

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY
ON APPEAL FROM THE FULL COURT OF
THE FEDERAL COURT OF AUSTRALIA

No A32 of 2018

BETWEEN:

AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION
Appellant

LINDSAY KOBELT
Respondent



OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. Facts

2. **Geography:** This case concerns credit provided in a very remote part of Australia, primarily to the residents of two remote indigenous communities in the APY lands: FC [21], [72]-[73], [243], [246], [248]-[265].
3. **Nobby's General store:** Kobelt's store sold goods including food, groceries, fuel and second-hand cars. The cars were sold almost exclusively to indigenous customers, and were not subject to warranties: FC [1], [19], [21], [24]-[26], [71].
4. **Nobby's customers:** Most of Kobelt's customers were impoverished, could not read, could not add up, and had low levels of financial literacy: FC [417]-[419], [283], [288]-[289]. They were vulnerable, or suffered special disadvantage, on that basis: FC [620]. Kobelt knew of these characteristics: FC [423]-[424], [289].
5. **Kobelt's book-up system:** Kobelt offered indigenous customers credit via book-up: FC [228], [236], [54], [74]. The system had the following characteristics:
 - 5.1. **Key cards and PINs:** Customers were required to provide their key cards and PINs, and information on the date their wages/Centrelink payments were paid: FC [28]-[29], [38].
 - 5.2. **Withdrawal conduct:** Kobelt withdrew all, or almost all, of the funds paid into the customers account immediately upon that money being paid in: FC [29], [31]. He would thereafter exercise his discretion to allow customers to use some (up to a maximum of 50%) of the amount he had withdrawn to purchase food and groceries: FC [31], [59], [521], [56], [81]. Withdrawals were often made early in the day or late at night to preclude customers having any practical opportunity to access any of their money by other means: FC [43], [46]-[48], [548]. On one occasion where the CBA payment system failed, substantial withdrawals were made going well beyond what was authorised: FC [92]-[95], [550].
 - 5.3. **Record keeping:** Kobelt kept inadequate and illegible records of the amounts owing under his book-up system: FC [623], [41]-[44], [49], [61], [57], [69], [484]

- 5.4. **Credit card:** There was an expensive credit charge for the cars: FC [492], [618].
- 5.5. **Tying conduct:** The effect of the scheme was that Kobelt controlled how much his customers could spend (FC [598]-[599]), the kinds of goods and services they could purchase (FC [453], [599]) and the places their money could be used (usually at Nobby's: FC [57]-[60]). As such, it tied customers to Kobelt, contributing to and prolonging a dependency relationship which deprived them of independent means of obtaining the necessities of life: FC [603]-[607].
- 5.6. **Kobelt's position:** Kobelt knew the above facts; seemed indifferent as to whether customers could afford the commitment undertaken; pursued, and was at all relevant times aware of, his own interests; and took advantage of the vulnerability of this customers to bring about "considerable advantage" to himself: FC [423], [456], [559], [620].

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II. The statutory scheme

6. Sections 12 CB and 12CC of the *ASIC Act* (v 1, Tab 4).

III. Ground 1 – Voluntariness vs vulnerability

7. The fact that a customer understands the nature and terms of transaction and voluntarily enters into it is not inconsistent with it being unconscionable: cf FFC [263]-[266], [316]-[317]; AS [31]-[33], [37]; Reply [6]-[7].

8. Voluntariness is inconsistent with undue influence, but its absence is not determinative of the existence of unconscionability: AS [34].

8.1. *Thorne v Kennedy* (2017) 91 ALJR 1260 at 1273 [37]-[40], [86], [94], [113]-[115] (v 2, Tab 17).

8.2. *ACCC v Lux Distributors Pty Ltd* [2013] ATPR 42-447 at [25]-[27], [61]-[64] (v 1, Tab 8).

9. Voluntary conduct that results from someone taking advantage of a vulnerability is unconscionable. Unconscionability protects from exploitation parties who are unable, for reasons of vulnerability or other special disadvantage, to accurately perceive, judge or protect their own interests: FC [419].

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10. A proper evaluation of all the circumstances of this case leads inevitably to the conclusion that the Book-up system operated by Kobelt was unconscionable within the meaning of s 12CB: **AS [29], [39]**. The most relevant factors are:

10.1. The inequality of bargaining power between Kobelt and his customers (s 12CC(1)(a) and (c)): FC [510], [515].

10.2. The withdrawal and tying conduct was not necessary to protect any legitimate business interests of Nobby's (s 12CC(1)(b)): FC [620].

10.3. The "very expensive" and undisclosed nature of the credit charge imposed (s 12CC(1)(e) and (i)): FC [492], [496]

10 **IV. Ground 2 – Predation and exploitation**

11. The finding that Kobelt had engaged in forms of predation and exploitation must be understood as referring to the taking advantage of the customers' vulnerability or special disadvantage: FC [606], [609], [620]; cf FFC [267]-[268]; **AS [41], [44]**.

12. While it is necessary to show that a party has taken advantage of the special disadvantage of the other party, nothing further is required: **AS [42]-[45]; Reply [8]**.

12.1. *Bridgewater v Leahy* (1998) 194 CLR 457 at 493 [122] (**v 1, Tab 9**).

12.2. *Johnson v Smith* [2010] NSWCA 306 at [5], [98]-[102] (**v 2, Tab 13**).

20 **V. Ground 3 – Role of historical and cultural norms and practices**

13. The cultural and historical practices upon which the FFC relied were factors which characterised the vulnerability of which Kobelt took advantage, rather than excusing it: **AS [23], [48]-[49]; Reply [4]-[5]**.

14. In addition, the FFC erred by:

14.1. giving too much weight to the perceived benefits of the system in light of weak evidence of those benefits: **AS [47]; FC [582], [616]-[617]**.

14.2. using cultural factors to excuse what would otherwise be outside the bounds of commercial good conscious, leading to a lower standard of protection from economic exploitation for a particular group and more than one standard of Australian "conscious": **AS [40], [50], [52]**.

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