HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION APPELLANT

AND

LINDSAY KOBELT RESPONDENT

Australian Securities and Investments Commission v Kobelt
[2019] HCA 18
12 June 2019
A32/2018

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

S P Donaghue QC, Solicitor-General of the Commonwealth, and K E Clark with P P Thiagarajan for the appellant (instructed by Australian Securities and Investments Commission)

T J North QC and H M Heuzenroeder for the respondent (instructed by Lempriere Abbott McLeod)

CATCHWORDS

Australian Securities and Investments Commission v Kobelt

Trade practices – Consumer protection – Unconscionable conduct – Where s 12CB(1) of *Australian Securities and Investments Commission Act 2001* (Cth) relevantly prohibited "unconscionable" conduct in trade or commerce in connection with supply or possible supply of financial services – Where respondent provided "book-up" credit to Anangu customers of general store – Where book-up credit allowed deferral of whole or part of payment for goods subject to respondent retaining customer's debit card and personal identification number – Where respondent used debit card to withdraw whole or nearly whole of wages or Centrelink payments shortly after credited to prevent customers having practical opportunity to access monies – Where respondent applied part of withdrawn funds to reduce customer's indebtedness and made remainder available for provision of future goods and services – Where respondent's record-keeping inadequate and often illegible – Where customers vulnerable due to remoteness, limitations on education, impoverishment and low levels of financial literacy – Where book-up system "tied" Anangu customers to general store – Where customers had understanding of basic elements of book-up system – Where withdrawals authorised by customers – Where customers generally supportive of book-up and respondent's business – Where book-up protected customers from cultural practices requiring sharing of resources with certain categories of kin – Where book-up ameliorated effects of "boom and bust" cycle of expenditure and allowed purchase of food between pay days – Whether respondent's conduct unconscionable within meaning of s 12CB(1) of Act.

Words and phrases – "agency", "book-up", "credit", "cultural practices", "demand sharing", "dishonesty", "exploitation", "financial literacy", "humbugging", "inequality of bargaining power", "legitimate interests", "moral obloquy", "passive acceptance", "power imbalance", "special disadvantage", "standard of conscience", "system or pattern of conduct", "transparency or accountability", "unconscientious conduct", "unconscionable conduct", "undue influence", "unfair", "unjust", "unwritten law", "victimisation", "voluntary", "vulnerability".

Australian Securities and Investments Commission Act 2001 (Cth), ss 12CA, 12CB, 12CC.

KIEFEL CJ AND BELL J.

Introduction

1 Residents of some Aboriginal communities located in rural and remote Australia have been accustomed to obtaining credit from storekeepers under arrangements known as "book-up". Under these arrangements, the customer may be required to give the storekeeper the debit card ("keycard") linked to the bank account to which the customer's wages or Centrelink payments are credited, and to disclose the personal identification number ("PIN") for the keycard. The storekeeper is authorised to withdraw funds from the customer's account in reduction of the customer's debt and in return for the supply of goods over the interval between the customer's "pay days".

2 Book-up credit appears to have developed in association with the extension of social security entitlements to Aboriginal Australians in the late 1950s. Initially, arrangements might have been made for the recipient's social security cheque to be posted to a nominated store in the expectation that it would be cashed in the store and the proceeds applied to the purchase of goods from the store over the course of the succeeding fortnight. The change to the supply of the customer's keycard and PIN is suggested to have come about as the result of changes in the way Centrelink payments and other periodic payments are made.

3 In 2002, the Australian Securities and Investments Commission ("ASIC") commissioned a report on problems associated with book-up credit ("the Renouf report"). The author observed that, in the absence of alternative appropriate financial services, book-up is often the only means for Aboriginal consumers to obtain access to credit. Book-up credit was described in the Renouf report as "a convenient way of managing money over a fortnightly or weekly payment cycle for consumers who lack financial management skills or are affected by cultural pressure to immediately share resources when they are available".

4 The issue presented by the appeal is whether the supply of credit to the residents of remote communities in the Anangu Pitjantjatjara Yankunytjatjara Lands ("the APY Lands"), under the book-up system maintained by the respondent, Mr Kobelt, contravened the proscription of unconscionable conduct fixed by s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act").

Sections 12CB and 12CC of the ASIC Act

In the form in which it was in force from 1 January 2012 to 25 October 2018[1], s 12CB relevantly provided:

> "(1) A person must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of financial services to a person (other than a listed public company); or
>
> (b) the acquisition or possible acquisition of financial services from a person (other than a listed public company);
>
> engage in conduct that is, in all the circumstances, unconscionable.
>
> …
>
> (3) For the purpose of determining whether a person has contravened subsection (1):
>
> (a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
>
> (b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.
>
> (4) It is the intention of the Parliament that:
>
> (a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and
>
> (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

---

1 The provision was further amended with effect from 26 October 2018 by the *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018* (Cth), Sch 2 items 1-2 by omitting the words "(other than a listed public company)" from s 12CB(1)(a)-(b) and omitting s 12CB(5).

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract."

6 Section 12CC(1) contains a non-exhaustive statement of matters to which the court may have regard for the purpose of determining whether a person has contravened s 12CB in connection with the supply, or possible supply, of financial services. Relevantly, these include:

"(a) the relative strengths of the bargaining positions of the supplier and the service recipient; and

(b) whether, as a result of conduct engaged in by the supplier, the service recipient was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient or a person acting on behalf of the service recipient by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the financial services; and

(e) the amount for which, and the circumstances under which, the service recipient could have acquired identical or equivalent financial services from a person other than the supplier; and

…

(j) if there is a contract between the supplier and the service recipient for the supply of the financial services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the service recipient; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the service recipient in complying with the terms and conditions of the contract; and

…

(l) the extent to which the supplier and the service recipient acted in good faith."

Procedural history

7 ASIC brought proceedings in the Federal Court of Australia (White J) against Mr Kobelt alleging contraventions of s 29(1) of the *National Consumer Credit Protection Act 2009* (Cth) ("the NCCP Act") and s 12CB of the ASIC Act in connection with his supply of credit under the book-up system. Section 29(1) of the NCCP Act, which came into operation on 1 July 2011, proscribes engagement in a "credit activity" without a licence. Mr Kobelt did not hold a licence permitting him to engage in credit activity. The primary judge found that, from 1 July 2011 until at least April 2014, Mr Kobelt contravened s 29(1) of the NCCP Act in the provision of credit to purchasers of second-hand motor vehicles. The breach of s 29(1) of the NCCP Act is not relied upon in support of ASIC's unconscionability case.

8 It is common ground that Mr Kobelt's supply of credit to Anangu purchasers of second-hand motor vehicles and other goods was conduct in trade or commerce and that it was engaged in in connection with the supply of "financial services". The issue is whether Mr Kobelt's conduct in connection with the supply of credit under his book-up system was, in all the circumstances, "unconscionable".

9 Prior to amendments which came into effect on 1 January 2012, there was no counterpart to s 12CB(4)(b). Nonetheless, it is accepted that, before the introduction of that provision, a system or pattern of conduct by a trader could constitute unconscionable conduct without the necessity to identify the circumstances of, or the effect upon, any particular consumer (a "system case")[2]. ASIC pleaded a system case by reference to the supply of book-up credit to 117

---

2 *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 at 140-141 [33] per Tamberlin, Finn and Conti JJ.

of Mr Kobelt's Anangu customers. ASIC also pleaded a case that Mr Kobelt's supply of book-up credit to four nominated Anangu customers was unconscionable. In closing submissions, ASIC did not seek findings against Mr Kobelt in connection with the supply of credit to the four nominated customers. It confined its case to the system case.

10 The primary judge found that Mr Kobelt's conduct in connection with the supply of credit under the book-up system was unconscionable: Mr Kobelt had chosen to maintain a system which, while it provided some benefits to his Anangu customers, took advantage of their poverty and lack of financial literacy to tie them to dependence on his store[3]. His Honour declared that Mr Kobelt, by his conduct in providing credit under the book-up system at least since 1 June 2008, had contravened s 12CB of the ASIC Act[4]. Mr Kobelt was ordered to pay the Commonwealth a pecuniary penalty[5] in the sum of $100,000.

The Full Court

11 Mr Kobelt appealed against the primary judge's orders to the Full Court of the Federal Court of Australia (Besanko, Gilmour and Wigney JJ). The appeal was allowed in part, and the Full Court set aside the primary judge's orders arising from the finding of unconscionable conduct. In their joint reasons, Besanko and Gilmour JJ accepted that Mr Kobelt's Anangu customers' poverty and lack of financial literacy made them vulnerable in their dealings with Mr Kobelt[6]. Their Honours were not persuaded, however, that Mr Kobelt's conduct in supplying credit on his book-up terms was unconscionable[7]. The conclusion took into account the primary judge's findings that Mr Kobelt's Anangu customers had a basic understanding of the book-up system, voluntarily entered into book-up credit contracts with Mr Kobelt and understood that they could frustrate the agreement either by cancelling their keycard or by directing

---

3 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [620].

4 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [627].

5 ASIC Act, s 12GBA.

6 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 730 [228]-[232].

7 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 736 [269].

that future payments be credited to a different bank account[8]. The conclusion also took into account the primary judge's finding that Mr Kobelt acted without dishonesty and with a degree of good faith and that ASIC did not submit, and the primary judge did not find, that Mr Kobelt exerted undue influence on his Anangu customers to enter into book-up credit contracts with him[9].

12 Wigney J agreed with their Honours' analysis and, in separate reasons, his Honour additionally held that the primary judge had given insufficient consideration to anthropological evidence of the cultural practices of the Anangu, which differentiate them from mainstream Australian society, and which serve to explain why Anangu customers chose to engage in book-up arrangements with Mr Kobelt[10].

13 On 17 August 2018, Gageler, Nettle and Edelman JJ granted ASIC special leave to appeal from that part of the Full Court's judgment and orders respecting the claimed contravention of s 12CB(1) of the ASIC Act. As a condition of the grant of special leave, ASIC undertook that it would not seek its costs of the application or the appeal. The appeal is brought on three grounds which variously challenge the weight given by the Full Court to the factors that bear on the evaluative judgment of whether conduct in connection with the supply of credit is rightly characterised as unconscionable.

14 The term "unconscionable" is not defined in the ASIC Act and is to be understood as bearing its ordinary meaning. The proscription in s 12CB(1) is of conduct in connection with the supply of financial services that objectively answers the description of being against conscience. The values that inform the standard of conscience fixed by s 12CB(1) include those identified by Allsop CJ in *Paciocco v Australia and New Zealand Banking Group Ltd*: certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made, and:

> "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

---

8 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 735-736 [265]-[268].

9 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 735 [263]-[264].

10 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 741 [296].

respond for their protection, especially from those who would victimise, predate or take advantage"[11].

15 It is the application of the last-mentioned value with which the appeal is concerned. In *Kakavas v Crown Melbourne Ltd*[12] and *Thorne v Kennedy*[13] it was said that a conclusion of unconscionable conduct requires not only that the innocent party be subject to special disadvantage, but that the other party must also unconscientiously take advantage of that special disadvantage. This has variously been described as requiring victimisation, unconscientious conduct or exploitation[14].

16 ASIC's central submission, underlying each of its grounds, is that:

"[T]he factors that made Mr Kobelt's customers vulnerable and that therefore led them to be willing to voluntarily enter into the book-up arrangement, contrary to their interests, were wrongly treated by the Full Court as excusing what would otherwise have been unconscionable conduct anywhere else in modern Australian society."

17 The submission takes as a given that entry into book-up credit arrangements with Mr Kobelt was objectively contrary to the interests of his Anangu customers. It is a submission that accords with the primary judge's analysis that[15]:

"The freedom of the Anangu to make decisions concerning their own lives must of course be respected. However, regard must be had to the limited education, disadvantages, and limited financial literacy of the Book-up customers generally, to which I referred earlier. These placed them in a particularly disadvantageous position relative to Mr Kobelt and diminish the significance which can be attached to the voluntariness of their conduct. Accordingly, the Anangu customers' own subjective views are not conclusive of the conscionability of Mr Kobelt's conduct."

---

11 (2015) 236 FCR 199 at 274 [296].

12 (2013) 250 CLR 392 at 427 [124]; [2013] HCA 25.

13 (2017) 91 ALJR 1260 at 1272 [38]; 350 ALR 1 at 13; [2017] HCA 49.

14 *Thorne v Kennedy* (2017) 91 ALJR 1260 at 1272 [38]; 350 ALR 1 at 13.

15 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [589].

18 The alternative analysis, favoured by the Full Court, is encapsulated by Wigney J's observation that it is not that Mr Kobelt's book-up system took advantage of his Anangu customers' vulnerability but rather that Mr Kobelt, like the proprietors of other establishments in remote communities who provide book-up credit, was fulfilling a demand. The observation takes into account factors that are the subject of challenge in each of ASIC's grounds of appeal: acting with a degree of good faith; absence of undue influence or dishonesty; and the customers' satisfaction with the terms of book-up credit[16].

19 As will appear, determinative of the appeal is the absence of *unconscientious* advantage obtained by Mr Kobelt from the supply of credit to his Anangu customers under his book-up system. The Full Court did not err in holding that Mr Kobelt's conduct did not contravene s 12CB(1) of the ASIC Act and it follows that the appeal must be dismissed. It is necessary to refer in some detail to the evidence and the primary judge's findings to explain why that is so.

Mr Kobelt's book-up system

20 Mr Kobelt has had limited education and has lived in a remote community for significant parts of his working life. From the mid-1980s, he operated a general store in Mintabie, South Australia, under the name "Nobbys Mintabie General Store" ("Nobbys"). Mintabie is situated in the far north of South Australia, approximately 1,100 km from Adelaide in an area excised by lease to the Government of South Australia from the APY Lands. A range of goods including food, groceries, fuel and second-hand cars was sold at Nobbys. Almost all of Mr Kobelt's customers were Anangu persons who resided predominantly in two remote communities, Mimili and Indulkana, north-west of Mintabie in the APY Lands. These customers were characterised by their poverty and their low levels of literacy and numeracy which, relevantly, meant that they lacked "financial literacy".

21 Mr Kobelt supplied credit to his Anangu customers under a book-up system by which payment for goods was deferred in whole or in part subject to the customer supplying Mr Kobelt with the keycard and PIN linked to the account into which the customer's wages or Centrelink payments were credited. Generally, Mr Kobelt retained possession of the keycard until the debt was repaid, although on occasions Mr Kobelt returned a customer's keycard notwithstanding that the debt had not been repaid. This might happen if the customer was travelling away from the APY Lands. On such occasions, the customer returned the keycard to Nobbys on his or her return. There were two

---

16 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 756 [373].

other stores in Mintabie and at least one of these stores provided credit to Anangu customers under a book-up scheme that did not materially differ from that provided by Mr Kobelt.

22 Mr Kobelt, or members of his family who assisted in the running of Nobbys, used the keycard and PIN to access the customer's account and to withdraw the whole or nearly the whole of the available funds ("the withdrawal conduct"). The majority of withdrawals were made early in the morning, before or shortly after Nobbys opened, on the day funds were credited to the account. Withdrawals were made promptly to prevent the customer having any practical opportunity to access the monies in the account by internet or telephone banking. Mr Kobelt did not know the amount in a customer's account and the process of withdrawing funds was one of trial and error. There were occasions when funds had been withdrawn in excess of a limitation placed on Mr Kobelt's authority.

23 Customers were not required to complete any form of application to obtain book-up credit and additional credit was available under the book-up system without further formality. The withdrawal of funds from Mr Kobelt's customers' accounts was authorised and was subject to an informal understanding that part of the funds would be applied in reduction of the customer's debt and part was in exchange for the provision of future goods and services. Mr Kobelt applied at least 50 per cent of the funds withdrawn from his customers' accounts to reduce their indebtedness to Nobbys. Mr Kobelt said that the remaining 50 per cent of his customers' funds was available for the customer's use. Mr Kobelt did not apply the customers' "entitlement" to 50 per cent of the funds in a literal way; 50 per cent served Mr Kobelt as a guideline for the maximum amount available to the customer's use ("the book-down").

24 Mr Kobelt exercised control over the amount of the book-down, limiting his customers to amounts of $100, $150 or $200 to ensure that they would have "something" at the end of the week. Mr Kobelt's discretionary control over his book-up customers extended on occasions to the refusal to allow the customer to buy sweets or chips. The primary judge accepted Mr Kobelt's evidence that he had never refused to supply food to a customer from whose account he had withdrawn all the money. Generally, such customers were limited to the purchase of milk, bread and meat.

25 Anangu customers had to travel a considerable distance to shop at Nobbys. Mr Kobelt issued purchase orders which enabled his book-up customers to purchase goods, or to obtain cash, at other stores. Purchase orders were transmitted by Mr Kobelt to nominated stores and were issued in amounts ranging from $20 to $500. The customer was able to purchase goods, or obtain cash, at the nominated store and Mr Kobelt settled with the store owner. Mr Kobelt charged customers a fee of $5 or $10 for the issue of a purchase order. The fee was less than the fee charged by Australia Post for its express money

order service. Mr Kobelt also provided customers with cash advances under the book-up system. At least some customers who were given a cash advance paid a fee for the service.

26 Most of the book-up credit provided by Mr Kobelt to his Anangu customers was made in connection with the sale of second-hand motor vehicles. The sale of these vehicles formed a significant part of Mr Kobelt's business. The vehicles sold at Nobbys often had been driven in excess of 200,000 km and were not subject to any statutory warranty of repair. In some instances, purchasers paid for a vehicle in cash. In these instances, the purchase price was discounted by around $1,000. More commonly, Anangu customers paid a deposit of between $440 and $3,500 and the balance of the purchase price was repaid under the book-up system.

27 Mr Kobelt maintained that he did not impose any credit charge on goods sold to his Anangu customers. The primary judge rejected Mr Kobelt's evidence in this respect in relation to the sale of second-hand motor vehicles. His Honour found that cash-paying customers were able to purchase a Nobbys vehicle at a price around $1,000 less than the stated price. In truth, his Honour found that book-up customers purchasing second-hand vehicles at Nobbys, for an average price of $5,600, were paying an expensive credit charge. His Honour's conclusion that Mr Kobelt's conduct was unconscionable took into account the fact that the credit charge had not been made explicit to his book-up customers[17].

28 The evidence did not establish whether car dealers in Alice Springs and Port Augusta, with whom Mr Kobelt compared the prices for his cars, and whom he regarded as his competitors, sold cars to Anangu persons on credit. The majority of Mr Kobelt's Anangu book-up customers did not own assets which could be pledged as security for a loan. The primary judge recognised that it would have been difficult for Mr Kobelt's Anangu customers to obtain loans from commercial lenders. His Honour acknowledged that an advantage of Mr Kobelt's book-up system was that it provided a relatively simple means by which Anangu persons could obtain credit that would not otherwise be available to them[18].

29 Mr Kobelt knew most of his Anangu customers and he was aware of their financial circumstances. He did not make inquiries about his Anangu customers' capacity to repay the balance of the purchase price of a second-hand car or other

---

17 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [551].

18 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [510].

consumer good before entering into book-up credit arrangements with the customer. Over a period of ten years, Mr Kobelt had only refused to extend book-up credit to about 12 to 15 customers. He had a total customer base of 600 Anangu persons, of whom about 200 visited his store each week.

30 Mr Kobelt's Anangu customers had the capacity to frustrate their book-up credit contracts by cancelling their keycard or by arranging for their Centrelink payments, or wages, to be credited to a different account. Some customers had done so. In those cases, with one exception, Mr Kobelt had chosen not to pursue any avenues of debt recovery. He appreciated that it was not in his commercial or reputational interest to do so.

31 Mr Kobelt had an unsophisticated approach to many matters, which was manifest in his book-up arrangements. His record-keeping was rudimentary. Such records as he kept of book-up transactions were illegible or only barely legible. Entries were so cramped and chaotic that it was difficult to understand fully the state of the running accounts of the 117 book-up customers at any given time. Customers were not given any record of withdrawals or account statements. There was no evidence that any customer had asked to examine Mr Kobelt's records of book-up transactions. Had such an inquiry been made, the customer would have had considerable difficulty understanding the entries and no means of checking their accuracy. There was no suggestion, however, that Mr Kobelt maintained his records dishonestly, nor was it part of ASIC's system case that the withdrawal of funds from customers' accounts was not authorised. And Mr Kobelt's Anangu customers had a basic understanding of his book-up credit system.

The anthropological evidence

32 ASIC adduced evidence from Dr Martin, an anthropologist, who at ASIC's request visited Mimili and Indulkana and interviewed a number of Mr Kobelt's Anangu customers. In his report, Dr Martin explained the "intersection between the distinctive Anangu society and culture of the APY Lands, and the wider Australian society and its culture and institutions (including the legal and financial systems)", observing that there are "varying degrees of incommensurability" between Anangu values and practices and those of the wider Australian society. Dr Martin stated that the Anangu have adapted their values and practices to accommodate those of the market economy through the personalisation of financial transactions, that is, Anangu consumers prefer to conduct financial transactions through the use of brokers, such as storekeepers. The face-to-face contact involved in the supply of book-up credit, as distinct from reliance on paperwork, was perceived by Dr Martin's Anangu interviewees as consistent with Anangu customs.

33 As Dr Martin explained the phenomenon, Anangu customers entrusted Mr Kobelt with their keycards to enable them to exercise "agency" in the sense of the capacity to act and to exercise choice in what was perceived to be the individual's own interests. Several interviewees reported "that they supported book-up in general and were positively disposed to Nobby's Credit Facility in particular". Dr Martin got no sense that any of the individuals whom he interviewed "felt that the terms on which Nobby's provided credit to them were unjust, unfair, or unreasonable".

34 Dr Martin explained that motor vehicles have come to be central to social, ceremonial and economic life among Aboriginal communities in the APY Lands; they provide access to country necessary for hunting and gathering, visiting kin in other communities, increased shopping opportunities away from communities, attending sporting fixtures, attending medical appointments and, importantly, participation in initiation and funerals. Anangu interviewees told Dr Martin that book-up was the only means by which they could purchase a vehicle.

35 Apart from enabling impoverished Anangu customers to acquire second-hand motor vehicles and other consumer goods on credit, the anthropological evidence pointed to book-up credit as having two particular advantages in light of Anangu culture and practices. Dr Martin explained that it is common for the Aboriginal residents of remote communities to spend money as it becomes available without regard to the medium- to long-term consequences of the expenditure (the "boom and bust cycle"). The primary judge acknowledged that the limitation that Mr Kobelt placed on the amount which the customer could expend by way of book-down had a beneficial effect in ameliorating the boom and bust cycle.

36 Dr Martin also explained that an embedded social obligation of the Anangu requires that they share their resources with specific categories of kin ("humbugging" or "demand sharing"). The obligation is a foundational principle of Anangu life: the giver has a responsibility to share and the recipient the right to share, even to the point of demanding a share. The primary judge found that money is the subject of demand sharing and Anangu persons who are believed to have access to money may be importuned to the extent of being bullied and exploited to share it. In this respect his Honour referred to the account of a financial counsellor, Mr Stauner[19]:

> "Humbug [is an] ongoing problem in communities across the APY Lands, this is where family members or friends pressure other members of the

---

19 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [576].

> community for cash, food, use of their car or telephone without considering the feelings of the other party. [T]his is also mostly done in the family group where younger members of the family pressure the older members".

37 Mr Stauner had witnessed residents of the APY Lands being subject to immediate demands to share cash withdrawn from an ATM. The Mimili storekeeper also gave evidence of witnessing behaviour of this description. According to the storekeeper the practice was common and was not confined to the kin of the resident making the withdrawal.

38 The primary judge acknowledged that Mr Kobelt's book-up system may confer an incidental benefit on Anangu customers by relieving the pressure of demand sharing. Nonetheless, his Honour considered that any such advantage should not be overstated[20]. Although all six Anangu witnesses gave evidence of sharing their money with others and of using it to buy goods which were shared with others, none gave evidence of feeling pressured or overborne or of being bullied. Only one witness gave evidence that the desire to avoid demand sharing was the reason for engaging in book-up credit[21]. Other Anangu witnesses acknowledged that they had felt an obligation to share and that one of the reasons that they liked shopping at Nobbys was that they could do so away from the gaze of others. Nonetheless, his Honour considered that this evidence fell short of a statement that the reason for engaging in book-up credit was to avoid demand sharing.

39 A further reason for discounting the significance of demand sharing as an advantage of the book-up system was the primary judge's view that Mr Kobelt's conduct in depriving his customers of access to their own funds increased the likelihood that the customers themselves would engage in a form of demand sharing with those who still had access to funds[22]. His Honour noted the availability of financial counselling to Anangu residents of Mimili and Indulkana through the MoneyMob service[23]. In the circumstances, the finding was that the

---

20 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [585].

21 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [582].

22 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [584].

23 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [572].

avoidance of improvident spending did not justify the withdrawal conduct under Mr Kobelt's book-up arrangements.

40 Save for two witnesses who had particular grievances, the primary judge found that Mr Kobelt's Anangu customers considered that he had treated them well and they were well-disposed towards him. It was evident that they appreciated the ability to buy food in between their pay days[24]. His Honour accepted that many of Mr Kobelt's Anangu book-up customers were satisfied with the book-up arrangement. This was evidenced, among other things, by the fact that several customers had entered into book-up credit arrangements with Mr Kobelt on more than one occasion, returning to Nobbys to hand over their keycards and PINs[25].

41 The primary judge approached the determination upon an acceptance that "[t]here are undoubtedly features of the Book-up system which several of the Book-up customers find attractive"[26] and "[w]hether rightly or wrongly and whether well informed or not, each [Anangu witness] must have considered [book-up credit] appropriate to their needs"[27].

42 The primary judge's finding of unconscionability took into account evidence of an occasion when, as the result of the failure of the Commonwealth Bank's computer system, Mr Kobelt had been able to withdraw sums from his customers' accounts which were well in excess of the available balance in those accounts[28]. While this incident ("the CBA glitch") did not form part of the book-up system, his Honour considered that it was difficult to avoid the conclusion

---

24 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [588].

25 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [591].

26 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [591].

27 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [588].

28 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [93].

that Mr Kobelt had "on this occasion prey[ed] on the customers with CBA accounts to his own advantage"[29].

43 The principal consideration which informed the primary judge's conclusion was that there was no necessity for Mr Kobelt to withdraw the whole of the customer's funds in order to protect Mr Kobelt's legitimate interests[30]. The primary judge identified a number of alternative means by which Mr Kobelt might have protected his legitimate interests while permitting his Anangu customers to purchase goods from Nobbys on credit. His Honour accepted that these alternative arrangements may not have been available in all cases, or, even if available, may not have been satisfactory in all cases. Nonetheless, they served to indicate that the book-up system operated by Mr Kobelt went well beyond that which was necessary for the protection of his own legitimate interests[31].

44 His Honour found that Mr Kobelt acted with "a degree of good faith" in his dealings with his Anangu customers. However, this did not mean that Mr Kobelt acted in an "altruistic or disinterested way"[32]. His Honour observed that Mr Kobelt was at all times pursuing his own interests, and that he had done so even when the pursuit of those interests was to the detriment of his customers[33]. While there were aspects of Mr Kobelt's conduct which could be regarded as benevolent, those aspects were, in his Honour's estimate, incidents of arrangements that he put in place for the benefit of his business.

45 His Honour observed that the book-up system operated to tie customers to Nobbys, which conferred on Mr Kobelt a significant commercial advantage[34]. His Honour characterised the tying effect of Mr Kobelt's book-up credit as

---

29 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [550].

30 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [522].

31 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [525]-[538].

32 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [559].

33 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [559].

34 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [603].

constituting a form of exploitation and predation[35]. While the supply of credit under Mr Kobelt's book-up system could be seen as a benevolent form of paternalism, it prolonged his Anangu customers' dependence on his exercise of discretionary control over their lives[36].

The Full Court

46 In overturning the primary judge's finding of unconscionability, the Full Court took into account that Mr Kobelt's book-up system was not out of the ordinary in relation to the supply of credit to Indigenous communities: at least one of the two other stores in Mintabie supplied book-up credit to Anangu customers. Their Honours considered that the advantages of the book-up system in alleviating demand sharing and the effects of the boom and bust cycle, while difficult to weigh and quantify, were "undoubtedly present"[37]. They also considered that Mr Kobelt did not exercise any form of undue influence over his book-up customers or make dishonest use of their keycards, and that while his record-keeping was chaotic, there was no suggestion that his records were maintained dishonestly[38]. Significantly, despite the customers' low levels of financial literacy, their Honours noted the finding that the customers understood the basic elements of the book-up system including the withdrawal conduct and that they voluntarily entered into book-up credit contracts[39]. Their Honours found that there was no basis for the primary judge's finding that Mr Kobelt engaged in predatory or exploitative conduct in connection with the supply of credit under the book-up system[40].

---

35 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [606], [609].

36 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [607].

37 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 735 [262] per Besanko and Gilmour JJ, and see Wigney J's concurring judgment at 741 [296].

38 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 735 [263]-[264] per Besanko and Gilmour JJ.

39 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 735 [265]-[266] per Besanko and Gilmour JJ.

40 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 735-736 [267]-[268] per Besanko and Gilmour JJ.

The conduct of the appeal

47 The conclusion that a supplier of a financial service has engaged in conduct that contravenes the statutory norm of conscience fixed by s 12CB(1) of the ASIC Act is an evaluative judgment. Nonetheless, it is a judgment that is either right or wrong. It was the duty of the Full Court to conduct a "real review" of the evidence and the primary judge's reasons for judgment[41]. Their Honours were unanimous in concluding that the primary judge erred in finding that Mr Kobelt's conduct in the supply of credit under his book-up system was unconscionable. That conclusion is challenged on three grounds. Before turning to those grounds, there should be reference to three features of the proceedings that are not the subject of ASIC's appeal.

48 The first feature is that ASIC's case, below and in this Court, is that unconscionable conduct involves "the existence of a special [dis]advantage of which someone takes ... [u]nconscientious advantage"[42] and that Mr Kobelt's conduct in supplying credit under his book-up system took unconscientious advantage of the vulnerability of his Anangu customers. In the circumstances, the appeal does not provide the occasion to consider any suggestion that statutory unconscionability no longer requires consideration of (i) special disadvantage, or (ii) any taking advantage of that special disadvantage[43].

49 Moreover, ASIC made no submission that courts have adopted an unduly restrictive interpretation of the term "unconscionable" contrary to the evident intention of the legislature. The Court was not taken to the legislative history or other extrinsic materials to make good such a suggestion. That is, perhaps, unsurprising since, if the legislative intention were to fix a standard for the supply of financial services in trade or commerce lower than that of conduct that answers the description of being against conscience, it is to be expected that the draftsperson would have employed another term.

50 Among other values, that of certainty in the conduct of commercial transactions is reflected in the legislative choice to fix the standard of conscience in s 12CB(1)[44]. Any consideration of "lowering the bar" from that standard

---

41 *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at 686 [43]; 331 ALR 550 at 558; [2016] HCA 22, citing *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25] per Gleeson CJ, Gummow and Kirby JJ; [2003] HCA 22.

42 [2018] HCATrans 252 at 1940-1945.

43 [295] per Edelman J.

44 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 274-275 [296]-[298] per Allsop CJ.

should only be undertaken in a case in which the proposition is squarely raised and argued.

51 The second feature of the proceedings concerns the significance of the finding that the credit provided by Mr Kobelt on the purchase of second-hand vehicles was of a "very expensive kind"[45]. ASIC's pleaded case in connection with the credit charge imposed by Mr Kobelt on the purchase of second-hand motor vehicles was with respect to the alleged contravention of s 29(1) of the NCCP Act. Mr Kobelt's appeal against the primary judge's orders respecting the contravention of s 29(1) was dismissed and special leave to cross-appeal from that dismissal was refused.

52 ASIC did not particularise the credit charge on the purchase of second-hand vehicles in its pleaded case of unconscionable conduct. Nonetheless, Besanko and Gilmour JJ considered that the amount of the credit charge had been an issue at the trial. The conduct of Mr Kobelt's defence had made it one: Mr Kobelt sought to establish that the terms on which he offered credit were better than the terms which his customers could obtain from traditional financial institutions[46]. On the hearing in this Court, ASIC acknowledged that the primary judge's finding was that the credit charge on the purchase of a motor vehicle was objectively expensive, not that it was more expensive than credit available from another credit provider. ASIC accepted that, divorced from the fact that it was undisclosed, the finding of the expensive credit charge had "limited" significance to its unconscionability case. As Besanko and Gilmour JJ observed, the lack of disclosure of the high credit charge was not the gravamen of ASIC's unconscionable conduct case. And as their Honours also observed, "[t]here may be an argument here that it is also relevant that [the Anangu customers] were receiving the motor vehicles at or below market value"[47].

53 ASIC's acknowledgment of the limited significance of the expensive credit charge on the purchase of second-hand vehicles to its system case of unconscionable conduct was appropriate. The system case was concerned with the provision of credit under the book-up system. Credit under the book-up system was available for the purchase of second-hand vehicles, food, fuel,

---

45 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [492].

46 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 727 [209].

47 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 736 [267(3)].

general groceries and other services[48]. The essential features of the book-up system which were said to make the provision of credit unconscionable were the withdrawal conduct and the tendency of the withdrawal conduct to tie customers to dependence on Nobbys.

54 The third feature of the proceedings is that the primary judge made no findings with respect to Mr Kobelt's conduct in relation to the supply of credit to the four customers identified as A, B, C and D, who were the subjects of the case which ASIC did not press[49].

The grounds of appeal

55 Against this background, we now turn to the grounds on which the appeal is brought:

(1) The Full Court failed to give "due weight" to the special disadvantage or vulnerability of Mr Kobelt's Anangu customers and gave "undue or disproportionate weight" to the customers' basic understanding of the book-up system, voluntary entry into the book-up contracts, ability to terminate the contracts (albeit by acting in breach of them), and "agency" or freedom of contract.

(2) The Full Court erred in overturning the primary judge's findings that Mr Kobelt engaged in predation or exploitation; in failing to give "any or due weight" to evidence of Mr Kobelt's "irregular conduct" which, while not part of the "system", was indicative of predation and exploitation; and in giving "undue or disproportionate weight" to the finding that Mr Kobelt acted "with 'a degree of good faith' and not dishonestly or fraudulently".

(3) The Full Court gave "undue or disproportionate weight" to the incidental benefits or advantages of the book-up system arising from historical and cultural norms and practices of the Anangu community, and did not attach "any or due weight" to the primary judge's findings that these historical and cultural norms and practices contributed to or demonstrated the special disadvantage of some of Mr Kobelt's customers.

---

48 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 701 [60].

49 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [625]-[626].

56 The legal error that is said to underlie ASIC's first ground is the Full Court's asserted failure to distinguish the principles of undue influence from those of unconscionability under the general law. The argument directs attention to their differing focus: undue influence being concerned with the quality of the consent of the weaker party and unconscionability being concerned with the conduct of the stronger party in taking advantage of the vulnerability of the weaker party. ASIC submits that, while the exertion of undue influence bears on the determination of unconscionability, the absence of undue influence is entirely neutral and the Full Court was wrong to take it into account.

57 ASIC refers to *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*[50] as illustrative of the correct approach. The Full Court of the Federal Court of Australia found that Lux Distributors Pty Ltd ("Lux") engaged in conduct in connection with promotion and supply of vacuum cleaners to three elderly customers that was, in all the circumstances, unconscionable contrary to s 51AB of the *Trade Practices Act 1974* (Cth) and s 21 of the *Australian Consumer Law*. This was so notwithstanding the customers' voluntary entry into the sale contracts. The normative standard applied in *Lux* was that of "honest and fair conduct free of deception"[51]. Notably, Lux's sales strategy employed a deceptive ruse to gain access to the customer's home and, once entry was gained, a selling technique that was designed to create a sense of obligation to purchase[52].

58 Recognition that the supplier of a financial service may engage in conduct that is unconscionable, notwithstanding the recipient's voluntary entry into the contract for the supply of the service[53], does not make the absence of the exertion of undue influence an irrelevant consideration. Section 12CC(1)(d) invites the court to consider "*whether* any undue influence or pressure was exerted on, or any unfair tactics were used against" the recipient of the financial service (emphasis added) as one of the factors to be weighed in determining whether, in all the circumstances, the supplier's conduct is unconscionable. The absence of the exertion of undue influence, pressure or unfair tactics bears on the assessment of whether the commercial advantage obtained by the supplier in connection with the supply of the financial service is an *unconscientious* advantage.

---

50 (2013) ATPR ¶42-447.

51 *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* (2013) ATPR ¶42-447 at 43,467 [41].

52 *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* (2013) ATPR ¶42-447 at 43,465 [27], 43,467 [39], 43,468 [44].

53 *Thorne v Kennedy* (2017) 91 ALJR 1260 at 1272 [40]; 350 ALR 1 at 14.

59 For the same reasons, ASIC's challenge in its second ground to the weight given by the Full Court to the finding that Mr Kobelt did not act dishonestly must be rejected. ASIC argues that, to the extent that notions of moral tainting or obloquy[54] "suggest[] a need for dishonesty or something more than the taking advantage of the special disadvantage" of the recipient, they are unhelpful in applying the statutory standard of unconscionability in the ASIC Act and cognate legislation. The submission does not go anywhere. It may be accepted that conduct in the supply of a financial service may be unconscionable in circumstances in which the supplier's conduct does not involve dishonesty. This is not to say that the absence of dishonesty, or other moral taint, is not a material consideration in determining whether, objectively, the supplier's conduct involves such a departure from accepted community standards in the supply of the financial service as to warrant the characterisation that it is unconscionable[55].

60 The Full Court made clear that it approached the determination upon a view that consideration of moral obloquy had a role to play but was not a substitute for the statutory words[56]. Their Honours correctly took into account the findings that Mr Kobelt acted with a degree of good faith and not dishonestly as among the circumstances to which it was necessary to have regard in determining whether his conduct fell below the statutory norm of conscience.

61 On the hearing, ASIC did not press that part of its second ground that contends that the Full Court erred in overturning the primary judge's findings of exploitation and predation. The argument now put is that a supplier may fall below the standard of conscionability fixed by s 12CB(1) without engaging in predatory or exploitative conduct. The primary judge's findings in these respects are said to "really … mean nothing much more than taking advantage of the disadvantage". There is no warrant for treating the primary judge's reasons in these respects as mere surplusage. They were findings which informed his Honour's conclusion that Mr Kobelt took *unconscientious* advantage of the vulnerability of his Anangu customers and were consistent with what had been said in *Kakavas* and *Thorne v Kennedy*, referred to earlier in these reasons.

---

54 *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 583 [121], 584 [124] per Spigelman CJ; *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* (2013) ATPR ¶42-447 at 43,467 [41], 43,470 [61] per Allsop CJ, Jacobson and Gordon JJ.

55 *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* (2018) 356 ALR 440 at 477 [195] per Bathurst CJ.

56 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 724 [193] per Besanko and Gilmour JJ, 741 [296] per Wigney J.

62 ASIC's central submission is that the Full Court failed to take into account that conduct may be unconscionable if the innocent party is subject to a "special disadvantage 'which seriously affects the ability … to make a judgment as to [the innocent party's] own best interests'". The submission is developed in support of the third ground of appeal and focuses on Wigney J's analysis. In ASIC's submission, his Honour was wrong to approach the determination upon a view that "[w]hat the wider Australian society and its culture and institutions might regard as disadvantageous and unfair might be regarded by an Anangu person as in fact advantageous and reasonable"[57]. The vice in the conclusion, on ASIC's argument, is that it fails to recognise that the Anangu customers' special disadvantage seriously affected their ability to make a judgment as to their own best interests[58]. The Anangu customers' lack of financial literacy and choice to enter into book-up credit with Mr Kobelt, in ASIC's submission, result in the maintenance of a system that would be unacceptable in mainstream Australian society.

63 The submission assumes that, if Mr Kobelt's Anangu customers had not been wanting in financial literacy, they would not have chosen to obtain credit under the book-up system. Implicit in Besanko and Gilmour JJ's analysis, and explicit in Wigney J's analysis, is that the evidence does not support that conclusion.

64 According to Dr Martin, it was clear "that there is widespread use of book-up, that there is support for this amongst many" members of the community, and:

> "that book-up is seen by many Anangu as enabling them to access cash, food and other necessities when they are in the bust segment of the boom and bust cycle, or away from their home community, and also to circumvent the difficulties in saving for larger capital expenditures on valued consumer goods (most particularly motor vehicles)".

65 Book-up credit provided Mr Kobelt's customers with the ability to purchase goods, including motor vehicles, notwithstanding their low incomes and lack of assets with which to secure a loan. While the primary judge canvassed a number of alternative ways in which Anangu customers might have obtained credit, his Honour did not find that the alternatives would serve in all cases. Not

---

57 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 747 [329].

58 *Thorne v Kennedy* (2017) 91 ALJR 1260 at 1272 [38]; 350 ALR 1 at 13, citing *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462; [1983] HCA 14.

only were alternative forms of credit not necessarily available but, as Wigney J noted, some of the suggested alternatives might not have suited the Anangu. They may have preferred to enter into a book-up contract because it did not require the customer to deal with bureaucracy or to fill out paperwork and because they liked to deal with Mr Kobelt as a trusted broker[59]. It is a large submission that the provision of book-up credit on terms which suited Mr Kobelt's adult Anangu customers and which enabled them to purchase a consumer good which they valued highly is to be characterised as objectively against their interests.

66 The Full Court's finding was that book-up credit suited Mr Kobelt's Anangu customers for reasons that stemmed from cultural practices and norms and not from their position of special disadvantage. ASIC's challenge to the weight that the Full Court gave to the advantages of book-up credit is principally directed to the evidence of demand sharing. ASIC embraces the primary judge's view that this advantage should not be overstated.

67 The circumstance that only one of the six Anangu witnesses identified the avoidance of demand sharing as a reason for entering into book-up credit arrangements is not to deny that book-up credit was supported by Mr Kobelt's Anangu customers because, among other matters, it relieved them of the pressure of demand sharing. Dr Martin commented on the reluctance of his Anangu interviewees to disclose personal views about the "institution" of book-up. He considered it reasonable to infer that within the "Anangu polity" a consensual public account of book-up was to be accorded primacy rather than individual views.

68 It was Dr Martin's opinion that[60]:

> "By leaving their keycards with the storekeeper, Aboriginal people can avoid the all-pervasive 'humbugging' for cash from relations, particularly on those days when wages or pensions are known to be deposited electronically into accounts, and they may also accumulate savings."

69 The opinion is in line with the Renouf report, which also identified the avoidance of demand sharing as a benefit of book-up credit. It was open to the Full Court to place weight on the avoidance of demand sharing, together with ameliorating the effects of the boom and bust cycle of expenditure, as advantages

---

59 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 752 [354].

60 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 742 [304].

of book-up credit which were not the product of the Anangu customers' special disadvantage.

70 While, as the Full Court acknowledged, the CBA glitch and some instances of other irregular conduct may not have reflected well on Mr Kobelt, their Honours were right to put these instances to one side in considering whether Mr Kobelt's conduct in supplying credit under his book-up system contravened s 12CB(1). Stripped of the findings of predatory and exploitative conduct, ASIC's case relies upon the primary judge's assessment that Mr Kobelt's conduct in withdrawing all of the funds in book-up customers' accounts involved the imposition of a condition that was not reasonably necessary for the protection of his legitimate interests.

71 The primary judge acknowledged that it suited some customers to have Mr Kobelt take the whole of the available balance from their accounts, that some customers may have requested him to do so, that it may have helped customers to deal with humbugging, and that it may have reduced customers' transaction fees. However, his Honour observed that none of these bore on the reasonable necessity to withdraw the funds for the protection of Mr Kobelt's own interests.

72 Section 12CC(1)(b) invites the court to have regard to:

> "whether, as a result of conduct engaged in by the supplier, the service recipient was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier".

73 The primary judge's finding was that[61]:

> "I am satisfied, however, that [alternative systems] serve to indicate that Mr Kobelt's requirement that he obtain possession of customers' key cards and PINs and that he be permitted (*absent a contrary instruction from a customer*) to withdraw the whole of the available balance in the customer's account from time to time, went well beyond what was reasonably necessary for the protection of his own legitimate interests." (emphasis added)

74 The finding was not that Anangu customers were required, as a result of Mr Kobelt's conduct, to comply with a condition that Mr Kobelt withdraw the whole of the available balance in the customer's account. The finding was that, under Mr Kobelt's book-up system, credit was supplied on terms which included authorisation to withdraw the whole of the available balance in the customer's

---

61 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [538].

account unless the customer placed a limit on the authorisation. In any event, the conclusion of unconscionability requires consideration of the supplier's conduct in all of the circumstances[62]. Again, the finding that it suited many of his Anangu customers for Mr Kobelt to withdraw all of their funds, for reasons unconnected with the customers' want of financial literacy, bears directly on whether his conduct in supplying book-up credit contravened the statutory norm.

75 Mr Kobelt was not required to act in an altruistic or disinterested way in his dealings with his customers. Nor was Mr Kobelt required to devise an alternative, superior form of book-up credit. The statutory proscription is on engaging in unconscionable conduct. The difficulty with ASIC's system case of statutory unconscionability lies in identifying any advantage that Mr Kobelt obtained from the supply of book-up credit that can fairly be said to be against conscience.

76 The only advantage that the primary judge identified was that book-up credit tied Mr Kobelt's customers to dependence on Nobbys. His Honour suggested that had the book-up system not created this dependence, Mr Kobelt's Anangu customers might well have chosen to shop at community stores in the APY Lands or in Marla. Even if true, this would not support a conclusion that the supply of credit on Mr Kobelt's book-up terms took unconscientious advantage of his Anangu customers' vulnerability. And, as Wigney J noted, Dr Martin's evidence was that Anangu residents of Mimili and Indulkana viewed shopping at Mintabie as an exercise of "agency" because there was a wider choice available at the Mintabie stores, prices were cheaper and travel was not viewed as a disincentive for most Anangu. Indeed, travel could be seen as advantageous because it entailed visiting "country" and was a "highly social occasion". There was no evidence that Mr Kobelt's customers considered that they had been exploited because they had had to return to Nobbys.

77 Contrary to the tenor of ASIC's submission, the Full Court's conclusion that Mr Kobelt's conduct was not unconscionable does not posit a different, lower standard of conscionable conduct in the supply of credit to Anangu consumers than applies to the supply of credit to consumers in mainstream Australian society. It is a conclusion that takes into account, correctly, all of the circumstances[63] including the evidence of the cultural norms and practices of the Anangu residents of the APY Lands. Acceptance of this evidence is against the

---

62 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 586 [185], 587 [188] per Gageler J, 620 [294] per Keane J; [2016] HCA 28.

63 ASIC Act, s 12CB(1).

premise of ASIC's central submission, that the supply of book-up credit was objectively contrary to the interests of Mr Kobelt's Anangu customers.

78 The basic elements of Mr Kobelt's book-up system were understood by Mr Kobelt's Anangu customers, and those who chose to enter into book-up credit contracts with him appear to have done so because it enabled them to purchase goods which they valued and which otherwise they may not have been able to acquire. The terms on which book-up credit was supplied were perceived by the Anangu customers to be appropriate. This perception was not the product of the Anangu customers' lack of financial literacy: it reflected aspects of Anangu culture that are not found in mainstream Australian society.

79 Book-up credit has a long history in rural and remote Indigenous communities. In this context, Mr Kobelt's supply of book-up credit was not out of the ordinary. No feature of Mr Kobelt's conduct in the supply of book-up credit to his Anangu customers exploited or otherwise took advantage of the customer's lack of education and financial acumen. While Mr Kobelt's book-up credit system was open to abuse, Mr Kobelt did not abuse it. In the circumstances, the Full Court was right to hold that Mr Kobelt's conduct in connection with the supply of credit to his Anangu customers was not unconscionable.

Order

80 For these reasons, there should be the following order:

Appeal dismissed with costs.

81 GAGELER J. "Unconscionable" is an obscure English word which centuries of use by courts administering equity have transformed into a legal term of art. In Australia, the central concern of a court administering equity in identifying conduct as unconscionable has long been understood to be to relieve against a stronger party to a transaction exploiting some special disadvantage which has operated to impair the ability of a weaker party to form a judgment as to his or her interests[64].

82 Section 12CA of the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act") gives statutory expression to that equitable conception of unconscionable conduct. The section's prohibition against engaging in conduct in relation to financial services that is "unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories" operates to impose an additional statutory sanction on conduct that is unconscionable in equity[65]. Suggestions that its reference to conduct that is unconscionable within the meaning of the unwritten law imports some more expansive and less precise denotation[66] are contradicted by extrinsic material explaining the precise choice of statutory language[67] and have been properly refuted[68].

---

64 *Blomley v Ryan* (1956) 99 CLR 362 at 392, 405; [1956] HCA 81; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462; [1983] HCA 14; *Bridgewater v Leahy* (1998) 194 CLR 457 at 470 [39]-[40], 478-479 [74]-[76]; [1998] HCA 66; *Thorne v Kennedy* (2017) 91 ALJR 1260 at 1272 [38]; 350 ALR 1 at 13; [2017] HCA 49.

65 See *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 62 [5]-[6], 71-72 [40], 73-74 [44]-[46]; [2003] HCA 18; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 397 [2]; [2013] HCA 25; *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 271 [281].

66 eg, *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301 at 316-319 [43]-[50].

67 Australia, House of Representatives, *Trade Practices Legislation Amendment Bill 1992*, Explanatory Memorandum at 8-9 [41]-[44]; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2408.

68 *Hampton v BHP Billiton Minerals Pty Ltd [No 2]* [2012] WASC 285 at [190]; *Razdan v Westpac Banking Corporation* [2014] NSWCA 126 at [150], citing *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* (2001) 117 FCR 23 at 73-74 [114]-[115], 76 [123], 77 [126].

83 Section 12CB of the ASIC Act does something more. The section's prohibition against engaging in conduct in connection with the supply or possible supply of financial services "that is, in all the circumstances, unconscionable" is expressed to be "not limited by the unwritten law of the States and Territories relating to unconscionable conduct"[69]. Those words make clear that the statutory conception of unconscionable conduct is unconfined to conduct that is remediable on that basis by a court exercising jurisdiction in equity. Furthermore, determination by a court exercising jurisdiction in a matter arising under the section of whether conduct is, in all the circumstances, unconscionable is required by s 12CC to be informed by the numerous considerations specified in that section, each of which has the potential to bear positively or negatively on the characterisation of conduct as conduct that is or is not unconscionable, and each of which must be taken into account if and to the extent that it is applicable in all the circumstances[70].

84 Exactly what s 12CB does might be seen in different ways. The section might, on the one hand, be seen to confer statutory authority on a court exercising jurisdiction in a matter arising under it to develop the equitable conception of unconscionable conduct taking into account a range of considerations that are broader than those traditionally taken into account by courts administering equity and that include the considerations specifically identified in s 12CC. The section might, on the other hand, be seen to prescribe a normative standard of conduct, which standard a court exercising jurisdiction in a matter arising under it is required to recognise and to administer having regard to considerations which include those identified in s 12CC. Both perspectives on the operation of the section can be found, sometimes intertwined, in the case law[71]. Examination of the legislative history and pre-history of s 12CB, much of which Edelman J helpfully refers to in his reasons for judgment, yields no real indication of a legislative intention to adopt one view in preference to the other.

85 The difference between the perspectives is diminished when it is recognised that the Commonwealth Parliament can be taken to have understood that "[a]ny standard or criterion will have a penumbra of uncertainty under which the deciding authority will have room to manoeuvre – an area of choice and of discretion; an area where some aspect of policy will inevitably intrude", that "[t]he degree of vagueness or discretion will be affected by what is conceived to

---

69 Section 12CB(1), (4)(a) of the ASIC Act.

70 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 587 [188]-[189], 620 [294]; [2016] HCA 28.

71 eg, *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 at 140 [30]; *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 266-267 [262]-[263].

be the object of the law and by judicial techniques and precedents" and that, "[g]iven a broad standard, the technique of judicial interpretation is to give it content and more detailed meaning on a case to case basis"[72]. The distinction between a judicially developed standard and a statutory standard developed judicially can in practice be a fine one.

86 The difference in perspective nevertheless bears on how a court exercising jurisdiction in a matter arising under s 12CB goes about determining whether impugned conduct is, in all the circumstances, unconscionable. For reasons which will become apparent, I consider that identification of the correct perspective bears materially on the resolution of this appeal.

87 The correct perspective, in my opinion, is that unambiguously adopted by the Full Court of the Federal Court in relation to materially identical provisions[73] in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*[74]. The correct perspective is that s 12CB operates to prescribe a normative standard of conduct which the section itself marks out and makes applicable in connection with the supply or possible supply of financial services. The function of a court exercising jurisdiction in a matter arising under the section is to recognise and administer that normative standard of conduct. The court needs to administer that standard in the totality of the circumstances taking account of each of the considerations identified in s 12CC if and to the extent that those considerations are applicable in the circumstances.

88 The Commonwealth Parliament's appropriation in s 12CB of the terminology of courts administering equity in the expression of the normative standard which the section prescribes serves to signify the gravity of the conduct necessary to be found by a court in order to be satisfied of a breach of that standard. "Unconscionability", as has been long and well understood, "is not a slight matter, and behaviour is only unconscionable where there is some real and substantial ground based on conscience for preventing a person from relying on what are, in terms of the general law, that person's legal rights"[75].

---

72 *Thomas v Mowbray* (2007) 233 CLR 307 at 351 [91]; [2007] HCA 33, quoting Zines, *The High Court and the Constitution*, 4th ed (1997) at 195.

73 Section 51AB of the *Trade Practices Act 1974* (Cth) and s 21 of the *Australian Consumer Law*, Sch 2 to the *Competition and Consumer Act 2010* (Cth).

74 (2013) ATPR ¶42-447 at 43,463 [23], 43,467 [41].

75 *Burt v Australia & New Zealand Banking Group Ltd* (1994) ATPR (Digest) ¶46-123 at 53,598.

89 Parliament's appropriation of that terminology in s 12CB shorn of the constraints of the unwritten law is indicative of an intention that conduct of the requisite gravity need not be found only in a fact-pattern which fits within the equitable paradigm of a stronger party to a transaction exploiting some special disadvantage which operates to impair the ability of a weaker party to form a judgment as to his or her best interests. The requirement to administer the standard in the totality of the circumstances taking account of the considerations identified in s 12CC is a further indication that the standard has potential application within a range of factual scenarios not all of which would be recognised in equity as giving rise to relief on the basis of unconscionable conduct. For example, whereas undue influence constitutes a distinct (albeit often overlapping) ground for relief in equity[76], under s 12CC(1)(d) the presence or absence of undue influence is one, and only one, of the considerations to be taken into account in determining whether conduct is or is not unconscionable.

90 Important to the resolution of this appeal, in my opinion, is that what Parliament's appropriation of the terminology of equity in the expression of the normative standard in s 12CB does not do is to authorise a court exercising jurisdiction in a matter arising under that section to dilute the gravity of the equitable conception of unconscionable conduct so as to produce a form of equity-lite. The appropriation of the terminology of equity does not allow a court to adopt a process of reasoning which starts with the equitable conception of unconscionable conduct, involving exploitation of a special disadvantage, and then uses considerations identified in s 12CC to water down the court's assessment of what amounts to a special disadvantage or to allow the court to arrive more easily at an assessment that conduct amounts to exploitation.

91 In *Paciocco v Australia & New Zealand Banking Group Ltd*, I referred to unconscionable conduct within the meaning of s 12CB as requiring "a 'high level of moral obloquy' on the part of the person said to have acted unconscionably"[77]. "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

---

76 *Thorne v Kennedy* (2017) 91 ALJR 1260 at 1272 [40]; 350 ALR 1 at 14.

77 (2016) 258 CLR 525 at 587 [188], quoting *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 583 [121].

adoption of it has been criticised judicially[78] and academically[79]. The criticism is justified. I regret having mentioned it.

92 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.

93 The judgment required of a court exercising jurisdiction in a matter arising under s 12CB is a heavy one. For a court to pronounce conduct unconscionable is for the court to denounce that conduct as offensive to a conscience informed by a sense of what is right and proper according to values which can be recognised by the court to prevail within contemporary Australian society. Those values are not entirely confined to, or entirely removed from, the values which historically informed courts administering equity in the development of the unwritten law of unconscionable conduct[80]. They include respect for the dignity and autonomy and equality of individuals. They include respect for the cultural diversity of communities.

94 The challenge in the present appeal is to bring such a judgment to bear on a system of conduct which occurred consensually, over a considerable period without more than occasional complaint or expression of dissatisfaction[81], and at what is described in the anthropological evidence as an "intersection" between the distinctive culture of the Anangu people of the Anangu Pitjantjatjara Yankunytjatjara Lands and the culture of wider Australian society. "An intersection of systems", as was put in that evidence, "necessarily raises the possibility of varying degrees of incommensurability of the values, understandings and practices of those systems in that intersection, as well as varying forms of accommodation and adaptation by the Aboriginal people concerned"[82].

---

78 eg, *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* (2018) 356 ALR 440 at 477 [194]-[195], 495-496 [275]-[278].

79 eg, Baxt, "Continuing 'Furore' Over Moral Obloquy and Unconscionability" (2017) 91 *Australian Law Journal* 809 at 809-810.

80 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 271 [283].

81 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [590]-[593].

82 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 746 [328].

95 The difficulty of that challenge was present in my mind at the time of participating in the grant of special leave to appeal from the judgment of the Full Court of the Federal Court. I considered it then to be a factor which weighed against special leave to appeal being granted. Hard cases test and sometimes strain legal principle. They do not always lend themselves to elucidation of legal principle in a way that can be predicted to provide precedential guidance of the systemic usefulness generally to be expected from a decision of an ultimate court of appeal. Special leave to appeal having been granted, it is unsatisfactory but unsurprising to me that the Court should find itself closely divided on the resolution of the appeal.

96 Insofar as they formed part of the "unconscionable system" case pursued by the Australian Securities and Investments Commission ("ASIC") at trial, the details of the "book-up" system provided by Mr Kobelt to Anangu customers, largely from Mimili and Indulkana, at his general store in Mintabie are set out in the reasons for judgment of Kiefel CJ and Bell J.

97 In evaluating Mr Kobelt's book-up system against the standard which s 12CB prescribes for all conduct occurring anywhere in Australia in connection with the supply or possible supply of financial services, it can immediately be accepted that there are applicable considerations amongst those identified in s 12CC which point in both directions.

98 Pointing towards a conclusion that the book-up system was unconscionable are that Mr Kobelt's bargaining power was stronger than that of his Anangu customers[83], that he treated his Anangu customers differently from his non-indigenous customers[84], and that there were other means by which he might have protected his legitimate interests as a seller of motor vehicles and other goods on credit to his Anangu customers which were less restrictive to his Anangu customers' freedom of action[85]. Leaving aside theoretical alternatives to a system of book-up such as arranging for periodic repayments of indebtedness to be made from customers' accounts by way of direct debit, it can in particular be accepted that protection of his own interests as a creditor created no practical need for Mr Kobelt to withdraw all, or almost all, of the funds paid into his Anangu customers' accounts immediately upon those funds being paid in given his understanding that 50 per cent of the amounts paid into his Anangu

---

83 Section 12CC(1)(a) of the ASIC Act. See *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [507]-[515].

84 Section 12CC(1)(f) of the ASIC Act. See *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [552]-[553].

85 Section 12CC(1)(b) of the ASIC Act. See *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [517]-[538], [616].

customers' accounts would remain available for their own use[86]. His informal method of bookkeeping can be accepted to be one which would have made it difficult for his Anangu customers to keep track of their current state of indebtedness had they been minded to do so[87].

99 To the considerations pointing towards a conclusion that the book-up system was unconscionable can be added that the credit charge for the purchase of motor vehicles that Mr Kobelt imposed was found by the primary judge to have been very expensive when compared with commercial lending rates for unsecured loans[88] (although ASIC did not plead as part of its unconscionable system case, and the primary judge did not find, that the Anangu customers could have acquired identical or equivalent credit from another provider at a lesser charge[89]) and that the same credit charge was found by the primary judge not to have been disclosed by Mr Kobelt[90] (although ASIC did not plead as part of its unconscionable system case, and the primary judge did not find, that the non-disclosure was unreasonable[91]).

100 Considerations identified in s 12CC which point against a conclusion that the book-up system was unconscionable include the lack of any contention on the part of ASIC that Mr Kobelt exerted undue influence or undue pressure over his Anangu customers[92]. They include that, although Mr Kobelt did not act altruistically, he did not act systematically in bad faith[93]. Despite being rigid in requiring his Anangu customers to provide their debit cards and personal identification numbers, he was generally willing to negotiate the amount to be

---

86 See *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [522].

87 Section 12CC(1)(c) of the ASIC Act. See *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [541]-[546].

88 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [492], [551], [618].

89 cf s 12CC(1)(e) of the ASIC Act.

90 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [496], [551], [609].

91 cf s 12CC(1)(i) of the ASIC Act.

92 Section 12CC(1)(d) of the ASIC Act. See *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [547].

93 Section 12CC(1)(l) of the ASIC Act. See *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [557]-[559].

withdrawn from an individual customer's account and to return a customer's card temporarily should the customer wish to travel[94].

101 The competing considerations having been noted, it should also be noted that, quite properly, neither ASIC nor Mr Kobelt has ever contended that the judgment required to be made for the purpose of s 12CB can be arrived at through a mere balancing of the applicable considerations identified in s 12CC. Throughout the course of the litigation, ASIC has consistently placed weight on the impoverishment and lack of financial sophistication of the Anangu people. Mr Kobelt has consistently placed weight on his own lack of sophistication, on the simplicity of his book-up system, on the fact that his book-up system met a demand on the part of the Anangu people, and on the fact that a similar book-up system was provided by at least one of the two other general stores in Mintabie.

102 A significant difference between the parties has been as to whether it is meaningful to say that Mr Kobelt's Anangu customers exercised freedom of choice in continuing to deal with him and, if so, as to the weight to be accorded to their freedom of choice.

103 A central component of the unconscionable system case as pleaded by ASIC against Mr Kobelt was that the system left his Anangu customers with little or no funds in their bank accounts at the beginning of each payment cycle with the consequence that the customers had no option but to ask him for additional credit, which he provided at his discretion on condition that they increase their existing indebtedness to him, thereby "creating and continuing a relationship of dependency between the customers and Mr Kobelt". The pleaded system, in short, was a system which had the practical effect of locking Mr Kobelt's Anangu customers into a cycle of perpetual indebtedness to him.

104 Had ASIC's pleaded case been made out in those stark terms at trial, there would have been little difficulty concluding that the book-up system was unconscionable. There would have been no need to attempt to explain the operation of the system in terms of Mr Kobelt taking advantage of his Anangu customers' disadvantage. The seriousness of the consequences for those customers would have been enough to take Mr Kobelt's conduct in implementing the system so far outside societal norms of acceptable commercial behaviour as to warrant its condemnation as offensive to conscience.

105 The primary judge went a long way towards accepting ASIC's pleaded case in finding the book-up system to have had the effect that his Anangu customers became "tied" to Mr Kobelt for the provision of necessities of life and

---

94 Section 12CC(1)(j) of the ASIC Act. See *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [454], [554]-[556].

in going on to characterise Mr Kobelt's conduct in administering the system as "a form of exploitation" primarily for that reason[95]. Whilst not contradicting the primary judge's finding that there was some tying effect, the Full Court appropriately pointed out that the strength of the tying effect had to be evaluated in the context of other findings[96]. Anangu customers did, on occasion, pay off their debts to Mr Kobelt and bring their relationship to an end[97]. For so long as they maintained their relationship with Mr Kobelt, they were not restricted to buying only from him in that they were generally able to obtain purchase orders and cash advances from him to enable them to purchase goods at other stores including in Mintabie although not in Mimili and Indulkana[98]. More importantly, Anangu customers could, and on occasion did, sever their relationship with Mr Kobelt by such simple expedients as not returning their debit cards after travelling, cancelling their debit cards, or redirecting their periodic payments into other accounts[99].

106 There is little point inquiring whether adoption of any of those expedients might have placed a customer in breach of a contractual commitment to Mr Kobelt. The system did not readily lend itself to analysis in terms of strict contractual rights. Mr Kobelt did not consider it in his commercial interests to attempt to enforce contractual rights against his Anangu customers[100] and there is no suggestion that his Anangu customers thought of their relationship in strict contractual terms. The point is that each of those methods by which a customer might sever his or her relationship with Mr Kobelt was tolerated within the system as it operated in practice.

107 Once it is accepted that the continuation of the relationship between Mr Kobelt and his Anangu customers was not the involuntary consequence of the

---

95 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [603]-[607], [620].

96 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 736 [268], 757 [376].

97 See *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [29], [64], [591].

98 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [78]-[87].

99 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [36], [67], [89], [268], [371], [454], [511]-[512], [530].

100 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [90].

operation of the book-up system but a matter of choice on the part of those customers, a central component of the unconscionable system case as pleaded by ASIC falls away. ASIC argues, however, that it is wrong to place much weight on that choice. Using language drawn from the description of unconscionable conduct in equity to characterise the relevant effect of the applicable considerations identified in s 12CC – and focussing in particular on the consideration that the control which his book-up system gave Mr Kobelt over funds paid into his Anangu customers' accounts went beyond what was necessary to protect his legitimate business interests as a creditor – ASIC argues that Mr Kobelt's book-up system still involved exploitation of his Anangu customers' vulnerability. It is at this point that I think ASIC's argument dilutes the gravity of the equitable conception of unconscionable conduct carried over into the normative standard of conduct prescribed by s 12CB and fails in the application of that normative standard adequately to accommodate societal norms of acceptable commercial behaviour to the peculiar circumstances of the case.

108 Important to appreciate is why the vast majority of the Anangu customers, who were found by the primary judge to have had a rudimentary but adequate understanding of the basic operation of the book-up system[101], chose to maintain their relationship with Mr Kobelt and to continue to participate in that system.

109 The explanation is revealed in the anthropological evidence as supported by the testimony of those of the 117 Anangu customers who gave evidence. The anthropological evidence explained the preference of the Anangu people to "personalise" financial transactions by incorporating outsiders as "brokers" in order to better access goods and services those outsiders can provide[102]. Three of the six Anangu customers who gave evidence spoke of the advantage Mr Kobelt's book-up system offered to them and their families of having access to food and groceries between pay days[103]. The anthropological evidence explained more broadly that trusting Mr Kobelt to take immediate control of funds paid into their bank accounts and then negotiating with him when they needed access to those funds allowed his Anangu customers to smooth out the "boom and bust" cycle of household expenditure which would otherwise have resulted in them experiencing a chronic shortage of money for the necessities of

---

101 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [425], [586]-[588].

102 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [30], [389]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 743-744 [308]-[310].

103 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [326], [332], [345].

life towards the end of each fortnightly pay cycle[104] and as well allowed them to manage customary obligations to share their resources with their relatives[105]. Having access to the book-up system for the purchase of motor vehicles allowed them to finance the purchase of the consumer items which they valued highly[106].

110 To say, as does ASIC, that the cultural considerations which fed into Mr Kobelt's Anangu customers' choice to maintain their relationship with Mr Kobelt and to continue to participate in his book-up system were amongst the very factors which made those customers vulnerable and that the operation of Mr Kobelt's book-up system "would be patently unacceptable conduct elsewhere in modern Australian society" fails, in my opinion, to afford to the Anangu people the respect that is due to them within contemporary Australian society. Those of the Anangu people who chose to maintain their relationship with Mr Kobelt and to continue to participate in his book-up system evidently considered that continued participation in the book-up system suited the interests of them and their families having regard to their own preferences and distinctive cultural practices.

111 The evidence does not provide a sufficient basis for me to be satisfied that the Federal Court was, or that this Court is, in a position to question the choice made by Mr Kobelt's Anangu customers, much less to question the ability of those customers to make it. The result is that I cannot characterise Mr Kobelt's provision of his book-up system to his Anangu customers as involving exploitation of those customers' vulnerability and that I cannot, on that basis or any other basis that has been argued, conclude that Mr Kobelt's provision of that system was conduct so offensive to the norms of wider Australian society as to warrant its condemnation as unconscionable.

112 The unanimous conclusion of the Full Court of the Federal Court that Mr Kobelt's book-up system was not demonstrated on the case presented at trial by ASIC to have been unconscionable was, in my opinion, correct. ASIC's appeal must be dismissed with costs.

---

104 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [565]-[569].

105 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [575]-[585].

106 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at Appendix One [41].

113 KEANE J. I agree with Kiefel CJ and Bell J that the appeal should be dismissed. I gratefully adopt the summary by their Honours of the issues presented to this Court. In particular, I agree with their Honours that the appellant's case in this Court was not conducted on the basis that either the expensive credit charge for the supply of second-hand motor vehicles, or the non-disclosure of that charge, was integral to its complaint that the book-up system was unconscionable. The case presented by the appellant in this Court was that the book-up system was unconscionable whether it was used to fund the supply of groceries or fuel or second-hand motor vehicles.

114 In addition, I adopt the summary by Kiefel CJ and Bell J of the statutory provisions material to the appeal, the findings of the courts below, and the contentions of the parties. Further, I adopt their Honours' analysis of the evidence of Dr Martin in relation to the advantages of the book-up system to the respondent's customers. I wish to state my own reasons for concluding that the respondent has not been shown to have contravened s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act").

115 In my respectful opinion, the appeal should be dismissed for the reason that it has not been established that, upon "a scrutiny of the exact relations established between the parties"[107], the respondent engaged in conduct which can properly be characterised as unconscionable. In particular, the appellant's case did not establish that the respondent exploited his customers' socio-economic vulnerability in order to extract financial advantage from them[108].

116 Taking the appellant's case at its highest, it might be said that the respondent's customers were rendered more vulnerable to exploitation by the book-up system than might otherwise have been the case. To say that, however, is distinctly not to say that the respondent actually took advantage of that increased vulnerability, or even acted with predatory intent with a view to doing so.

Section 12CB

117 Insofar as the trial judge found that the respondent was at all relevant times aware of, and pursued, his own interests[109], it must be borne in mind that the purpose of s 12CB of the ASIC Act is to regulate commerce. The pursuit by

---

107 *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 118; [1953] HCA 2.

108 cf *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 426-427 [122]-[124]; [2013] HCA 25.

109 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [559].

those engaged in commerce of their own advantage is an omnipresent feature of legitimate commerce. A trader does not, generally speaking, stand in a fiduciary relationship with his or her customers, and good conscience does not require a trader to act in the interests of others[110]. To say that the respondent was pursuing his own commercial interests with a view to profit is to state the obvious, but also to say very little as to whether he engaged in unconscionable conduct. In particular, it does not assist in discerning whether the conduct in question exhibits those features which distinguish unconscionable conduct from the legitimate pursuit of self-interest.

118 The use of the word "unconscionable" in s 12CB – rather than terms such as "unjust", "unfair" or "unreasonable" which are familiar in consumer protection legislation[111] – reflects a deliberate legislative choice to proscribe a particular type of conduct. In its ordinary meaning, the term "unconscionable" requires an element of exploitation. The term imports the "high level of moral obloquy"[112] associated with the victimisation of the vulnerable. As five members of this Court observed recently in *Thorne v Kennedy*[113], a finding of unconscionable conduct requires the unconscientious taking advantage of a special disadvantage, which has "been variously described as requiring 'victimisation'[114], 'unconscientious conduct'[115], or 'exploitation'[116]". And in *Kakavas v Crown*

---

110 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 64 [11]; [2003] HCA 18.

111 See, eg, *National Consumer Credit Protection Act 2009* (Cth), Sch 1 s 76; ASIC Act, s 12BF.

112 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 587 [188]; [2016] HCA 28, citing *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 583 [121]. See also *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125 at 155-156 [28 ER 82 at 100]; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462, 467; [1983] HCA 14; *Louth v Diprose* (1992) 175 CLR 621 at 638; [1992] HCA 61; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 400-401 [17]-[18], 439-440 [161].

113 (2017) 91 ALJR 1260 at 1272 [38]; 350 ALR 1 at 13; [2017] HCA 49.

114 *Hart v O'Connor* [1985] AC 1000 at 1028; *Louth v Diprose* (1992) 175 CLR 621 at 638; *Bridgewater v Leahy* (1998) 194 CLR 457 at 479 [76]; [1998] HCA 66; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 401 [18], 402 [22], 403 [26], 439-440 [161].

115 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461 per Mason J, 474 per Deane J; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 64 [15].

Melbourne Ltd, this Court unanimously confirmed that "[h]eedlessness of, or indifference to, the best interests of the other party is not sufficient" to establish the "predatory state of mind" that must be shown[117].

119 The legislative choice of "unconscionability" as the key statutory concept, rather than less morally freighted terms such as "unjust", "unfair" or "unreasonable", confirms that the moral obloquy involved in the exploitation or victimisation that is characteristic of unconscionable conduct[118] is also required for a finding of unconscionability under s 12CB. Section 12CB(4)(a) of the ASIC Act does not require a contrary conclusion. The direction in s 12CB(4)(a) means that the application of s 12CB(1) is not limited to conduct that has been held to be "unconscionable" under the general law, but it does not operate to give the term "unconscionable" a meaning different from its ordinary meaning. Adherence to the ordinary meaning of the term "unconscionable" is appropriate for two reasons rooted in the nature of the judicial function. First, the courts must give effect to what Parliament has enacted[119]. Here, it must be acknowledged that the Parliament has deliberately chosen to use this expression as the focus of attention, and not a more open-textured or morally neutral expression that would be less certain in its scope. And secondly, the appellant did not propound a meaning for "unconscionable" different from its ordinary meaning; and so the respondent had no occasion or opportunity to meet such a contention.

---

116 *Louth v Diprose* (1992) 175 CLR 621 at 626; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 63 [9], 64 [14]; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 439-440 [161].

117 (2013) 250 CLR 392 at 439 [161].

118 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 425 [118]; *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 587 [188], 618-619 [292].

119 *Northern Territory v Collins* (2008) 235 CLR 619 at 642 [99]; [2008] HCA 49; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 [31]; [2010] HCA 23; *Momcilovic v The Queen* (2011) 245 CLR 1 at 133-134 [315]; [2011] HCA 34; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389-390 [25]; [2012] HCA 56; *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 659 [32]; [2013] HCA 52; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 649-650 [229]; [2015] HCA 41.

120 In addition, the circumstance that s 12CB is to be applied by way of a multi-factorial judgment informed by the considerations listed in s 12CC does not suggest that the evaluative judgment ultimately to be made as to unconscionability is morally neutral[120]. The approach contemplated by s 12CC to the determination of "unconscionability" for the purposes of s 12CB is consistent with the settled approach of a court of equity, which takes a "more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case"[121]. The ultimate issue under the statute is whether the conduct in question is rightly to be characterised as unconscionable. In determining that issue, s 12CB calls for a judgment as to whether the impugned conduct exhibits the level of moral obloquy associated with predatory conduct.

121 Next, it is necessary to observe that sub-s (4)(b) of s 12CB does not mean that it is not an essential characteristic of unconscionable conduct within the meaning of the statute that it involve a calculated taking advantage of a weakness or vulnerability on the part of victims of the conduct in order to obtain for the stronger party a benefit not otherwise obtainable. Under the general law, the absence of such a calculated taking advantage means that the conduct in question cannot be said to be exploitative[122]. Sub-section (4)(b), in dispensing with the need for proof of disadvantage to any *particular* individual, allows a system of conduct or pattern of behaviour to be found to be unconscionable within the meaning of the statute even though the extent of the disadvantage cannot be quantified in the case of any individual. Understood in this way, sub-s (4)(b) is consistent with the requirement implicit in the notion of unconscionability that the impugned conduct effect a disadvantage upon its victims.

122 The declaration in sub-s (4)(b) is a manifestation of Parliament's intention that the purpose of s 12CB is to establish a statutory norm of conduct, rather than simply to provide an avenue of relief for victims of individual transactions[123]. The same intention is evident in the framing of s 12CB as a prohibition breach of which can lead to the imposition of a pecuniary penalty payable to the

---

120 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 587 [188].

121 *The "Juliana"* (1822) 2 Dods 504 at 521 [165 ER 1560 at 1567]; *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 119; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 426-427 [122]-[124].

122 *Louth v Diprose* (1992) 175 CLR 621 at 632; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 426-427 [124].

123 See Australia, House of Representatives, *Competition and Consumer Legislation Amendment Bill 2011*, Explanatory Memorandum at 21 [2.21].

Commonwealth[124], and in the power conferred on the Australian Securities and Investments Commission to take civil action to recover such a pecuniary penalty independently of the victim of any alleged contravention of s 12CB[125]. The presence of sub-s (4)(b) does not mean, however, that the actual or prospective disadvantage to the victims of systematic conduct said to be unconscionable is irrelevant to the evaluative exercise required by s 12CB.

123 Significantly in this regard, s 12CC(1)(e) expressly contemplates that, for the purpose of determining whether a supplier of financial services has contravened s 12CB, the court may have regard to "the amount for which, and the circumstances under which, the service recipient could have acquired identical or equivalent financial services from a person other than the supplier". Attention is thereby directed to the prospective financial disadvantage to the customer. Accordingly, although the absence of proof that actual disadvantage has been suffered by an individual consumer or individual consumers may not be a fatal deficit in a case alleging a contravention of s 12CB, the circumstance that it is not apparent that a consumer could have acquired identical or equivalent financial services from a person other than the supplier on terms more advantageous to the recipient points to the conclusion that the supplier has not contravened s 12CB.

The deficits in the appellant's case

124 In several respects, the appellant's case fell short of demonstrating that the respondent exploited his customers' vulnerability with a view to his securing pecuniary advantage at their expense.

125 While the "tying effect" of the book-up system may have made customers more dependent on the respondent or vulnerable to exploitation by him, that vulnerability was not itself an exploitation for pecuniary advantage. While it may be accepted that the respondent's customers were vulnerable to exploitation, the appellant failed to show either that the respondent sought to exploit that vulnerability by victimising his customers for his financial advantage, or that he actually inflicted financial disadvantage on them. In particular, it was not shown that the respondent's withdrawals under the book-up system were intended to benefit him to the disadvantage of his customers. Further, it was not shown that this conduct was apt to extract from the respondent's customers a benefit that might otherwise have enured, somehow, to them.

126 Ordinarily, of course, in the circumstances that obtain elsewhere in Australia, a customer may be able to turn unused funds to his or her financial

---

124 ASIC Act, s 12GBA.

125 ASIC Act, s 12GBC.

advantage by loan or investment, but in the unusual circumstances of the present case it was not apparent that the respondent's customers were disposed to turn their unused funds to their pecuniary advantage. On the other hand, using the respondent as a banker as well as a supplier of goods allowed customers to avoid the practice of demand sharing or "humbugging". This positive advantage of the respondent's book-up system to his customers cannot be ignored.

127 To say that the respondent's requirement of the surrender of a customer's card and PIN is a requirement that might not be made elsewhere in Australia as a term of the supply of goods on credit is to observe that "elsewhere" in Australia the circumstances of the market would make insistence upon that term impossible to sustain. In the present case, however, it was a characteristic feature of the demand side of the highly unusual market in which the respondent operated as a supplier that his requirement was acceptable to customers because of the peculiarities of that market. The respondent was not responsible for those peculiarities. In particular, the respondent was not responsible for the possibility that the book-up system as operated by him, including in particular the withdrawal conduct, proved to be acceptable to his customers because of the appreciation on their part that the absence of ready funds was of benefit to them in assisting them to extricate themselves from the unwelcome burdens of demand sharing.

128 As to the suggestion that the book-up system facilitated the extraction of an excessive price for motor vehicles sold by the respondent to his customers, it was not shown that any customer who purchased a motor vehicle from the respondent could have obtained a better deal from another supplier, but was prevented from seeking such a deal by the circumstance that the customer was "tied" to the respondent and chose, for that reason, to deal with him rather than another supplier. Nor was it shown that had the book-up system not been used, the respondent's customers could or would have obtained more favourable terms for the supply of motor vehicles by the respondent. That there was no demonstrated nexus between the book-up system, and the withdrawal conduct in particular, and the high price of motor vehicles supplied by the respondent is no technical quibble: so far as purchases of motor vehicles by individual customers are concerned, the "tying effect" of the respondent's book-up system was very limited. It consisted only of the distinctly modest leverage afforded by the amount of the "unused" funds in each withdrawal by the respondent.

129 In addition, if one looks beyond individual transactions to the broader socio-economic context, there was good reason why the respondent would not seek to exploit his customers' vulnerability by attempting to turn the tying effect of the book-up system to his advantage at the expense of his customers. The appellant's case of inequality of bargaining power between the respondent as supplier and his customers failed to come to grips with the existence of the countervailing market power of customers inherent in their numbers and social solidarity, as well as the existence of competing suppliers. The countervailing

power exercisable by customers meant that they were able collectively to "punish" the respondent if he sought to insist on predatory terms. For all the lack of financial sophistication of the respondent's customers, there is no reason to think that they lacked awareness of the power which, if exercised, could inflict serious damage on the respondent's business. In terms of the probabilities of human behaviour, it is difficult to accept that the respondent would intentionally court the risk of such punishment. The absence of any finding that he did so is hardly surprising.

130 NETTLE AND GORDON JJ. Mintabie is a community in the far north of South Australia, about 1,100 km north of Adelaide. It is in an area excised by lease to the Government of South Australia from the Anangu Pitjantjatjara Yankunytjatjara Lands ("the APY Lands"). Several Indigenous communities live in the APY Lands to the north or northwest of Mintabie. Two communities − Mimili and Indulkana − are located 165 km and 116 km by the main road from Mintabie respectively. There are no banks, credit unions or like institutions in or immediately adjacent to the APY Lands, meaning credit is not readily available to the residents of the APY Lands ("the Anangu").

131 From the mid-1980s until 2018, the respondent, Lindsay Kobelt, ran a general store at Mintabie under the name "Nobbys Mintabie General Store" ("Nobbys"), with the assistance of his partner, his son and some employees[126]. Nobbys sold a range of goods including food, groceries, general goods, fuel and second-hand cars. As part of his business, Mr Kobelt provided credit facilities to customers, including by way of an informal system called "book-up". The supply of cars and provision of book-up were closely linked: most of the book-up that was provided related to the sale of second-hand cars and most customers bought their cars through book-up. The primary judge found that it was likely Mr Kobelt had begun offering book-up as a means of attracting and retaining customers as the population in Mintabie declined.

132 The appellant ("ASIC") brought proceedings in the Federal Court of Australia against Mr Kobelt alleging that his book-up system contravened s 29(1) of the *National Consumer Credit Protection Act 2009* (Cth) ("the NCCP Act") and was unconscionable contrary to s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act")[127].

133 ASIC was successful before the primary judge on both grounds. The primary judge held that, between 1 July 2011 and 31 October 2012 in respect of 92 customers, and continuing until at least April 2014, Mr Kobelt contravened s 29(1) of the NCCP Act by engaging in credit activity within the meaning of s 6(1) of the NCCP Act when selling cars by way of book-up without holding a licence to engage in that credit activity[128].

---

126 The primary judge found that at all material times Mr Kobelt's partner and son were acting within the scope of their actual or apparent authority, meaning that their knowledge, states of mind and conduct could be attributed to Mr Kobelt.

127 ASIC also pleaded, but subsequently abandoned, a secondary case of unconscionability against Mr Kobelt: a case directed to specific customers.

128 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [8], [210].

134 The primary judge also held that Mr Kobelt contravened s 12CB(1) of the ASIC Act in that, since at least 1 June 2008 and continuing until at least July 2015, in connection with the supply of financial services to customers of Nobbys, Mr Kobelt engaged, in trade or commerce, in a system of conduct or pattern of behaviour within the meaning of s 12CB(4)(b) of the ASIC Act which was unconscionable within the meaning of s 12CB(1)(a) of the ASIC Act[129].

135 Mr Kobelt appealed to the Full Court of the Federal Court. It was common ground that Mr Kobelt did not hold a licence authorising him to engage in "credit activity" as defined in the NCCP Act. The Full Court, like the primary judge, found Mr Kobelt had contravened s 29(1) of the NCCP Act for conduct engaged in between 1 July 2011 and 31 October 2012[130].

136 However, the Full Court allowed Mr Kobelt's appeal in relation to s 12CB of the ASIC Act, holding that Mr Kobelt's book-up system was not unconscionable. Besanko and Gilmour JJ reasoned that, although Mr Kobelt's customers were vulnerable because they had "very limited or no net assets, had very limited net income", "had low levels of financial literacy" and lived in "remote and impoverished communities"[131], Mr Kobelt's book-up system was not unconscionable because the customers "understood the book-up arrangements and voluntarily entered into them" and the customers knew they could bring the arrangements to an end and some did[132]. Besanko and Gilmour JJ accepted that the effect of Mr Kobelt's conduct was to tie his customers to him, and that effect was advantageous to him, but said that there were also advantages to his customers[133]. Wigney J considered that the primary judge's conclusion that Mr Kobelt's book-up system was unconscionable was infected by one or other of two errors: a failure to give sufficient weight to Anangu culture and practices; and having regard to, or giving excessive weight to, what his Honour described as "un-pleaded or non-systems considerations"[134].

---

129 *ASIC v Kobelt* [2016] FCA 1327 at [9], [627].

130 *Kobelt v Australian Securities and Investments Commission* ("*Kobelt (FC)*") (2018) 352 ALR 689 at 697-698 [43], 724 [194], 726 [205], 741 [296].

131 *Kobelt (FC)* (2018) 352 ALR 689 at 702 [67]; see also at 736 [268].

132 *Kobelt (FC)* (2018) 352 ALR 689 at 736 [268]-[269].

133 *Kobelt (FC)* (2018) 352 ALR 689 at 736 [268].

134 *Kobelt (FC)* (2018) 352 ALR 689 at 749 [343].

137 On appeal to this Court, the sole issue[135] was whether Mr Kobelt's book-up system was unconscionable contrary to s 12CB of the ASIC Act. In all the circumstances, Mr Kobelt's book-up system was unconscionable.

138 The parties, at trial and on appeal both in the Full Court and in this Court, pointed to competing considerations which they submitted bore upon whether the system of conduct or pattern of behaviour Mr Kobelt engaged in was unconscionable. All of those considerations are relevant, but it will be convenient to group them under a number of different categories: vulnerability; taking advantage; and the effect of the arrangements.

139 Before turning to those considerations, it is necessary to begin with the ASIC Act.

Section 12CB of the ASIC Act

140 Division 2 of Pt 2 of the ASIC Act is concerned with unconscionable conduct and consumer protection in relation to financial services. Subdivision C of Div 2 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"[136]. The prohibition in s 12CA does not apply to conduct that is prohibited by s 12CB[137].

141 Section 12CB(1) prohibits persons from engaging in conduct that "is, in all the circumstances, unconscionable" in connection with, relevantly, the supply of financial services in trade or commerce[138]. Although s 12CB(1) was amended with effect from 1 January 2012[139], the amendments were not material to the issues in this appeal.

---

135 Mr Kobelt's application for special leave to cross-appeal to challenge the finding that he had contravened s 29(1) of the NCCP Act was refused during the hearing of the appeal.

136 See *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 71-74 [38]-[46]; [2003] HCA 18.

137 See ASIC Act, s 12CA(2).

138 ASIC Act, s 12CB(1)(a).

139 See *Competition and Consumer Legislation Amendment Act 2011* (Cth), item 3 in the table at s 2 and Sch 2.

142 From 1 January 2012, s 12CB relevantly provided:

"(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of financial services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of financial services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

…

(3) For the purpose of determining whether a person has contravened subsection (1):

(a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract."

143 Section 12CB(4)(b) makes it clear that the prohibition 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"[140]. A "system" connotes an internal method of working; a "pattern" connotes the external observation of events[141].

144 "Unconscionable" is not defined in the ASIC Act and s 12CB is "not limited by" the unwritten law of the States and Territories relating to unconscionable conduct[142]. As will be explained, the non-exhaustive list of factors set out in s 12CC necessarily implies that the statutory conception of unconscionability is more broad-ranging than that of the unwritten law. Nevertheless, the unwritten law has a significant part to play in ascribing meaning to the term "unconscionable" under s 12CB(1)[143].

Unwritten law

145 The equitable doctrine of unconscionable conduct "looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so"[144]. The "abiding rationale" of the doctrine is to "ensure that it is fair, just and reasonable for the stronger party to retain the benefit of the impugned transaction"[145].

---

140 Section 12CB(4)(b), in its present form, has been in effect since 1 January 2012. However, even prior to that express provision under the ASIC Act, s 12CB was taken to apply in the same way: see *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 at 140 [30], 142-143 [43]-[44], cited in *Kobelt (FC)* (2018) 352 ALR 689 at 721 [179]-[183].

141 See *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 362 ALR 66 at 87 [104].

142 ASIC Act, s 12CB(4)(a).

143 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 271 [283].

144 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474; [1983] HCA 14.

145 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 425 [118]; [2013] HCA 25.

146 Relief under the doctrine of unconscionable conduct requires that the innocent party was subject to a special disadvantage in dealing with the other party[146] when the transaction was entered into, "which seriously affect[ed] the ability of the innocent party to make a judgment as to [their] own best interests"[147]; and that the other party unconscientiously took advantage of that special disadvantage. The existence of those circumstances at the time of the transaction is what "affect[s] the conscience" of the stronger party and renders the enforcement of the transaction, or the taking of the benefit, "unconscientious" or "unconscionable"[148].

147 It is not possible to identify exhaustively what amounts to a special disadvantage[149]. However, the essence of the relevant weakness is that it "seriously affects" the innocent party's ability to safeguard their own interests[150]. Relevant matters may include, but are not limited to, "poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary"[151]; as well as "illness, ignorance, inexperience, impaired faculties, financial need or other circumstances" that affect the innocent or weaker party's

---

146 *Wilton v Farnworth* (1948) 76 CLR 646 at 655; [1948] HCA 20; *Blomley v Ryan* (1956) 99 CLR 362 at 385, 405, 415, 428; [1956] HCA 81; *Amadio* (1983) 151 CLR 447 at 461, 467, 474; *Louth v Diprose* (1992) 175 CLR 621 at 637; [1992] HCA 61; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 407 [26]; [1998] HCA 48; *Bridgewater v Leahy* (1998) 194 CLR 457 at 478-479 [75]; [1998] HCA 66; *C G Berbatis Holdings* (2003) 214 CLR 51 at 80-81 [68]; *Kakavas* (2013) 250 CLR 392 at 424-425 [117]-[118]; *Thorne v Kennedy* (2017) 91 ALJR 1260 at 1272 [38], 1284 [110]; 350 ALR 1 at 13, 30; [2017] HCA 49.

147 *Amadio* (1983) 151 CLR 447 at 462.

148 *Thorne* (2017) 91 ALJR 1260 at 1284 [110]; 350 ALR 1 at 30, quoting *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 118; [1953] HCA 2.

149 *Amadio* (1983) 151 CLR 447 at 474; *Louth* (1992) 175 CLR 621 at 637; *C G Berbatis Holdings* (2003) 214 CLR 51 at 92 [99]; *Thorne* (2017) 91 ALJR 1260 at 1285 [113]; 350 ALR 1 at 30-31.

150 *Thorne* (2017) 91 ALJR 1260 at 1285 [113]; 350 ALR 1 at 31, quoting *Kakavas* (2013) 250 CLR 392 at 425 [118]. See also *C G Berbatis Holdings* (2003) 214 CLR 51 at 64 [12], citing *Blomley* (1956) 99 CLR 362 at 392 and *Amadio* (1983) 151 CLR 447 at 476-477.

151 *Blomley* (1956) 99 CLR 362 at 405.

ability to protect their own interests[152]. It is not sufficient that the matters give rise only to an inequality of bargaining power[153].

148 A party will have unconscientiously taken advantage of an innocent party when the former knew or ought to have known of the existence and effect of the special disadvantage[154]; or, put another way, when the special disadvantage was sufficiently evident at the time of the transaction to make it unconscientious to procure or accept the assent of the innocent party[155].

149 Unconscionable conduct does not require a finding of dishonesty[156]. However, it is not merely concerned with what is "fair" or "just"[157]. Unconscionable conduct can include the passive acceptance of a benefit in unconscionable circumstances[158]. And unconscionable conduct can be found even where the innocent party is a willing participant, the question is how that willingness or intention to participate was produced[159].

---

152 *Blomley* (1956) 99 CLR 362 at 415, quoted in *Amadio* (1983) 151 CLR 447 at 459 and *Thorne* (2017) 91 ALJR 1260 at 1285 [113]; 350 ALR 1 at 30-31.

153 *Amadio* (1983) 151 CLR 447 at 462.

154 *Thorne* (2017) 91 ALJR 1260 at 1272 [38]; 350 ALR 1 at 13, citing *Amadio* (1983) 151 CLR 447 at 462.

155 *Thorne* (2017) 91 ALJR 1260 at 1285 [114]; 350 ALR 1 at 31. See also *Blomley* (1956) 99 CLR 362 at 428; *Amadio* (1983) 151 CLR 447 at 474; *Louth* (1992) 175 CLR 621 at 637; *Kakavas* (2013) 250 CLR 392 at 427 [124], 439 [158].

156 See, eg, *Amadio* (1983) 151 CLR 447 at 478; *Bridgewater* (1998) 194 CLR 457 at 493 [122].

157 See *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 583 [121].

158 *Hart v O'Connor* [1985] AC 1000 at 1024, quoted in *Bridgewater* (1998) 194 CLR 457 at 479 [76]; see also at 493 [122].

159 *Bridgewater* (1998) 194 CLR 457 at 491 [118], quoting *Huguenin v Baseley* (1807) 14 Ves Jun 273 at 299-300 [33 ER 526 at 536].

150 As this Court has recognised and restated a number of times, invocation of equitable doctrines, including unconscionable conduct[160]:

> "calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the [weaker party]. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. ... [']A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case'."

151 Here, the issue of special disadvantage must be considered as part of the broader question: whether Mr Kobelt's book-up system took advantage of an inability on the part of some of his customers to make worthwhile decisions in their own interests, which inability was sufficiently evident to Mr Kobelt, or should have been, to render his system exploitative[161].

152 It is sometimes said that unconscionable conduct entails "moral obloquy" or a "high level of moral obloquy"[162]. So to describe unconscionable conduct, however, reveals little of the requisite character of unconscionability. Such descriptors are better seen as emphatic expressions of conclusion rather than expressions of applicable standards.

153 The doctrine of unconscionability was recently criticised by the Court of Appeal of Singapore for its vagueness and generality[163]. The Court applied a distinction between "broad" and "narrow" unconscionability in an effort to

---

160 *Jenyns* (1953) 90 CLR 113 at 118-119, quoting *The "Juliana"* (1822) 2 Dods 504 at 521 [165 ER 1560 at 1567] (citation omitted). See also *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 325 [23]; [2003] HCA 57; *Kakavas* (2013) 250 CLR 392 at 426 [122]-[123]; *Thorne* (2017) 91 ALJR 1260 at 1273 [43]; 350 ALR 1 at 14-15.

161 See *Kakavas* (2013) 250 CLR 392 at 426-427 [124], citing *Louth* (1992) 175 CLR 621 at 632.

162 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 587 [188]; [2016] HCA 28, quoting *World Best* (2005) 63 NSWLR 557 at 583 [121].

163 See *BOM v BOK* [2018] SGCA 83 at [121]-[125].

address this issue[164]. The utility of such distinctions, however, is questionable. 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[165]. However, efforts to address the "indeterminacy"[166] of the doctrine by way of further distillations, categorisations or definitions may risk "disappointment, ... a sense of futility, and ... the likelihood of error"[167]. This is because evaluating whether conduct is unconscionable "is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules"[168]. Instead, at least in the Australian statutory context, what is involved is an evaluation of business behaviour (conduct in trade or commerce) in light of the values and norms recognised by the statute[169]. The problem of indeterminacy is addressed by close attention to the statute and the values derived from it, as well as from the unwritten law[170].

Non-exhaustive list of factors

154 Section 12CB(1) requires that the court have regard to "all the circumstances"[171] in determining whether conduct is unconscionable. But the ASIC Act also gives "express guidance as to the norms and values that are relevant to inform the meaning of unconscionability and its practical application"[172]. That express guidance is found in the non-exhaustive list of

---

164 *BOM* [2018] SGCA 83 at [140]-[142].

165 *Paciocco* (2015) 236 FCR 199 at 276 [304].

166 *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at 436 [58].

167 *Paciocco* (2015) 236 FCR 199 at 276 [304].

168 *Paciocco* (2015) 236 FCR 199 at 276 [304].

169 *Paciocco* (2015) 236 FCR 199 at 276 [304].

170 *Kojic* (2016) 249 FCR 421 at 436 [58].

171 See *Paciocco* (2016) 258 CLR 525 at 587 [188], 620 [294]. See also *Jenyns* (1953) 90 CLR 113 at 118-119, quoted in *Kakavas* (2013) 250 CLR 392 at 426 [122] and *Thorne* (2017) 91 ALJR 1260 at 1273 [43]; 350 ALR 1 at 14-15.

172 *Paciocco* (2015) 236 FCR 199 at 270 [279]; see also at 276 [306]; *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* (2013) ATPR ¶42-447 at 43,463 [23].

factors set out in s 12CC, which assists in setting a framework for the values that lie behind the notion of conscience identified in s 12CB[173]. The factors relevantly include[174]:

> "(a) the relative strengths of the bargaining positions of the supplier and the service recipient; and
>
> (b) whether, as a result of conduct engaged in by the supplier, the service recipient was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
>
> (c) whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services; and
>
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient or a person acting on behalf of the service recipient by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the financial services; and
>
> (e) the amount for which, and the circumstances under which, the service recipient could have acquired identical or equivalent financial services from a person other than the supplier; and
>
> (f) the extent to which the supplier's conduct towards the service recipient was consistent with the supplier's conduct in similar transactions between the supplier and other like service recipients; and
>
> ...
>
> (i) the extent to which the supplier unreasonably failed to disclose to the service recipient:
>
> (i) any intended conduct of the supplier that might affect the interests of the service recipient; and

---

173 *Paciocco* (2015) 236 FCR 199 at 272 [285], 276 [304]; *Kojic* (2016) 249 FCR 421 at 436 [58], 442-443 [87].

174 ASIC Act, s 12CC(1).

(ii) any risks to the service recipient arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the service recipient); and

(j) if there is a contract between the supplier and the service recipient for the supply of the financial services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the service recipient; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the service recipient in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the service recipient engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the service recipient for the supply of the financial services; and

(l) the extent to which the supplier and the service recipient acted in good faith."

155 No one factor (or select group of factors) is primary or determinative. It is, therefore, not appropriate to select particular factors upon which to focus[175]. All the relevant factors must be taken into account[176].

Voluntariness

156 At the heart of this appeal is what is said to be a tension between the voluntariness of the customers' entry into the transactions and perceived advantages of the system on the one hand; and their vulnerability and the conduct of Mr Kobelt on the other.

---

175 *Paciocco* (2016) 258 CLR 525 at 587 [189], 620 [294].

176 See *Paciocco* (2016) 258 CLR 525 at 587 [188], 620 [294]. See also *Jenyns* (1953) 90 CLR 113 at 118-119, quoted in *Kakavas* (2013) 250 CLR 392 at 426 [122] and *Thorne* (2017) 91 ALJR 1260 at 1273 [43]; 350 ALR 1 at 14-15.

157 It is important to appreciate, therefore, that considerations of voluntariness need to be assessed in the context of the system of conduct in issue. Conduct can be unconscionable even where the innocent party is a willing participant; the question is *how that willingness or intention was produced*[177]. An innocent party may be capable of making an independent or rational judgment about an advantage in an otherwise bad bargain. However, an advantage, and the capacity of the innocent party to identify that advantage and make a rational choice, cannot operate to transform what is, in all the circumstances, an exploitative arrangement. Nor can the existence of that advantage absolve from liability the stronger party who unconscientiously takes advantage of the weaker party.

158 To contend otherwise in this case is to use the limited choices available to Mr Kobelt's customers in relation to cars and credit to excuse a system which tied those customers to Nobbys and placed them in a position of dependence in relation to Mr Kobelt. Of course, to be able to purchase a car is better than to have no car; to have access to credit is preferable to having no access to credit. But these propositions say nothing about the terms on which the car and credit are provided.

159 Voluntariness must be judged against other relevant matters: the power imbalance between the parties; the relative lack of choice available to Mr Kobelt's customers; the fact that customers had a limited understanding of the terms of the arrangement; the lack of transparency of the terms and conditions of the arrangement; and, importantly, Mr Kobelt's exploitative conduct. Many of those matters arose from Mr Kobelt's particular conduct, rather than any particular characteristic of his customers. They arose because Mr Kobelt chose to set up his system of book-up in the way that he did.

160 Contrary to the view of Wigney J in the Full Court, and notwithstanding that some customers expressed positive views about Nobbys, it is not paternalistic to assess the vulnerability of Mr Kobelt's customers and whether that vulnerability was exploited. It is not paternalistic to take into account that the view of a vulnerable party of a transaction will be shaped by context and circumstance. Equally, it is not paternalistic to look at the transaction and the position of the parties objectively. It is to do no more than engage with the criteria of unconscionability.

161 Moreover, so to conclude does not ignore that there are perceived to be cultural benefits of book-up generally, in that it can, in some circumstances, address "boom and bust" expenditure and "demand sharing" obligations.

---

177 *Bridgewater* (1998) 194 CLR 457 at 491 [118], quoting *Huguenin* (1807) 14 Ves Jun 273 at 299-300 [33 ER 526 at 536].

Because the focus of s 12CB(1) is on the conduct of the supplier of financial services, those cultural benefits, even if they were being addressed by Mr Kobelt's system, do not relieve a finding of unconscionability with respect to his particular system. Instead, s 12CB(1) requires the supplier to set up a system, a book-up system, that is not unconscionable. The contention that Mr Kobelt's book-up system is "better than nothing" is not good enough. Mr Kobelt's system could, and should, have been better. There were alternative ways to access those benefits without exploitation. Voluntariness of entry into the arrangements, and the perceived advantages of the system, do not prevent Mr Kobelt's conduct from being unconscionable.

162 Before considering the relevant factors in detail, it is necessary to say something more about the facts.

Facts

Mr Kobelt's book-up system

163 "Book-up" is a term used to describe various informal systems of credit available in many rural and regional towns around Australia. A form of book-up was available at least at one of the two other stores in Mintabie.

164 Mr Kobelt's book-up system provided credit facilities to customers of Nobbys. All but one of the customers to whom Mr Kobelt provided book-up were Indigenous. Book-up was the only means by which Mr Kobelt provided credit to his Anangu customers. Mr Kobelt also extended credit to non-Indigenous customers but on different terms to the book-up facility. Specifically, he did not require non-Indigenous customers to provide security and he allowed them until the end of the week in which the credit was provided to pay his account, or sometimes until the end of the following week. At trial, 117 recipients of book-up services were identified as part of ASIC's case against Mr Kobelt under the ASIC Act. All 117 customers were Indigenous residents of the APY Lands. Between July 2011 and October 2012, Mr Kobelt sold 105 second-hand cars to 92 customers under the book-up system.

Vulnerability

165 The communities in which Mr Kobelt's customers lived were remote. The majority of his customers were impoverished. They had no or limited net assets, and only limited net income. While some had employment of some kind at some time, at least half were dependent on Centrelink benefits as their principal source of income. Less than half of the 117 customers were able to read and the reading ability of those who could read was compromised.

166 More than half of Mr Kobelt's customers could not "add up". The majority of the customers had low levels of financial literacy and lacked the

competence of most Australians in the wider community to make informed decisions concerning the use of financial services. They lacked understanding of the basis upon which debit cards (known as "key cards") and personal identification numbers ("PINs") are issued and of the steps customers should take in their own self-interest.

167 The 117 customers were vulnerable, with that vulnerability "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"[178].

168 The Full Court referred to some countervailing considerations: in particular, voluntariness, the customers' knowledge and cultural matters.

169 It can be accepted that all 117 customers had "an understanding of the basic elements of the [b]ook-up system"[179]. They understood that they could purchase a vehicle or other goods from Nobbys on credit; that the credit arrangement involved them paying later for the vehicle or goods by providing Mr Kobelt with their key card and PIN and authorising him to use it to withdraw money from their bank account as it became available; and that the disadvantage arising from the customers not having access to money for the necessities of life could be addressed by Mr Kobelt advancing further credit.

170 The 117 customers had an awareness of the above aspects of the system at the time they entered into the book-up arrangement and chose voluntarily to do so. Entering into the arrangements was their choice. Each of the Anangu witnesses from whom evidence was led at trial consented to Mr Kobelt making withdrawals from their account using their key card and PIN.

171 Evidence at trial showed that many Indigenous people in remote communities spend improvidently, a pattern or cycle known as "boom and bust" expenditure. A boom and bust cycle mirrors the deposit of income, such as from employment or welfare payments, into bank accounts. Money is spent as it becomes available, without consideration of the medium- to long-term consequences of such expenditure. A significant number of Mr Kobelt's book-up customers were affected in this way. Evidence at trial also highlighted the practice of "demand sharing". This term refers to an Anangu social obligation requiring sharing of resources with specific categories of kin, under which the

---

178 *ASIC v Kobelt* [2016] FCA 1327 at [620]. See also *Kobelt (FC)* (2018) 352 ALR 689 at 702 [67], 736 [268].

179 *ASIC v Kobelt* [2016] FCA 1327 at [543]. See also *Kobelt (FC)* (2018) 352 ALR 689 at 712 [134].

giver has a responsibility to share and the recipient the right to share. This cultural practice can give rise to bullying or exploitation. However, there was very little evidence that Mr Kobelt's customers chose to enter into the book-up system to avoid demand sharing.

Mr Kobelt's actions − taking advantage

172 When a customer approached Mr Kobelt for book-up, Mr Kobelt would require very little information from them. If he did not know them, he would ask their name and where they lived. He would ask all customers wishing to use his book-up system what income they received and the day on which it was paid into the account to which Mr Kobelt would be given access. He would make his assessment by reference to that information. He did not ask customers to complete any application form. He did not enquire whether they had any other debts, liabilities or commitments. He was indifferent as to whether his customers could afford the commitment they were undertaking, having regard to their financial position more generally. Until the end of 2010, the arrangements were wholly verbal. From January 2011, Mr Kobelt asked customers to provide a signed authority which stated only: "I [name of customer] give Lindsay permission to take money from my Key Card [number of card]". One hundred and fifty-one customers gave permission in this way, although there were 21 instances where the authority was not signed by the customer, and two instances of customers signing without any authority written above.

173 To receive book-up, Mr Kobelt required that customers provide him with a key card linked to the bank account into which their income was paid, as well as their PIN. Mr Kobelt generally retained customers' key cards until their debt was paid in full. Mr Kobelt would put each key card in its own resealable plastic bag. He would stick a piece of masking tape to the outside of the bag on which he would write the customer's name, their PIN and, in most cases, details of when payments would be made into the account. Apart from writing on the masking tape (and, commencing in January 2011, obtaining a written authority), Mr Kobelt did not otherwise record in writing the terms and conditions on which he provided book-up.

174 Customers could frustrate the book-up arrangements by cancelling their key cards or having their income paid into a different account. From time to time, some customers did so. But while Mr Kobelt generally did not take enforcement action against these customers, he accepted that this was because it was not in his commercial or reputational interest to do so. The primary judge found that to frustrate the arrangements would require customers to "act in

breach of their agreement with Mr Kobelt, that is, to act in a way which was dishonourable, if not dishonest"[180].

Sale of second-hand cars

175 Most of Mr Kobelt's book-up related to the sale of second-hand cars. The arrangements were generally as follows. Mr Kobelt and the customer would enter into a written contract for sale of the second-hand car. The contracts were in the form prescribed by the *Second-hand Vehicle Dealers Regulations 1995* (SA). None of the contracts in evidence referred to book-up or the fact that the sales were by credit.

176 In most cases, the cars had already been driven more than 200,000 km. This meant the statutory duty to repair defects under s 23 of the *Second-hand Vehicle Dealers Act 1995* (SA) did not apply. Two Anangu witnesses gave evidence at trial that the second-hand vehicles sold by Mr Kobelt broke down within a relatively short period of time, requiring them to return to Nobbys and purchase another car from Mr Kobelt. This happened on more than one occasion. The primary judge observed that, on the road between Mimili and Indulkana, there were numerous cars on the side of the road, which appeared to be broken down, abandoned or derelict. Many of the vehicles seemed to be of the kind sold by Nobbys.

177 Mr Kobelt's method of pricing the vehicles was as follows. When Mr Kobelt offered a vehicle for sale, he attached to the vehicle the form containing the details required by statute, including the price at which the vehicle may be purchased ("the list price"). He calculated the list price by adding together the price he paid for the vehicle, any transport cost and the cost of any significant repair work, then doubling that sum. He then compared that figure to competitor prices for similar vehicles, and sometimes adjusted the figure so it was a little less than the competitor price.

178 Until at least April 2014, Mr Kobelt's practice was to sell vehicles at a reduced price for customers who could pay the purchase price in full in cash at the time of purchase, and the list price to those to whom he provided book-up. The primary judge rejected Mr Kobelt's evidence that he had not differentiated the price in this way for four years, taking the view that Mr Kobelt was seeking – contrary to other evidence before the Court[181] – to establish falsely that the price differential practice had ceased several years earlier[182] and finding, with respect

---

180 *ASIC v Kobelt* [2016] FCA 1327 at [513].

181 See generally *ASIC v Kobelt* [2016] FCA 1327 at [154]-[172].

182 *ASIC v Kobelt* [2016] FCA 1327 at [155].

to the submission that Mr Kobelt's oral evidence could be attributed to a faulty memory, that it was "implausible that this is a matter about which Mr Kobelt could have been honestly mistaken"[183].

179 Nearly all of the 105 sales of vehicles using book-up were made to the Anangu and the prices ranged between $2,500 and $7,800. The average and median prices were $5,600 and $5,800 respectively. The price differential between cash and book-up sales was usually at least $1,000 per vehicle and sometimes more. The price differential was a charge for the provision of credit[184]. The primary judge considered that, in most cases, it was probable that the book-up customers were not aware of this charge, let alone the amount of the charge.

Withdrawal conduct

180 Mr Kobelt or his son would generally withdraw the whole, or nearly the whole, of the funds available in a customer's account, usually on the day, or shortly afterwards, that the funds were paid in by the employer or Centrelink ("the Withdrawal Conduct"). Mr Kobelt or his son would often make the withdrawals very early in the day or between midnight and 1 am. They did this to prevent customers being able to access their funds by other means. Mr Kobelt and his son regarded themselves as being in "competition" with many of the customers as to who could make withdrawals first. Mr Kobelt's approach was to continue withdrawing amounts incrementally until the attempted withdrawal was unsuccessful due to insufficient funds.

181 Between 1 July 2010 and 30 November 2012, Mr Kobelt withdrew a total of just under $1 million ($984,147.90) from the accounts of 85 customers to whom he had provided book-up for the purchase of second-hand cars.

182 There was no objective justification for Mr Kobelt withdrawing, in most cases, all of the available funds in the customers' accounts. In some instances, he withdrew amounts which exceeded those which the customer had authorised – sometimes as a result of Mr Kobelt failing to realise a customer's debt had already been paid – and in other cases made withdrawals more frequently than had been authorised.

---

183 *ASIC v Kobelt* [2016] FCA 1327 at [169].

184 See *ASIC v Kobelt* [2016] FCA 1327 at [196]; see also at [123], [171], [199]; *Kobelt (FC)* (2018) 352 ALR 689 at 725-726 [202]-[205]. See also s 11 of the *National Credit Code* in Sch 1 to the NCCP Act.

183 On 14 December 2010, there was a "glitch" in one of the Commonwealth Bank of Australia's systems ("the CBA glitch"), one consequence of which was that withdrawals and transfers from CBA debit accounts were approved, even though the withdrawals and transfers exceeded the available balance in the customers' accounts. Mr Kobelt took advantage of the CBA glitch to withdraw $56,944 from his customers' CBA accounts, even though he had no authority to do so (at least with respect to a significant proportion of that amount). As the primary judge found, Mr Kobelt must have appreciated at the time that this amount was much more than normal and could not have thought that his customers had authorised him to make these extra withdrawals. The CBA glitch resulted in overdrafts to some customers' accounts.

184 These extra withdrawals revealed that Mr Kobelt's attitude was to transfer to himself whatever funds were available in a customer's account at any one time.

Book-down

185 Without access to their key card or their funds, customers had no means of acquiring groceries and the other necessities of life. To address this, Mr Kobelt would supply goods to customers by way of further book-up (sometimes called "book-down").

186 Mr Kobelt allowed, at his discretion, customers to use some of the amount he had withdrawn and transferred into his own account to purchase groceries at Nobbys, to obtain cash, or to make a purchase at another community store in the APY Lands through a "purchase order" sent from Nobbys. He applied the balance towards the debt owed to him.

187 Mr Kobelt generally limited the credit allowed for book-down to 50 per cent of the amount he had most recently withdrawn.

188 The book-down arrangement was not recorded in writing and in most cases Mr Kobelt did not expressly agree with customers that they were "entitled" to 50 per cent: more often than not he told them only that they could have a "little bit" or only "some" groceries. And although customers were nominally "entitled" to that 50 per cent, Mr Kobelt would not generally allow them to access the whole amount, instead limiting access to $100, $150 or $200 at a time. The primary judge referred to Mr Kobelt's justification that he limited access to ensure that his customers would have "something" at the end of the week, but his Honour made no such finding.

189 Mr Kobelt did not maintain any record showing the balance available to each customer by reason of the 50 per cent he said would be available. Customers with a significant book-up debt were generally permitted to buy milk, bread and meat with book-down but not items like sweets and chips. In that way,

Mr Kobelt controlled the expenditure of his book-up customers. As a result, with few exceptions, customers had to travel to Nobbys to access their money and acquire groceries.

190 Mr Kobelt sometimes allowed customers to use book-down to purchase bus tickets to travel away from the APY Lands. He generally arranged these purchases because he had a 1300 number to Greyhound, the bus company.

191 If Mr Kobelt allowed a customer to make a cash advance, he applied either a small, fixed charge or, in some instances, a charge of 10 per cent of the amount of the cash advance.

192 If Mr Kobelt sent off a "purchase order" to another store, he charged $5 or $10[185]. Through his "purchase order" system, Mr Kobelt would send a store in the APY Lands a purchase order which named the customer, the amount of credit authorised and often the nature of the authorised purchase – for example, "goods" or "cash". The recipient store would then allow the customer to purchase food or would issue cash in the amount stated. Mr Kobelt's fee of $5 or $10 for each purchase order was cheaper than the comparable express money order service provided by Australia Post. Several stores in the APY Lands did not agree to purchase order arrangements with Mr Kobelt.

193 Customers' access to bus tickets, cash advances and purchase orders was at Mr Kobelt's discretion. In some situations, Mr Kobelt's exercise of that discretion, and thus control, was arbitrary: for example, in one case Mr Kobelt allowed book-up for a customer to buy a bus ticket to Adelaide but, a short time later, he refused funds for the customer to buy a return ticket to the APY Lands because Mr Kobelt thought that the customer had had enough book-down.

Record keeping

194 Mr Kobelt made "inadequate and often illegible" records of the book-up transactions[186] and Mr 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[187].

195 Mr Kobelt provided no written record of his withdrawals to customers. He kept printed EFTPOS records of withdrawals in the plastic bag containing the

---

185 See [2018] HCATrans 252 at lines 945-947.

186 *ASIC v Kobelt* [2016] FCA 1327 at [544].

187 *ASIC v Kobelt* [2016] FCA 1327 at [484].

key card but discarded them once the bag became too full (usually after two or three months).

196 Until 2014, the records were kept in a rudimentary form of running account. The entries were handwritten, in abbreviated form, into unused diaries – although the entries bore no correlation to the dates printed in those diaries. The entries were made in a "cramped and somewhat chaotic manner"[188] and often over printed portions of the diaries, making it difficult to understand the state of a customer's account at any given time. Further, Mr Kobelt did not record in the diaries the balance owed by the customer after each transaction but would calculate it from time to time. In 2014, Mr Kobelt commenced keeping his records in the form of ledger cards. Even then, it was unrealistic for customers to have understood, or checked the accuracy of, Mr Kobelt's records, had they wished to do so.

197 For customers who had not purchased a car but who used book-up for food and groceries only, Mr Kobelt did not keep records of the transactions in the diaries; he only kept printed EFTPOS records in the plastic bag containing the key card.

Fees and charges of the book-up system

198 The book-up system was said to be "fee free and interest free"[189], except for the provision of credit in relation to the sale and purchase of second-hand cars, purchase orders and cash advances.

199 For the purchase of second-hand cars, to which most of Mr Kobelt's book-up related, the primary judge concluded that the credit provided by Mr Kobelt was "of a very expensive kind"[190].

200 That conclusion has been criticised as unfounded. But to the contrary, it was sustained by the primary judge's following findings of fact. There was no evidence of the actual effective interest rates charged by Mr Kobelt. However, for illustration, the primary judge made a hypothetical calculation: assuming a $4,000 vehicle purchase and a $1,000 charge (that is, the usual price differential[191]), with the aggregate of $5,000 being repaid by regular monthly

---

188 *ASIC v Kobelt* [2016] FCA 1327 at [69].

189 *Kobelt (FC)* (2018) 352 ALR 689 at 733-734 [257(2)].

190 *ASIC v Kobelt* [2016] FCA 1327 at [492]; see also at [618].

191 See [179] above.

instalments over a 12, 18 or 24 month period, the effective annual interest rates would be 43.4 per cent, 29.5 per cent or 22.4 per cent respectively. By way of comparison, according to forensic accounting evidence led at trial, a commercial lender would have charged interest on a variable unsecured personal loan in the range of 14 to 15.2 per cent. Mr Kobelt's rate for book-up on vehicles was therefore significantly in excess of the rates for personal loans.

201 The primary judge also considered expert evidence on the effective interest rate paid by four particular Anangu customers on their aggregate purchase of nine vehicles. The total interest (for all customers on the nine vehicles) using personal loan rates would have been $2,886.14. By comparison, the minimum total price differential that would have been charged by Mr Kobelt was $9,000 (that is, $1,000 per vehicle multiplied by nine vehicles). The plurality in the Full Court upheld the primary judge's finding that the credit charges for second-hand cars were "very expensive"[192].

202 Mr Kobelt's position throughout the trial was that he did not charge interest or impose any charge for the provision of book-up. Consistently with that position, he did not disclose to his customers the existence of any charge. His counsel submitted at trial, in reliance on the expert evidence of Mr Paul Jorgensen, a forensic accountant, that Mr Kobelt's "interest free terms were better than customers could obtain from traditional finance institutions"[193]. But, as already explained, both the fact that certain credit attracted some kind of charge (in relation to the cars, purchase orders and the provision of cash) and the relative expense of certain of those charges were accepted by the primary judge. And those findings were not overturned on appeal.

203 Finally, there were charges for the purchase of the second-hand cars, and, expensive or otherwise, they were not disclosed to Mr Kobelt's customers.

204 The fact that much of the credit supplied to Mr Kobelt's customers through book-up came at a substantial undisclosed charge cannot be ignored in assessing whether Mr Kobelt's conduct in connection with the supply of credit under his book-up system was, in all the circumstances, unconscionable. That is so even though ASIC did not attempt to prove that the cars were sold at a price above their market value. The problem was, and remains, the existence of the undisclosed credit charge. That conclusion is not altered by the fact that ASIC did not plead the expensiveness of credit as a particular of unconscionable

---

192 See *Kobelt (FC)* (2018) 352 ALR 689 at 713 [138], 726 [207], 729 [226]-[227] per Besanko and Gilmour JJ; cf at 754 [364]-[365] per Wigney J.

193 *ASIC v Kobelt* [2016] FCA 1327 at [493].

conduct. As the plurality held in the Full Court, the cost of the credit was an issue at trial[194].

Effect of the arrangements − tying conduct

205 Mr Kobelt's system "tied" book-up customers to Nobbys. The primary judge found that this "tying" effect was a form of "exploitation"[195] and that this, combined with Mr Kobelt's requirement that he have access to the whole of customers' incomes, was a form of "predation"[196]. The Full Court overturned these conclusions[197]. By its notice of appeal, ASIC contended that the Full Court erred in overturning the findings of the primary judge that Mr Kobelt had engaged in predation or exploitation. At the hearing of the appeal, although counsel for ASIC contended that the words "predation" or "exploitation" meant no more than taking advantage of disadvantage, ASIC did not abandon the contention that the primary judge's findings on predation and exploitation (or that Mr Kobelt had "taken advantage") should be restored. Those findings should be restored.

206 The system deprived customers of independent means of obtaining the necessities of life. It prevented them from shopping in their own communities. It created a prolonged dependence on Mr Kobelt's exercise of discretion.

207 By making his customers dependent on a favourable exercise of his goodwill, Mr Kobelt placed them in a position of vulnerability, separate to and different from the vulnerability which existed at the time they entered into the book-up arrangement. The primary judge was right to describe the system as constituting "exploitation" and "predation".

Mr Kobelt's knowledge

208 The primary judge was satisfied that Mr Kobelt knew of the characteristics of his customers on the basis that it must have been obvious from the interactions he had with them.

---

194 See *Kobelt (FC)* (2018) 352 ALR 689 at 727 [208]-[210].

195 *ASIC v Kobelt* [2016] FCA 1327 at [606]; see also at [620].

196 *ASIC v Kobelt* [2016] FCA 1327 at [609].

197 See *Kobelt (FC)* (2018) 352 ALR 689 at 735-736 [267]-[268], 756-757 [374]-[379], 758-759 [385].

209 ASIC did not contend that Mr Kobelt had adopted forms of undue influence or exerted undue pressure. The primary judge therefore made no finding to that effect.

210 Despite the illegibility of Mr Kobelt's records, it was not found that he maintained his records dishonestly, or used the key cards and PINs dishonestly. The primary judge said that Mr Kobelt acted with a *degree* of good faith, but at all times pursued his own interests, even when that was to the detriment of his customers. The primary judge found as a fact that some of the withdrawals from the customers' accounts were not authorised.

Advantages to customers?

211 In the Full Court, the plurality found that the primary judge had given insufficient weight to, among other things, the advantages to Nobbys' customers in alleviating the disadvantages associated with demand sharing and boom and bust expenditure. Unsurprisingly, in this Court, Mr Kobelt relied upon that finding, and the evidence said to support that finding, in seeking to demonstrate the advantages to customers of his book-up system.

212 Dr David Martin, a social anthropologist, was retained by ASIC and gave evidence at the trial. Dr Martin was described by the primary judge as having a deep understanding of remote Aboriginal people's relationship with money and financial transactions, including an understanding about "particular mechanisms by which Aboriginal people typically seek to structure and personalise relationships with outsiders in order to access goods and services which they value"[198].

213 The primary judge described Dr Martin's evidence as "generally helpful and reliable"[199]. However, it is necessary to understand Dr Martin's evidence including the relevant findings made about it by the primary judge and the Full Court. He was retained to provide an opinion concerning certain of Nobbys' Anangu customers in relation to ASIC's (ultimately abandoned) secondary case directed to specific customers rather than the book-up system generally, as well as "any other Aboriginal customers of Nobbys with whom [he spoke] as part of [his] field trip"[200]. Dr Martin was instructed to assume that for the majority of Nobbys' Anangu book-up customers: periodic payments into their accounts were those customers' only source of income; use of a key card was the primary or

---

198 *ASIC v Kobelt* [2016] FCA 1327 at [389].

199 *ASIC v Kobelt* [2016] FCA 1327 at [416].

200 *ASIC v Kobelt* [2016] FCA 1327 at [391].

exclusive means by which the customers accessed their account; and the customer was a resident of a remote community, in the APY Lands, and had very limited or no assets and very little income.

214 Dr Martin's initial instructions were to report on, among other things, any facts or circumstances affecting customers' ability or willingness to question or negotiate the terms of book-up and to complain about those terms. Those instructions were later expanded to address an additional question, namely, "[w]hat, if any, social or cultural matters affect the ability or willingness of Aboriginal residents of the APY Lands"[201] – that is, persons of the APY Lands generally, not those who identified as Nobbys customers – to understand the nature, terms, advantages and disadvantages of credit arrangements generally and of the specific arrangement provided by Nobbys; question or negotiate the terms of transactions (including credit arrangements) with traders; and complain about the terms of such transactions? Dr Martin conducted three field trips to the APY Lands, during which he spoke to a total of 23 Indigenous residents in Mimili and Indulkana.

215 Given that Dr Martin was never asked to express an opinion specifically with respect to the 117 customers the subject of ASIC's primary case (that is, directed to the book-up system generally), the primary judge considered that care had to be taken before accepting characterisations of the 117 customers that depended upon inferences drawn from characteristics of the Anangu population generally. Indeed, Dr Martin accepted in cross-examination, and in his report, that it was not reasonable to impute to all of Mr Kobelt's customers all of the characteristics which he had been asked to assume.

216 The primary judge referred to Dr Martin's description at trial of demand sharing as part of the "foundational principles of reciprocity, exchange and sharing within a hunter gatherer society". Dr Martin considered, however, that while it might be reasonable to come to the view that leaving key cards at Nobbys was part of a strategy to avoid demand sharing, Dr Martin had "no firm evidence to come to that view"[202]. In the result, the primary judge found that there was "very little evidence from the Anangu customers themselves that they handed over their key cards and PINs to Mr Kobelt *in order to* achieve … these outcomes. … [W]ith one exception, none [of the Anangu witnesses] said that it was the desire to avoid this kind of sharing which was the reason they engaged in [b]ook-up or that they shopped at Nobbys"[203]. Mr Kobelt's challenges to the

---

201 *ASIC v Kobelt* [2016] FCA 1327 at [392].

202 *ASIC v Kobelt* [2016] FCA 1327 at [578].

203 *ASIC v Kobelt* [2016] FCA 1327 at [582].

primary judge's findings in respect of avoidance of demand sharing, and the extent to which the primary judge had considered Dr Martin's evidence in respect of this issue, were dismissed by the plurality in the Full Court.

217 The plurality were right to do so. As was explained in *Thorne v Kennedy*[204], where a transaction is sought to be impugned by the operation of vitiating factors such as, relevantly, unconscionable conduct, it is necessary for a primary judge to conduct a close consideration of the facts; and it is equally necessary for an appellate court to assess any challenge to the primary judge's conclusions in light of the advantages enjoyed by that judge. That is because an assessment of whether unconscionable conduct has been established calls for a precise examination of the particular facts, and the exact relations established between the parties[205]. The advantage of a primary judge in seeing the parties and estimating their characters and capacities is "immeasurable"[206].

218 Moreover, this appeal is concerned with Mr Kobelt's book-up system, not all book-up systems or even the generalised conception of book-up systems described by Dr Martin. It is concerned with the 117 recipients of book-up services identified as part of ASIC's case against Mr Kobelt, not all Anangu people or all Aboriginal people living in remote areas. In particular, there was very little evidence that those 117 customers chose to enter into the book-up system to avoid demand sharing. Therefore, this Court should be slow to go beyond the primary judge's findings of fact, which were upheld on appeal, and conclude, inferring from general information pertaining to the Anangu or remote Aboriginal people, that Mr Kobelt's customers entered into the book-up arrangements for cultural reasons and not due to their position of special disadvantage. The primary judge's factual findings dictate otherwise: due to their vulnerability, the 117 customers had little other choice.

Alternatives to Mr Kobelt's book-up system

219 The primary judge found that Mr Kobelt's book-up system went beyond what was reasonably necessary to protect his legitimate interests in two fundamental ways: by requiring that customers hand over key cards and PINs and by withdrawing the whole, or nearly the whole, of the available balance in the customer's account on each payday.

---

204 (2017) 91 ALJR 1260 at 1272-1273 [41]; 350 ALR 1 at 14.

205 *Thorne* (2017) 91 ALJR 1260 at 1273 [43]; 350 ALR 1 at 14-15, quoting *Jenyns* (1953) 90 CLR 113 at 118-119.

206 *Wilton* (1948) 76 CLR 646 at 654, cited in *Louth* (1992) 175 CLR 621 at 633.

220 The primary judge identified other arrangements that Mr Kobelt could have used, which made the provision of key cards and PINs not reasonably necessary to protect his legitimate interests[207].

221 First, Mr Kobelt could have applied to be a "Participant" in the Commonwealth Government's "Centrepay" system. Once a supplier has been accepted as a Participant, Centrelink recipients may authorise Centrelink to pay part of their benefits to that Participant. The Centrepay facility is generally directed to essential services and only a selection of "additional services". Mr Kobelt said at trial that he would take up this option if it were offered to him, despite earlier difficulties he had encountered when he had enquired about participating in Centrepay. That said, doubts were expressed by the primary judge and by Wigney J as to whether the Centrepay facility would encompass the purchase of used cars, although Nobbys as a supplier of food and groceries might have been eligible for acceptance as a Participant.

222 Second, Mr Kobelt could have agreed on a direct debit arrangement with the purchasers of his cars. Mr Kobelt agreed that this system could work well if the customers could organise it.

223 Third, for customers who lived nearby, Mr Kobelt accepted that he could have retained possession of the customers' key cards but not their PINs. He could have handed the key card back to the customer when they came to Nobbys, with the expectation that they would do so on or shortly after each payday to effect a transfer to Nobbys in reduction of their debt.

224 Fourth, Mr Kobelt could have arranged deductions from customers' wages to pay off their debt.

225 In addition, to mitigate the disadvantages of boom and bust expenditure, some book-up customers could request that Centrelink make pension payments weekly, rather than fortnightly. There was no suggestion that such a facility would not also have been available to those book-up customers who were recipients of Centrelink benefits.

226 Wigney J in the Full Court questioned whether some of these alternatives were in fact reasonably available or feasible. In his Honour's view, the primary judge's analysis of these various alternatives tended to ignore evidence that suggested that the Anangu may have preferred Mr Kobelt's book-up system to the alternatives because it involved the personalisation of the financial transaction. It is true that the primary judge made limited reference to the

---

207 While this point was not pleaded by ASIC as a particular of unconscionable conduct, the plurality in the Full Court held that it did not need to be pleaded.

personalisation of financial transactions, referring only to that concept in describing the expertise of Dr Martin. However, two further matters should be observed about this aspect of Dr Martin's evidence. Dr Martin's evidence was that there was a *tendency* for Indigenous APY Lands residents to personalise financial transactions by conducting financial transactions through "brokers" such as storekeepers to better access goods and services. This tendency was based on inferences Dr Martin drew from the assumptions set out in his instructions together with his observations and interviews. The limitations on the extent to which Dr Martin's evidence can be used to establish that the Anangu generally and Mr Kobelt's customers specifically had such a tendency are self-evident. Further, there is nothing to suggest that the alternatives outlined above would result in any reduction, let alone any great reduction, in the personalisation of the transaction. It is plain that each retains some relationship with a local storekeeper including, specifically, that the credit is provided by a person known to the customer; it is simply the method by which book-up or another form of credit – each necessarily personal – is provided that is different.

227 In addition to the alternative arrangements identified by the primary judge, it is plain that another real alternative was and remains an appropriately functioning form of *book-up*. The characteristics of such a system are readily identifiable: an assessment of whether customers needed the credit facility and could afford the repayments; the disclosure of all fees and charges to customers; no retention as "security" of a customer's key card, let alone their PIN; the transfer of an agreed amount or proportion of weekly or fortnightly income, rather than the whole of a customer's income; legible and consistent records of the original credit advanced, the payments made, and a running total of the balance outstanding, imposing a discipline to keep these records up to date; and a system where the customers were not "tied" to the credit provider for the provision of other goods and services.

228 Finally, the Withdrawal Conduct[208] is itself illustrative of the problems. That conduct revealed that Mr Kobelt worked actively to avoid some customers having access to the 50 per cent of the income which should have been available to them and that those customers were not content with having 50 per cent of their income available only at Mr Kobelt's discretion and only through his store or purchase orders. That conduct further supports the conclusion that the customers would not necessarily have chosen Mr Kobelt's book-up system if the fact of alternatives was explained and made available.

---

208 See [180]-[184] above.

229 Alternatives were available. There is nothing to suggest that these alternatives would not have worked and, in fact, in relation to some of them, Mr Kobelt agreed that they could work well.

Mr Kobelt's book-up system was unconscionable

230 Mr Kobelt accepted that statutory unconscionability was capable of applying to a system of conduct or pattern of behaviour and that his provision of credit to the 117 customers was conduct "in trade or commerce" and was conduct in connection with the supply of "financial services" to individuals. Therefore, the sole issue was and remains whether Mr Kobelt, in the implementation and provision of his book-up system, engaged in a system of conduct or pattern of behaviour that was "unconscionable" contrary to s 12CB(1) of the ASIC Act. For the reasons that follow, the answer is "yes".

231 ASIC advanced three grounds in respect of the Full Court's finding to the contrary. Those grounds related to the special disadvantage of Mr Kobelt's customers, the predatory and exploitative nature of Mr Kobelt's conduct, and the weight to be given to purported advantages arising from the book-up system in relation to the practices of demand sharing and boom and bust expenditure. Each identifies a matter central to the assessment of unconscionability in the circumstances of this case but none can be viewed in isolation. Accordingly, the issues raised by ASIC will be addressed in the context of assessing Mr Kobelt's conduct against the non-exhaustive list of factors in s 12CC.

232 The Court's focus must primarily be on the nature of the conduct by the stronger party[209]. First, s 12CB(4)(b) extends s 12CB(1) unconscionable conduct to a "system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged". It follows from the fact that a specific person need not be identified that special disadvantage of an individual is not a necessary component of the prohibition[210]. Indeed, Parliament's intention in this respect was explained in the following terms[211]:

---

209 See Australia, House of Representatives, *Competition and Consumer Legislation Amendment Bill 2011*, Explanatory Memorandum at 22 [2.24].

210 See Australia, House of Representatives, *Competition and Consumer Legislation Amendment Bill 2011*, Explanatory Memorandum at 22 [2.23].

211 Australia, House of Representatives, *Competition and Consumer Legislation Amendment Bill 2011*, Explanatory Memorandum at 21 [2.21].

> "[T]he focus of the provisions is on *conduct* that may be said to offend against good conscience; it is not specifically on the characteristics of any possible 'victim' of the conduct (though these may be relevant to the assessment of the conduct)." (emphasis in original)

233 That focus on the conduct of the stronger party reflects the difference between the equitable doctrines of unconscionable conduct and undue influence. The former is concerned with the conduct of the stronger party in unconscientiously taking advantage of the weaker party. The latter is concerned with the quality of the consent or assent of the weaker party[212]. That distinction is also reflected in ss 12CB(1) and 12CC(1), where the prohibition in s 12CB(1) is against unconscionable conduct and "any undue influence or pressure ... or any unfair tactics" is only *one* of several factors to be taken into account if relevant[213].

234 The assessment of whether conduct is unconscionable within the meaning of s 12CB involves the evaluation of facts by reference to the values and norms recognised by the statute, and thus, as it has been said, a normative standard of conscience which is permeated with accepted and acceptable community standards[214]. It is by reference to those generally accepted standards and community values that each matter must be judged.

Vulnerability or special disadvantage

235 Vulnerability or special disadvantage may arise from matters including "poverty or need of any kind ... [and] illiteracy or lack of education"[215]. Mr Kobelt's customers were vulnerable or at a special disadvantage[216]. Their vulnerability existed because of the remoteness of their communities, the limitations on their education, their impoverishment, and the limitations on their financial literacy – not as a result of Anangu cultural practices. Both the primary

---

212 *Thorne* (2017) 91 ALJR 1260 at 1281 [86]; 350 ALR 1 at 25 and the authorities cited therein.

213 ASIC Act, s 12CC(1)(d).

214 *Lux Distributors Pty Ltd* (2013) ATPR ¶42-447 at 43,463 [23], cited in *Paciocco* (2015) 236 FCR 199 at 275 [298].

215 *Blomley* (1956) 99 CLR 362 at 405, quoted in *Amadio* (1983) 151 CLR 447 at 474 and *Kakavas* (2013) 250 CLR 392 at 425 [117]. See also *Thorne* (2017) 91 ALJR 1260 at 1285 [113]; 350 ALR 1 at 30-31.

216 See [165]-[171] above.

judge and the Full Court accepted that Mr Kobelt's customers were vulnerable[217] and there was no dispute that Mr Kobelt knew of his customers' special disadvantage[218].

236 Indeed, as the primary judge noted, the ready willingness of Mr Kobelt's 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[219]. As Wigney J observed, the Anangu plainly had a different conception of, and different attitude towards, their key cards and they trusted Mr Kobelt. But that observation, and that trust, do not provide an answer, or defence, to the fact that, in *all* the circumstances, Mr Kobelt's book-up system was unconscionable contrary to s 12CB of the ASIC Act. Instead, the fact that the Anangu had a different conception of, and different attitude towards, their key cards and that they trusted Mr Kobelt is part of the factual matrix which identifies, and explains, their vulnerability and the voluntariness of their entry into the book-up system as well as the significance of the other relevant factors listed in s 12CC(1), which are addressed next.

Mr Kobelt unconscientiously took advantage of his customers' vulnerability

237 The Full Court found that Mr Kobelt had not taken advantage of his customers' vulnerability because the customers understood the basic elements of Mr Kobelt's book-up system, including the Withdrawal Conduct[220]; voluntarily entered into the book-up arrangements[221]; had the ability to terminate the contracts[222]; and had agency, which must be respected[223], and their freedom of contract should not be impeded.

---

217 *ASIC v Kobelt* [2016] FCA 1327 at [620]; *Kobelt (FC)* (2018) 352 ALR 689 at 702 [67], 736 [268], 755-756 [371]-[372].

218 See [208] above.

219 *ASIC v Kobelt* [2016] FCA 1327 at [620].

220 See [169]-[170] and [180]-[184] above; *Kobelt (FC)* (2018) 352 ALR 689 at 735 [265], 752 [355].

221 *Kobelt (FC)* (2018) 352 ALR 689 at 735 [266], 752 [355].

222 *Kobelt (FC)* (2018) 352 ALR 689 at 736 [268].

223 *Kobelt (FC)* (2018) 352 ALR 689 at 743-744 [309]-[310], 750 [348], 751-752 [352], [355], 757 [376].

238 There are a number of errors in that analysis. Vulnerable persons may be unable to protect their own interests. If a person, unable to protect their own interests, voluntarily enters into a transaction, this does no more than remove the conduct from it being the subject of relief on the ground of undue influence where the elements, and methods of proof, are quite different[224]. It is because it is a transaction that is *voluntarily* entered into by someone under a special disadvantage that unconscionability, including statutory unconscionability, developed, in order to ensure that persons who are vulnerable and unable to protect their own interests are not the victim of conduct by a stronger party in unconscientiously taking advantage of that vulnerability. And that is what Mr Kobelt's book-up system did.

239 The unconscionability of Mr Kobelt's conduct was that the 117 customers were at such a special disadvantage relative to Mr Kobelt so as to be unable to make a decision in their own interests, and Mr Kobelt, knowing or in circumstances where he ought to have known of their incapacity to make a decision in their own interests, took advantage of that disadvantage to get them to agree to his terms.

240 It is irrelevant that some of the customers might have regarded the requirements of Mr Kobelt's system as not unreasonable or considered that it alleviated pressures of demand sharing. The requirements of the system were unreasonable, regardless of any effects on demand sharing. Even if some of his 117 customers might have thought otherwise, the customers were so disadvantaged by their remoteness, the limitations on their education, their impoverishment and the limitations on their financial illiteracy, as well as the limited available alternatives, as to be in a position where they could not demand a superior system.

(i) Power imbalance: s 12CC(1)(a), (e) and (j)(i)

241 Mr Kobelt held all the power in the relationship. His Anangu customers were vulnerable and unable to protect their own interests. They were limited in their ability to acquire credit on the same terms, or at all, anywhere in reasonable proximity to the APY Lands, meaning that Nobbys had a near-monopoly on the provision of credit. Further, Mr Kobelt did not provide credit to the Anangu on any other terms except book-up; and he was not flexible in relation to the requirement that customers provide their key card and PIN or in relation to certain other terms on which he provided credit[225].

---

224 See *Thorne* (2017) 91 ALJR 1260 at 1281 [86]; 350 ALR 1 at 25.

225 cf *Kobelt (FC)* (2018) 352 ALR 689 at 755 [367]-[368].

242 The fact that there was no indication that the customers wished to bargain with Mr Kobelt is unsurprising. That is often the position with vulnerable persons: they do not know of potential alternatives and often, even if they are aware of such alternatives, lack the ability to negotiate. Moreover, s 12CC(1)(a) requires consideration of the "relative strengths of the bargaining positions" of the relevant parties. It is concerned with the existence of the power imbalance, not the wishes of the weaker party.

243 As against that, the ability of customers to frustrate the arrangements should be given little, if any, weight. The primary judge found that to frustrate the arrangements would require customers to "act in breach of their agreement with Mr Kobelt, that is, to act in a way which was dishonourable, if not dishonest"[226]. Mr Kobelt did not challenge this finding before the Full Court. That reinforced the power imbalance. And, no less importantly, it would be wrong to conclude that the theoretical ability of the weaker party to frustrate the wrongful conduct of the stronger party could ameliorate the wrongful conduct of that stronger party. That is the antithesis of unconscionability.

244 As has been observed, unequal bargaining power on its own is not sufficient to establish unconscionability[227]. But it provides the context in which the remaining factors are to be assessed.

(ii) Circumstances of entry: s 12CC(1)(c), (i) and (j)(i)

245 The circumstances in which Mr Kobelt's Anangu customers entered into the book-up arrangements were characterised not only by a power imbalance, but also by a lack of transparency and lack of proper understanding of the arrangements, resulting in an inability of Mr Kobelt's customers to hold him to account.

246 When customers entered into the arrangements, Mr Kobelt failed to document and disclose properly, or at all, the terms and conditions of the arrangement, the amount and frequency of the withdrawals, the amount of the debt or charges or the price differential for the purchase of the second-hand cars[228]. As the primary judge found, Mr Kobelt's customers would not have been able to understand his inadequate and often illegible records[229].

---

226 *ASIC v Kobelt* [2016] FCA 1327 at [513].

227 See *Amadio* (1983) 151 CLR 447 at 462.

228 See [172]-[173], [175], [179], [188]-[189], [194]-[197] and [202]-[203] above.

229 *ASIC v Kobelt* [2016] FCA 1327 at [544], [546].

247 Wigney J considered that these facts and matters did not deserve any significant weight for two reasons: (1) there was a cultural preference for Anangu customers to deal with business matters "face-to-face [rather] than be provided with a sheath [sic] of documents"[230]; and (2) there was no evidence that any customer had sought an account of the transactions[231]. That analysis is incomplete: it interprets s 12CC(1)(c) too narrowly.

248 The problem was that there was *no transparency or accountability* under Mr Kobelt's system. Mr Kobelt's "face-to-face" interactions did not enable customers to have a *proper* understanding of the terms of the book-up arrangement. When customers entered into the book-up arrangement they had only an understanding of the "basic elements" of the arrangement. That meant that the customers did *not* have a clear understanding of exactly how much Mr Kobelt would withdraw; how often and at what time of day he would withdraw; where their funds would be kept; whether and through what mechanism they were entitled to access their funds; how much they could access at a given time and to what uses it could be put; the fact that book-up for second-hand cars attracted a charge; and the fact that there were alternatives. Put simply, Mr Kobelt's book-up system was characterised by a complete lack of transparency and accountability. A cultural preference for oral communication does not justify exploitation or taking advantage of people without their knowledge or in the absence of full disclosure. Instead, the preference for oral communication demands that the credit provider provide the financial service in a manner which addresses that preference.

(iii) Mr Kobelt's book-up system and its implementation: s 12CC(1)(d), (j)(ii)-(iv) and (l)

249 Mr Kobelt's book-up system, and his implementation of it, allowed Mr Kobelt to engage in wrongful conduct to obtain a financial benefit to the detriment of his customers.

250 The primary judge said that Mr Kobelt acted with a degree of good faith, although that statement was qualified with the statement that Mr Kobelt pursued his own interests at all times, even when that pursuit was to the detriment of his customers.

251 What the unchallenged factual findings established was that Mr Kobelt's book-up system enabled him to abuse his position of power to the detriment of his customers.

---

230 *Kobelt (FC)* (2018) 352 ALR 689 at 747 [330].

231 *Kobelt (FC)* (2018) 352 ALR 689 at 753 [359].

252 As has been explained: the circumstances of entry[232]; requiring customers to hand over their key card and PIN[233]; Mr Kobelt withdrawing the whole, or nearly the whole, of the available funds by trial and error and deliberately before customers could access their funds by other means[234]; there being no objective justification for withdrawing all or most of the available funds as soon as they were deposited; Mr Kobelt controlling how much of their funds that his customers could access and what they could spend those funds on[235]; and there being no transparency (meaning that Mr Kobelt's customers could not hold Mr Kobelt to account[236]), compel that conclusion.

253 The conclusion is reinforced by the ways Mr Kobelt carried out the arrangements, not always complying with the terms of his arrangement, and making the withdrawals causing overdrafts in connection with the CBA glitch[237]. Contrary to the Full Court's conclusion[238], s 12CC(1)(j)(iv) *requires consideration* of the post-contractual conduct of the parties.

(iv) Tying

254 Mr Kobelt's book-up system tied his customers to Nobbys[239]. It created a prolonged dependence on Mr Kobelt's exercise of discretion. It placed them in an ongoing and increased position of vulnerability. Mr Kobelt exercised a high degree of control over his customers' funds and expenditure by precluding access

---

232 See *Mr Kobelt's book-up system* at [163]-[164], *Vulnerability* at [165]-[171], *Mr Kobelt's actions − taking advantage* at [172]-[204], *Effect of the arrangements − tying conduct* at [205]-[207] and *Mr Kobelt's knowledge* at [208]-[210] above.

233 See [173] above.

234 See [180]-[184] above.

235 See [185]-[193] above.

236 See [172]-[173], [175], [179], [188]-[189], [194]-[197], [202]-[203] and [205]-[207] above.

237 See *Mr Kobelt's actions − taking advantage* at [172]-[204], *Effect of the arrangements − tying conduct* at [205]-[207] and *Mr Kobelt's knowledge* at [208]-[210] above. See in particular at [182]-[184] above.

238 cf *Kobelt (FC)* (2018) 352 ALR 689 at 729 [222], 754 [362].

239 See [172]-[193], [205]-[207] above.

to their funds, preventing them from being able to access the necessities of life and making them dependent on his discretion.

255 "Tying", in various forms, has been the subject of restriction and condemnation for over a century in Australia[240], the United Kingdom[241] and the United States[242]. That condemnation, for the most part, arose because the parties

---

240 See *Australian Industries Preservation Act 1906* (Cth), s 4; *Australian Industries Preservation Act 1909* (Cth), s 5, inserting s 7A into the *Australian Industries Preservation Act 1906*; *Attorney-General of the Commonwealth v Adelaide Steamship Co Ltd* (1913) 18 CLR 30 at 32-39; [1913] AC 781 at 794-801; *Heron v Port Huon Fruitgrowers' Co-operative Association Ltd* (1922) 30 CLR 315 at 323-327; [1922] HCA 20; *Peters American Delicacy Co Ltd v Patricia's Chocolates and Candies Pty Ltd* (1947) 77 CLR 574 at 583, 589-591; [1947] HCA 62; *Buckley v Tutty* (1971) 125 CLR 353 at 373, 375-377; [1971] HCA 71; *Queensland Co-operative Milling Association v Pamag Pty Ltd* (1973) 133 CLR 260 at 263-264; [1973] HCA 24; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288 at 293-294; [1973] HCA 40; *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at 138-139 [24]-[27]; [2001] HCA 45. See also *Trade Practices Act 1974* (Cth), s 47 and *Competition and Consumer Act 2010* (Cth), Sch 1, s 47; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd [No 2]* (2008) 170 FCR 16.

241 On restraints of trade, see *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] AC 535 at 552; *McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society* [1919] AC 548 at 571-572; *Petrofina (Gt Britain) Ltd v Martin* [1966] Ch 146 at 165-166, 173, 177, 180; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269. The "Truck Acts" in the United Kingdom also prohibited a form of tying: see, eg, *Truck Act 1831* (1 & 2 Gul IV c 37); *Truck Amendment Act 1887* (50 & 51 Vict c 46); *Truck Act 1896* (59 & 60 Vict c 44); *Truck Act 1940* (UK); *Bristow v City Petroleum Ltd* [1987] 1 WLR 529 at 532; [1987] 2 All ER 45 at 47-48.

242 See *Sherman Act of 1890*, 15 USC §1; *Clayton Act of 1914*, 15 USC §14; *Federal Trade Commission Act of 1914*, 15 USC §45; *United Shoe Machinery Corporation v United States* (1922) 258 US 451 at 457; *International Business Machines Corp v United States* (1936) 298 US 131 at 135-136; *International Salt Co Inc v United States* (1947) 332 US 392 at 395-396; *United States v Paramount Pictures Inc* (1948) 334 US 131 at 156-159; *Northern Pacific Railway Co v United States* (1958) 356 US 1 at 5-6; *Jefferson Parish Hospital District No 2 v Hyde* (1984) 466 US 2 at 12-15; cf *Illinois Tool Works Inc v Independent Ink Inc* (2006) 547 US 28 at 34-38.

did not bargain from a "position of equality"[243] or because the covenant that tied the purchaser to acquire the seller's products was unreasonable or contrary to the public interest[244].

256 Moreover, the sale of second-hand cars using book-up was itself exploitation[245]. Although he refused to acknowledge the price differential at trial, Mr Kobelt required purchasers of cars on book-up to pay significantly more than purchasers with cash[246]. The sale of second-hand cars meant customers were caught in a vicious circle of indebtedness to Mr Kobelt and then, once locked into the book-up arrangement, customers had limited options to regain control of their funds[247]. Their potential options were a cash advance, at Mr Kobelt's discretion and sometimes at a fee of ten per cent, or to request a purchase order, again at Mr Kobelt's discretion, at a cost of $5 or $10 and, even then, several stores in the APY Lands would not accept Mr Kobelt's purchase orders[248].

257 The lack of suggestion of dishonesty on the part of Mr Kobelt does not prevent Mr Kobelt's book-up system being unconscionable. Dishonesty is not required for a finding of unconscionable conduct in equity[249]. And statutory unconscionability under the ASIC Act is intended to be broader than the

---

243 *Amoco* (1973) 133 CLR 288 at 317; see also at 294. See also *Queensland Co-operative* (1973) 133 CLR 260 at 264, 268, 276; *Paramount Pictures Inc* (1948) 334 US 131 at 162.

244 See, eg, *Buckley* (1971) 125 CLR 353 at 376-378; *Queensland Co-operative* (1973) 133 CLR 260 at 263-264, 267-269, 275; *Amoco* (1973) 133 CLR 288 at 295-296, 305-307, 315-316; *Peters (WA)* (2001) 205 CLR 126 at 139 [27].

245 See *Mr Kobelt's book-up system* at [163]-[164], *Vulnerability* at [165]-[171], *Mr Kobelt's actions – taking advantage* at [172]-[204] and *Effect of the arrangements – tying conduct* at [205]-[207] above.

246 See [175]-[179] above.

247 See *Mr Kobelt's actions – taking advantage* at [172]-[204] and *Effect of the arrangements – tying conduct* at [205]-[207] above.

248 See [185]-[193] above.

249 See fn 156 and accompanying text.

unwritten law[250]. Dishonesty is not required for a finding of unconscionability under s 12CB(1)[251].

258 Unconscionable conduct in equity can include the passive acceptance of a benefit in unconscionable circumstances[252]. Mr Kobelt's conduct went beyond that − he engaged in an active system of conduct that, even if approached without dishonest motives or with a "degree of good faith", had the *effect* of being exploitative and unfair. The requirement is still "victimisation or exploitation" by a stronger party of a more vulnerable party[253]. And that was the problem with Mr Kobelt's book-up system.

(v) Values, norms and practices

259 As Wigney J recognised in the Full Court, the terms, nature and circumstances of Mr Kobelt's book-up system bespoke unconscionability and "[m]any, if not most, members of the broader Australian community would probably find some aspects of the system to be surprising, if not extraordinary"[254]. That understates the position. Putting to one side that the majority of Mr Kobelt's customers were financially illiterate Anangu living in a remote, harsh and impoverished part of northern South Australia, in what other circumstances would a small-scale consumer credit provider require, let alone expect, a borrower's assent to terms that, as security for relatively modest advances, the borrower hand over the right to receive the whole of the borrower's meagre monthly income, with not less than half of it to be applied in reduction of the loan; the borrower confer on the credit provider an untrammelled discretion as to how much, if any, of the other half should be made available to the borrower for the purchase of life's necessities; and the borrower be tied to purchasing all such necessities from the credit provider at the credit provider's prices, or else pay the credit provider for the privilege of a "purchase order"?

---

250 See ASIC Act, s 12CB(4)(a) and Australia, House of Representatives, *Competition and Consumer Legislation Amendment Bill 2011*, Explanatory Memorandum at 21 [2.20].

251 See *Paciocco* (2015) 236 FCR 199 at 266 [262].

252 *Bridgewater* (1998) 194 CLR 457 at 479 [76], quoting *Hart* [1985] AC 1000 at 1024; see also at 493 [122].

253 *Kakavas* (2013) 250 CLR 392 at 439-440 [161].

254 *Kobelt (FC)* (2018) 352 ALR 689 at 758 [383].

260 Where else and with what other customer would it be regarded as acceptable that the terms of the arrangement go entirely undocumented; that the credit provider not be required to, and not, render invoices, receipts or reconciliations; and that the credit provider not maintain financial accounts sufficient even for two experienced accountants, who gave evidence at trial, to determine how much had been advanced and how much had been paid? Surely, anywhere else with any other customer, such an arrangement would be regarded as unconscionable. It is no answer to say that the customers were Anangu people. It is no answer to say that the customers agreed.

261 The plurality in the Full Court considered that it was enough that the customers understood the basic elements of the system and entered into it voluntarily and, either serendipitously or otherwise, derived from it the benefits of alleviating the boom and bust expenditure cycle and the burdens of demand sharing. Wigney J added, in effect, that it was not unconscionable to impose those terms of credit on the customers because of the differences between "the values, norms and practices of the Anangu people who comprised Mr Kobelt's book-up customers"[255] and the norms and practices of "the wider Australian society and its culture and institutions"[256].

262 That reasoning should be rejected. It does not alleviate the unconscionability of Mr Kobelt's book-up system that his customers were so disadvantaged as to regard Mr Kobelt's offering as acceptable. As the primary judge held, it was the fact that the customers were so significantly disadvantaged, and that Mr Kobelt knew or should have known it to be so, that rendered his conduct unconscionable. Nor is it to the point that the customers may have entered into the scheme voluntarily and without undue influence. Mr Kobelt's book-up system was unconscionable because it took advantage of the customers' vulnerability and special disadvantage. No doubt, Mr Kobelt was in business to make a profit and it cannot reasonably be expected of him that he should have acted as if he were a charity. It is also apparent that there were other traders in the area who provided book-up credit on similar terms and that, apart from book-up, such other forms of credit as were available to the Anangu were limited. It may be, too, that the Anangu liked to go shopping in Mintabie and preferred dealing face-to-face with people like Mr Kobelt to attempting to arrange credit with mainstream credit providers. And it may also be that participating in book-up gave some customers a degree of control over boom and bust expenditure patterns and an excuse to avoid demand sharing requests. But none of that renders Mr Kobelt's conduct any the less unconscionable.

---

255 *Kobelt (FC)* (2018) 352 ALR 689 at 758 [383].

256 *Kobelt (FC)* (2018) 352 ALR 689 at 747 [329].

263 The freedom to make a profit is not a licence to act unconscionably. Nor is an oligopoly of the kind in which Mr Kobelt participated. And the fact that other traders may have behaved in the same unconscionable manner does not excuse it.

(vi) Mr Kobelt's book-up system was not reasonably necessary to protect his legitimate interests: s 12CC(1)(b)

264 This issue has been addressed. Book-up is not itself unconscionable. The problems were with Mr Kobelt's book-up system and its particular features. Mr Kobelt's system was not reasonably necessary to protect his legitimate interests − there were alternatives[257]. It may be that, in circumstances of the kind which existed in *Paciocco v Australia & New Zealand Banking Group Ltd*, s 12CB(1) would not be enlivened merely by reason of the content of a condition of a consumer credit contract[258]. But, even then, it would depend on the circumstances of each case whether the consumer was at a relevant disadvantage to the credit provider and in particular whether the credit provider, by stipulating for a particular condition of the credit contract, should be seen to have taken unconscientious advantage of that consumer. Here, for the reasons already given, there can be no doubt that the Anangu were at a material, relevant disadvantage to Mr Kobelt and that Mr Kobelt took unconscientious advantage of them by stipulating for the conditions he did notwithstanding that other, less onerous requirements would have been adequate to protect his legitimate interests. Here, there can be no doubt that s 12CC(1)(b) is applicable and to a significant degree informs the engagement of s 12CB(1).

Conclusion and orders

265 Mr Kobelt's system of conduct was unconscionable contrary to s 12CB(1) of the ASIC Act. The orders should be:

1. Appeal allowed with no order as to costs.

2. Set aside orders 2, 3, 4 and 5 of the Full Court of the Federal Court of Australia made on 20 February 2018 and, in their place, order that:

    (a) the appeal be dismissed; and

    (b) each party bear their own costs.

---

257 See [219]-[229] above.

258 (2016) 258 CLR 525 at 586 [185]-[186].

EDELMAN J.

Introduction

266 A shopkeeper develops a "system" of credit. He applies it only to impoverished and often illiterate and innumerate Aboriginal customers. He gives those customers Hobson's choice – no matter how badly they need credit, they can either "choose" that system or "choose" no credit at all. His system has, at its core, the sale of cars on credit at up to three times the market rate for unsecured credit. But the effective interest rate is concealed from the customers. The customers are also required to provide the shopkeeper with their bank card and Personal Identification Number ("PIN"). The shopkeeper promises to use the card and PIN to withdraw only half of the customer's income for repayment of the car purchase, although he sometimes takes more for repayment. The shopkeeper almost invariably withdraws the other half of the income, which he deposits in his own bank account; he denies the customers access to that other half of "their money" except to purchase goods from him or for limited cash withdrawals or purchase orders. The customers are unable to know the state of the running account, or even the amount of "their money" in the shopkeeper's account, because he does not give them access to any of his very rudimentary records.

267 The legal issue underlying this appeal concerns the meaning and application of the statutory concept of "unconscionability". Professor Birks once compared the utility of the concept of unconscionability to a lawyer with the utility of the concept of a small brown bird to an ornithologist[259]. In *Commonwealth Bank of Australia v Kojic*[260], I suggested that this concern would be ameliorated as analogies and comparisons emerged by application of the principles and values underlying the statute[261]. Although conscience has no single, objective moral voltage, the moral baseline required by the courts would emerge by incremental development in the long run through "very slow degrees and by very short steps"[262], and through the process of methodological reductionism.

---

259 Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *University of Western Australia Law Review* 1 at 16. See also *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 409 [34]; [1998] HCA 48.

260 (2016) 249 FCR 421 at 442-443 [86]-[87].

261 See *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 276 [304].

262 *Stack v New York, N H & H R Co* (1900) 58 NE 686 at 687.

268 Unfortunately, "[i]n the long run we are all dead"[263]. In the meantime, against the background of repeated attempts by Parliament to liberalise the rigour of moral disapprobation which courts have required for the statutory prohibition of unconscionable conduct, but even without it, I dissent from the conclusion of the majority of this Court. In my view, the conduct in this case falls squarely within the statutory description of "unconscionable" in s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act"). For the reasons that follow, in addition to those of Nettle and Gordon JJ, with which I agree, I would allow the appeal. Mr Kobelt's system of credit provision, when considered as the case was pleaded and run, was unconscionable. I agree with the conclusions and orders of Nettle and Gordon JJ.

Mr Kobelt's system

269 The system pleaded by the Australian Securities and Investments Commission ("ASIC") as being unconscionable was "a system of conduct or pattern of behaviour ... incidents of which are particularised [by reference to the circumstances of five customers pleaded as typical of 117 customers in the group]". The pleaded circumstances of those customers involved all of the matters described in the introduction above, save for (i) the extent of the interest charge on the used car purchases, (ii) the discriminatory operation of the system, and (iii) the state of Mr Kobelt's record keeping. However, as Besanko and Gilmour JJ in the Full Court of the Federal Court of Australia observed, apart from the discriminatory operation of the system these matters were run as part of the case at trial[264]. As for the discriminatory operation of the system, Besanko and Gilmour JJ said that they were "disposed to think" that this needed to be pleaded but their Honours did not conclude that the primary judge erred by relying upon it because, they said, it was a "relatively insignificant consideration"[265].

270 The centrality of the sale of used cars to Mr Kobelt's system of credit is clear from Mr Kobelt's evidence, quoted by the primary judge in the course of describing how "Book-up" operated[266]:

---

263 Keynes, *A Tract on Monetary Reform* (1923) at 80.

264 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 727 [210], 728 [219], 729 [225].

265 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 727 [211].

266 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [30].

"Q: What I'm enquiring about is what arrangement did you come to with Aboriginal customers for payment for those cars if they wanted to Book-up the purchase price of the cars?

A: I would ask for a deposit and half their – I would ask them what their income was, when they got paid. I would say, well, I want half the money for payment, and the rest you can – other half you can have yourself, food and cash.

Q: The other 50 percent for food or cash. How is that to be accessed by the Aboriginal customer?

A: Either purchase order or they come into the store.

Q: So the entirety of the money in their account would come to you, and you would make the 50 percent available back?

A: Most of the times. They would ask me sometimes to leave X amount in their key card if they were going to Port Augusta or Alice Springs, which I would do.

His Honour: Is the position that, right from the start when you were agreeing to Book-up of a car, you would agree with the customer that you would take pretty well the whole of what was in their account but say to them that 50 percent of that would be used to reduce the debt on the car and the other 50 percent would be available to them?

A: Yes, available to them. Yes, and I would take – and I would take – if they told me to take all the money out, I would take it out. If they told me to leave some, I would leave some."

271 This description of how Book-up operated was later qualified by the primary judge's conclusions that customers were not always entitled to access the 50 per cent of the total amount that was not used to reduce their debt but was nevertheless withdrawn from their account and deposited into Mr Kobelt's account[267].

---

267 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [59]-[60]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 693-694 [15]-[16].

Mr Kobelt's system in more detail

272 At trial, ASIC submitted that Mr Kobelt had adopted a system for the provision of credit that was unconscionable. It was alleged that Mr Kobelt had unconscionably provided credit to at least 117 customers under this system between at least 1 June 2008 and July 2015[268]. The system was pleaded by particular reference to the circumstances of five customers (two of whom were married). On this appeal, ASIC focused upon six elements of the system: (i) the requirement for customers to provide their debit card and PIN to Mr Kobelt; (ii) Mr Kobelt's withdrawal conduct; (iii) the record keeping, or lack thereof, by Mr Kobelt; (iv) the expensive credit charged by Mr Kobelt; (v) the tying of customers to Mr Kobelt; and (vi) Mr Kobelt's knowledge of the above elements and his taking advantage of the customers. To these elements can be added the application of the system, in its entirety, only to Aboriginal customers[269].

273 Mr Kobelt ran a general store at Mintabie, in the far north of South Australia approximately 1,100 km north of Adelaide, within the Anangu Pitjantjatjara Yankunytjatjara Lands ("the APY Lands")[270]. The majority of Mr Kobelt's customers lived in two remote Aboriginal communities in the APY Lands to the northwest of Mintabie, Mimili and Indulkana, located approximately 165 km and 116 km by the main road from Mr Kobelt's general store[271]. Some of his customers lived in communities which were much further distant than Mimili and Indulkana[272]. Mr Kobelt's system, in its entirety, was applied only to these Aboriginal customers[273]. Mr Kobelt knew that his

---

268 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [9], [211]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 700-701 [60], 702 [66], 748 [337].

269 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [236], compare at [71].

270 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [1].

271 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [21], [72]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 702 [70].

272 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [73].

273 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [71], [552]-[553]; compare *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 727 [211], 754-755 [366].

customers were vulnerable; he knew that more than half of his customers could not read, and he knew that many had no assets, limited income and a low level of financial literacy[274].

274 Mr Kobelt's system required his credit customers to provide him with their debit card linked to the bank account into which their wages or Centrelink payments were made, and their PIN[275]. Every time they received income he would withdraw all, or nearly all, of their money, including any Centrelink welfare payments made to them[276]. Mr Kobelt's system involved rudimentary record keeping. The records that he did keep were inadequate, often illegible, and chaotic[277]. Neither the printed records of the withdrawals, nor any form of periodic account statement, were given to his customers[278]. The system also created a vulnerability of customers to unauthorised withdrawals. Mr Kobelt would sometimes withdraw more from the customer's account than was owed to him, reimbursing later when he realised the error[279]. On one day, when a glitch in the cash transfer system at the Commonwealth Bank of Australia permitted withdrawals exceeding the balance of debit accounts, Mr Kobelt withdrew

---

274 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [289], [419], [423], [424]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 730 [232].

275 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [28]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 693 [13], 748 [337].

276 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [29]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 693-694 [15], 740 [291].

277 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [69], [544]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 728 [218]-[219], compare at 753 [358].

278 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [50].

279 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [63], [557]; compare *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 729 [222], 735 [259], 754 [362].

$56,944 from his customers' accounts knowing that he did not have authority to make those withdrawals, which were much more than normal[280].

275 At the core of Mr Kobelt's system of credit was the sale of used cars for amounts ranging from $2,500 to $7,800[281]. As ASIC pleaded, and as the primary judge decided[282], during one window of a little over a year[283], within the seven year period of the system, Mr Kobelt sold one or more cars to 92 of the 117 customers. Mr Kobelt sold used cars that seemed to be of the same kind, and may have been the same, as the numerous cars that were broken down and abandoned by the side of the road to the nearest towns[284]. The credit charges for the car sales were not disclosed to the customers[285]. They were hidden in a price difference between cash and credit sales. The credit charge was "very expensive"[286]. The usual credit charge, if repaid by 12 monthly instalments on a $4,000 vehicle, gives an effective interest rate of more than 43%, significantly more than the commercial lending rates for unsecured personal loans of 14%-15.2%[287].

---

280 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [92]-[97]; compare *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 729 [222], 736 [267], 755 [369]-[370], 758-759 [385].

281 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [24]-[25], [74].

282 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [24]-[25], [116]-[117]. See also *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 693 [12].

283 From 1 July 2011 to 31 October 2012.

284 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [264].

285 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [496]; compare *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 736 [267].

286 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [492]-[493]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 727 [210], 729 [226], compare at 754 [363]-[365].

287 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [485], [489], [491]; compare *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 754 [364]-[365].

276 The reason the car sales on credit were at the core of Mr Kobelt's system of credit was that the cost of purchasing a car would often exceed the customer's financial means. As Mr Kobelt explained in his evidence, his system of credit involved him taking half of the customer's regular income as repayments of that debt[288]. However, the other half of money withdrawn from the customer's bank account was also kept by Mr Kobelt in his bank account. In order for a customer to gain access to the other half kept in Mr Kobelt's account, the customer would have to return to Mr Kobelt's store to obtain a cash advance or a purchase order for another store, or to purchase food or groceries from Mr Kobelt[289].

277 Both Mr Kobelt at trial, and counsel in this Court, described the half of the customer's money that had not been agreed for repayment of the purchase price of the car as "their money"[290]. But it was not treated by Mr Kobelt as their money in any real sense. It was held, undifferentiated, as Mr Kobelt's own funds. Mr Kobelt refused them permission to make some purchases, limiting some customers with a significant debt to buying milk, bread and meat and refusing the purchase of other items like sweets and chips[291]. He refused them permission to access the whole of the amount at any one time[292]. More often than not, he told them that "they could [only] have 'a little bit', or even only that they could have 'some' food or groceries"[293].

---

288 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [30]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 693-694 [15].

289 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [31]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 694 [15].

290 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [56].

291 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [453].

292 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [56]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 695 [28].

293 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [60]. See also *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 694 [16].

278 Although some complaints had been received and there were indications of dissatisfaction by some customers[294], there was no evidence of general complaints by Mr Kobelt's customers. There was even evidence that some customers found features of the system attractive[295], although it was not suggested that those features would have been absent from another system of credit without the many disadvantages of Mr Kobelt's system. Although for some, perhaps many, Mr Kobelt's system of credit was better than no credit at all, nevertheless his Anangu customers, unlike other customers, were offered no other alternative[296]. And the manner in which the system was implemented, which was pleaded as part of the system itself, was appalling.

The approach to unconscionability required by s 12CB of the ASIC Act

279 The meaning of the proscription against unconscionable conduct in s 12CB of the ASIC Act cannot be understood other than against its background in equitable doctrine and the repeated responses by parliaments to that equitable doctrine.

280 The history of equity's proscription against unconscionable bargains has not been one in which "unconscionable" has had a single, unitary application. A conscience is the moral force that acts upon an individual with knowledge. There is no monolithic moral force to conscience. In the "most common case"[297] of unconscionable conduct in equity in the nineteenth century, the Court of Chancery treated as "unconscionable" any bargain that was not fair or reasonable. That circumstance involved transactions entered by expectant heirs or reversioners concerning their future or reversionary interests. The transaction would be set aside unless the other party could prove that the transaction was fair and reasonable[298]. It did not matter that the expectant heir seeking to obtain

---

294 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [592]-[593].

295 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [591]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 745 [319], 752 [354]-[355].

296 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [34]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 694 [17].

297 *Fry v Lane* (1888) 40 Ch D 312 at 321.

298 *The Earl of Portmore v Taylor* (1831) 4 Sim 182 at 209 [58 ER 69 at 79]; *Bromley v Smith* (1859) 26 Beav 644 at 662, 665 [53 ER 1047 at 1054, 1055]; *Tottenham v Green* (1863) 32 LJ Ch 201 at 205; *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 at 490-491; *O'Rorke v Bolingbroke* (1877) 2 App Cas 814 at 833; *Langdon v*

(Footnote continues on next page)

income by a mortgage of a future or reversionary interest was of mature age[299] and "perfectly understood the nature and extent of the transaction"[300]. There would be a taking of an "unfair advantage"[301], or a breach of "the rule of reasonableness"[302], if any substantial undervalue, sometimes described as a "hard bargain"[303], could be proved. The same approach, requiring fairness and reasonableness to be proved by the other party, was taken to transactions entered without independent legal advice by the poor and "imperfect[ly] educat[ed]"[304], or the poor and illiquid[305], or the elderly[306].

281 The liberal approach of equity to characterising as "unconscionable" bargains in this area led to the United Kingdom Parliament's intervention with the *Sales of Reversions Act 1867* (UK) (31 & 32 Vict c 4)[307], subsequently adopted in each Australian colony or State[308], which provided that "[n]o Purchase, made *bonâ fide* and without Fraud or unfair Dealing, of any

---

Reuss (1883) 4 LR (NSW) Eq 28 at 31; *Fry v Lane* (1888) 40 Ch D 312 at 320-321; *Rae v Joyce* (1892) 29 LR Ir 500 at 509.

299 *Davis v The Duke of Marlborough* (1819) 2 Swans 108 at 143 [36 ER 555 at 566]; *Bromley v Smith* (1859) 26 Beav 644 at 664-665 [53 ER 1047 at 1055]; *Langdon v Reuss* (1883) 4 LR (NSW) Eq 28 at 31.

300 *Bromley v Smith* (1859) 26 Beav 644 at 665 [53 ER 1047 at 1055]; *Langdon v Reuss* (1883) 4 LR (NSW) Eq 28 at 31.

301 *Middleton v Brown* (1878) 47 LJ Ch 411 at 413.

302 *Beynon v Cook* (1875) LR 10 Ch App 389 at 391.

303 *Beynon v Cook* (1875) LR 10 Ch App 389 at 391; *Middleton v Brown* (1878) 47 LJ Ch 411 at 413; *Rae v Joyce* (1892) 29 LR Ir 500 at 509-510.

304 *Fry v Lane* (1888) 40 Ch D 312 at 321, citing *Evans v Llewellin* (1787) 1 Cox 333 [29 ER 1191] and *Haygarth v Wearing* (1871) LR 12 Eq 320.

305 *Wood v Abrey* (1818) 3 Madd 417 at 423-424 [56 ER 558 at 560-561].

306 *Baker v Monk* (1864) 33 Beav 419 at 422-423 [55 ER 430 at 431].

307 See *Beynon v Cook* (1875) LR 10 Ch App 389 at 392-393; *Sinclair v Elderton* (1900) 21 LR (NSW) Eq 21 at 23-24.

308 *Sales of Reversions Act 1879* (SA), ss 1, 2, 3; *Sales of Reversions Law Amendment Act 1884* (NSW), ss 1, 2, 3; *Real Property Act 1914* (Vic), s 7; *Conveyancing and Law of Property Act 1935* (Tas), s 3(11); *Property Law Act 1969* (WA), s 92; *Property Law Act 1974* (Qld), s 230.

Reversionary Interest in Real or Personal Estate shall hereafter be opened or set aside merely on the Ground of Undervalue". That legislation did not alter the meaning of "unconscionability" in equity, but it precluded a conclusion of unconscionable conduct "merely on the ground of undervalue"[309]. Nevertheless, by the mid-twentieth century, the equitable bar had risen significantly.

282 By the mid-twentieth century, the conscience of equity hardened so that mere "unfairness" or "unreasonableness" was not sufficient in any of the various categories. Claimants had to be subject to some "special" disadvantage – a disadvantage that must seriously affect their ability to make a judgment about their own interests[310]. Moreover, there had to be a "taking of advantage" of that special disadvantage[311]. Although that taking of advantage did not, and does not, require that the victim suffer any "loss or detriment"[312], it required much more than mere unreasonableness, being variously described in Australia as requiring "victimisation" or "exploitation"[313]. In England, in addition to these descriptions the courts also described equity as requiring conduct that is "morally reprehensible"[314] or conduct that "shocks the conscience of the court"[315]. With some exceptions in application[316], these various epithets established a high bar

---

309 See *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 at 490; *O'Rorke v Bolingbroke* (1877) 2 App Cas 814 at 833.

310 *Blomley v Ryan* (1956) 99 CLR 362 at 415; [1956] HCA 81; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462; [1983] HCA 14; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 425 [118]; [2013] HCA 25; *Thorne v Kennedy* (2017) 91 ALJR 1260 at 1272 [38]; 350 ALR 1 at 13; [2017] HCA 49.

311 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 425 [118]; *Thorne v Kennedy* (2017) 91 ALJR 1260 at 1272 [38]; 350 ALR 1 at 13.

312 *Blomley v Ryan* (1956) 99 CLR 362 at 405.

313 See *Thorne v Kennedy* (2017) 91 ALJR 1260 at 1272 [38]; 350 ALR 1 at 13 and the authorities cited there.

314 *Boustany v Pigott* (1993) 69 P & CR 298 at 303; *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at 153; *Portman Building Society v Dusangh* (2000) 80 P & CR D20 at D21-D22; *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 at 110.

315 *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 at 152. See also *Portman Building Society v Dusangh* (2000) 80 P & CR D20 at D21-D22.

316 See *Bridgewater v Leahy* (1998) 194 CLR 457 at 493 [123], compare at 471 [42]; [1998] HCA 66.

for the vitiation of transactions in twentieth century equity on the ground of unconscionable conduct.

283 The initial legislation[317] in Australia that prohibited unconscionable conduct in consumer transactions was intended to be reasonably similar to the equitable rule, although it included within its scope the equitable doctrine of undue influence. As stated by the Attorney-General in the Second Reading Speech[318] for that initial legislation, the provision was based upon a recommendation from a Green Paper[319], which in turn recommended adoption of the Swanson Committee's recommendation for a statutory proscription based upon the "familiar concept to Australian law" of the equitable doctrine of unconscionable conduct[320]. The Explanatory Memorandum to the initial legislation referred to the exposition of the equitable doctrine of unconscionable conduct in this Court's decision in *Commercial Bank of Australia Ltd v Amadio*[321] and said that the new provision would "at least" include conduct that would fall within that equitable proscription against unconscionable conduct as well as the equitable doctrine of undue influence[322].

284 The statutory proscription against unconscionable conduct was applied also to business transactions in 1993[323] by the introduction of s 51AA of the *Trade Practices Act 1974* (Cth), which prohibited corporations from engaging in conduct that was "unconscionable within the meaning of the unwritten law". The reference to "unwritten law" was to the equitable doctrine of unconscionable

---

317 Section 52A of the *Trade Practices Act 1974* (Cth), inserted by the *Trade Practices Revision Act 1986* (Cth), s 22.

318 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 March 1986 at 1627.

319 Evans, Cohen and Willis, *The Trade Practices Act: Proposals for Change* (1984) at 17 [71].

320 Trade Practices Act Review Committee, *Report to The Minister for Business and Consumer Affairs* (1976) at 67 [9.60].

321 (1983) 151 CLR 447.

322 Australia, House of Representatives, *Trade Practices Revision Bill 1986*, Explanatory Memorandum at 22-23 [82]-[84].

323 Inserted by the *Trade Practices Legislation Amendment Act 1992* (Cth), s 9 and commenced operation on 21 January 1993.

conduct[324]. There was, then, a gap between business transactions, which were covered by the legislative implementation of the equitable doctrine in s 51AA, and consumer transactions, which were covered by the initial proscription, now renumbered s 51AB[325], which was modelled on the equitable doctrine but could potentially go further[326].

285 An example of a case involving a business transaction brought under s 51AA of the *Trade Practices Act* is the decision of this Court in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* ("*Berbatis*")[327]. In that case, lessees were in negotiations with the lessors for a renewal of their lease, which was nearing the end of its term. The lessors knew that the lessees needed a renewal in order to sell their business. The lessees contracted with a purchaser to sell the business for $65,500 subject to assignment of their lease. But the lessors refused to assign the lease unless the assignment contained a term discharging them from legal claims and consenting to the dismissal of proceedings against them, to which the lessees were parties, and which were ultimately successful. The lessees agreed to the terms but continued to take part in the proceedings against the lessors. The Australian Competition and Consumer Commission alleged that, amongst other claims, the term of the assignment of lease that required the lessees' withdrawal from the legal proceedings was unconscionable. By a majority, Kirby J dissenting, this Court held that the term was not unconscionable because the lessees were not subject to any special disadvantage[328].

286 Prior to the commencement of the *Berbatis* litigation, a Standing Committee of the House of Representatives recommended the enactment of "a significantly strengthened provision to deal with the general problem of unfair conduct" in the form of proscription against corporations engaging in conduct

---

324 Australia, House of Representatives, *Trade Practices Legislation Amendment Bill 1992*, Explanatory Memorandum at 8 [41], 9 [44]. See also *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 71-72 [40]; [2003] HCA 18.

325 *Trade Practices Legislation Amendment Act 1992* (Cth), s 8.

326 Australia, House of Representatives, *Trade Practices Legislation Amendment Bill 1992*, Explanatory Memorandum at 9 [47].

327 (2003) 214 CLR 51.

328 (2003) 214 CLR 51 at 64-65 [15], 77 [56], 115-116 [185], compare at 97-98 [115]-[117].

that is "unfair"[329]. The recommendations of the Standing Committee were adopted, although the new provision did not replace "unconscionable" with "unfair". Instead, the new s 51AC of the *Trade Practices Act*[330] created a "mirror for small business consumers ... [of] the legal rights available to consumers in section 51AB, and incorporate[d] a range of additional matters"[331]. That range of additional matters included six new matters, on top of the five matters replicated from s 51AB, in the non-exhaustive list of matters to which the court could have regard.

287 In the Second Reading Speech for the Bill that introduced the new s 51AC of the *Trade Practices Act*, the Minister said that s 51AC was intended to "extend the common law doctrine of unconscionability expressed in the existing section 51AA"[332]. Similarly, the Explanatory Memorandum said that it was "envisaged that [s 51AC] would prohibit [undue influence and unconscionable conduct as understood in equity] but would, in addition, extend to other conduct that is, in all the circumstances, unconscionable"[333].

288 Despite the intention for s 51AC to extend beyond the reach of the existing legislative proscription implementing the equitable proscription, one concern expressed during debate was that the failure to change the language from "unconscionable" to "unfair" would result in a harsher test than that which was recommended[334]. The Minister explained that the words "unconscionable conduct" were chosen for "greater certainty", so that the scope of s 51AC would

---

329 Australia, House of Representatives, Standing Committee on Industry, Science and Technology, *Finding a balance: towards fair trading in Australia* (1997) at 11 [1.42], 181 [6.73] (Recommendation 6.1).

330 Inserted by the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth), Sch 2, item 2.

331 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 September 1997 at 8800.

332 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 September 1997 at 8800.

333 Australia, House of Representatives, *Trade Practices Amendment (Fair Trading) Bill 1997*, Explanatory Memorandum at 22.

334 Australia, Senate, *Parliamentary Debates* (Hansard), 1 April 1998 at 1705-1706. See also Australia, House of Representatives, Standing Committee on Industry, Science and Technology, *Finding a balance: towards fair trading in Australia* (1997) at 179-180 [6.69]-[6.72].

be extended beyond the equitable proscription by "build[ing] on the existing body of case law"[335].

289 The new s 51AC was described as adding an "exocet missile" to the defensive armoury of small businesses[336]. Some commentators observed that after the enactment of s 51AC the result in *Berbatis* may very well have been different[337]. But in the decade after the introduction of s 51AC on 1 July 1998, the reality of the application of s 51AC by the courts fell far short of these expectations of Parliament and academic commentators. By 2008, the Senate Standing Committee on Economics reported that it was "in no doubt that section 51AC of the *Trade Practices Act* has fallen short of its legislative intent"[338]. The Standing Committee observed as follows[339]:

> "[T]he fact there have only been two successful findings under section 51AC over the past decade primarily reflects the courts' narrow interpretation of this section, rather than any great adjustment in business behaviour. There are simply too many allegations where the actions of retail landlords and franchisors appear unethical, and yet there is no legal redress because it is not unconscionable under the legal definition of unconscionable."

290 The Standing Committee noted that s 51AC was "not working effectively because the courts are not interpreting the section as broadly as was the

---

335 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 September 1997 at 8800-8801.

336 Brown, "The Impact of Section 51AC of the *Trade Practices Act 1974* (Cth) on Commercial Certainty" (2004) 28 *Melbourne University Law Review* 589 at 598-599, citing Duncan and Christensen, "Section 51AC of the Trade Practices Act 1974: An 'Exocet' in Retail Leasing" (1999) 27 *Australian Business Law Review* 280 at 280.

337 Webb, "Fayre play for commercial landlords and tenants – Lessons for Lawyers" (2001) 9 *Australian Property Law Journal* 99 at 109; Dean, "*ACCC v Berbatis Holdings* (2003) 197 ALR 153" (2004) 26 *Sydney Law Review* 255 at 269.

338 Australia, Senate, Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974* (2008) at 43 [5.54].

339 Australia, Senate, Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974* (2008) at 31 [5.4].

legislative intent"[340], and the "current interpretation of section 51AC sets the bar too high"[341]. The Standing Committee asked "how can the bar be lowered?"[342] It again considered replacing the word "unconscionable" with "unfair", recognising the "appeal of this proposal" and acknowledging that this may be a "simpler and more efficient amendment to the section" than some other proposals[343]. However, the Standing Committee was concerned about the effect that this would have on the "architecture of statute" and the "uncertainty and confusion" that it would cause among courts and parties to litigation[344]. Instead of changing the language of "unconscionable" to "unfair", the Standing Committee recommended an alternative way for the bar to be lowered. It suggested "clarify[ing] for the courts that unconscionable conduct in section 51AC is broader than the special disadvantage doctrine"[345] by amending s 51AC to provide "that the prohibited conduct in the supply and acquisition of goods or services relates to the terms or progress of a contract"[346].

291 The Standing Committee's recommendation was implemented by the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010*

---

340 Australia, Senate, Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974* (2008) at 9 [3.1].

341 Australia, Senate, Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974* (2008) at 32 [5.6].

342 Australia, Senate, Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974* (2008) at 32 [5.7].

343 Australia, Senate, Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974* (2008) at 12 [3.12], 35 [5.18].

344 Australia, Senate, Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974* (2008) at 35 [5.18].

345 Australia, Senate, Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974* (2008) at 35 [5.20].

346 Australia, Senate, Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974* (2008) at 36 [5.21] (Recommendation 1).

(Cth)[347], which also made equivalent changes to the cognate provision in the ASIC Act[348]. New factors were added, including permitting courts to consider the terms of the contract and the conduct of the supplier in complying with those terms[349].

292 The final relevant amendments occurred on 1 January 2012[350]. This was after the beginning, but before the end, of the period in respect of which the conduct relevant to this appeal occurred. However, it was not suggested at trial or on appeal to either the Full Court or to this Court that this timing was of any consequence. Those amendments followed the report of an expert panel that recommended the introduction of "interpretative principles" to recognise that the statutory proscriptions against unconscionable conduct go "beyond the scope of the equitable and common law doctrines of unconscionability, and are not confined by them"[351]. The expert panel also recommended harmonising or unifying the business and consumer unconscionability proscriptions[352]. Those recommendations were adopted[353]. In the Second Reading Speech for the Bill introducing the amendments, the Minister stated[354]:

> "Courts have tended to stick closely to the traditional equitable concept when applying the statutory prohibitions in sections 51AB and 51AC of the Trade Practices Act and sections 12CB and 12CC of the ASIC Act.

---

347 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 42 [4.10]-[4.11].

348 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 54 [4.56].

349 See *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth), Sch 1, item 1.

350 *Competition and Consumer Legislation Amendment Act 2011* (Cth), Sch 2, item 4.

351 Horrigan, Lieberman and Steinwall, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct* (2010) at ix [2.4], 40 [2.4].

352 Horrigan, Lieberman and Steinwall, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct* (2010) at x [2.8], 41 [2.8].

353 Australia, House of Representatives, *Competition and Consumer Legislation Amendment Bill 2010*, Explanatory Memorandum at 19 [2.7].

354 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 May 2010 at 4361-4362.

> For example, the common law required victims of unconscionable conduct to establish that they were at a 'special disadvantage' through factors like infirmity, age or a difficulty understanding English, before a court would recognise that unconscionable conduct had occurred. The present statutory prohibitions on unconscionable conduct sought to remove limitations such as these on the ability of people to seek redress when subjected to unconscionable conduct.
>
> The bill amends the law to make it clear that the prohibition is not limited to the equitable or common-law doctrines of unconscionable conduct. The courts should not limit the application of the provisions by reference to ancient common-law doctrines that are not part of the statute book."

293 Other interpretive principles were inserted to make clear that the proscription can apply to a system of conduct or a pattern of behaviour and a specific person with a special disadvantage need not be identified[355], and that unconscionable conduct "can extend beyond the formation of the contract to both its terms and the way in which it is carried out"[356]. The Minister said that the introduction of these interpretive principles "will ensure that the courts will have a clear message about the way in which parliament intends the law to apply"[357]. Professor Paterson compared the amended provision with the equitable doctrine and observed that it seemed unlikely that courts applying the statute would "insist on a requirement of a predatory state of mind by the stronger party"[358].

---

355 Australia, House of Representatives, *Competition and Consumer Legislation Amendment Bill 2010*, Explanatory Memorandum at 24 [2.20]-[2.23]. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 May 2010 at 4361.

356 Australia, House of Representatives, *Competition and Consumer Legislation Amendment Bill 2010*, Explanatory Memorandum at 25 [2.24]. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 May 2010 at 4362.

357 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 May 2010 at 4359.

358 Paterson, "Unconscionable bargains in equity and under statute" (2015) 9 *Journal of Equity* 188 at 209.

294 The same changes were replicated in the unconscionable conduct provisions in the ASIC Act[359]. The cognate provision in the ASIC Act in connection with the supply of financial services in trade or commerce is s 12CB(1), which is set out in full in other judgments.

295 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 twentieth century, by which equity had raised the required bar of moral disapprobation. In particular, statutory unconscionability permits consideration of, but no longer requires, (i) special disadvantage, or (ii) any taking advantage of that special disadvantage. Like other open-textured criteria, such as "unfair" or "unjust", there is no clear baseline moral standard for what constitutes "unconscionable" conduct within s 12CB of the ASIC Act. Nevertheless, the history of development of that statutory proscription demonstrates a clear legislative intention that the bar over which conduct will be unconscionable must be lower than that developed in equity even if the bar might not have been lowered to the "unreasonableness" and "unfairness" assessments in the various categories in nineteenth century equity.

Mr Kobelt's system was unconscionable

296 Although ASIC's case was pursued only as an allegation of a "system"[360] of unconscionable conduct within the broad legislative proscription, the system was pleaded and argued by reference to the circumstances of a number of representative customers. Even under the stricter equitable test for unconscionable conduct, Mr Kobelt's conduct in relation to any of the six Anangu customers called as witnesses by ASIC should have been sufficient for a finding that his contracts with them were unconscionable in equity.

297 One example is the married couple, AH and AW[361]. They had few assets and limited education. AH received a Centrelink pension, which since 2013 has been a Disability Support Pension. AW received a Newstart Allowance. AH could not identify his bank statements when shown them and could not add

---

359 *Competition and Consumer Legislation Amendment Act 2011* (Cth), Sch 2, item 1. See Australia, House of Representatives, *Competition and Consumer Legislation Amendment Bill 2010*, Explanatory Memorandum at 25 [2.25].

360 ASIC Act, s 12CB(4)(b).

361 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [295]-[319].

the numbers in them. AW had difficulty understanding her bank statements and had not heard of anything called a "bank loan". She did not know of any way of buying a car other than by Book-up. When AH was asked why he gave Mr Kobelt his bank card for the Book-up system he replied "I don't know but because of food. Because I didn't have no food." AH did not know what Mr Kobelt was going to do with AH's bank card and PIN. AH and AW used Book-up to purchase four cars in 18 months for amounts ranging from $4,000 to $8,000. AW explained that when "the car broke down, we get another car, and another car". The credit charged by Mr Kobelt on the $4,000 car, if repaid with principal over a 12 month period, would have amounted to an effective interest rate of 43%, significantly in excess of unsecured personal loan rates of 14-15.2% adduced in evidence[362].

298 The evidence from the other customers is no better. One customer, Customer B[363], had no assets and only limited education, and gave evidence with the aid of an interpreter. Together with his wife, he purchased seven cars in a little over two years. He was not told by Mr Kobelt how much money would be taken from his account or when he would have his bank card returned. He stopped shopping at a general store in Mimili because Mr Kobelt had his bank card.

299 Another customer, Ms Pearson[364], who purchased four cars in four years, was too scared to ask Mr Kobelt to withdraw more than $150 or $200 from her own account for her own use because "that was the only limit I was allowed for".

300 Another customer, Mr Brumby[365], who bought 12 cars from Mr Kobelt over five years and was described in Mr Kobelt's rudimentary records as "slut", was denied funds from his bank account to purchase return bus tickets in what the primary judge described as "an illustration of the control which [Mr Kobelt] could exercise over his Book-up customers"[366].

---

362 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [485], [489].

363 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [320]-[327].

364 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [361]-[377].

365 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [336]-[360].

366 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [350].

301 Mr Kobelt's system of credit was, for some customers, better than nothing. Customer D, for example, gave evidence that prior to the Book-up system of credit there were times when he went hungry between pension days[367]. Mr Kobelt's offer of credit, including Book-up, without more would not have been unconscionable if it had been offered on terms that were consistent with good conscience, clearly explained as one of a number of possible alternatives, and implemented fairly and transparently. It could have the benefit, like other, better, systems of credit such as regular direct debits, of smoothing the fluctuations of expenditure between receipts of income[368]. There could also be cultural benefits, such as avoiding a cultural practice and social obligation of "demand sharing" of resources amongst kin[369], although as the primary judge and the Full Court emphasised, there was very little evidence to support the conclusion that any customer entered the Book-up arrangements in order to avoid demand sharing[370].

302 However, the Full Court was wrong to conclude that Mr Kobelt's system of credit was not unconscionable because it had some of these advantages, and was understood by his customers, "chosen" by them and entered into voluntarily[371]. The most basic error in this reasoning is that the choice of Mr Kobelt's system of credit by the Anangu customers was no real choice at all – Mr Kobelt offered them no other alternative. This reasoning also ignores many of the circumstances of the system of credit that were pleaded and argued before the primary judge. What was unconscionable was not the mere fact that Book-up was offered, and voluntarily accepted, but the *manner* in which the system of credit was offered and administered. The manner of offer, and the process of administration, of the system of credit underlie many of the non-exhaustive factors enunciated in s 12CC(1) of the ASIC Act. Without attention to those

---

367 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [332].

368 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [569]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 735 [262], 742 [302], 751 [349].

369 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [585], [617]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 735 [262], 742 [302], 751 [349].

370 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [582]-[583]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 715-716 [152], 732-733 [250]-[251], compare at 751 [352].

371 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 735 [266], 736 [268]-[269], 749-750 [345], 758 [384], 759 [386].

factors the assessment of unconscionability becomes a high-level instinctive reaction that the legislation seeks to avoid. Further still, there is a danger that without close attention to the non-exhaustive factors the assessment will become a high-level instinctive reaction informed by the "high bar" imposed by the twentieth century rigour attached to the meaning of unconscionability in equity. The most relevant factors are as follows.

303 First, there was the extreme difference in bargaining position between the customers and Mr Kobelt (s 12CC(1)(a)). Many of his customers were impoverished, illiterate and innumerate. They had little other opportunity to obtain credit.

304 Secondly, the conditions imposed by Mr Kobelt were not reasonably necessary for the protection of his business interests (s 12CC(1)(b)). There were reasonable alternatives such as direct debit, deductions from wages, direct payments from Centrelink, or possession of bank cards without PINs[372].

305 Thirdly, basic understanding of the credit transaction was impossible because the rates of interest were concealed within the price differential for cars purchased on credit as opposed to purchased with cash, so that, even with high levels of literacy and numeracy, effective interest rates could not be calculated. Furthermore, customers had no access to records of their debts in order to understand the ongoing system of credit and even those records that were kept were rudimentary (s 12CC(1)(c)).

306 Fourthly, the effective rates of interest, potentially up to 43% for a car sold for $4,000 with repayments taken over 12 months, were, as the primary judge concluded, "very expensive" and were far above market rates for unsecured lending (ss 12CC(1)(e), 12CC(1)(j)(ii)).

307 Fifthly, Mr Kobelt discriminated between his customers (s 12CC(1)(f)). The Book-up system was the only form of credit that was offered to Aboriginal customers, although other forms of credit were offered to non-Aboriginal customers. No other form of credit could be negotiated by Aboriginal customers (s 12CC(1)(j)(i)).

308 Sixthly, the undisclosed risks of supplying Mr Kobelt with the customer's bank card and PIN included the possibility of unauthorised withdrawals, including withdrawals with a lack of good faith such as the occasion when Mr Kobelt withdrew $56,944 from his customers' accounts knowing that he did

---

372 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [525]-[539]; compare *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 752 [354].

not have authority to make withdrawals of those amounts (ss 12CC(1)(i)(i), 12CC(1)(j)(iv)).

309 Seventhly, to a significant degree the system of credit had the effect of tying Mr Kobelt's customers to make purchases from him (s 12CC(1)(b)). Those tied purchases were subject to the discretion of Mr Kobelt, who restricted the goods which the customers could purchase and the amount of money that they could withdraw from funds that were not used to discharge their debts to him.

310 Although there was no allegation that Mr Kobelt had exerted undue influence (s 12CC(1)(d)), and although there was no suggestion of dishonest use of the bank cards and PINs or that the records were maintained dishonestly (s 12CC(1)(j)(iv)), when all the elements of Mr Kobelt's system of credit are considered together, as s 12CB requires for a case pleaded and run this way, they point overwhelmingly to a conclusion of unconscionability.

Conclusion

311 Despite Parliament's repeated attempts to liberalise the application by the courts of statutory proscriptions against unconscionable conduct, and despite recognition at all stages of this litigation that the statutory concept of unconscionability in s 12CB(1) of the ASIC Act is broader than the concept in equity[373], there was not a close focus in this litigation upon the consequences of the difference between a "narrow" and a "broad" application of the concept of unconscionability[374]. The result in this case, from which I dissent, is based upon a narrow application of the concept. For some, a broad interpretation is not precluded by the linguistic connotations of "unconscionable" because "there is a close association of ideas between the terms unreasonableness, lack of good faith, and unconscionability"[375]. For others, the linguistic connotation of "unconscionable" carries a force well beyond that of unreasonableness or unfairness so that the use of the term "unconscionable" might continue stubbornly to resist any attempt by Parliament to decouple the statutory proscription from its modern, restrictive equitable conception. If so, any lowering of the bar towards the nineteenth century equitable meaning

---

373 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [216]; compare *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 724 [192]-[193].

374 *Berbatis* (2003) 214 CLR 51 at 79 [65].

375 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 265. See also Paterson, "Unconscionable bargains in equity and under statute" (2015) 9 *Journal of Equity* 188 at 212-213.

synonymous with "unfairness" or "injustice" may only be possible if "unconscionable" is replaced with "unjust"[376] or "unfair"[377].

312 However, in my opinion, even if the narrow view of unconscionability were applied to ASIC's "system" case, the appeal should be allowed. The primary judge was correct to conclude that Mr Kobelt's system of advancing and administering credit was unconscionable. One might ask how it was possible that Mr Kobelt was only able to impose and implement upon the pleaded 117 customers the extraordinarily harsh conditions of his single system of credit. It is difficult, perhaps impossible, to escape the conclusion that this was only possible because his customers lived in remote communities, were highly vulnerable, and accepted the conditions and implementation because, as appalling as those conditions were, the system was better than no credit at all.

313 On the broad view of "unconscionability" this conclusion should be inescapable. Almost every one of the indicia of unconscionability in s 12CC points to the system being unconscionable. Even if there were evidence, which there was not[378], to support a conclusion that the Anangu customers "chose" the system of credit for cultural reasons, the conclusion of unconscionability cannot be avoided by pointing to this so-called "choice" between Mr Kobelt's system of credit and no credit at all. If a Hobson's choice, such as that by the Anangu of Mr Kobelt's system of credit, were a significant factor militating against a system being unconscionable then this could amount to a licence to a monopolist to impose, on a "take it or leave it" basis, extortionate terms and conditions on those in need of a service. It is hard to imagine that this could have been the intention of Parliament. As the Solicitor-General of the Commonwealth rightly said in oral submissions, in what is probably a significant understatement, the system of credit adopted by Mr Kobelt is one that would be unacceptable in mainstream Australian society. It is made less acceptable, not more acceptable, because it was the *only* form of credit offered, and thus accepted, in remote communities of highly vulnerable persons in need of credit.

---

376 Compare *Contracts Review Act 1980* (NSW).

377 Compare *Consumer Rights Act 2015* (UK). And see Paterson and Brody, "'Safety Net' Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models" (2015) 38 *Journal of Consumer Policy* 331 at 353.

378 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [582]-[585]; *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689 at 732 [243]-[244].