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UNCONSCIONABLE CONDUCT

FOREWORD TO SECOND EDITION
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The Hon. Michael Kirby AC CMG

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Second Edition
By Paul Vout et al.

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Three and a half years have passed since I wrote the foreword to the first edition of this excellent book. In that time, Justice French, whose views on the scope of s 51AA of the *Trade Practices Act* 1974 (prohibition on conduct that is unconscionable within the meaning of the unwritten law) were expressed at first instance in *Australian Competition & Consumer Commn v CG Berbatis Holdings Pty Ltd (No. 2)* (2000) 96 FCR 491 and referred to by the general editor, Dr Paul Vout, in the Preface to the first edition, has become Chief Justice of Australia. Only time will tell whether French CJ's opinion that s 51AA may encompass undue influence and duress, as well as *Amadio*-type unconscionable dealing, will prevail. If and when the issue returns to the High Court, I will not, alas, play a part in its judicial resolution. My judicial service has come to its constitutional conclusion. My decisions on the *Trade Practices Act* 1974 (*Cth)*, like those of other judges of the past, remain in the books. This is the judicial afterlife. Happily, this book may rescue some of the old cases from an oblivion that they certainly do not deserve.

Since the first edition of this book, the New South Wales Court of Appeal has held that 'unconscionable conduct' should be excised from the notion of duress. In *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40 at 46 an earlier bench of that Court held that "[p]ressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct". However, in *Australia & New Zealand Banking Group Ltd v Karam* (2005) 64 NSWLR 149 at 168, the Court noticed the "vagueness inherent in the terms 'economic duress'

and 'illegitimate pressure'". 'Duress', it held, should be limited to threatened or actual unlawful conduct, although "the threat or conduct need not be directed to the person or property of the victim narrowly defined, but can be to the legitimate commercial and financial interests of the party". In the absence of such a threat, parties may nevertheless have an agreement set aside "where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct" without resort to or reliance upon the doctrine of duress. Years earlier, in *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, I described 'economic duress' as an unsatisfactory and uncertain doctrine. My concern was that the doctrine tended to encourage the courts to substitute their own subjective opinions about agreements for those reached by the parties. In *Equiticorp*, I expressed the opinion that the concepts of economic duress were generally better dealt with under the doctrines of undue influence and unconscionability. That view appears to have now found favour in *Karam*. I suspect that the result, if it survives higher scrutiny, will be greater clarity and certainty in the law, even if it does mean that 'duress' might technically fall outside the compass of any future editions of this book. For now, duress, and the decisions in *Crescendo Management* and *Karam*, are examined in 35.7.

Since the first edition, statutory developments in the form of the *Independent Contractors Act 2006* (*Cth*) and the extension of statutory unconscionability to retail leases in Victoria in the *Retail Leases Act 2003* (*Vic*) have occurred. These important developments are considered by Justice Lindgren and Anna Dziedzic in their updated contribution at 35.9, along with the most recent cases on the *Contracts Review Act* 1980 *(NSW)*.

The second edition also includes Professor Jim Davis' contribution on equitable doctrines concerning mistake (7.2). This difficult area of the law has been more closely scrutinised since the English Court of Appeal overturned *Solle v Butcher* [1950] 1 KB 671 in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679. In the latter case, the Court of Appeal held that the equitable

doctrine of common mistake applied by Lord Denning, in *Solle,* did not exist. *Great Peace* has since been applied in Australia: *Australia Estates Pty Ltd v Cairns City Council* [2005] QCA 328) at [51]-[64] per Atkinson J (with whom Jerrard JA agreed). Professor Davis' contribution to this second edition is a most valuable addition.

Since my judicial retirement I have come to appreciate even more than before the work of practitioners and academics who devote their time to the collection, organisation and analysis of the law and the cases. Good taxonomies are essential to the fundamentally messy character of the common law legal system. This book is an excellent work of taxonomy of great value to judges and practitioners. I congratulate Dr Vout and his co-authors on the second edition.