IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A32 of 2018**

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

B E T W E E N: **Australian Securities and Investments Commission**
Appellant

-and-

Lindsay Kobelt
Respondent

APPELLANT'S SUBMISSIONS WITH REDACTED ATTACHMENTS

Filed on behalf of the Appellant by:
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Date of this document: 5 October 2018
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ADELAIDE REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**
Appellant

LINDSAY KOBELT
Respondent

SUBMISSIONS OF THE APPELLANT

PART I CERTIFICATION

1. These submissions (with annexures redacted) are in a form suitable for publication on the internet.

PART II ISSUES ARISING

2. The appeal raises the following questions:

   (a) Did the Full Federal Court err in its construction and application of ss 12CB and 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***) by failing to give due weight to the special disadvantage or vulnerability of the respondent's customers, and by giving undue weight to the customers' voluntary entry into the relevant book-up arrangements?

   (b) Did the Full Federal Court err in overturning the Primary Judge's findings that the respondent engaged in predation or exploitation and in the significance to be attached to the finding that the respondent acted without subjective bad faith or dishonesty?

   (c) Did the Full Federal Court erroneously rely upon historical and cultural norms and practices of the Anangu Pitjantjatjara Yankunytjatjara (**APY**) community (demand sharing and boom and bust expenditure) so as to excuse what would otherwise be unconscionable conduct?

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3. Each of these questions should be answered in the affirmative.

PART III SECTION 78B, *JUDICIARY ACT 1903* (CTH)

4. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV CITATIONS

5. First instance: *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 (**FC**) (liability); [2016] FCA 1561 (ex tempore, declaratory relief); [2017] FCA 387 (penalty and costs).

6. Full Federal Court: *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 (**FFC**) and [2018] FCAFC 18.

PART V FACTS FOUND OR ADMITTED

7. From the mid-1980s, with the assistance of others, the respondent (**Kobelt**) operated a general store in Mintabie, South Australia under the name 'Nobby's Mintabie General Store' (**Nobby's**). Mintabie is situated in the far north of South Australia, approximately 1,100km from Adelaide on an opal field that is part of an area excised by lease to the Government of South Australia from the APY Lands: FC [1] **[AB14]**, [19] **[AB17]**; FFC [6], [10] **[AB250]**.[1] There are two other general stores in Mintabie: FC [22] **[AB17]**; FFC [11] **[AB250]**.

8. Nobby's sold a range of goods including food, groceries, fuel and second-hand cars: FC [19]; FFC [10]. A significant part of Kobelt's business came from the sale of cars, the average price of which was $5600, and which generally fell outside the statutory duty to repair under s 23 of the *Second-Hand Vehicle Dealers Act 1995* (SA) having been driven in excess of 200,000 km: FC [24]-[26] **[AB18]**; FFC [12] **[AB251]**.

9. Almost all of Kobelt's customers were Indigenous persons (specifically, **Anangu**) who resided predominately, but not exclusively, in two remote communities (Mimili and Indulkana) north-west of Mintabie: FC [21] **[AB17]**, [71] **[AB28]**; FFC [30] **[AB254]**. There are no mainstream banking facilities on the APY Lands: FC [246] **[AB67]**; FFC [122] **[AB274]**. In Mimili, most employment is publicly or community funded, there

[1] Kobelt ceased trading in 2018 when his licence to operate a business on the APY Lands was revoked by the Government of South Australia: FFC [37] **[AB255]**.

are no industries, and there are few commercial enterprises. Economic opportunities are limited: FC [261] **[AB70]**; FFC [73] **[AB264]**. No signs of material wealth were observed by the Primary Judge in either Mimili or Indulkana: FC [265] **[AB71]**; FFC [76] **[AB265]**.

10. The majority of Kobelt's customers were Anangu with the following characteristics: (i) impoverished, in the sense of having no or limited assets and incomes: FC [418] **[AB107]**; FFC [68] **[AB263]**; (ii) low levels of financial literacy, and lacking the competence of most Australians in the wider community to make informed decisions concerning the use of financial services: FC [419] **[AB107]**; FFC [109] **[AB271]**; (iii) most could not read, and the reading ability of those that could was compromised: FC [417] **[AB107]**; FFC [108] **[AB271]**; (iv) most could not add up: FC [283] **[AB74-75]**, [289] **[AB76]**; FFC [81] **[AB266]**; and (v) at least half were financially dependent on social security payments as their principal source of income: FC [38] **[AB21]**, [288] **[AB76]**; FFC [82] **[AB266]**. Kobelt was aware of his customers' vulnerable circumstances: FC [289] **[AB76]**, [423]-[424] **[AB108-109]**.

11. Since at least 1 June 2008, Kobelt offered customers at Nobby's credit via a system called '**Book-up**': FC [4] **[AB15]**; FFC [173] **[AB286]**. Kobelt likely began offering Book-up as a means by which Nobby's could attract and retain customers as the population in Mintabie declined: FC [75]-[76] **[AB29]**. The term 'book-up' is a general one, used to describe various informal systems of credit which are common-place in remote Australia. In these submissions, 'Book-up' refers to the particular system operated by Kobelt.

12. Book-up was interest-free and operated identically with respect to all goods purchased at Nobby's, except that in relation to cars there was an undisclosed and 'very expensive' credit charge (as cars were sold at higher price on credit than if purchased with cash). No charge was made in relation to the purchase of other goods on credit: FC [154] **[AB45]**, [171] **[AB49]**, [492]-[496] **[AB125-126]**; FFC [138] **[AB278]**, [326] **[AB323]**.

13. Kobelt withdrew substantial amounts via Book-up: in the period between 1 July 2010 and 30 November 2012, he withdrew a total of just under $1 million from the accounts of 85 customers to whom Book-up had been provided in respect of the sale of second-hand cars: FC [54] **[AB24]**; FFC [27] **[AB253]**.

14. It was a condition of Book-up that customers provide Kobelt with a debit card (referred

to as a 'key card') linked to the bank account into which their wages or Centrelink payments were made, along with their PIN – both of which were kept by Kobelt until he determined that the debt had been repaid: FC [28]-[29] **[AB18]**; FFC [13]-[15] **[AB251-252]**. Kobelt used the debit cards and PINs to withdraw all, or almost all, of the funds in the customers' bank accounts, usually on the day social security payments were made into the account or shortly thereafter (the **Withdrawal Conduct**): FC [29] **[AB18]**; FFC [151] **[AB281]**, [291] **[AB315]**. That was done by trial and error, repeatedly withdrawing fixed amounts until the attempt was declined, then reducing the amount and trying again until the account was drained: FC [47] **[AB23]**. Withdrawals were often made early in the day or late at night, so as to preclude customers having any practical opportunity to access their monies by other means (eg, internet or phone banking): FC [46] **[AB22-23]**, [548] **[AB136]**; FFC [21] **[AB253]**. Some customers gave directions to Kobelt limiting the amount that he was authorised to withdraw, but these were not always complied with: FC [31] **[AB19]**, [48] **[AB23]**; FFC [23] **[AB253]**. Sometimes he withdrew more than what was owed: FC [63] **[AB26]**.[2]

15. In most cases, Kobelt would take all of the money in the customer's account and apply it in reduction of the customer's debt. Kobelt claimed that half of the money withdrawn was notionally available for the customer to spend, though 'their half' remained in Kobelt's account at all times and was not held on trust for the customer: FC [31] **[AB19]**, [521] **[AB131]**; FFC [15] **[AB251-252]**. With limited exceptions, customers obtained access to 'their half' of the money only by returning to Nobby's to purchase goods (referred to by ASIC as the 'tying effect'). The exceptions were that customers could obtain a cash advance (sometimes for a fee), or a 'purchase order' (for a $10 fee) which allowed the customer to make purchases at other stores (which stores would later be reimbursed by Nobby's), or Kobelt would arrange for the purchase of bus tickets to travel beyond the APY Lands: FC [31] **[AB19]**, [78]-[88] **[AB29-31]**. If customers were travelling and requested the return of their key card, for example to Alice Springs, Kobelt would *generally* release it and have them return it when they came home: FC [67] **[AB27]**.

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[2] The FFC considered that unauthorised withdrawals, including those on the day of the CBA glitch, were not part of the system, and should have been pleaded in the particulars if ASIC wished to rely on them: FFC [222] **[AB299]**, [361]-[362] **[AB333]**.

16. Kobelt exercised a high degree of control over: (i) how much a customer could spend at any one time (allowing the customer to purchase a 'little bit' or 'some' food and groceries, even when they had not used the whole of the notional 50%); (ii) the kinds of goods and services they could purchase; and (iii) from where (usually Nobby's): FC [57]-[60] **[AB25-26]**; FFC [15]-[16] **[AB251-252]**. Customers were limited by the exercise of Kobelt's discretion in the items they could buy. Staples, such as milk, bread and meat were never refused, but Kobelt limited, or refused to allow the purchase of items like sweets, soft drink and chips: FC [453] **[AB116]**; FFC [125] **[AB275]**. In some situations, Kobelt's exercise of control seemed to involve arbitrary decision-making: for example, in one case he refused funds to buy a return bus ticket to the APY Lands: FC [350] **[AB88]**, [599] **[AB146]**.

17. The Primary Judge found that Book-up tied customers to Kobelt, thereby contributing to and prolonging a dependency relationship which deprived customers of independent means of obtaining the necessities of life and contributing to and perpetuating their vulnerability: FC [55] **[AB24-25]**, [232] **[AB64-65]**, [606]-[607] **[AB147-148]**; FFC [161]-[163] **[AB283-284]**, [234] **[AB301]**, [268] **[AB309]**.

18. The Primary Judge found that Kobelt seemed to be indifferent as to whether customers could afford the commitment undertaken, particularly with respect to the purchase of a car using Book-up: FC [456] **[AB117]**; FFC [126] **[AB275]**, [254] **[AB305]**. As the cars were old and driven long distances over rough terrain, some of Kobelt's customers purchased cars quite frequently (sometimes several cars in just one or two years): FC [26] **[AB18]**, [264] **[AB70]**, [287] **[AB75]**, [301] **[AB78]**, [563] **[AB139]**.

19. Kobelt had 'little or no insight' into the importance of providing (or even being able to provide if requested) a true and proper account to his customers: FC [484] **[AB124]**; FFC [127] **[AB275]**. Nobby's hand-written, rudimentary records were inadequate and illegible: FC [544] **[AB135]**; FFC [127] **[AB275]**. Some examples of those records, which were in evidence, are attached to these submissions. The 50:50 arrangement was not recorded in writing: FC [31] **[AB19]**; and no record was maintained showing the balance said to be available to each customer: FC [57] **[AB25]**.

20. The Primary Judge found that Kobelt pursued, and was at all relevant times aware of, his own interests: FC [559] **[AB138]**. This was demonstrated by the Withdrawal Conduct generally, and highlighted specifically by the withdrawals he made from the

Commonwealth Bank of Australia (**CBA**) accounts of customers on 14 December 2010, in the episode referred to as the 'CBA glitch': FC [92]-[97] **[AB32-33]**, [550]-[559] **[AB136-138]**; FFC [143] **[AB280]**. In that episode, a fault in the CBA's transaction processing system on this day allowed Kobelt to make withdrawals even if they exceeded the available balance, causing those customers' accounts to become overdrawn: FC [92]-[93] **[AB32]**; FFC [136] **[AB277]**. The Primary Judge found that Kobelt was aware of the glitch, and could not have thought that his customers had authorised extra withdrawals, but notwithstanding this, over the course of several hours withdrew a total of $56,944 from his customers' CBA accounts, an amount that was much more than he normally withdrew: FC [95] **[AB32]**; FFC [36] **[AB255]**.

10 21. ASIC brought proceedings against Kobelt alleging that his system[3] of conduct contravened s 29(1) of the *National Consumer Credit Protection Act (2009)* (Cth) (***NCCPA***) and s 12CB of the *ASIC Act*. ASIC was successful before the Primary Judge. Kobelt appealed to the FFC, which allowed the appeal in relation to s 12CB of the *ASIC Act*, but dismissed the appeal insofar as it concerned the *NCCPA*.

PART VI ARGUMENT

(A) SUMMARY

22. The FFC held that Kobelt had not contravened s 12CB of the *ASIC Act*. The chief error in the approach of the plurality (Besanko and Gilmour JJ) lay in their Honours' emphasis
20 on the concepts of voluntariness and agency on the part of the Book-up customers, whereas for Wigney J it lay in the emphasis placed on the putative benefits of the Book-up system in the context of historical and cultural norms and practices of the Anangu customers.

23. Both approaches resulted in the vulnerability and disadvantage of the Anangu customers being given inadequate attention. The very factors that made Kobelt's customers vulnerable were used to excuse what would be patently unacceptable conduct elsewhere in modern Australian society. The end result, unless corrected, will set a lower standard of consumer protection in the case of remote indigenous consumers than for others in
30 Australian society, notwithstanding that such consumers are a group who fall squarely

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[3] A plea concerning a number of specified individuals was not pressed by ASIC at trial.

within those the *ASIC Act* is designed to protect.

(B) STATUTORY SCHEME AND OVERVIEW OF CASE LAW

Unconscionable conduct under s 12CB

24. Part 2 of the *ASIC Act* contains a suite of consumer protection provisions concerning financial services.[4] Subdivision C of Div 2 is concerned with 'Unconscionable conduct'. It contains two prohibitions. Section 12CA(1) prohibits a person, in trade or commerce, from engaging in conduct in relation to financial services if the conduct is 'unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories'.[5] Section 12CB(1) prohibits conduct which 'is, in all the circumstances, unconscionable' in connection with the supply or acquisition, or possible supply or acquisition, of financial services in trade and commerce. The prohibition in s 12CA does not apply to conduct that is prohibited by s 12CB.[6]

25. Section 12CB is not limited by the unwritten law of the States and Territories relating to unconscionable conduct.[7] In particular, s 12CB can apply to 'a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour'.[8] 'A "system" connotes an internal method of working, a "pattern" connotes the external observation of events'.[9]

26. 'Unconscionability' is not defined in the *ASIC Act*. It is a 'value-laden concept'.[10] It has,

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4 The conduct found by the primary judge to be unconscionable occurred during the period from at least 1 June 2008 to at least July 2015. While amendments to ss 12CB (and 12CC) of the *ASIC Act* came into effect on 1 January 2012, the matter proceeded on the basis that the amendments were not material to the outcome. The amended versions of ss 12CB and 12CC were relied upon in the primary judge's reasoning: see FC [213] **[AB58-59]**, [224] **[AB62-63]**; FFC [175] **[AB287]**.

5 See generally *ACCC v C G Berbatis* (2003) 214 CLR 51 (***Berbatis***) at [38]-[46] (Gummow and Hayne JJ).

6 *ASIC Act* s 12CA(2).

7 Since 1 January 2012, see *ASIC Act* s 12CB(4)(a). This provision is consistent with how the provision was interpreted prior to that date: see *ASIC v National Exchange* (2005) 148 FCR 132 (***National Exchange***) at [30] (Tamberlin, Finn and Conti JJ); *Tonto Home Loans Australia v Tavares* (2011) 15 BPR 29,699 at [291] (Allsop P).

8 Since 1 January 2012, this has been express through s 12CB(4)(b) of the *ASIC Act*. However, the same was true prior to the insertion of that provision: see *National Exchange* (2005) 148 FCR 132 at [33] (Tamberlin, Finn and Conti JJ), as explained at FFC [179]-[183] **[AB288-289]**.

9 *Unique International College Pty Ltd v ACCC* [2018] FCAFC 155 at [104] (Allsop CJ, Middleton and Mortimer JJ).

10 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 (***Paciocco FFC***) at [262] (Allsop CJ).

as its root, the 'protection of the vulnerable from exploitation by the strong'.[11] When assessing unconscionability, a court must undertake an evaluative analysis of the conduct, which requires 'close consideration' of the facts.[12] This analysis is undertaken in light of 'norms and values in the law, especially, but not limited to Equity, that bear upon the notion of... business conscience.'[13] That is because, despite the scope of s 12CB being broader than the unwritten law, 'Parliament can be taken to have adopted, for the operation of the Act and arising out of its text, the values and norms that inform the living Equity in that doctrine'.[14] Hence Equity cases contain useful illustrations of circumstances which can amount to unconscionable conduct under that section.[15]

27. However, care must be taken to ensure that cases in Equity do not artificially constrain the scope of s 12CB, because the *ASIC Act* gives 'express guidance as to the norms and values that are relevant to inform the meaning of unconscionability and its practical application'.[16] The court must have regard to 'all the circumstances' of the case.[17] A non-exhaustive list of factors is set out in s 12CC, which assist in setting a framework for the values that lie behind the notion of conscience identified in s 12CB.[18] No one factor (or select group of factors) has pre-eminent, let alone determinative, effect. Moreover, it is not appropriate to select from the relevant factors particular factors upon which to focus.[19] All must be taken into account.

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11 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 (***Amadio***) at 461-462 (Mason J), 474-475 (Deane J); *Paciocco FFC* (2015) 236 FCR 199 at [282] (Allsop CJ).

12 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 (***Kakavas***) at [14] (the Court), quoted in *Thorne v Kennedy* (2017) 91 ALJR 1260 (***Thorne***) at [41] (Kiefel CJ, Bell, Keane, Gageler and Edelman JJ).

13 *Paciocco FFC* (2015) 236 FCR 199 at [263] (Allsop CJ), [405] (Middleton J). See also *Kakavas* (2013) 250 CLR 392 at [15] (the Court)

14 See *Paciocco FFC* (2015) 236 FCR 199 at [283] (Allsop CJ).

15 See *Paciocco FFC* (2015) 236 FCR 199 at [284] (Allsop CJ).

16 *Paciocco FFC* (2015) 236 FCR 199 at [279], see also at [306] (Allsop CJ), *ACCC v Lux Distributors Pty Ltd* [2013] ATPR 42-447 (***Lux***) at [23] (Allsop CJ, Jacobson and Gordon JJ).

17 See *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525 (***Paciocco HC***) at [293]-[294] (Keane J, with whom French CJ and Kiefel J agreed). See also *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 118-119 (Dixon CJ, McTiernan and Kitto JJ), cited in *Kakavas* (2013) 250 CLR 392 at [122], *Thorne* (2017) 91 ALJR 1260 at [43] (Kiefel CJ, Bell, Keane, Gageler and Edelman JJ), *Paciocco FFC* (2015) 236 FCR 199 at [296] (Allsop CJ) and *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* (2018) 356 ALR 440 (***Ipstar***) at [270] (Leeming JA).

18 *Paciocco FFC* (2015) 236 FCR 199 at [285], [304] (Allsop CJ); *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 (***Kojic***) at [58] (Allsop CJ), [87] (Edelman J).

19 See *Paciocco HC* (2016) 258 CLR 525 at [189] (Gageler J), [294] (Keane J, with whom French CJ and Kiefel J agreed).

(C) GROUND 1: FAILURE PROPERLY TO CONSTRUE AND APPLY SS 12CB AND 12CC

28. The FFC erred in its construction and application of ss 12CB and 12CC of the *ASIC Act* in two key ways: firstly, by failing to give due weight to the special disadvantage or vulnerability of Kobelt's customers; and secondly, by giving undue or disproportionate weight to the customers' basic understanding of the contracts, their ability to terminate them and their 'agency' or freedom of contract. This led to an outcome which ASIC submits was plainly wrong.

29. The Primary Judge found that many of Kobelt's customers were at a special disadvantage or vulnerable 'arising from a combination of factors: the remoteness of their communities, the limitations on their education, their impoverishment, and the limitations on their financial literacy. As noted, the ready willingness of the Book-up customers to hand over their key cards and their PINs seems to reflect a lack of understanding of the precautions which they should take in their own self-interest': FC [619]-[620] **[AB150-151]**. It has long been accepted that special disadvantage may arise from matters including 'poverty or need of any kind … [and] illiteracy or lack of education'.[20]

30. The FFC did not overturn these findings. To the contrary, it accepted that the customers were 'vulnerable', including because they had very limited net income and low levels of financial literacy: Besanko and Gilmour JJ at [67], [268] **[AB309]**. However, the FFC found that Kobelt had not taken advantage of that vulnerability, because it gave great weight to the propositions that the customers:

(a) understood the basic elements of Kobelt's Book-up system, including the Withdrawal Conduct: Besanko and Gilmour JJ at [265] **[AB308]**; Wigney J at [317] **[AB321]**;

(b) voluntarily entered into the Book-up arrangements: Besanko and Gilmour JJ at [266] **[AB308]**; Wigney J at [355] **[AB331]**, [384] **[AB340]**;

(c) had the ability to terminate the contracts: Besanko and Gilmour JJ [268] **[AB309]** (albeit by acting in breach, a point omitted by the plurality in this context); and

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[20] *Kakavas* (2013) 250 CLR 392 at [117], citing *Amadio* (1983) 151 CLR 447 at 474-475 (Deane J), in turn citing *Blomley v Ryan* (1954) 99 CLR 362 at 405 (Fullagar J). See also *Thorne* (2017) 91 ALJR 1260 at [113] (Gordon J).

(d) had agency which must be respected and that their freedom of contract should not be impeded: Wigney J at [309]-[310] **[AB319-320]**, [348] **[AB329]**, [352] **[AB330]**, [355] **[AB331]** and [376] **[AB337-338]**.

31. While ASIC accepts that the factors summarised above (other than (c)) are relevant considerations, the FFC's error lay in the vastly disproportionate weight accorded to them, to the point that they were used, effectively, to exclude a finding of unconscionability. In effect, the voluntariness of the customers' conduct trumped their vulnerability. ASIC makes five more detailed points in support of this ground.

32. ***First***, even if it be the fact that the customers understood the 'basic elements' of the Book-up system (the 'basic elements' not being identified by the FFC, although they plainly did not include the substantial credit charge), and even if they voluntarily entered into it, that is no barrier to a finding of unconscionability. The FFC was wrong to find this was a 'powerful consideration against a finding of unconscionable conduct': Besanko and Gilmour JJ at [266] **[AB308]**. That follows because:

(a) Conduct has been held to be unconscionable (under both statute and in equity) when customers have <u>understood</u> the nature of the transaction and have not had their will overborne. For example, in *Lux*, conduct was held to be unconscionable despite a finding that the customers who purchased the vacuum cleaners had understood the nature of the product and voluntarily entered into the transaction. Each of the customers, despite being elderly (age itself not being a special disadvantage) was described as 'able to decide matters for herself', 'no-nonsense' 'not pliable', having a 'reasonable command of matters' and 'not an innocent'.[21] But none of that precluded a finding of unconscionability. That is not surprising, in light of the recognised distinction between the equitable doctrines of unconscionability and undue influence.[22] It is the latter doctrine, rather than the former, that deals with circumstances in which the will of an innocent party is 'not independent and voluntary because it is overborne'.[23] Thus, where a transaction is

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21 *Lux* [2013] ATPR 42-447 at [61] (Allsop CJ, Jacobson and Gordon JJ).

22 *Thorne* (2017) 91 ALJR 1260 at [40] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), [115] (Gordon J).

23 *Amadio* (1983) 151 CLR 447 at 462 (Mason J), quoted in *Thorne* (2017) 91 ALJR 1260 at [40] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), [115] (Gordon J).

involuntary or not understood, other forms of relief are available and may be more appropriate;[24]

(b) Voluntariness is a common feature of unconscionable conduct cases. Indeed, the very mischief that the law seeks to prevent may be the exploitation of the desire of the vulnerable party to enter into the impugned transaction.[25] As Mason J put it in *Amadio*, in a passage recently quoted with approval by the High Court,[26] in cases of unconscionable conduct the will of the innocent party, 'even if independent *and voluntary*',[27] is the result of the disadvantageous position in which the person is placed and the other party unconscientiously taking advantage of that position. In the present case, the customers' willingness to enter into Kobelt's book-up arrangement, despite its high (and undisclosed) cost of credit and the requirement to sacrifice total control of their finances, tends to underline the disadvantageous position of the customers of which Kobelt took advantage.

33. ***Secondly***, and relatedly, unconscionability operates to protect from exploitation parties who are unable, for reasons of vulnerability or other special disadvantage, to accurately perceive, judge or protect their own interests.[28] The FFC's emphasis on customers' basic understanding of the Book-up system, and their voluntary entry into it, caused the FFC to give insufficient weight to those basic elements of the system which operated against customers' interests, such as the high cost of the credit used to purchase cars, the withdrawal of all available funds and the dependency cycle thereby created.[29] The FFC should have assessed the customers' interests objectively, rather than focusing exclusively on their perceptions of their interests (which were coloured by their vulnerability): cf Wigney J [329]-[332] [**AB324-325**]. This is especially important in light of the Primary judge's findings that the customers had low financial literacy, and

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24 *Thorne* (2017) 91 ALJR 1260 at [86]-[87], [92] (Gordon J).

25 See, eg, *Bridgewater v Leahy* (1998) 194 CLR 457 at [75] (Gaudron, Gummow and Kirby JJ); *Amadio* (1983) 151 CLR 447 at 461 (Mason J); 474 (Deane J).

26 *Thorne* (2017) 91 ALJR 1260 at [40] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), [94], [115] (Gordon J).

27 *Amadio* (1983) 151 CLR 447 at 461 (emphasis added).

28 See, eg, *Kakavas* (2013) 250 CLR 392 at [117]; *Thorne* (2017) 91 ALJR 1260 at [38], [64] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), [76] (Nettle J), [81] (Gordon J); *Paciocco FFC* (2015) 236 FCR 199 at [296] (Allsop CJ).

29 See *ASIC Act* s 12CC(1)(j)(iv) – regarding conduct engaged in after entering into the contract.

little or no access to alternative sources of credit: FC [247] **[AB67]**, [510] **[AB129]**. It is also significant that workable alternatives were available to Kobelt to protect his own interests (such as repayment by direct debit), but that these alternatives were not offered to his customers: FC [531]-[533], [538]-[540] **[AB133-135]**.

34. ***Thirdly***, the fact that Kobelt was found not to have exerted undue influence should carry little weight in circumstances where the vulnerability of the customers meant influence did not need to be exerted in order to get them to agree to the Book-up arrangement. The absence of undue influence was relevant,[30] but undue influence is only one way of establishing special disadvantage and 'there are many other circumstances that can amount to a special disadvantage which would not establish undue influence'.[31] For that reason, the absence of undue influence should not have counted significantly against the primary Judge's conclusion of unconscionability.

35. ***Fourthly***, the ability of customers to bring Book-up arrangements to an end by cancelling their debit cards or having their income paid to another account is a factor to be given little, if any, weight. It is inconsistent with prior authority, and contrary to public policy, to rely on a vulnerable *customers'* ability to breach a contract to militate against a finding of unconscionable conduct by the *service provider*. Such an approach is in stark contrast to *Paciocco*, where the customers' ability to *lawfully* terminate their contracts at any time was a factor counting against a finding of unconscionability,[32] and with *Lux*, where despite the capacity of customers lawfully to terminate the contract during the cooling off period, the Court nonetheless found the conduct to be unconscionable.[33]

36. Kobelt alleges that the FFC erred in failing to overturn the Primary Judge's implicit finding that customers would consider cancelling or redirecting periodic payments as dishonourable or dishonest.[34] But Kobelt did not challenge this finding, so the FFC cannot have erred in failing to overturn it. In any event, it was open for the Primary Judge to state (expressly *not* in a concluded manner) that an exercise by customers of their power to cancel their cards or redirect periodic payments was probably in breach of their

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30 See *ASIC Act* s 12CC(1)(d).

31 *Thorne* (2017) 91 ALJR 1260 at [40] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ),[80]-[81] (Gordon J).

32 *Paciocco HC* (2016) 258 CLR 525 at [111], [190] (Gageler J), [288], [292] (Keane J).

33 *Lux* [2013] ATPR 42-447 at [72].

34 Notice of Contention, [2.2] **[AB476]**; FC [513] **[AB129-130]**.

contract with Kobelt, and exposed customers to enforcement action (even though Kobelt, acting in his own self-interest, did not take such action, deciding it was preferable to wait for customers to return or write off the debts): FC [90] **[AB31]**, [513]-[514] **[AB130]**. Further, given the derogatory diary entries that accompanied such conduct (which give an indication of how Kobelt reacted when it occurred),[35] the Court should be slow to conclude that the customers' actions could ameliorate the imbalance in bargaining power.

37. ***Fifthly***, to emphasise the customers' agency or freedom of contract is to misunderstand the task set by ss 12CB and 12CC. In all cases in which a contract is set aside for unconscionable conduct, the freedom of the parties to enter into that contract in the prevailing circumstances is impaired. Unconscionability exists precisely because in some circumstances agency and freedom of contract must yield to fairness, so as to prevent exploitation of the vulnerable. The task of the Court is to determine whether those circumstances exist in the instant case. If there is a value related to agency or freedom of contract relevant to the evaluative task required of the Court, it is in the terms set out by Allsop CJ in *Paciocco*, where his Honour referred to 'faithfulness or fidelity to a bargain freely **and fairly** made' as 'a central aspect of legal policy and commercial law.'[36] There is no value in the freedom to enter into an unconscionable arrangement.

38. Section 12CB posits 'a standard of conduct which, on proven facts, a person obliged to meet that standard either has met or has not'.[37] The question whether that standard has been met is one that demands a unique answer, and it is for this Court to determine that answer based on its own assessment of 'all the circumstances'. It is, of course, 'essential for the appellate court to scrutinise the trial judge's findings and assess any challenge to the trial judge's conclusions in light of the advantages enjoyed by that judge'.[38] That appears not to have occurred in the FFC. But in any event, this Court is now as well placed as the FFC to form the evaluative judgment required in determining whether Kobelt's conduct was unconscionable.[39]

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35 Kobelt's diary entries contained a number of derogatory entries concerning those customers (eg, 'Bitch', 'Slut', and 'Get [expletive deleted] No More'): FC [91] **[AB31-32]**, [350] **[AB88]**.

36 *Paciocco FFC* (2015) 236 FCR 199 at [297] (Allsop CJ) (emphasis added).

37 Compare *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 at [46] (Gageler J), see also at [151] (Edelman J); *Berbatis* (2003) 214 CLR 51 at [119] (Callinan J, with whom Kirby J agreed).

38 See *Thorne* (2017) 91 ALJR 1260 at [41], [54] (Kiefel CJ, Bell, Keane, Gageler and Edelman JJ).

39 *Thorne* (2017) 91 ALJR 1260 at [43] (Kiefel CJ, Bell, Keane, Gageler and Edelman JJ)

39. A proper evaluation of all the circumstances of this case leads inexorably to the conclusion that the Book-up system operated by Kobelt was unconscionable within the meaning of s 12CB, as the Primary Judge found. The critical factors that support that conclusion are:

(a) the obvious inequality of bargaining power between Kobelt and his customers, most of whom were illiterate, innumerate, dependent on social security and with low levels of financial literacy (s 12CC(1)(a) and (c));[40]

(b) that Kobelt took all (or virtually all) the funds in the customers' accounts, irrespective of the quantum of repayments due. He controlled the access customers had even to 'their 50%' of their funds, limiting what customers could buy, and controlling the circumstances in which cash or a purchase order to shop anywhere other than Nobby's could be obtained: FC [620] **[AB150-151]**. None of this was necessary to protect any legitimate business interests of Nobby's (s 12CC(1)(b));[41]

(c) the 'very expensive' and undisclosed nature of the credit charge imposed by Kobelt (s 12CC(1)(e) and (i)): FC [492], [496] **[AB125-126]**;

(d) customers were not generally offered any variation of the standard Book-up arrangements, and Kobelt did not always comply with requests that a fixed or lesser amount be withdrawn (s 12CC(1)(j)): FC [48] **[AB23]**, [555], [556] **[AB138]**; and

(e) Kobelt took all the money as soon as possible after its entry into customers' accounts, so as to ensure that customers had little practical opportunity to withdraw or transfer money for themselves before Kobelt had done so (s 12CC(1)(l)): FC [46] **[AB22-23]**, [559] **[AB138]**; FFC [21] **[AB253]**.

(C) GROUND 2: PREDATION, EXPLOITATION AND IRREGULAR CONDUCT

40. Whilst Kobelt himself may have viewed Book-up as perfectly acceptable, whether the system was exploitative of his disadvantaged customers is to be judged objectively against contemporary community standards.

41. The Primary Judge was correct to find that Kobelt had engaged in forms of predation and

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[40] See [10] above. See also FC [510], [515] **[AB129-130]**.

[41] See [14]-[15] above. See also FC [520]-[522] **[AB31]**, [538] **[AB134-135]**.

exploitation: FC [606], [609] **[AB148]**, [620] **[AB150-151]**.[42] Those findings must be understood, in light of the authorities, as referring to the taking advantage of the customers' vulnerability or special disadvantage.[43] That follows because, while it is undoubtedly necessary to show that a party has taken advantage of the special disadvantage of the other party,[44] nothing further is required.[45] In particular, the concept of 'moral obloquy' (particularly if it is understood as importing a conception of 'dishonesty') is best avoided, as it tends to direct attention to a concept not found in the statutory provisions.[46] The FFC correctly so held: FFC at [193], [296] **[AB292, 316]**.

42. In both *Amadio* and *Bridgewater v Leahy*,[47] unconscionable conduct was found in respect of the passive acceptance of a benefit in circumstances where there was knowledge of a special disadvantage. In *Amadio*, Deane J held that 'there is no suggestion that Mr Virgo or any other officer of the bank has been guilty of dishonesty or moral obliquity in the dealings between Mr and Mrs Amadio and the bank.'[48] It was sufficient that Mr Virgo 'simply closed his eyes to the vulnerability... and the disability which adversely affected them.'[49] Similarly, in *Bridgewater,* Gaudron, Gummow and Kirby JJ held that:[50]

> It is not an answer that there was no finding that Neil had pursued the initiative to its implementation ... The equity to set aside the deed may be enlivened not only by the

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42 Even though the relevant conduct was found to be unconscionable, there was, for example, no finding of a predatory state of mind in *Thorne* (2017) 91 ALJR 1260 at [65] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), [120] (Gordon J). See also *Johnson v Smith* [2010] NSWCA 306 at [5] (Allsop P), [98]-[102] (Young JA), accepting that 'a person whose subjective motives are pure can, nonetheless, be held to be acting unconscionably'.

43 'Predation' in this context is used as a way (among others) of demonstrating exploitation. This is different to the context in which the High Court referred to 'predatory state of mind' in *Kakavas* at [161], which concerned whether constructive knowledge of special disadvantage could be sufficient (a discussion which is not relevant to cases, like the present, where there is actual knowledge of special disadvantage).

44 See, eg, *Thorne* (2017) 91 ALJR 1260 at [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ); *Kakavas* (2013) 250 CLR 392 at [6] (the Court).

45 *Johnson v Smith* [2010] NSWCA 306 at [5] (Allsop P), [98]-[102] (Young JA); FC [222] **[AB299]**.

46 See, eg, *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168 at [22] (Santamaria JA, Neave and Osborn JJA agreeing); *Paciocco FFC* (2015) 236 FCR 199 at [262], [305] (Allsop CJ, Besanko and Middleton JJ agreeing); *Kojic* (2016) 249 FCR 421 at [54]-[56] (Allsop CJ, Edelman J agreeing at [88]); *Ipstar* (2018) 356 ALR 440 at [195] (Bathurst CJ) and [275]-[278] (Leeming JA). See J. M. Paterson, 'Unconscionable Bargains in Equity and Under Statute' (2015) 9 *Journal of Equity* 188 at 191-192; Robert Baxt, 'Continuing "furore" over moral obloquy and unconscionability' (2017) 91 *Australian Law Journal* 809. Cf *Paciocco HC* (2016) 258 CLR 525 at [188] (Gageler J).

47 (1998) 194 CLR 457.

48 *Amadio* (1983) 151 CLR 447 at 478 (Deane J).

49 Ibid.

50 (1998) 194 CLR 457 at 493.

active pursuit of the benefit it conferred but by the passive acceptance of that benefit.

43. Accordingly, findings that Kobelt did not act dishonestly, that he acted 'with a degree of good faith',[51] or that he himself thought the conduct to be acceptable, are not inconsistent with the conclusion that he acted unconscionably. Indeed, were Kobelt to have acted dishonestly in respect of the Withdrawal Conduct, his conduct would have involved theft (or, at best, fraud). That his conduct falls short of criminality plainly does not preclude his Book-up system from being unconscionable.

44. The Primary Judge's characterisation of Kobelt's conduct as involving forms of predation and exploitation was wrongly rejected by Besanko and Gilmour JJ because, contrary to their Honours' findings (with which Wigney J agreed):

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(a) there was a factual finding by the Primary Judge (undisturbed by the plurality) that Kobelt's accessing the whole of the customers' accounts 'preclude[d] the customers having ... any practical opportunity, to access the monies by other means, for example, by internet or telephone banking': FC [46] **[AB22-23]**, [556] **[AB138]**; FFC [21] **[AB253]**, cf FFC [267(1)] **[AB308]**;

(b) there was a factual finding by the Primary Judge (undisturbed by the plurality) that the tying of customers to Nobby's through the Withdrawal Conduct favoured his own commercial interests, and was not necessary for the business' protection. The Primary Judge correctly found that that conduct went beyond security for

20 repayment, and ensured customers had to come to Nobby's if they wanted access to goods or (their own) money, even if it was inconvenient to do so: FC [522] **[AB131]**, [538] **[AB134-135]**, [616] **[AB150]**;

(c) Kobelt's conduct on the occasion of the CBA glitch[52] was not isolated from the system of conduct or pattern of behaviour – it was evidence of the manner in which the system was implemented. This conduct was consistent with, and the most egregious example of, Kobelt's practice of draining customers' accounts without regard to whether such withdrawals were authorised (which clearly the overdrawn

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30 51 FC [559] **[AB138]**. Whether the service provider acted with good faith is just one of many relevant factors, as s 12CC(1)(l) makes clear. That provision is inconsistent with the absence of good faith having any greater role in evaluating whether conduct is unconscionable, let alone a determinative role.

52 See above n 2 and [20].

amounts made possible by the CBA glitch were not).

45. The conclusion of predation or exploitation is not undermined by fact that the customers were held to have entered into the system voluntarily (for the reasons set out above at [32]-[33]), nor the idea that customers could avoid the arrangement by acting in breach of it by cancelling their debit card s (for the reasons set out above at [35]-[36]). Nor is it undermined to the extent there were incidental benefits to the customers, the existence of which is addressed further below (at [47]).

(D) GROUND 3: HISTORICAL AND CULTURAL FACTORS

46. The FFC erred by deploying historical and cultural norms and practices of the APY community (specifically demand sharing and boom and bust expenditure) to excuse what would otherwise be unconscionable conduct. This was a feature of the reasons of the plurality at [244] **[AB303]**, [257(3)] **[AB305-306]**, [262] **[AB308]**, and it was central to those of Wigney J at [328]-[332] **[AB323-325]**; [345]-[378] **[AB328-338]**.

47. While the Primary Judge found (in part on the basis of their effect on ameliorating the effect on some customers of the practice of demand sharing and of boom and bust expenditure) some incidental benefits to some customers, these were of minor significance. They were correctly given little weight by the Primary Judge, because:

    (a) a court should be slow to conclude that, by reason of cultural and historical practices that themselves have a complex history and are related to issues of poverty and welfare dependence,[53] a community of indigenous people 'benefits' from a practice that deprives them of access to, and control of, their own money. Applying that perspective to the Book-up system cannot rightly be regarded as involving a 'paternalistic' imposition of norms and practices from outside the community and denying the agency of indigenous people (cf Wigney J at [332] **[AB325]**). Instead, it is the opposite;

    (b) there was very little evidence that customers accepted the Book-up system *in order to* achieve those benefits.[54] Further, there was no evidence that Kobelt instituted the Book-up system *in order to* enable his customers to achieve these incidental benefits: FC [75]-[76] **[AB29]**. An incidental benefit of a system, which is neither

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[53] See generally FC [398] and [399] **[AB100-101]**.

[54] Only one witness stated this as a reason: FC [582] **[AB143]**.

sought to be conferred by the stronger party, nor sought to be obtained by the weaker party, has little relevance in assessing unconscionability;

(c) there was very little evidence that Anangu customers regarded demand sharing as detrimental: FC [582] **[AB143]**;

(d) in any event, the finding as to a potential incidental benefit in respect of demand sharing should be given little weight, in light of the Primary Judge's undisturbed findings that the system could also *exacerbate* demand sharing in the community, both by facilitating demand sharing of the cars and groceries purchased by Nobby's customers, and by increasing the need of customers deprived of access to their own money to demand sharing of money or food from other community members: FC [584] **[AB143]**;

(e) the availability of other modes of achieving reductions in boom and bust expenditure, being modes which did not require a shop owner to control *all* access to customer funds, reduces the weight that can properly be given to the achievement of those reductions by the Book-up system: FC [570]-[573] **[AB140-141]**, [616] **[AB150]**; and

48. The cultural and historical practices upon which the FFC relied, when properly considered in light of educational disadvantage and a lack of financial literacy, were factors which characterised the vulnerability of the customers and enabled Kobelt to exploit them. The reasoning adopted by Wigney J tends to equate vulnerabilities with cultural preferences, and the exploitation of those vulnerabilities with the free expression of cultural preferences. That is how, for example, Wigney J was able to characterise the 'discretionary control' exercised by Kobelt over 'the financial affairs and spending of his customers' as reflecting an 'indigenous preference for personalising financial transactions': FFC [378] **[AB338]**. That reasoning is inherently erroneous. It is apt to obscure what is really occurring: namely, taking advantage of customers' vulnerabilities.

49. The fact that book-up has been a 'deeply embedded and normative practice for Anangu in the APY Lands communities', and there was 'widespread use of it', does not weigh against a finding that the system operated by Kobelt was unconscionable. *First*, there was minimal evidence before the Court concerning (or factual findings in relation to) the characteristics of book-up systems other than Kobelt's. Absent such evidence, the Court should confine its focus to that system. If other systems are materially different, then the

conclusion that Kobelt's system is unconscionable may not affect those systems. *Secondly*, the longevity and popularity of Kobelt's system are more properly characterised as evidence of the absence of practical alternatives and of his customers' vulnerability. Until regulated by law, practices which stand to benefit stronger parties can persist for long periods of time.

50. The standard against which Kobelt's system is to be judged is a contemporary one. Even if similar book-up arrangements have existed for decades (for much of which period the system would have involved cheques, giving rise to some different considerations), that is not necessarily an impediment to a conclusion that such a system is no longer consistent with modern Australian community expectations.[55]

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51. The intersection between ancient indigenous cultural practices, money and the provision of modern financial services is complex. Simply because a particular system, such as Kobelt's Book-up, has evolved in a way that operates in practice in part to bridge a cultural divide, does not automatically mean that that system: (i) is the only, or best, or even a legitimate way to meet the needs of indigenous consumers; (ii) is beneficial to indigenous consumers; or (iii) should be maintained. Not all forms of book-up would, in ASIC's submission, be unconscionable. For those forms of book-up that require a credit licence[56] (being forms that involve the imposition of charges or interest), ASIC would have no complaint about a book-up system involving: a fully disclosed, reasonable charge for the provision of credit; agreement with each customer as to a reasonable

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amount to be applied to repayment of their debt by way of direct debit each pay cycle (as opposed to the provision of PINs and debit cards, or the payment of the whole income to the provider); and the keeping of accurate records of the amounts advanced and repaid.

52. It is for Parliament to set the standard for what constitutes acceptable standards in consumer, business and financial dealings. It has done so, in part, through ss 12CB and 12CC of the *ASIC Act* and the provisions of the *National Credit Code*.[57] Whilst ASIC accepts that cultural factors which characterise a particular group of consumers are

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55 *Lux* [2013] ATPR 42-447 at [23] (Allsop CJ, Jacobson and Gordon JJ); *Paciocco FFC* (2015) 236

30 FCR 199 at [279]-[301] (Allsop CJ), [402]-[406] (Middleton J).

56 It would also be possible to create a conscionable interest-free and fee-free book-up system.

57 The FFC considered that failure to comply with the *National Credit Code* should have been pleaded in the particulars if ASIC wished to rely on it: FFC [220]-[221] **[AB298]**, [380] **[AB338-339]**.

relevant considerations,[58] it disputes any suggestion that those factors can be used to 'water down' or lower the standard of acceptable conduct. To do so would be to allow the development of multiple Australian consciences. It would allow, if the FFC decision stands, conduct to take place in remote indigenous communities that would never be acceptable anywhere else in Australia.

(E) OTHER MATTERS

53. By way of proposed cross appeal and notice of contention,[59] Kobelt has disputed the application of the *NCCPA* to his conduct in providing credit to purchasers of second-hand cars. Kobelt was unsuccessful in relation to these issues at both trial and on appeal. The proposed cross appeal raises no new or contentious question of law, nor any matter of general importance. Accordingly, the appellant respectfully submits there is no proper basis for the High Court to grant special leave with respect to the cross-appeal.[60] To the extent necessary, ASIC will respond to the notice of contention in reply.

PART VII ORDERS SOUGHT

54. The orders sought are set out in the notice of appeal **[AB464-465]**.

PART VIII ESTIMATE

It is estimated that up to 2.5 hours will be required for ASIC's oral argument.

Dated: 5 October 2018

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58 They might, for example, require a credit provider to take extra steps such as translation of documents or oral explanations for consumers with low literacy skills.

59 See Notice of Cross-appeal dated 7 September 2018, Grounds 1, 2 and 3 **[AB469-470]** and Notice of Contention dated 7 September 2018, Ground 1 **[AB475]**.

60 *High Court Rules 2004* (Cth) r 42.08.04.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A32 of 2018**

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

B E T W E E N: **Australian Securities and Investments Commission**
Appellant

-and-

Lindsay Kobelt
Respondent

ATTACHMENTS REFERRED TO IN PARAGRAPH 19 OF THE APPELLANT'S SUBMISSIONS

Filed on behalf of the Appellant by:
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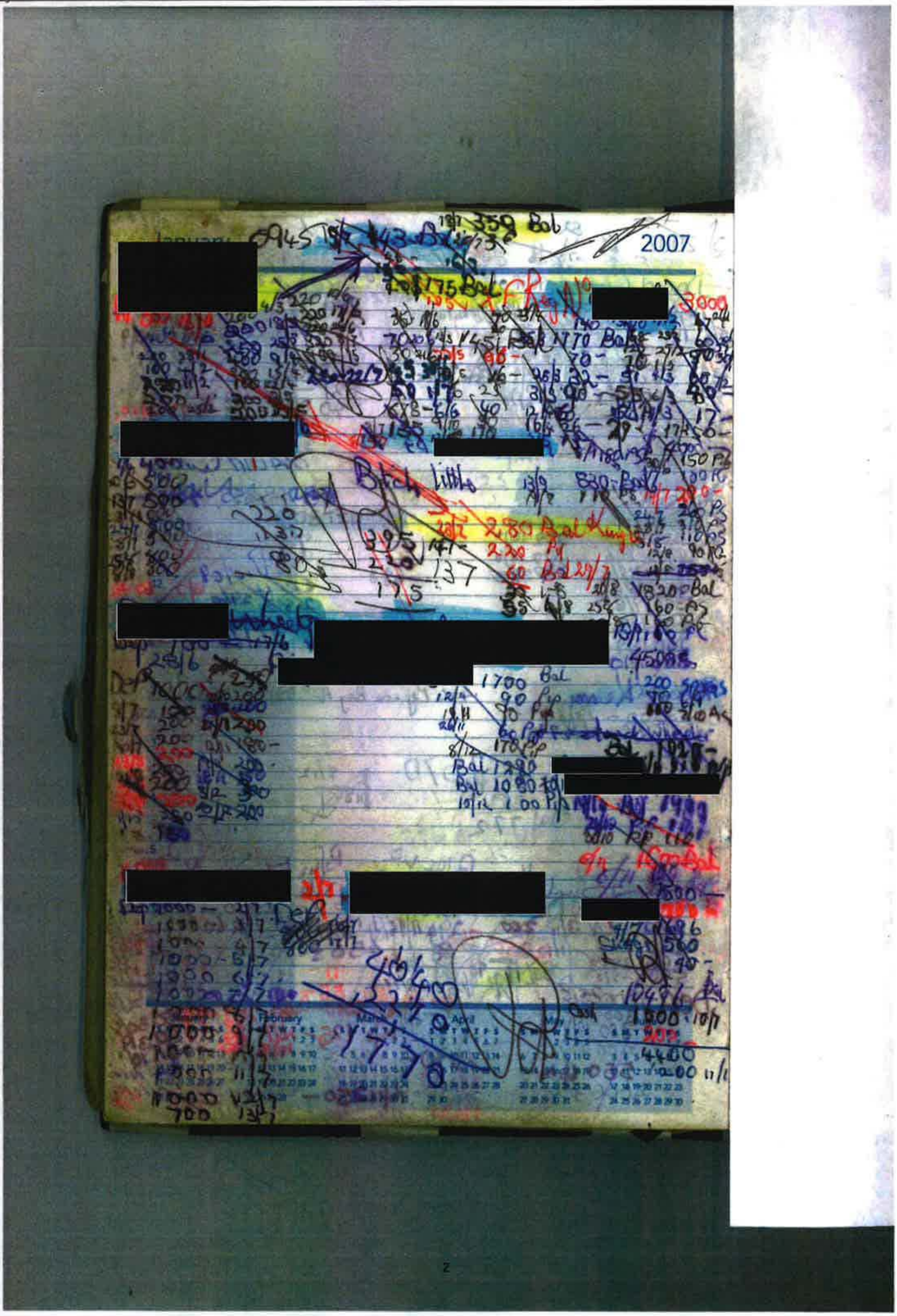
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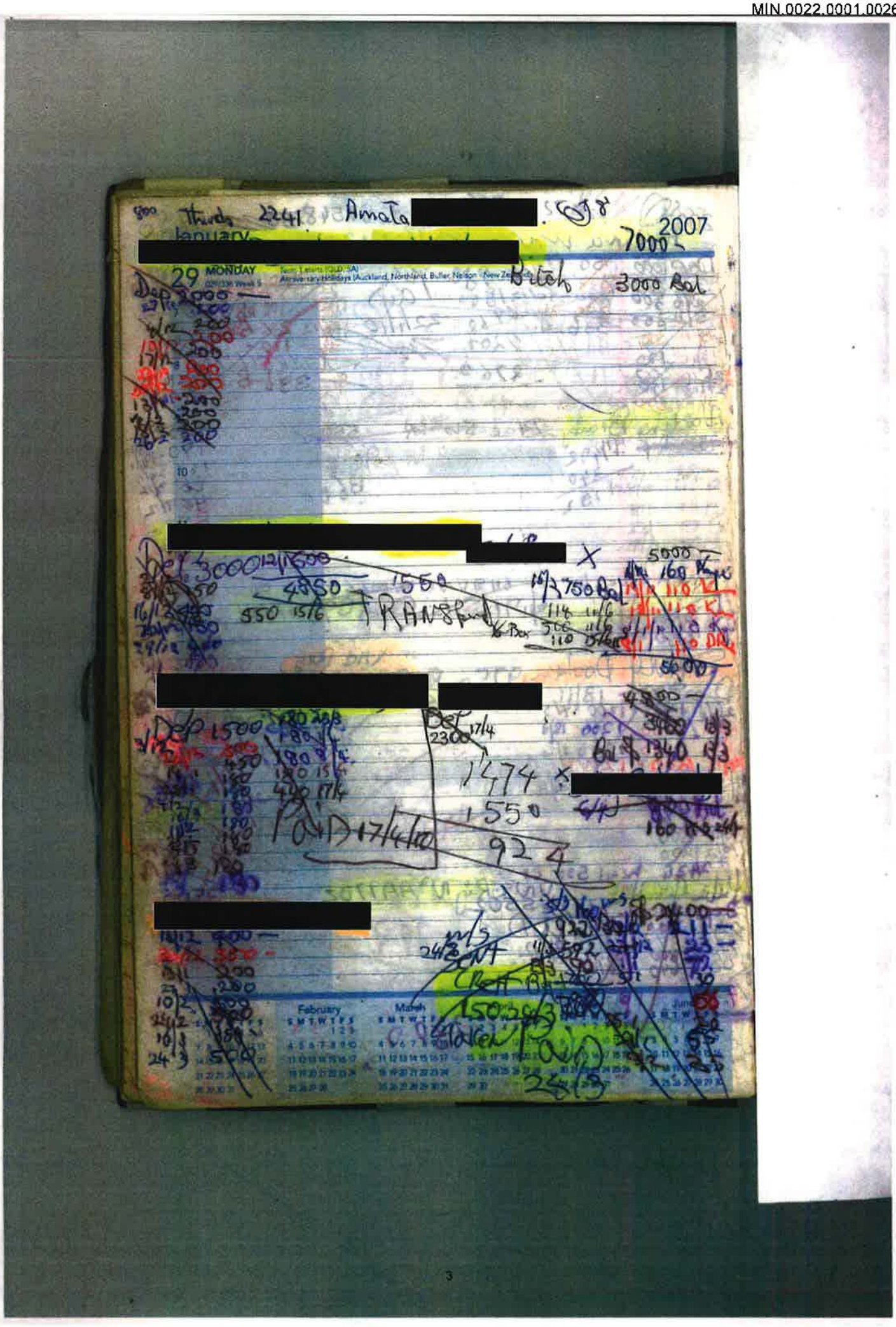
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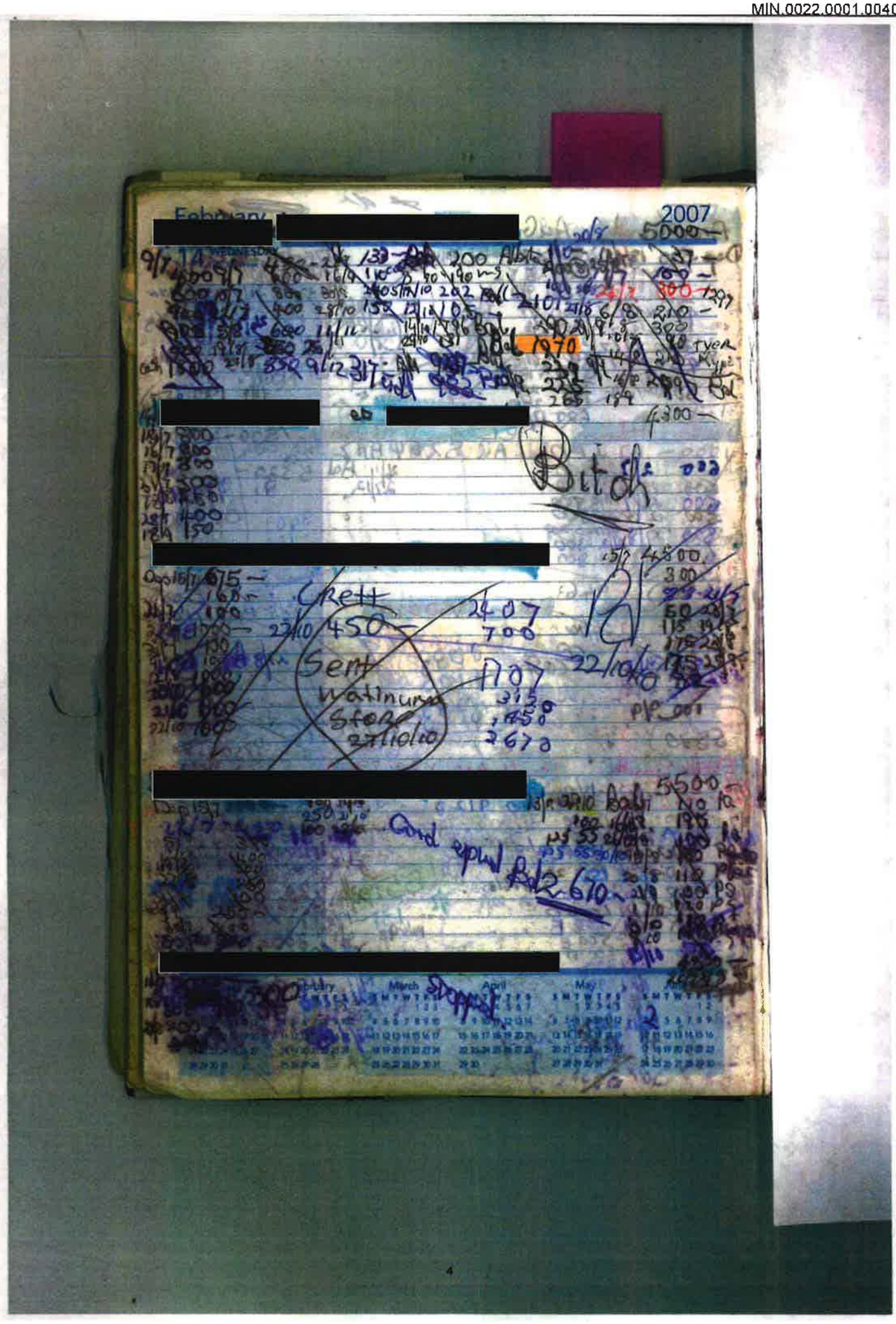
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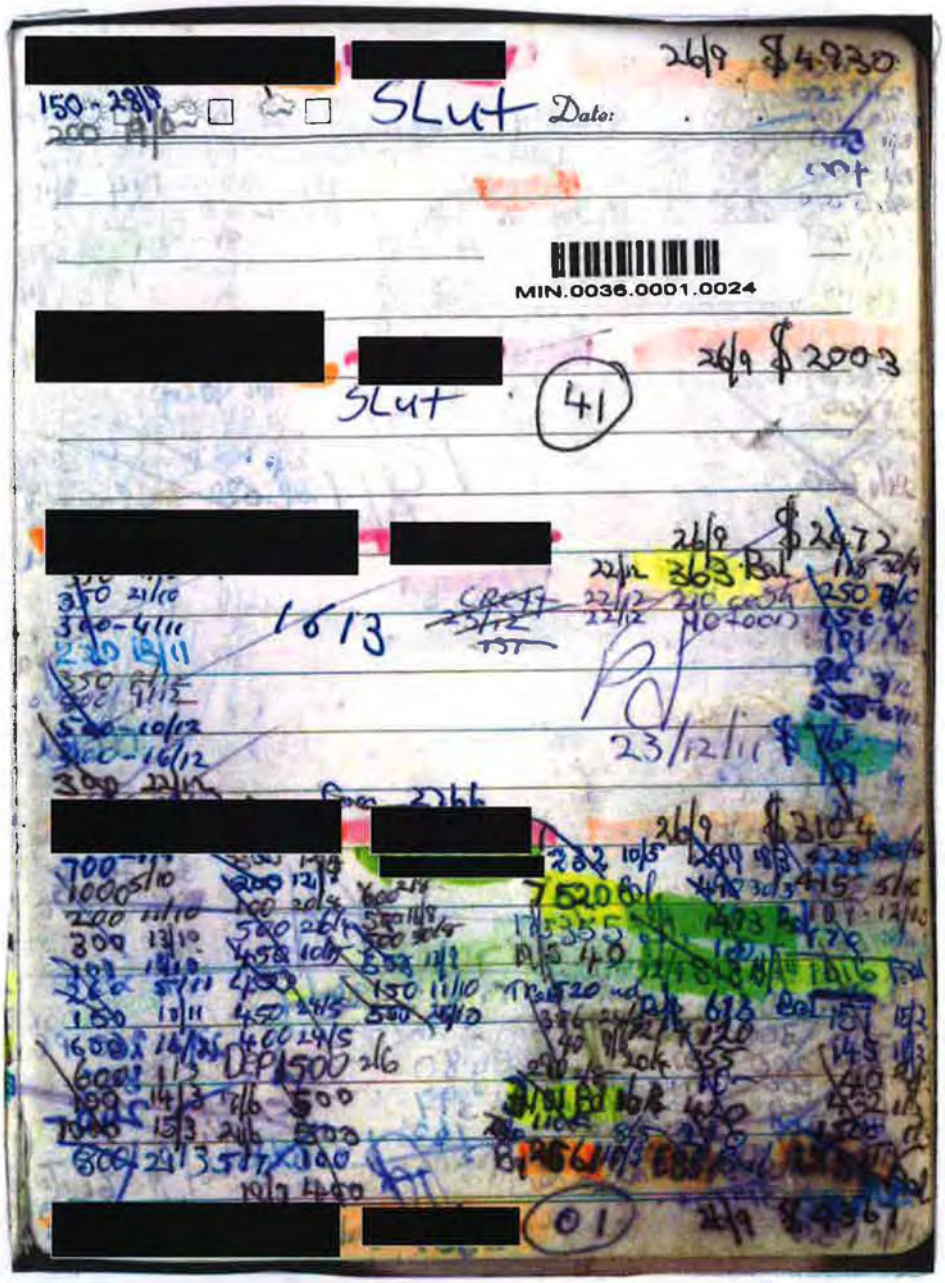
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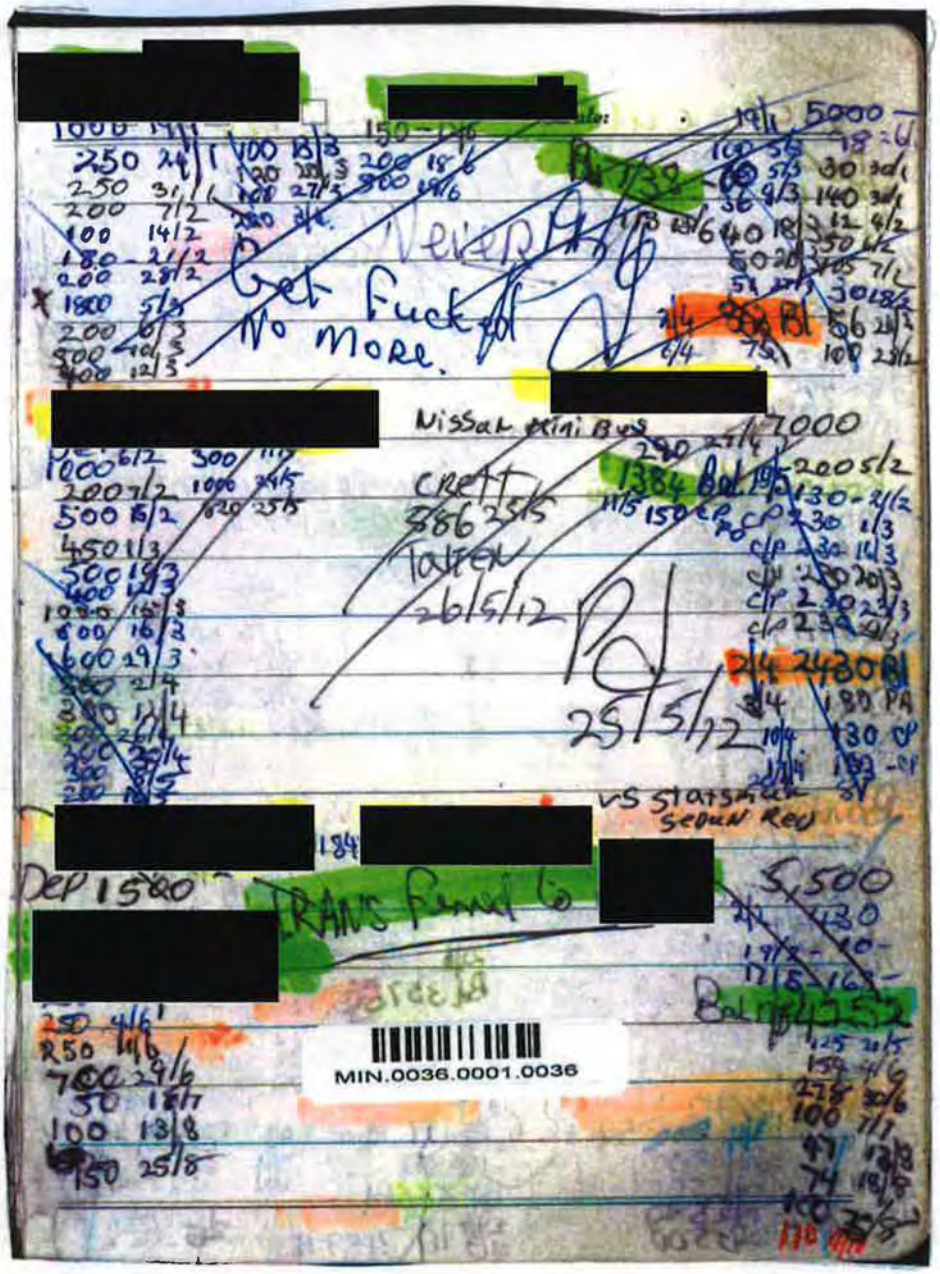
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