomas, 'Fairness and Certainty in Adjudication: Formalism v Substantialism' (1999) 9(3) *Otago Law Review* 459, 474 ('Fairness and Certainty in Adjudication').

[37] Thomas, 'Fairness and Certainty in Adjudication' (n 36) 474, citing Richard A Posner, 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986) 37(2) *Case Western Reserve Law Review* 179, 181–2.

[38] See Thomas, 'Fairness and Certainty in Adjudication' (n 36) 474.

[39] Such a survey also reveals that judges engage in lawmaking as well as law-applying: Lord Reid, 'The Judge as Law Maker' (1972) 12(1) *Journal of the Society of Public Teachers of Law* 22, 22.

Perhaps most obviously, statutes contain provisions that explicitly direct judges to make moral assessments. For example, consider the jurisdiction, conferred under Victoria's *Administration and Probate Act 1958* (Vic), to order that provision be made out of a deceased estate for the 'proper maintenance and support' of a person for whom the deceased 'had a moral duty to provide'.[40] As McMillan J said in *Morris v Smoel*, the basis of the jurisdiction is 'the enforcement of moral obligations',[41] demanding a 'broad evaluative judgment' and an assessment of whether or not a testator 'has failed in his or her moral duty'.[42]

Common law rules and doctrines, developed over years by judges themselves, also explicitly demand that judges make moral assessments on the facts of a case. In sentencing, for example, the judge is required to assess the 'moral culpability' of the offender, that moral judgment typically being central to the decision on the magnitude of the penalty.[43] If the offender's mental functioning was impaired at the time of the offending, the sentencing judge must decide whether, and to what extent, the offender's moral culpability was as a result reduced.[44] Similarly, in judicial review of an administrative decision, the common law principle of natural justice requires the judge to decide whether the decision-making process was procedurally fair.[45] What is sufficient for procedural fairness is a matter for evaluative judgment, taking into account not only the interests of the person affected but also the public interest.[46]

So far, we have sought to demonstrate that a range of legal rules and doctrines, both statutory and judge-made, explicitly require that judges engage in moral reasoning and exercise moral judgment. We now highlight a more pervasive role for judges as moral arbiters. Judges are daily confronted by the problem of indeterminacy in legal rules, in the sense that an applicable legal rule does not provide a clear answer to the legal question that is in dispute in the case. This problem of indeterminacy may arise because a rule is formulated in

[40] *Administration and Probate Act 1958* (Vic) ss 91(1), (2)(c).

[41] [2014] VSC 31, [32] ('*Morris*'). See also *Whitehead v State Trustees Ltd* [2011] VSC 424, [42]–[44] (Bell J).

[42] *Morris* (n 41) [34].

[43] See, eg, *DPP (Vic) v Neethling* (2009) 22 VR 466, 474 [38]–[39] (Maxwell P, Vincent JA and Hargrave AJA); *DPP (Vic) v Herrmann* [2021] VSCA 160, [14] (Maxwell P, Kaye, Niall, T Forrest and Emerton JJA); Judicial College of Victoria, *Victorian Sentencing Manual* (Online Manual, 4th ed, 23 December 2021) 102–3 <https://resources.judicialcollege.vic.edu.au/article/669236>, archived at <https://perma.cc/3WJ2-PDD4>.

[44] *R v Verdins* (2007) 16 VR 269, 274–5 [23]–[26] (Maxwell P, Buchanan and Vincent JJA); *Byast v The Queen* [2021] VSCA 344, [5]–[6] (Maxwell P and Emerton JA).

[45] See, eg, *Kioa v West* (1985) 159 CLR 550, 563 (Gibbs CJ), 585 (Mason J), 600–1 (Wilson J), 612–14 (Brennan J), 632–3 (Deane J).

[46] See *Roberts v Harkness* (2018) 57 VR 334, 354–5 [46]–[49] (Maxwell P, Beach and Niall JJA).

general terms — for example, 'maintain a safe system of work' — or because a rule is, as HLA Hart said, 'fundamentally *incomplete*: it provides *no* answer to the questions at issue'.[47]

Perhaps the best known examples of indeterminate legal rules are those imposing standards of 'reasonableness'. Judges must frequently apply such rules in the field of negligence law, where judgments of reasonableness are called for in formulating the duty of care and determining questions of breach.[48] But standards of reasonableness may be found in rules throughout the legal system. As John Gardner has argued, drawing on Aristotle, the 'moral case' for such standards is that 'if justice is to be done according to law, the law needs to save some space within its own rules for sensitivity to the particular facts of particular cases'.[49]

In circumstances of indeterminacy in legal rules, the act of adjudication necessarily calls for the exercise of moral judgment. Jeremy Waldron puts the point well:

> [M]any of the rules and standards … of positive law actually require those who administer them to exercise moral judgement. … [T]here are inevitably such gaps in positive law and such indeterminacy in the meanings of the legal rules as to make their administration in fact impossible without the exercise of moral judgement.[50]

Returning to the familiar example of rules imposing standards of reasonableness, Gardner argues that 'the zone that the reasonable person occupies' is legally deregulated, 'a zone of legally licensed adjudicative discretion'.[51] Within this legally deregulated zone, judges must make moral assessments if they are to reach reasoned decisions when adjudicating cases. The judicial method called for is described nicely by Lord Goff in a 1989 speech in which his Lordship characterises the judge's function as reasoning upwards from the facts of the case and 'searching for principles … which accord with a professionally developed sense of justice and an … intuitive sense of a just result'.[52]

[47] HLA Hart, 'Postscript', eds Penelope A Bulloch and Joseph Raz in HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 252, 252 (emphasis in original).

[48] *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–8 (Mason J); *Tame v New South Wales* (2002) 211 CLR 317, 379 [185] (Gummow and Kirby JJ). See also Justice Chris Maxwell, 'Too Much Law? Risk, Reasonableness and the Judge as Regulator' (2009) 14(2) *Deakin Law Review* 143, 152–8.

[49] John Gardner, 'The Reasonable Person Standard' [2019] *International Encyclopedia of Ethics* 1, 8. See also John Gardner, *Torts and Other Wrongs* (Oxford University Press, 2019) 273.

[50] Waldron, *Law and Disagreement* (n 35) 166.

[51] Gardner, *Torts and Other Wrongs* (n 49) 299.

[52] Lord Goff, 'The Future of the Law of Restitution' (1989) 12(1) *Sydney Law Review* 1, 2–3.

Once we appreciate how often legal rules and doctrines explicitly demand that judges undertake moral assessments, and we grasp the pervasiveness of indeterminacy in legal rules calling for moral judgment in adjudication, it seems that there is nothing unusual or anomalous about a judge being required by law to adjudicate questions of conscience. Rather, invoking the demands of conscience when resolving disputes seems consistent with fundamental features of adjudication that should be recognised as central to the delivery of justice.

Concerns that the practice of adjudicating questions of conscience lacks legitimacy should be seen in this light. Such concerns cannot be pressed in relation to adjudicating questions of conscience without, at the same time, being pressed in relation to adjudication writ large. And when pressed more generally in this way, the concerns seem implausible because they simply do not reflect the functional realities of adjudication. In the myriad ways we have described, the judge functions as a repository of the community's trust, charged with the responsibility of working with legal and moral resources in a reasoned and integrated way in resolving disputes.[53]

This vision of the judge as responsible for harnessing legal and moral resources in resolving disputes brings into focus the question of capability. Even if adjudicating questions of conscience is legitimate, why should the public repose trust and confidence in judges' capacity to succeed as moral reasoners? The answer to this question seems to matter greatly. After all, judges must develop habits of moral reasoning and judgment in settings where what is at stake is not their own conduct or their relationships with other people, but rather the rights and liabilities of parties before a court. And the coercive powers of the state underwrite the moral assessments that judges make in adjudication.

Aspects of the judicial role, and the institutional structure in which that role is carried out, suggest reasons to think that in fact judges are well-placed to engage in moral reasoning and make sound moral judgments. To begin with, in a country such as Australia, judges are largely insulated from political pressures and influences, enabling a focused engagement with moral considerations.[54] Adjudication responds piecemeal to the facts of individual cases,

[53] Thomas, 'Fairness and Certainty in Adjudication' (n 36) 462. See also Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford University Press, 2016) 18–27. This vision of the function of the judge seems to animate Samet's thesis that equity's contribution to the legal system is in 'ensuring that where legal liability is attached to an action, it closely follows the matrix of moral accountability for this action': Samet (n 26) 28. But one need not accept Samet's 'Accountability Correspondence' thesis as a theoretical justification of equity in order to adopt the vision of the function of the judge that it entails.

[54] See John Tasioulas, 'The Legal Relevance of Ethical Objectivity' (2002) 47(1) *American Journal of Jurisprudence* 211, 233.

creating conditions under which systemic, political factors are relatively unlikely to crowd out considerations of interpersonal morality between the parties.[55] Procedural rules and conventions tend to minimise factors such as bias that might corrupt moral reasoning.[56] The way in which cases fall to be adjudicated tends to emphasise aspects of those cases that engage moral considerations. Cases are framed and argued in respect of rights, duties, liabilities and powers, analytical categories that are readily understood in moral terms. Salient facts tend to relate to parties' states of mind and conduct vis-à-vis one another, the subject matter of morality.[57]

Moreover, judicial method seems well designed to inculcate in the judge a mindset that is conducive to moral reasoning and judgment. For example, as Samet puts it, 'judges become habituated to listening to both sides before making up their mind, gain proficiency at sifting truth from falsehood, and get accustomed to exercising a detached judgement'.[58] Moreover, judicial decisions are discursive and must meet an expectation that a coherent, integrated set of reasons, drawing on doctrinal and other resources from precedent cases, be offered in each case.[59]

More specifically, this expectation orients judges — in Waldron's words — to reason

> in the careful, measured, deliberative, and analytic way that moral philosophers think moral reasoners should reason … They define their terms, they separate different lines of reasoning, they pay attention to the logical force of the arguments they consider, they distinguish issues and discuss them in a certain order, they entertain objections to their own lines of reasoning and try to respond to them, and so on.[60]

When these aspects of the judicial method are added to the institutional position of judges, the constraints within which they operate, and the way in which cases are framed and argued before them, an overall case begins to emerge for thinking that judges are well-placed — perhaps very well-placed — to discharge

[55] Ibid.

[56] Samet (n 26) 206–7.

[57] See ibid 207, quoting Michael S Moore, 'Law as a Functional Kind' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Clarendon Press, 1992) 188, 230.

[58] Samet (n 26) 207.

[59] See Harding, 'Equity and the Rule of Law' (n 20) 292; Matthew Harding, 'Equity and the Value of Certainty in Commercial Life' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2019) 147, 161; Tasioulas (n 54) 233.

[60] Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7(1) *International Journal of Constitutional Law* 2, 4.

their responsibility to engage in moral reasoning and make moral judgments where required in the setting of adjudication.

In summary, then, there are reasons to think that concerns about legitimacy and capability are overstated when directed at the judicial practice of appealing to the demands of conscience when adjudicating disputes. To the extent that the reasons for decision in such cases can provide guidance to transacting parties, we suggest that the guidance emerges from a sound and defensible base. We need then to address the question whether prevailing judicial practice needs to change if conscience-based doctrines are to function as sources of guidance for transacting parties. In order to start answering that question, we must return to the capacity of these doctrines to communicate the moral purposes which are at stake.

## IV Judges and the Communicative Function of Conscience-Based Doctrines

Earlier, we argued that conscience-based doctrines should seek to guide conduct by provoking moral reasoning on the part of transacting parties. As scholars such as Samet and Agnew have highlighted, conscience-based doctrines might achieve such an objective by communicative means, signalling to parties that they are expected to be morally engaged and aware when they deal with one another.[61] And such a communicative function might be performed irrespective of any further guidance that conscience-based doctrines offer to transacting parties in the form of rules or principles specifying how to act.

We now consider the question of how effectively judges advance this communicative function. This question demands close attention to what judges do, and what they say they do, when they declare, interpret and apply conscience-based doctrines in adjudicative settings. Specifically, we consider two aspects of judicial practice that bear on the question of how the work of judges could enhance the communicative function of conscience-based doctrines. First, we consider 'objective' and 'subjective' dimensions of conscience-based doctrines as applied by judges. And secondly, we consider the linguistic choices made by judges when articulating conscience-based doctrines and applying them in adjudication. Throughout, we consider whether realising the communicative potential of conscience-based doctrines demands changes to judicial practice, concluding that judges may need to rethink conceptual and linguistic choices if this is to be achieved.

[61] See above nn 26–8 and accompanying text.

### A *'Objective' and 'Subjective' Dimensions*

Judges use the word 'objective' in two quite different ways to describe the application of conscience-based doctrines. On the one hand, the application of such doctrines is said to be objective in the sense that the judgment to be made of transacting parties' conduct does not defer to the parties' subjective moral beliefs about the propriety of that conduct. On this view, a defendant does not escape liability under a conscience-based doctrine simply because she believed that her actions were morally unimpeachable.[62] To the extent that judges refer to conscience-based doctrines as objective in this sense, the usage is largely uncontroversial, although there is always room for debate and disagreement about the extent to which objectivity is justified in one or another conscience-based doctrine given its precedential history and policy objectives.[63]

The second way in which judges describe the application of conscience-based doctrines as objective seems more controversial. According to this usage, the application, in adjudication, of the moral standards, values and principles on which the doctrines rest is properly unaffected by a judge's own moral beliefs and dispositions. On this view, judges applying conscience-based doctrines are not so much moral arbiters as moral conduits, expected to draw on an 'external' set of moral principles and community values and to do so in a detached, impersonal way.[64] Appellate courts frequently emphasise this understanding of the objectivity of conscience-based doctrines. Their decisions are replete with warnings against 'subjective evaluation of the justice of the case',[65] 'unprincipled and subjective judicial opinion',[66] 'high-level instinctive reaction',[67]

[62] See *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 398 (Gibbs J):

> It would not be just that a person who had full knowledge of all the facts could escape liability because his own moral obtuseness prevented him from recognizing an impropriety that would have been apparent to an ordinary man.

This was a case about knowing assistance in a breach of fiduciary duty: at 392; which is not ordinarily presented as a conscience-based doctrine. Nonetheless, Gibbs J's statement captures nicely the sense in which conscience-based doctrines are sometimes viewed as objective.

[63] For example, consider the debate about the High Court's recent emphasis on a 'predatory' state of mind in the unconscionable conduct doctrine: *Kakavas* (n 4) 439–40 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ), criticised in Rick Bigwood, 'Still Curbing Unconscionability: *Kakavas* in the High Court of Australia' (2013) 37(2) *Melbourne University Law Review* 463, 476–8, Jeannie Marie Paterson, 'Unconscionable Bargains in Equity and under Statute' (2015) 9(2) *Journal of Equity* 188, 197–9.

[64] See Samet (n 26) 207–10.

[65] *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 596 [76] (Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Hills Industries*').

[66] *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752, 1780 [59] (Lord Walker).

[67] *Kobelt* (n 18) 105 [302] (Edelman J).

'idiosyncratic notions of fairness and justice'[68] and even 'the formless void of individual moral opinion'.[69]

When judges view conscience-based doctrines this way, their concern seems to be to realise, in the application of the doctrines, the law's fundamental aspirations to certainty, consistency and predictability. This concern is an old one in the common law tradition, as is evidenced by the view expressed forcefully by Lord Camden, describing as follows the perceived dangers of judicial subjectivity: '[E]ach judge would have a distinct tribunal in his own breast, the decisions of which would be irregular and uncertain, and various, as the minds and tempers of mankind'.[70] The desire to avoid any appearance of subjectivity may also reflect what Samet describes as 'the judiciary's anxiety about their status as unelected and unrepresentative civil servants'.[71] Judges may be concerned that any explicit resort to personal values will be misunderstood as revealing a disregard of law or of the judicial obligation of impartiality.

While concern about judicial subjectivity and its implications for rule of law values is to be taken seriously, in our view it is neither possible nor desirable in the field of conscience-based doctrines for judges to avoid recourse to their own moral beliefs and dispositions altogether when making evaluative judgments about the conduct of defendants. Indeed, to some extent this seems to be precisely what conscience-based doctrines call for.

Those doctrines are organised around what have been described variously as 'broad normative standards'[72] and 'standards of indeterminate reference'.[73] As Nettle and Gordon JJ observed in *Kobelt*, 'evaluating whether conduct is unconscionable "is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules"'.[74] Rather, what is called for is 'a more comprehensive view … [that] looks to every connected circumstance

[68] *Muschinski v Dodds* (1985) 160 CLR 583, 615 (Deane J).

[69] Ibid 616 (Deane J), quoting *Carly v Farrelly* [1975] 1 NZLR 356, 367 (Mahon J) (Supreme Court of New Zealand).

[70] United Kingdom, *Cobbett's Parliamentary History of England*, 1774, vol 17, col 998, quoted in *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 211–12 [80] (McHugh J). See generally *Donaldson v Beckett* (1774) 2 Bro Parl Cas 129; 1 ER 837.

[71] Samet (n 26) 208.

[72] *Hills Industries* (n 65) 582 [25] (French CJ).

[73] *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 436 [58] (Allsop CJ), discussing Julius Stone, *The Province and Function of Law: Law as Logic, Justice, and Social Control* (Harvard University Press, 1950) 185–6.

[74] *Kobelt* (n 18) 59 [153], quoting *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 276 [304] (Allsop CJ) ('*Paciocco (FCAFC)*').

that ought to influence … [the court's] determination upon the real justice of the case'.[75]

The parallel with the 'reasonableness' standard, referred to earlier, is obvious. Here, as there, the judge must take a comprehensive, fact-sensitive, view, evaluating particular conduct in the light of values and norms expressed in general terms. Here, as there, doing 'real justice' requires the judge to engage with her subjective moral beliefs and sensibilities. However robust the evaluative framework, in the words of Justice EW Thomas, 'a subjective element remains'.[76]

It must be emphasised that the subjective moral judgments demanded by conscience-based doctrines are not at large. They are informed by the range of values and principles that have, over time, come to be associated with conscience-based doctrines through parliamentary deliberations and acts of judicial reasoning. For example, the values and principles which inform the standard of conscience imposed by s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') have been said to include

> 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; [and] the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing …[77]

Applying conscience-based doctrines requires moral judgments that are 'properly formed and instructed'[78] by such values and principles, as well as by

[75] *Kobelt* (n 18) 59 [150] (Nettle and Gordon JJ), quoting *Jenyns* (n 4) 119 (Dixon CJ, McTiernan and Kitto JJ), quoting *The Juliana* (1822) 2 Dods 504; 165 ER 1560, 1567 (Lord Stowell).

[76] Justice EW Thomas, 'The Conscience of the Law' (2000) 8 *Waikato Law Review* 1, 21. See also EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) 393. Thomas also makes the cogent point that subjective moral engagement is required given that judges are sworn to do justice according to law and must therefore be satisfied in every case that their judgments accord with the moral demands of justice: Thomas, 'The Conscience of the Law' (n 76) 20–1.

[77] *Paciocco (FCAFC)* (n 74) 274 [296] (Allsop CJ), adopted in *Kobelt* (n 18) 17 [14] (Kiefel CJ and Bell J). See also Thomas, 'The Conscience of the Law' (n 76) 3, noting that the law's conscience is its 'ultimate abhorrence of exploitation'.

[78] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 227 [45] (Gleeson CJ).

the standards of conduct that they animate. In this way, these doctrines continue a tradition that dates back at least to the time of Lord Nottingham, who famously repudiated the notion that equity proceeded by the application of a judicial conscience '*naturalis et interna*', as opposed to one '*civilis et politica*, and tied to certain measures'.[79]

That said, it is, of course, the very generality of these standards, values and principles which obliges the judge to bring to bear her own moral beliefs and sensibilities in assessing whether, in the circumstances of the case, a 'line has been crossed'.[80] As we have argued already, in interpreting the demands of open-textured standards, values and principles with reference to the facts of a particular case, the judge is properly engaged in moral reasoning. And necessarily entailed in moral reasoning — practical reasoning about what to do and decide in the circumstances at hand — is the application of moral beliefs and faculties. For the judge to attempt to put such beliefs and faculties to one side would thus be to misunderstand the nature of the task she has been given.

The reality of subjective moral engagement on the part of judges applying conscience-based doctrines is illustrated by the division of judicial opinion in *Kobelt* itself. The case focused on an informal system of credit operated by the defendant and used by members of remote Indigenous communities.[81] Four members of the High Court concluded that the defendant's operation of this credit system was not unconscionable under s 12CB of the *ASIC Act*,[82] while the other three concluded that it was.[83] In part, this division among members

[79] *Cook v Fountain* (1676) 3 Swans 585; 36 ER 984, 990 (emphasis in original). Indeed, as Peter Turner has pointed out to us, the tradition predates Lord Nottingham, even though the lord chancellors of the late medieval and early modern periods drew on ecclesiastical sources: see Mike Macnair, '*Coke v Fountaine* (1676)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 33, 56–8.

[80] Speaking of equity, Henry E Smith writes: 'As is well known, equity relies directly on basic morality. … [E]quity receives much of its substance from everyday moral disapproval of deceptive behavior': Henry E Smith, 'Equity as Meta-Law' (2021) 130(5) *Yale Law Journal* 1050, 1123.

[81] *Kobelt* (n 18) 13 [4] (Kiefel CJ and Bell J).

[82] Ibid 18–19 [19], 35–6 [79] (Kiefel CJ and Bell J), 46 [111] (Gageler J), 47 [115] (Keane J).

[83] Ibid 85 [258], 86 [262], 87 [264] (Nettle and Gordon JJ), 107 [312]–[313] (Edelman J). Indeed, Nettle and Gordon JJ were explicitly mindful of the potential for judicial divergence in the moral assessment of cases such as *Kobelt* (n 18): 'Certainly, in any given case, a conclusion as to what is, or is not, against conscience may be contestable: so much is inevitable given that the standard is based on a broad expression of values and norms': at 59 [153], citing *Paciocco (FCAFC)* (n 74) 276 [304] (Allsop CJ). See also *Stubbings* (n 19), where the High Court unanimously overturned the Victorian Court of Appeal's decision — also unanimous — that the conduct in question was not unconscionable, and affirmed the trial judge's decision that it was: at 421 [52]–[53] (Kiefel CJ, Keane and Gleeson JJ), 429–30 [94]–[95] (Gordon J), 448 [173]–[174] (Steward J).

of the High Court reflected different views as to the proper interpretation of the statutory conscience-based doctrine in s 12CB of the *ASIC Act*. But the division also seemed to extend to the moral beliefs brought to bear on evaluation of the defendant's conduct, given the cultural pluralism evident in the facts of the case.

Thus, Gageler J emphasised the distinct cultural norms and practices of the Indigenous communities concerned in arriving at a finding that the defendant's conduct was not unconscionable on the facts.[84] In contrast, Nettle and Gordon JJ explicitly found that the defendant's conduct was unconscionable notwithstanding those distinct cultural norms and practices.[85] Entailed in this difference of opinion appear to be divergent beliefs about the extent to which the cultural norms and practices in question should inform an overall evaluation of the defendant's conduct. This is not a divergence of beliefs about questions of legal interpretation. It seems rather to be straightforwardly a divergence of beliefs about questions of morality raised by the facts of the case.

*Kobelt* was undoubtedly an unusual and difficult case.[86] Nonetheless, that the judges in *Kobelt* differed in the moral beliefs they brought to their assessments of the defendant's conduct seems hardly surprising. Given that conscience-based doctrines demand subjective moral engagement on the part of judges, and given that people do differ in their moral beliefs and dispositions, it seems unreasonable to expect that different judges will achieve uniformity on pertinent moral questions, even when presented with the same facts and asked to apply the same broad standards and values.

That said, it seems more reasonable to expect that judges will achieve some consistency of method in arriving at the requisite moral judgments. In our view, one appropriate method might resemble the philosophical notion of 'reflective equilibrium', best articulated in the work of John Rawls.[87] Reflective equilibrium is iterative.[88] It calls for preliminary judgments based on moral intuitions to be formed and then tested with reference to values, principles and other relevant resources.[89] Judgments might then be refined, amended or even abandoned,[90] but at the same time they might inform and influence the values and principles that bear on the moral deliberation in question. The key point for present purposes is that, according to this method, a judge's moral intuitions play a critical

[84] *Kobelt* (n 18) 40 [94], 45–6 [109]–[111].

[85] Ibid 85–6 [259]–[262], 87 [264].

[86] On this, see the interesting dicta of Gageler J: ibid 40–1 [93]–[95].

[87] John Rawls, *A Theory of Justice* (Belknap Press, rev ed, 1999) 18, 42–3.

[88] Ibid.

[89] Ibid 42–3.

[90] See ibid.

role in the process of moral deliberation and judgment, albeit in a constrained, bounded way.[91]

To recap, then: judges might understand conscience-based doctrines as objective in the sense that application of the doctrines does not entail deference to the subjective moral beliefs of transacting parties. This is largely uncontroversial. At the same time, though, judges might understand conscience-based doctrines as objective in the sense that those doctrines do not require them to engage their own moral beliefs and dispositions. This view is difficult to defend. Conscience-based doctrines call for subjectivity on the part of judges, within bounds set by the values and principles informing the standards of conduct to which conscience-based doctrines refer. In our view, an appropriate method for such subjective moral engagement is something similar to the philosophical notion of reflective equilibrium.

Turning, then, to the communicative potential of conscience-based doctrines, it seems arguable that the prevailing judicial orthodoxy — emphasising objectivity and at the same time deprecating subjective moral judgment — is inimical to the fulfilment of this potential. In mischaracterising the nature of the task that judges are called upon to discharge when applying conscience-based doctrines to the facts of individual cases, this approach also obscures the fact that transacting parties are expected to engage their own moral sensibilities when deciding what to do. The approach implies that conscience-based doctrines embed standards that are somehow rarefied or out of reach, or that the category of conscience is, in fact, empty.

What should be emphasised, instead, is the accessibility of the standards to which conscience-based doctrines refer, as well as the scope these standards provide for individual moral judgment. The language of 'conscience' is helpful in this regard, as we discuss in more detail below. Precisely because the word 'conscience' is widely understood to refer to a subjective moral compass, judges, by invoking that word, may emphasise that conscience-based doctrines invite engagement with moral beliefs even if they do not defer to such beliefs. And, by exposing their own moral reasoning, judges can communicate to transacting parties that the demands of conscience are comprehensible, relevant to parties' circumstances, and capable of practical application in a commercial setting.

A judge who openly acknowledges the element of subjective moral engagement called for by conscience-based doctrines does not thereby enable a defendant to argue that, according to her own moral compass, there is propriety where others see deception or exploitation. As we have already argued, judges administering conscience-based doctrines are required to work with the values

[91] See ibid 40–6.

and norms that inform the standards of conduct to which the doctrines refer. These values and norms are acknowledged in public acts of reasoning by legislatures and courts and they enjoy a high degree of community consensus, even if their demands in difficult cases might be a matter of dispute. They include norms against lying, cheating, stealing and exploiting others. Just as judges must have recourse to these values and norms when making the moral judgments demanded by conscience-based doctrines, so must transacting parties themselves.

Moreover, because the values and norms in question enjoy wide community acceptance, it seems intuitively plausible that, much of the time, judges' subjective moral assessments about conduct in commercial settings will converge with those of transacting parties.[92] To the extent that this sort of convergence is present, the fact of judicial subjectivity in the administration of conscience-based doctrines might be no impediment to transacting parties deriving even relatively specific reliable guidance from judges' reasoning in cases where conscience-based doctrines are applied.

Nonetheless, a degree of divergence between the moral evaluations of judges and those of transacting parties remains inescapable, given the indeterminacy of the standards embedded in conscience-based doctrines and the subjective aspects of the judgments required. This is an extension of the point we noted earlier with reference to *Kobelt*: that different judges can arrive at different moral assessments on the same facts and with reference to the same values and norms. Does the possibility of this divergence between judicial and non-judicial moral evaluations inhibit the ability of conscience-based doctrines to achieve the sort of communicative effect that can provoke moral deliberation? There are reasons to think not.

As we have sought to argue, judicial transparency about the essential subjectivity of the moral judgments called for is the key to provoking moral deliberation by transacting parties. If, by this means, there can be a general enlivening of moral self-awareness and responsibility in the conduct of commercial dealings, then conscience-based doctrines will have effectively communicated to transacting parties what is expected of them: that they consult their own consciences in deciding how to act. Such guidance is valuable even if different parties reflecting morally on what they ought to do will arrive at different moral judgments, and even if there is no single correct answer to the moral question under consideration. On this view, the activation of moral engagement is critical because it changes the parameters of commercial decision-making and promotes a culture of ethical conduct.

[92] Thomas, 'Fairness and Certainty in Adjudication' (n 36) 470.

Pushing the point in another direction, we suggest that it may be desirable for there to be a degree of uncertainty on the part of transacting parties about the sorts of moral evaluations judges might arrive at given particular facts, values and norms. Such uncertainty might provoke caution in commercial dealings; after all, from a moral standpoint, caution is appropriate, and perhaps even required, when one is not certain what to do. To the extent that they provoke such a cautious posture by their very indeterminacy in application, conscience-based doctrines may achieve an enhanced conduct-guiding effect, even if it is relatively imprecise.[93]

### B *Linguistic Choices*

Whether the communicative potential of conscience-based doctrines is to be realised will depend to a great extent on how judges choose to articulate those doctrines. Linguistic choices that render the doctrines obscure will obviously inhibit those doctrines' capacity to guide transacting parties. This observation is not limited to conscience-based doctrines; in general terms, as Holmes J said in *McBoyle v United States*, 'it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed'.[94] Nonetheless, the observation is of particular interest in the case of conscience-based doctrines because their applicability has so often been explained in arcane language.[95] As a result, conscience-based doctrines present as unusually susceptible to the charge of obscurity.

One possible influence helping to explain obscurity in the articulation of conscience-based doctrines is the setting in which those doctrines are declared, developed and applied by judges. Judges administering conscience-based doctrines invariably do so in discharging their public duty to adjudicate disputes. This necessitates an ex post facto standpoint that looks closely to the facts of individual cases and, as we have seen, entails the engagement and application of moral beliefs and dispositions within bounds established by a construct of standards, values and principles. The focus is typically on the defendant's

[93] To be sure, such caution may generate certain costs. For example, productive economic activity might be eschewed in circumstances where parties adopt a cautious attitude to transacting. However, such costs might be acceptable and even necessary to ensure that transacting parties are morally engaged in the valuable ways described in the text.

[94] 283 US 25, 27 (1931).

[95] See, eg, *Kobelt* (n 18) 39–40 [91] (Gageler J), quoting *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525, 587 [188] (Gageler J) ('*Paciocco (HCA)*'), quoting *A-G (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121] (Spigelman CJ) ('*World Best Holdings*').

conduct, and the question is usually taken to be whether, according to the standard embedded in the applicable conscience-based doctrine, that conduct warrants the epithet 'unconscionable' or 'unconscientious'.[96]

The communicative function of conscience-based doctrines is not, in our view, advanced by the use of such language. To describe the past conduct of a particular defendant as 'unconscionable' provides no guidance to other transacting parties about what is expected of them. For an individual judgment to serve as a guide for future conduct, the judge needs to abstract from the particulars of the individual case and address transacting parties explicitly and in general and imperative terms.

As we have suggested, such guidance can be general or specific. At the general level, the judge could state clearly that transacting parties are expected to search their own consciences and deliberate from a moral point of view when dealing with one another. The judge's own process of moral reasoning in arriving at her decision could be used to illustrate the kind of moral deliberation required. To provide more specific guidance, the judge might identify the salient features of the case which led her to conclude that the defendant's conduct did, or did not, depart from the demands of conscience. She might articulate the specific moral propositions that have informed her application of relevant values and norms to the facts of the case. Where a finding of unconscionability is made, the judge might use a counterfactual to demonstrate how a breach of the conscience standard could have been avoided. Expositions of this kind not only assist litigants but promote a wider understanding of what the conscience standard requires in transactions of a particular type. As matters currently stand, such messages must be largely inferred from conclusions about 'unconscionability' or 'unconscientiousness'.

It is crucial that arcane terminology be eliminated if the communicative potential of conscience-based doctrines is to be fulfilled. Consider the phrase 'moral obloquy', a phrase used by some judges to identify the quality of conduct which breaches the statutory standard of conscience. In *Kobelt*, Gageler J reflected on the phrase in terms which bear setting out at length:

> In *Paciocco v Australia & New Zealand Banking Group Ltd*, I referred to unconscionable conduct within the meaning of s 12CB [of the *ASIC Act*] as requiring

[96] At times, judges express a preference for 'unconscientious', seemingly because of its clear focus on a defendant's conduct as opposed to a set of circumstances taken together: see, eg, *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 320 [5], 324 [20]–[21] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ). Recently, the word 'unconscionable' was said to be 'the language of business morality': *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40, [91] (Allsop CJ, Besanko and McKerracher JJ).

> 'a "high level of moral obloquy" on the part of the person said to have acted unconscionably'. 'Moral obloquy' is arcane terminology. Without unpacking what a high level of moral obloquy means in a contemporary context, using that arcane terminology does nothing to elucidate the normative standard embedded in the section. The terminology also has the potential to be misleading to the extent that it might be taken to suggest a requirement for conscious wrongdoing. My adoption of it has been criticised judicially and academically. The criticism is justified. I regret having mentioned it.
>
> What I meant to convey by the reference was that conduct proscribed by the section as unconscionable is conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience. To that view of the statutory standard I adhere.[97]

We share Gageler J's concern that such rarefied language is antithetical to the communicative function of conscience-based doctrines. Given that compliance with the law depends upon its being made comprehensible to those who are expected to comply, it is puzzling that in *Kobelt* other members of the High Court persisted with the language of 'moral obloquy'.[98]

The charge of obscurity brings us back to the language of conscience itself. Terms such as 'unconscionable' and 'unconscientious' are hardly ever encountered in ordinary usage.[99] In most settings and for most practical purposes, these terms are effectively meaningless. This suggests that the communicative function of conscience-based doctrines might be optimised by departing altogether from the language of conscience in favour of some other, more accessible, language.

Academics and lawmakers have in the past considered whether the statutory language of conscience should be replaced with the language of unfairness.[100] To date, this has not occurred. As Edelman J pointed out forcefully in *Kobelt*, one consequence has been a continued judicial reluctance to allow the statutory standard to develop separate from equity's unconscionable dealing doctrine,

[97] *Kobelt* (n 18) 39–40 [91]–[92] (citations omitted). In this passage, Gageler J referred to his judgment in *Paciocco (HCA)* (n 95) 587 [188], which in turn referred to the judgment of Spigelman CJ of the New South Wales Court of Appeal in *World Best Holdings* (n 95) 583 [121].

[98] See, eg, the language of Keane J in *Kobelt* (n 18) 48–9 [118]–[120] and, perhaps more equivocally, that of Kiefel CJ and Bell J: at 30–1 [59]–[60].

[99] Nicholas Felstead, 'Beyond Unconscionability: Exploring the Case for a New Prohibition on Unfair Conduct' (2022) 45(1) *University of New South Wales Law Journal* 285, 300.

[100] See *Kobelt* (n 18) 97–8 [286], 98 [288], 99–100 [290] (Edelman J) for a discussion of the legislative history in this regard. See generally JM Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44(1) *Journal of Consumer Policy* 1.

despite a clear legislative intention to the contrary.[101] A further consequence is that the statutory provisions retain an air of obscurity that would not attend references to 'unfair' conduct. After all, the language of unfairness is widely used and readily understood in daily life in a way that the term 'unconscionable' is not.[102]

The judgment of Edelman J in *Kobelt* is a reminder that judges have only limited scope to depart from the language of conscience when administering conscience-based doctrines, even if they wish to do so. In the case of statutory provisions that explicitly refer to 'unconscionable' conduct, judges are duty-bound to interpret that language as they find it. And, even in the case of equitable doctrines, precedential considerations preclude any radical departure from past conceptual framings and associated language. Nonetheless, if the language of conscience is unhelpfully obscure, then there may be an argument for judges to minimise their reliance on such language when administering conscience-based doctrines, even if they are required to resort to it to some extent.

Judges might, for example, start to emphasise that the demands of conscience-based doctrines resolve into a requirement that 'unfair' conduct be avoided. Indeed, to some extent an association between conscience-based doctrines and the language of unfairness is already present in the law. As members of the High Court pointed out in *Kobelt*,[103] for example, the *ASIC Act* authorises judges to have regard to whether a defendant engaged in 'unfair tactics' when assessing whether that defendant's conduct violated s 12CB of the Act.[104] Moreover, the language of unfairness may be found in other statutory provisions that impose standards and expectations on transacting parties in much the way that conscience-based doctrines do.[105]

[101] *Kobelt* (n 18) 102 [295] (Edelman J):

> This legislative history clearly demonstrates that although Parliament's proscriptions against unconscionable conduct initially built upon the equitable foundations of that concept, over the last two decades Parliament has repeatedly amended the statutory proscription against unconscionable conduct in continued efforts to require courts to take a less restrictive approach shorn from either of the equitable preconditions imposed in the 20th century, by which equity had raised the required bar of moral disapprobation.

See also Jeannie Marie Paterson, Elise Bant and Matthew Clare, 'Doctrine, Policy, Culture and Choice in Assessing Unconscionable Conduct under Statute: *ASIC v Kobelt*' (2019) 13(1) *Journal of Equity* 81, 109, quoting *Kobelt* (n 18) 106 [311] (Edelman J).

[102] For an insightful reflection on those propositions, see Felstead (n 99) 303–4.

[103] *Kobelt* (n 18) 30 [58] (Kiefel CJ and Bell J), 78 [233] (Nettle and Gordon JJ).

[104] *ASIC Act* (n 3) ss 12CC(1)(d), (2)(d). See also Edelman J's judgment in *Kobelt* (n 18), describing the historical association between the unconscionable dealing doctrine and the language of unfairness, even if this association does not persist today: at 94–102 [279]–[295].

[105] See, eg, *Fair Trading Act 1986* (NZ) ss 46I, 46L. See also *Contracts Review Act 1980* (NSW) ss 7, 9, directed against 'unjust' contract terms.

When compared to adjectives such as 'unconscionable' and 'unconscientious', the language of unfairness seems a more suitable vehicle for enabling conscience-based doctrines to discharge their communicative function.[106] The position is different, however, in respect of the word 'conscience' itself. If, as we think, conscience-based doctrines should seek to guide conduct by provoking moral deliberation on the part of transacting parties, then the word 'conscience' seems well suited to communicating to such parties what is expected of them. The idea of the conscience as a subjective moral compass is widely understood, and the word 'conscience', used to denote this idea, is in everyday use.[107]

A judicial statement enjoining transacting parties to consult their consciences is free of the air of obscurity that attends references to 'unconscionable' conduct. It straightforwardly directs transacting parties to engage their moral faculties in a way that most of us do regularly. And it clearly signals that moral agency is called for in commercial life, a signal that is critical to the success of conscience-based doctrines on the account offered here. On this view, the language of conscience has a distinctive utility in promoting understanding and accessibility of conscience-based doctrines and is to that extent arguably preferable to the more familiar — but less incisive — language of unfairness.

## V The Role of the Judge in Wider Context

In this concluding part of the article, we turn to the wider context in which judges administer conscience-based doctrines. The idea animating our observations in this part is that the success of conscience-based doctrines in provoking moral reasoning on the part of transacting parties will depend not only on judicial practice but also on the practice of other relevant communities. Here, we offer some brief thoughts on three such communities: lawyers, regulators and the business community itself. Our aim is not to provide anything like an exhaustive analysis of the respective roles which these communities should play in enabling conscience-based doctrines to guide conduct. Rather, we aim to pose questions that might inform future study of this topic, and to establish that judicial practice takes its place in what might be thought of as a moral ecosystem on which the effectiveness of conscience-based doctrines depends.

[106] See Jeannie Marie Paterson and Gerard Brody, '"Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct To Respond to Predatory Business Models' (2015) 38(3) *Journal of Consumer Policy* 331, 352.

[107] See Samet (n 26) 62.

### A *Lawyers*

We have argued that conscience-based doctrines demand moral engagement on the part of both judges and transacting parties. This aspect of conscience-based doctrines has profound implications for lawyers to whom transacting parties look for advice and guidance when deciding what they should and should not do. The lawyer whose client seeks clarification on the content of one or another conscience-based doctrine cannot fully elucidate that content by appealing to legal rules. She must also advise her client of the moral dimensions of the doctrine in question.[108] At the very least, this entails that the lawyer appreciate that the conscience-based doctrine in question has a moral dimension, that she bring that moral dimension to the attention of her client, and that she explain the ramifications for the client in the circumstances of the transaction, including that the doctrine requires that the client engage in moral reasoning. To the client who insists on being told 'how to get the deal done', the lawyer might have to insist that compliance with the moral demands of conscience is an inescapable requirement imposed by law.

Indeed, it seems arguable that the lawyer must go further in order to discharge her professional and moral responsibilities when advising clients about the demands of conscience-based doctrines. She may also have to bring her own moral intuitions and dispositions to bear in assisting her client in the process of reasoning morally about what to do — or not to do — in the transactional setting in question. This should not be seen as the lawyer passing moral judgment on a client's proposed course of action, even though moral misgivings about what a client proposes should prompt an ethical lawyer to question whether she wishes to lend her skills to that purpose.[109] The point, rather, is that the lawyer may have to express an opinion, informed not only by knowledge of past decided cases but also by the lawyer's own moral sensibilities about the

[108] Consider this statement of Sir Gerard Brennan, made some thirty years ago:

> In a case where the underlying moral purpose of the law on which advice is sought is not and perhaps cannot be perceived by the client unless the lawyer tells him, the commercial lawyer's duty cannot be restricted to legal advice, for then the moral decision — what ought to be done as distinct from what can lawfully be done — will not be addressed. If the lawyer alone knows the moral dimension of the decision to be made, it is morally unacceptable for him to be silent.
>
> Sir Gerard Brennan, 'Commercial Law and Morality' (1989) 17(1) *Melbourne University Law Review* 100, 105.

When, as is true of conscience-based doctrines, the moral purpose of the law is explicit, Sir Gerard's statement seems clearly to describe not only the moral duty of the lawyer but also her professional responsibility.

[109] See Barbara Mescher, 'Corporate Law Practice: Legal Advice and Ethics' (2018) 92(8) *Australian Law Journal* 636, 644–5.

moral judgment a judge might make should the client's conduct be challenged on grounds of conscience. In this way, the lawyer's discharge of her professional duty may require her to serve as a moral, as well as a legal, adviser.

Once the role of the lawyer in communicating to clients the content of conscience-based doctrines is properly understood, implications for legal education and training come into view. In the case of legal education, it is not sufficient for law students to learn the incidents of conscience-based doctrines as applied in adjudication. They must also appreciate the expectation of such doctrines that transacting parties — and their advisers — engage in moral deliberation. For example, law students should be equipped not only with an understanding of the elements of unconscionable dealing as laid out in cases such as *Amadio*;[110] they should also appreciate that the conscience-based doctrine applied in that case, and in analogous cases, demands active moral engagement on the part of those who propose to transact with vulnerable people. Legal training should both enable and encourage young lawyers to bring their moral sensibilities to bear on their advisory work, and legal practices should cultivate a culture of moral awareness and engagement.

In short, for conscience-based doctrines to be effective in provoking moral reasoning, lawyers must have a clear understanding that these doctrines express the community's expectation about how business should be practised, and a clear appreciation of their professional obligation to support that practice. One mechanism for generating the desired understanding might be to shift the focus in the teaching and assessment of certain core subjects in the law school curriculum, such as contracts and equity, to advising clients in transactional settings as well as preparing for litigation.

### B *Regulators*

Another community whose practice bears directly on the effectiveness of conscience-based doctrines is the community of regulatory officials. The role of regulators in ensuring that conscience-based doctrines provoke moral engagement in the business community is not straightforward, given that regulation is often associated with responding to and minimising harms arising from transactions, as opposed to educating transacting parties about what is expected of them. Contemporary regulatory theory and practice do, nevertheless, acknowledge the deep connections between proactive, educative guidance and

[110] *Amadio* (n 19) 467 (Mason J).

harm minimisation.[111] The remit and priorities of the key regulatory bodies in Australia such as the Australian Competition and Consumer Commission and ASIC are set accordingly.[112]

Indeed, in his final report, Commissioner Hayne noted that while a healthy business culture cannot be prescribed or legislated, it can be assessed and monitored by regulators in a way that assists business organisations to understand how best to translate the demands of law and morality for their activities.[113] Australian regulators can and should play a key role in bringing to the attention of the business community the demands of conscience-based doctrines, including the core demand that transacting parties engage in moral reasoning. The extent to which current regulatory practice achieves this aspiration is a question worth careful consideration.

### C *The Business Community*

Finally, we come to the business community itself. Judges may communicate the moral demands of conscience-based doctrines with great efficacy, and lawyers and regulators may discharge their role in reinforcing those demands, but the doctrines will fail to guide conduct if transacting parties are not receptive to them. To a large extent this is a question of culture. In his final report, Commissioner Hayne reflected on culture in the following terms:

> The culture of an entity can be described as the 'shared values and norms that shape behaviours and mindsets' within the entity. It has been described as 'what people do when no-one is watching' and that description captures what might be called the essentially 'internalised' or 'instinctive' application of shared values and norms. The shared values and norms can be seen as both reflecting and constituting the culture of an entity. It is evident that culture can drive or discourage misconduct.[114]

There is thinking still to be done on the question of how to inculcate, in Australian business organisations, the sort of culture that both encourages and

[111] See generally Christine Parker, 'Reinventing Regulation within the Corporation: Compliance-Oriented Regulatory Innovation' (2000) 32(5) *Administration and Society* 529; Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017).

[112] See *Competition and Consumer Act 2010* (Cth) ss 28(1)(a), (d)–(e); *ASIC Act* (n 3) s 1(2).

[113] *Royal Commission Final Report* (n 8) vol 1, 376.

[114] Ibid vol 1, 334 (citations omitted).

expects the moral engagement demanded by conscience-based doctrines.[115] Only when such a culture is present can those doctrines fully realise their potential.

In reflecting on culture, the success or otherwise of past cultural resources ought to be considered. For many years before Commissioner Hayne received his commission, the Australian Bankers' Association's *Code of Banking Practice* contained an explicit promise of ethical conduct.[116] The Code, however, clearly failed to inform the culture of Australian banks in a way that prevented the abuses documented by Commissioner Hayne. The Code — now entitled the *Banking Code of Practice* — has since been rewritten and re-released and, in the current version applicable from 5 October 2021, lists among its guiding principles: 'We will act honestly and with integrity'; '[w]e will be fair and responsible in our dealings with you' and '[w]e will build and sustain a culture based on strong ethical foundations'.[117] If in the future the culture of Australian banks can be set and maintained with reference to these promises, then the conduct-guiding effectiveness of conscience-based doctrines is likely to be enhanced considerably.

In the light of recent history and the community expectations which underpin the prohibitions on unconscionable conduct, closer attention needs to be paid to the conditions under which Australian business organisations might best achieve a culture of moral commitment and engagement. We offer two thoughts here by way of provocation.

First, such a culture is not only a product of industry-wide initiatives such as the *Banking Code of Practice*. It is also a product of the internal arrangements of individual organisations and the moral sensibilities of the individuals who work in the organisations in question. In a speech to the 2019 Banking and Finance Oath Conference, Wayne Byres, the Chair of the Australian Prudential Regulation Authority, emphasised the importance of individual moral

[115] In this regard, note the excellent recent study on the relationship between regulation and business culture in Vicky Comino, '"Corporate Culture" Is the "New Black": Its Possibilities and Limits as a Regulatory Mechanism for Corporations and Financial Institutions?' (2021) 44(1) *University of New South Wales Law Journal* 295.

[116] Australian Bankers' Association, *Code of Banking Practice* (at May 2004) r 2.2, archived at <https://perma.cc/M3VS-VND2>. See generally Bryan Horrigan, 'Unconscionability Breaks New Ground: Avoiding and Litigating Unfair Client Conduct after the ACCC Test Cases and Financial Services Reforms' (2002) 7(1) *Deakin Law Review* 73, 85.

[117] Australian Banking Association, *Banking Code of Practice* (at 5 October 2021) 5, archived at <https://perma.cc/WY35-4JZ9>.

commitment to effective cultural change.[118] For this reason he endorsed the Banking and Finance Oath,[119] formulated and promoted by an independent organisation formed for the purpose of 'improv[ing] our society by raising the moral and ethical standards of the banking and finance industry'.[120] The Oath is a mechanism by which individual bankers may make a public and binding commitment to ethical standards of conduct.[121] In our view, the use of such mechanisms to activate individual moral commitment deserves serious consideration, given that conscience-based doctrines demand moral engagement at the individual, as well as the organisational, level.

Secondly, as is the case with lawyers, members of the business community will be best equipped to respond appropriately to the demands of conscience-based doctrines if their education and training both emphasises the moral demands that the law, and sound business culture, make on them, and habituates them to moral deliberation. Excellent work is already under way examining how best to orient business education to inculcate moral sensibilities and capacities in the business leaders of the future, and it is to be hoped that these efforts will continue and expand in the years ahead.[122]

[118] Wayne Byres, 'Is Self-Regulation Dead?' (Speech, Banking and Finance Oath Conference, 8 August 2019) <https://www.apra.gov.au/news-and-publications/apra-chair-wayne-byres-speech-to-2019-banking-and-finance-oath-conference>, archived at <https://perma.cc/U5UH-M6HR>.

[119] Ibid.

[120] The Banking and Finance Oath, 'The Banking and Finance Oath Joins Forces with the Ethics Centre' (Media Release, 2 March 2021). For details of the organisation and the Oath, see *Banking and Finance Oath* (Web Page) <https://thebfo.org>, archived at <https://perma.cc/U4LE-68B3>. The Oath is as follows:

> Trust is the foundation of my profession. I will serve all interests in good faith. I will compete with honour. I will pursue my ends with ethical restraint. I will help create a sustainable future. I will help create a more just society. I will speak out against wrongdoing and support others who do the same. I will accept responsibility for my actions. In these and all other matters; My word is my bond.
>
> 'The Oath Explained', *Banking and Finance Oath* (Web Page) <https://thebfo.org/the-oath/mission-and-objectives>, archived at <https://perma.cc/T4V4-CRLL>.

At the time of writing, there were 2,057 signatories.

[121] 'The BFO Initiative', *Banking and Finance Oath* (Web Page) <https://thebfo.org/about-us/the-bfo-initiative>, archived at <https://perma.cc/788M-TE7E>.

[122] See, eg, Marco Berti et al, 'Embodied Phronetic Pedagogy: Cultivating Ethical and Moral Capabilities in Postgraduate Business Students' (2021) 20(1) *Academy of Management Learning and Education* 6. See also the recent work of Dr Rosemary Sainty as reported in Rosemary Sainty, 'Banking RC and Business Schools: Deliberative Forum Outcomes', *University of Technology Sydney* (Blog Post, 14 March 2019) <https://www.uts.edu.au/about/uts-business-school/news/banking-rc-and-business-schools-deliberative-forum-outcomes>, archived at <https://perma.cc/LME3-MWPC>.

## VI Conclusion

In this article, we have argued that judges can and should play a critical role in enabling conscience-based doctrines to serve a conduct-guiding objective in the Australian legal system, provoking moral reasoning on the part of transacting parties. Judicial decision-making is the engine room of conscience-based doctrines, and we have argued that judges enjoy both legitimacy and capability when making the moral judgments on which the application and development of the doctrines depend.

We have also argued that the demands of conscience-based doctrines are most effectively communicated where judges are transparent about the subjective aspects of the moral judgments they are called on to make, and encourage transacting parties to recognise that it is well within their capacity to make such judgments for themselves. To that end, we have argued that judges should refrain from emphasising the 'objectivity' of conscience-based doctrines and avoid obscure language, since both tend to undermine the capacity of conscience-based doctrines to activate the consciences of those whose conduct they are intended to guide.

Finally, we have argued that judicial practice in respect of conscience-based doctrines is properly viewed as one component in an overall ecosystem of moral engagement on which the effectiveness of conscience-based doctrines in guiding conduct depends. There is more work to be done to understand fully the incidents of that moral ecosystem and how its components may best be integrated.