IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A32 of 2018

BETWEEN:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Appellant

and

LINDSAY KOBELT
Respondent

10 **FORM 27D – RESPONDENT'S SUBMISSIONS**

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise Statement of Issues

2. The role that ought to be played by cultural norms and traditions of Anungu[1] as customers of the Respondent (**Kobelt**), in assessing statutory unconscionability, in the context of their freedom to contract with Kobelt for the supply store credit, as desired by them.
3. Whether a case based solely on a system of conduct or pattern of behaviour,[2] should take into account anomalous instances of conduct, in assessing statutory unconscionability, and if so, in
20 what way that assessment is to be made.
4. Whether the sale of vehicles on credit at market prices had a credit *"charge"* implicitly built into the price, merely because a discount was usually provided for cash sales.
5. Whether payments were *"instalments"* within the meaning of s 11(1)(b) of the *National Credit Code* (**NCC**) in circumstances where:
   5.1 Payments of deferred consideration for a purchase were undertaken by the creditor operating (with the debtor's authority) the debtor's bank account;
   5.2 Such payments were not predefined as to their amount or timing;
   5.3 Such payments were often effected at times and in amounts after negotiation between debtor and creditor, as reflecting changing circumstances and wishes of the debtor; and
30 5.4 Amounts outstanding from time to time were affected by both repayments and redraws of credit that were not predefined as to amount and timing.

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[1] "Anungu", pronounced "ananoo" is the word for indigenous person in the Pitjantjatjara tongue.

[2] ASIC explicitly chose not to press a case in relation to particular instances of alleged unconscionable conduct on the final day of trial: AB313[286]; AB151[625].

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Part III: Section 78B, *Judiciary Act 1903* (Cth)

6. No notices under this section are required.

Part IV: Facts Contested in Appellant's Summary of Argument (SoA)

7. The description of the Withdrawal Conduct (SoA[14]), while exhibiting a general pattern, needs to be qualified by reference to the more detailed description (at [33-34] below).

8. The statement that Kobelt *"sometimes"* withdrew more than was owed (SoA[14-15]), fails appropriately to qualify that statement, by reference to the findings that this was by mistake, and was rectified when discovered.[3]

9. It is incorrect to say that purchase orders were for a $10 fee (SoA[15]); rather it was $5 or $10 depending on the situation which was cheaper than alternatives.[4]

10. It is too broad a statement to say that Kobelt at all relevant times pursued his own interests (SoA[20]), in light of the fact that there was a finding that there were aspects of his conduct that were to be regarded as benevolent.[5]

Part V: Answering Argument

A closer analysis of the facts

11. It is common ground that a court, in this area of legal discourse, is required to undertake a close consideration of the facts and all the circumstances of the case (SoA[26-27]). Accordingly, some factual matters are addressed in greater depth (beyond the generality of SoA[7-20]).

Kobelt and his connection to the Anungu community

12. Kobelt,[6] who is 75 years old, left school half way through year 10, has an unsophisticated approach to many matters, and has lived in remote indigenous communities for a significant part of his life.[7] At the relevant time he was deeply ensconced in the Anungu community, and was generally well regarded by them.[8] He was *"almost 'part of the family'"*.[9]

13. Kobelt acted in good faith, and he and his family did not make dishonest use of the key cards and PINs as part of his bookup system; there was no suggestion of dishonest record

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[3] AB279[142]; AB299[222]; AB26[63].

[4] Ex R57, Admitted Fact 20; AB278[138(1)]; AB338[377] (cheaper).

[5] AB146[602].

[6] Who was referred to as *"Tjilbi"* by Anungu witnesses, T407, which means *"old man"* in the Pitjantjatjara tongue.

[7] T794.30; AB110[428]; AB206[38].

[8] AB282[154]; AB331[355]; AB144[588]; Ex A9[172] (*"Mr Kobelt treated Anungu well."*); T162.20-23, T873 (significance in Anungu culture, of Kobelt's participation by invitation in Anungu funeral ceremonies); T493.

[9] AB319[308], quoting from ASIC's expert witness, Dr Martin (**Dr Martin**).

keeping.[10] There was no pressure or undue influence exerted over customers.[11]

"Institution" of bookup

14. Bookup[12] or *"ticky"* as more generally conceived is a form of store credit that is common in regional and remote communities occurs across Australia. It is available in a large number of regional towns, indigenous communities, and on pastoral stations. It generally involves some form of *"security"* such as the handing over debit cards and PINs.[13] It has a long history, and is a result of the demand for it (in the economic sense) by indigenous communities where it is provided; which, in turn, is caused by certain aspects of indigenous culture, and the socio-economics of those indigenous communities (addressed in greater detail below at [26] *et seq*).

15. Bookup is so prevalent a part of indigenous society, that Dr Martin[14] referred to it as an institution, in the same way one would refer to the institution of marriage.[15] Many indigenous customers view bookup as an essential service,[16] because mainstream financial services are not available to them, and there is difficulty in obtaining credit.

Demand for Kobelt's system

16. Anungu found Kobelt's system to be attractive and it was in demand.[17] The fact that there had been few complaints reflected *"a very low level of dissatisfaction in all the circumstances."*[18] Anungu with experience of the system were repeat customers, and Anungu wanted to continue to use it.[19] At all times Kobelt understood that if he did not treat his customers well, they would cease to patronise his store.[20] In Anungu communities there is an omnipresent surveillance that takes place, where everybody is watching everybody else and forming views as to the purpose of their endeavours.[21] Consequently, if a person in Kobelt's position mistreated an indigenous person, it would be a matter that was widely discussed in

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[10] AB252[20]; AB279[142] AB308[264]; 329[348]; AB336[370]; AB340[386].

[11] AB282[154]; AB308[263]; AB321[316]; AB336[370], AB340[386].

[12] The general facts about bookup in these submissions are extracted from Ex R11, pp 5, 8, 13, 14, 16, 18 and 57.

[13] AB329[348] (As to pledging of key cards and PINs – *"... the evidence tended to show that this was a basic requirement of most bookup systems, and that this practice had a long history, was widespread, and deeply embedded in Anungu culture and practices, and was accepted to the point that it was essentially taken for granted."*)

[14] Dr Martin had himself ran a bookup system in the days when welfare payments were by cheque: T141.21-30; T151.8-T152.19.

[15] Ex A9, [94].

[16] AB318[301]; Dr Martin's evidence was that many people did not want to talk to him, because they wanted to continue to use bookup: T139.19-21; T150.19-21.

[17] AB266[85]; AB267[86]; AB267[88]; AB337[373].

[18] AB321[319]. See also the explanation by Witness AH, in Ex A9, [172-173].

[19] AB145[591]; AB340[384].

[20] AB116[453].

[21] T180.41-43.

the Anungu community.[22] The proprietor of the Mintabie Trading Post was forced to leave the APY lands when he fell from favour with the Anungu.[23]

17. While there are some differences between systems of bookup, those essentially the same as Kobelt's system, are neither recent nor out of the ordinary. The two other stores in Mintabie offered bookup that was not materially different, including a pledge of key cards and PINs.[24]

18. Kobelt's system had the advantages of simplicity, a lack of bureaucratic paperwork, and flexibility in response to customers' requests.[25] Anungu would often identify when *ad hoc* amounts came into their account so these could be applied to reduce the debt faster;[26] or they might ask that lesser amounts be taken out if they required money left in the account for some purpose such as travel and these requests would be complied with.[27] The pledged cards would be returned to debtor customers if needed for specific purposes such as travel.[28] Anungu generally volunteered their cards to Kobelt (rather than him needing to request the cards),[29] and because the security could be so easily frustrated,[30] it may be inferred that the pledging process was more symbolic than commercial.[31]

Goodwill and "tying"

19. Kobelt's system of bookup allowed customers to shop at competitor stores through purchase order arrangements. Between 6 April 2011 and 31 October 2012, for example, Kobelt

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[22] T162.25-28.

[23] T892-T893.

[24] AB307-308[261]; AB336[372]; AB266[85].

[25] AB336[372] (simple); AB331[354] (no bureaucracy/no filling out paperwork); AB328[346] (flexibility in response to customers' specific requests).

[26] T497; T504; T1075.4-5; AB113[443] (*"... there had been times when she had asked Mr Kobelt to take more than originally agreed to reduce her debt more quickly"*). There are numerous examples in the bank statement and merchant reports where the only inference available is that the customer has been in communication with Kobelt or one of his staff, in relation to taking out a specific amount of money. Some examples from the bank statements of Witness B suffice to make the point: Ex A2, G60, at 26-28 November 2010, there is an example of $590 being withdrawn in one transaction, when there was $592.02 in the account; Ex A2, G63, p60, at 17 May 2012, there must have been knowledge of the first Bungala payment of $410 because an amount of $400 was withdrawn, and subsequent entries of $100 followed by $300, suggest an expectation but some uncertainty of a second payment in of the same amount, in circumstances where there are no further attempts to transfer funds as identified in Ex A2, H29, last entry at MIN.0035.0001.0436; in Ex A2, G64, on 13 November 2012, there is an abnormal inflow into Witness B's account from an ATO refund, bringing the balance to $374.81, followed by a withdrawal in one attempt of $370.

[27] T519; AB27[68].

[28] Ex A9[172-173]; AB27[67]; AB116[454]; AB137[554].

[29] T950.1-5. Witness B stated that he learned to give the key card from discussions in the Mimili community: T738-T739. Note that on the related, but different issue, of how bookup first began at Kobelt's store in the 1980s the primary judge, it is submitted, erroneously concluded that it was Kobelt's requirement, made known to Anungu explicitly or implicitly, that a key card and PIN be provided, and he did not accept that Anungu *"initiated the idea"*: AB142[580]. Rather the pledging of key cards was part of the culture and simply taken for granted: AB329[348]; AB335[368]. The institution existed around Australia and had a long history (see [14] above).

[30] Anungu could simply arrange for income to be paid into different accounts – T838; AB255[35]; AB31[89]; Or cancel their key cards: AB20[36]; AB31[89-91]; AB71[268]; AB93[371-373]; AB116[454]; AB255[35]; AB265[78]; AB268[93]; AB279[142]. There was evidence presented by Kobelt of him suffering significant bad debts from irrecoverable bookup credit: Exs R32-R36. This occurred despite Kobelt's possession of cards and PINs, which demonstrates the customers' ultimate control of the situation, by the ability to procure the cancellation and reissue of a card.

[31] Contrast, the pledge considered in *Fitzsimons v. McBride, Minister for Liquor &c* [2008] NSWSC 782, [56-57].

extended credit of $58,175.98 in 425 purchase orders. He was willing to supply purchase orders, for a modest charge of $5 or $10 (less than the alternative of an Australia Post Express Money Order) to all other stores on the APT lands, with the exception of the Mimili store with whom he was in commercial dispute.[32] By the time of trial, some other stores were refusing to accept purchase orders from Kobelt, because of the pending litigation in this matter with ASIC.[33] Kobelt's system also provided for cash advances, which were (with a few anomalous instances) provided free of charge.[34]

20. The purchase orders and cash advances ameliorated (but it was found did not completely eliminate) the tying effect of the bookup system.[35] However, there are many unexceptionable goodwill generating devices used by retailers, such as loyalty cards, that have a tying effect upon customers. As part of his system Kobelt offered other advantages, such as booking bus tickets for Anungu.[36] The limited tying effect of bookup should not be overstated.[37]

Free choice of Anungu

21. Anungu understood that they could purchase a vehicle or other goods on credit, and well understood how the system worked (it being like an "institution" in their culture), including paying later for the vehicle or goods by providing Kobelt with their key card and PIN, and that they were authorising Kobelt to withdraw money from their bank account as it became available (ie the Withdrawal conduct). Anungu understood the basic elements of the bookup system and voluntarily entered in the arrangement.[38]

Cost of bookup credit

22. It is common ground that the credit was provided interest free (SoA[12]). In the case of vehicles sold on credit, there is a finding that there was an implicit charge by reason of the practice of providing discounts for cash sales. If the matters advanced in Part VI are accepted, then the credit was also advanced, save in anomalous cases, free of fees as well.

23. However, even if there was an implicit credit charge in relation to the sale of vehicles, the overall transactions were clearly fair because the credit sales were at or below market

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[32] AB254-255[33].

[33] AB302[236-238].

[34] AB31[86-87]. There were six instances where the evidence suggested the charging a fee, and *"numerous instances"* where there was no indication of a fee for cash advances: AB110-112[433-436].

[35] AB337-338[376-377].

[36] AB31[88].

[37] In particular ASIC's case that it forced customers to travel long distances was addressed by the anthropological evidence about traveling not being a disincentive: Ex R59; AB264[70]; AB337-338[376].

[38] AB271-272[110]; AB282[154]; AB302-303[241]; AB308[265-266]; AB321[316]; AB331[355]; AB340[384].

prices.[39] If the customers did not understand that there was a credit charge, neither did Kobelt.[40] ASIC never pleaded a case that there was a substantial implicit credit charge.

Withdrawl conduct

24. Other aspects of the bookup system are only properly understood against the anthropological evidence. As part of Kobelt's case, that evidence is relevant in two ways. First, that evidence corroborates the findings of voluntariness because it explains why subjectively Anungu would wish to enter into bookup arrangements. Secondly, it explains objectively that certain aspects of the bookup system that seem intuitively to be detrimental, when properly understood actually afford objective advantages to Anungu as understood in a cultural context – and consequently that the subjective desire to enter into bookup arrangements becomes understandable.

25. Money, being a post-colonisation phenomenon, has insinuated itself into Aboriginal culture in a manner where it is viewed from a different perspective than in mainstream Australia.[41] It has a prominent position, because it can be exchanged for food and other valuable items; and it also has specific uses in funeral ceremonies, and obligations to redress inadvertent infringements of ritual.[42] Anungu tend to dissipate money as soon as it comes into their possession, often by the purchase of immediately consumable items, which leaves families short of money at the end of a payment cycle (the **boom/bust cycle**).[43] Attempts at budgeting are almost invariably followed by a reversion to prior practices.[44]

26. Anungu society is a shared society, and key cards and other resources are shared amongst family members; indeed a key card is viewed as a resource to be shared and pledged.[45]

27. Demand sharing (sometimes referred to as *"humbugging"*) is a complex cultural phenomenon, where Anungu have obligations to share their resources with specific categories of kin.[46] It is often concerned with money, but extends to services such as a ride in a vehicle, food, and hunted game (with the correct kin category). It is part of a foundational principle of

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[39] The issue is squarely adverted to and considered at AB306[257](10), and expressly accepted by Wigney J at AB334[364-365].

[40] Kobelt's solicitor's evidence, at T780, was that he was surprised at the ASIC examination by the existence of the letter (Ex A2, B1) raising issues concerning the NCC. Accordingly, Kobelt's evidence in Ex A2, D2 was unguarded on such issues, including the passages extracted at AB41[140-141]. Kobelt's subjective view was that for a cash sale the price would come down, to achieve quick turnover, and on occasions he made *"virtually nothing"* on the cash sales. This is inconsistent with any belief that credit sales were somehow loaded with an implicit credit charge.

[41] T197.35-37.

[42] T197.39-T198.1.

[43] Ex A9[34]; Ex A2, D2 at T83.14-24; T222.24-25; T223.6-7; T242.22-27; Witness AW, T505; Witness D, T562; Witness B, T739.

[44] T223.32-35.

[45] ASIC's expert Mr Stauner at T214.15-20; T225.37-38; Ex R11, pp16-17; T566 – Witness D sharing money with another family.

[46] Ex A9[83]; T198.8.

reciprocity, exchange and sharing within hunter gatherer society.[47] Not everything within a household is open for sharing. People seek to be able to control their own resources, but because of obligations to share with kin (which extends beyond the nuclear household), they are unable completely to control those resources. The locus is not so much on the generosity of the giver but on the rights and obligations that can be exercised by the receiver.[48]

28. The existence of demand sharing obligations entails a lack of utility for Anungu in accumulating money in bank accounts, and accumulations of saving risk being dissipated, by demand sharing to provide for family or communal expenses.[49] There was abundant evidence that pressures from demand sharing pervaded the APY lands.[50] Indigenous persons engage in elaborate strategies to avoid the pressures of demand sharing, such as the example Dr Martin gave of being entrusted with a bank passbook to enable the account holder to keep secret from kin their true level of assets, with another account passbook implying impecuniosity for public disclosure.[51]

29. Mintabie was a predominantly white enclave away from the immediate pressures, omnipresent surveillance, and responsibilities of the Anungu environment.[52] One of the advantages of Anungu travelling to Mintabie, is that it reduces demands from relations on cash available to customers while they are shopping, and they can spend their money with more autonomy given reduced pressures from demand sharing.[53] Further, Anungu sometimes deliberately pass responsibility for managing things like cash flow to outsiders, which is an example of incorporating outsiders as *"brokers"* in order to gain better access to goods and services.[54] By leaving a key card with Kobelt, there is an insulation from the potential

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[47] T155.14-31.

[48] T185.9-17; T146.28-43.

[49] T198.3-8; T199.13-18; T222.27-28.

[50] In his brief visits to the APY Lands (T148.31-32), people told Dr Martin about the existence of phenomena that Dr Martin opined to be demand sharing (T148.31-32). However, he did not observe it directly himself (T148.17-23). Mr Stauner gave detailed evidence of his observations of it (Ex A14, pp15-16; T220.3 (it was like bullying); T220.16 (occurred daily); T220.16-29 (after cash from ATM occasions when immediate demands for money); T221.6 (easier for non-Anungu to refuse); T221.13 (part of reason for his not carrying cash was to avoid humbugging); T221.34 *et seq* (strategies to avoid humbugging); T223.43-44 (painted a painting and his family have all gone to Alice Springs with him to spend his money); T225.37-38 (ask for keys, will given them, they will go to Alice Springs – it's a shared society)). Mr Kilpatrick who used to run the Mimili store, was aware of humbugging (T243.22). He observed people being humbugged after withdrawing money from the ATM (T243.27). It was not limited to requests by kin, or for cash, it *"was pretty much anything"* (T243.32). It included demands to do extra shopping (T243.36-43). The phenomenon was a daily occurrence (T243.47). Requests were not limited to Aboriginal persons (T244.7). Similarly, notwithstanding a cultural stigma in talking about it (T221.20-27), the Anungu evidence supported it: Witness AH (T437-T438); Witness AW (T525.5 *et seq*); Witness B (T741); Witness D (T572.20-T573.31 (likes shopping at Nobbys because people can't see what he buys)); Witness RP (who was pseudonymised as "Jennifer" in the annexures to Dr Martin's report) (T723.9-13).

[51] T155.33-34; T156.18-20.

[52] T182.27-46; T180.41-43.

[53] T180.18-29; T182.27-47; T183.23-26.

[54] T157.4-10; Ex A9[87].

pressures of demand sharing, there is an anthropological literature about the use of third persons in this way, and it is a widely observed fact that such strategies are employed.[55]

30. ASIC's report found that indigenous persons believed that bookup could help with budgeting or protecting resources from demands from kin.[56] In response to the proposition that a person giving over their key card with authority to withdraw the money and make it available (to pay off debt, or for further goods) was a strategy to avoid demand sharing, Dr Martin stated that he had no *"firm"* evidence for that, but that it was *"plausible"* and *"reasonable to come to that view."* Kobelt's evidence was that customers requested that all monies be withdrawn, with the proffered reason being so that it was removed before family *"got their hands on it"*.[57] Despite the cultural stigma of talking about demand sharing,[58] most Anungu witnesses gave evidence that they expected, or in one instance may have requested, that virtually all the money be taken from their account in the repayment of bookup credit.[59]

Discretion, boom/bust cycle and level of credit

31. If it suited Anungu to conduct their lives with low balances in their bank accounts to avoid demand sharing, or if they had emptied their accounts because of a spendthrift propensity, bookup supplied the ability through the payment cycle to purchase the necessities of life, such as food and fuel, and thereby avoid the adverse affects of the boom/bust cycle, as well providing access to durable goods, such as vehicles, that could improve their lifestyles.

32. ASIC complains that the practice of allowing a redraw of amounts over the payment cycle, to counter the boom/bust cycle, vested in Kobelt an inappropriate level of discretion. But in practice the system was operated with a high degree of flexibility with Kobelt in constant negotiation with Anungu consumers as to their wishes. Even if Kobelt was not entirely benevolent, market forces and his desire to generate goodwill ensured such discretion as he had was fairly exercised and there was no pattern established on the evidence of an abusive exercise.

33. When Kobelt commenced to provide bookup, customers would come into the store and *"want to book down; they would hand their key card and number over and we would let them book*

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[55] T157.4-10; T147.14-17.

[56] Ex R11, p18.

[57] T806.37; T806.43. The primary judge did not attach *"much weight"* to this evidence (AB142[579-580]), but Wigney J considered it consistent with the evidence of Dr Martin, and Ex R11: AB330-331[353]. Besanko and Gilmour JJ characterised the statement of not attaching much weight to the evidence as a rejection of it, and were not disposed to intervene as an appellate court on this single issue: AB304[251].

[58] T221.20-27.

[59] Witness AH, T421-T422; Witness AW not unhappy with no money in account, T471, and asks Kobelt to take out money T497; Witness D, T557.

a little bit down." As Kobelt came to know Anungu customers better, and the fact that they received regular income, they would be allowed more credit. There would be a discussion with the customers about when income payments were expected, and agreements as to any limit on the amount to be withdrawn. If the level of debt exceeded the incoming amount, subject to agreement to the contrary, the money would be withdrawn as it became available, and a reduced level of booking up would occur in the next cycle to control the customer's level of indebtedness. If the debt had been repaid, the customer would be told *"Your key card is clear"*, be offered the card back, and the customer would then usually take out any remaining balance in cash by EFTPOS.[60]

34. For the selling of second hand vehicles on bookup, it was usually agreed that *"pretty well the whole of what was in"* the customer's bank account could be withdrawn, but roughly half would be used to reduce debt, and the other half made available to the customer for further purchases.[61] If Kobelt was requested to leave money in the account he would do so.[62] Customers were never refused bookup for necessities, but if their debt was too high they would be told to *"slow down"* and items such as lollies or chips they had selected for purchase would be removed.[63] Kobelt would comply with requests to vary the initially withdrawn amount.[64] On occasions when customers complained that there was insufficient money left in their accounts, adjustments were made to accommodate their needs.[65] If a customer sought to book up in excess of the amount due on the next pay day for food, they were permitted so to do, provided the amount was not excessive,[66] but Kobelt required that they moderate their purchases,[67] so that funds were available across the payment cycle.

35. There was an incentive for Kobelt not to let the level of debt get out of hand, because customers were always able to frustrate the arrangement by diverting income into other accounts or cancelling their key cards.

36. Thus, the system of bookup had elements of short term paternalism (as any effective strategy to avoid the boom/bust cycle would involve); but a prohibition implied by a finding of

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[60] T800-T804. Note that while some of Kobelt's evidence was not accepted, as Besanko and Gilmour JJ observed, on occasions when the primary judge did not accept Kobelt's evidence *"he made that very clear"*: AB295[204]. The primary judge did not reject this evidence, save that he concluded (it is submitted erroneously – see fn 29 above) that it was Kobelt's initial requirement *"whether explicitly or implicitly"* that key cards and PINs be provided as security and thus it was not Anungu that initiated the idea: AB142[580].

[61] T806.21.

[62] T806.27; T890.27-45.

[63] T875.25-30.

[64] SoA[16]; T824.31 – the reference to Schedule D is to the Amended Statement of Claim.

[65] T890.1-20. This included, if the customer wanted, giving the money back usually as cash.

[66] T952.29.

unconscionable conduct, is ultimately a worse form of paternalism in the long run in dictating to Anungu that (for their own supposed good) they have a desired service removed from them. Anungu sometimes deliberately pass responsibility for managing things like cashflow to trusted outsiders,[68] and ASIC's case seeks to deny them that aspect of their culture.

37. As noted above, customers often communicated with Kobelt when amounts of money were coming into their account so that a transfer could take place and reduce their debt faster. Given their levels of income, Anungu often paid down vehicle debts quickly.[69] This was possible because there were no ongoing credit fees or interest on the outstanding balances, and customers were able to devote a large proportion of their income to repayment, in circumstances where resources were shared amongst kin[70] and there was a low cost of rent on the community.[71]

Response to SoA – Ground 1 – Weight applied to voluntariness and to special disadvantage

38. While the Anungu customers generally, but not invariably, had low levels of financial literacy, the issue was not whether they could understand complex transactions such as bank mortgages, but whether they had an informed understanding of how bookup (which had the cultural status of an *"institution"* like marriage) operated. One of its primary advantages to Anungu was its simplicity, which allowed persons with low financial literacy to understand it.

39. **Voluntariness:** The SoA[32-39] fastens upon the role of voluntariness in the equitable doctrine relating to entering into contracts unconscionably, without considering that concept in the context of the full nature of the doctrine, and whether such notions are appropriately imported into the statutory concept; and it seeks to import false distinctions into the statutory concept of unconscionable conduct.

40. In relation to the equitable doctrine, there is a nexus between two concepts, being "voluntariness" and "special disadvantage". The special disadvantage differs from mere disadvantage, because *"the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his* [or her] *best interests"*[72] where this (ie the ability to judge interests) is or ought to be known to the stronger party, yet they *"take advantage"* of the situation[73] by entering into a transaction, unless it is shown that the

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[67] T875.25.

[68] T157.4-10.

[69] See the graphs in Ex R53.

[70] T214.15-20; T225.37-38; Ex R11, pp16-17; T566 – Witness D sharing money with another family.

[71] T185.19-21.

[72] *Commercial Bank of Australia v. Amadio* (1983) 151 CLR 447, 462 (***Amadio***).

[73] *Amadio*, 461.

transaction is *"fair, just and reasonable"*. The concept of the voluntariness of the transaction is coloured by the seriously affected ability to make judgments as to where best interests lie, such that the advantage taken by the stronger party has victimised the party subject to the special disadvantage.[74] Central to the equitable doctrine is the concept of abuse of power.[75]

41. When the equitable doctrine is invoked, the plaintiff will have concluded that the transaction was not in their best interests or appropriate to their needs, and will seek to set it aside or resist its enforcement. However, the findings in this case were that the Anungu *"indicated that they understood that they had a choice and made arrangements with knowledge of the way in which the Book-up system worked. ... Whether rightly or wrongly and whether well informed or not, each must have considered it appropriate to their needs. ... It is evident that they appreciated, in particular, the ability to buy food in between their respective paydays and pension days."*[76] The facts set out above show that Anungu utilizing bookup were predominantly satisfied often repeat customers, and there were undoubtedly features of the system that they found to be attractive.[77] The Anungu customers *"understood ... the disadvantage arising from the arrangement of them not having access to money ..."* and how that could be addressed within the system by a redraw of credit.[78]

42. The implicit[79] submission by ASIC, is that Anungu at all times remain incapable of judging their own best interests because their judgment is seriously affected by poverty and lack of financial literacy, even after repeat experience is gained of how the system impacted their lives, as to both benefits and detriments, and an affinity with its requirements as part of a cultural *"institution"*. Wigney J rightly criticised such an approach as being paternalistic,[80] and clearly Anungu were not seriously affected by an inability to make judgments as to their interests in those circumstances.

43. The attempt to exclude subjective assessment by Anungu (SoA[33]) appears inappropriately premised upon the distinction, as derived from equity, between, on the one hand, unconscionable bargain making, and, on the other, undue influence. In the context of statutory unconscionability the attempt to maintain such an overarching distinction is denied by the existence of s 12CC(1)(d) of the *Australian Securities and Investments Commission*

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[74] To use the terminology of the Privy Council in *Hart v. O'Connor* [1985] 1 AC 1001, 1024D.

[75] *Commonwealth Bank v. Kojic* (2016) 249 FCR 421, [72].

[76] AB144[586-588].

[77] AB145[591].

[78] AB109[425].

[79] Possibly explicit at SoA[33].

[80] AB331[355].

Act 2001 (Cth) (***ASIC Act***), and its predecessor provisions. While the values in equity inform the statutory standard, it is not bound by such rigid distinctions; it builds on, and is not restrained by doctrines of equity.[81]

44. In the context of statutory unconscionability, ASIC's reference to *ACCC v. Lux*,[82] fails to address that there was a particular accumulation of aspects of the partly systemised pressure selling tactics of Lux, not present in this case, which were unconscionable even if some of the elderly customers were able to make voluntary decisions albeit under some moral duress. Those factors were the use of deceptive telephone calls to gain access to the elderly ladies' homes; the use of the ruse of a free service for the vacuum cleaners; the tactic of engaging the potential customer in the home long enough to gain their confidence; and the placing of moral pressure on the potential customers by taking effort in unpacking the new vacuum cleaner and treating the sale of an expensive item as a *fait accompli*. In Kobelt's system there was no pressure placed upon Anungu and he acted with *bona fides* (see [13] above).

45. **Available alternatives:** As Wigney J considered,[83] it is questionable whether some of the alternatives were feasible. Centrepay was dedicated to essential services and unlikely to be available to purchase a vehicle. Analysis of the various alternatives tended to ignore evidence that Anungu prefer the bookup system because it involved a personalisation of the transaction through the incorporation of Kobelt as a *"broker"* and it did not involve Anungu having to deal with bureaucracy and paperwork.

46. A more perceptive analysis would (with respect) follow that of Keane J in *Paciocco v. ANZ Banking Group*,[84] emphasising, in the absence of dishonesty or pressure or abuse of market power, where the transactions were understood, that Kobelt dealt no less favourably with his Anungu customers than the other stores offering bookup; after all there was always the ability of customers to favour the competitor store with their custom and some of them did.

47. **Absence of undue influence:** When combined with the findings of honesty and *bona fides* this was a fundamental basis to distinguish all situations where defendants had adopted a system that was based on pressure selling (like *Lux*), or specifically created a system that targeted or was designed to engage with vulnerable people, like *ACCC v. ACN 117372915*[85]

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[81] *Paciocco v. ANZ Banking Group Ltd* (2015) 236 FCR 199, [263]; *Tonto Home Loans Australia Pty Ltd v. Tavares* (2011) 15 BPR 26,699, [291].

[82] [2013] ATPR 42-447.

[83] AB331[354].

[84] (2016) 258 CLR 525, [288-289].

[85] [2015] FCA 368.

or *ASIC v. National Exchange*.[86] Anungu seeking to use bookup came to Kobelt, and he did not seek them out or pressure them.

48. **Anungu ability to escape the arrangement:** In light of the evidence about the way Anungu perceive money in a manner different from mainstream Australia, and that a key card is seen as a resource to be shared, the power dynamics between Kobelt and his customers were complex and multifaceted, which is conspicuously overlooked in the submissions in SoA concerning the niceties of public policy and breach of contract. There was no basis in the evidence to conclude, and the issue was never joined at trial, that Anungu viewed cancelling the key cards as dishonourable. The decision in *Lux*[87] is focused on the systematic pressure selling and deceit aspects of the case, which detracted from the cooling off right. The diary entries (intended at the time to be private to Kobelt and his family) reflect an understandable exasperation with the fact that they were being required to write off bad debts where customers had not shown them good faith.[88] They may reflect poor manners but, it is submitted, have little importance in this case.

49. **Appellate restraint:** The contention that the Full Court did not have regard to the advantages enjoyed by the primary judge is incorrect.[89]

50. **A proper evaluation:** The asserted *"critical factors"* in SoA[39] are each explicable in a manner consistent with good conscience, or are not part of the pleaded and asserted system because the conduct was anomalous:

    50.1. As to SoA[39(a)] – inequality of bargaining power by reason of low levels of financial literacy, is addressed by (1) Kobelt's own lack of education and sophistication; (2) the simplicity and flexibility of the bookup system which Anungu understood; (3) the mediating effect of competition and Kobelt's desire to treat his customers well to enhance his goodwill; (4) Kobelt's honesty and *bona fides* in operating the system, with an absence of pressure or undue influence; (5) the interest free nature of the credit; (6) save for the question of the implicit charge, the absence of fees for the provision of credit;

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[86] (2005) 148 FCR 132.

[87] See at [44], [50], [58] (received wrong vacuum cleaner back), [60], and especially [72]. The detriments in the case were not just financial, but included invasion of privacy and feelings of extreme embarrassment. The elderly ladies were not necessarily aware of the right to cool off, which was not actively brought to their attention. It seems likely that the strategy of Lux was that there would be a material number of cases where the right to cool off was not understood, or the purchaser was too embarrassed to exercise it. Contrast this, with the knowledge of Anungu of the bookup system, which was an institution in their culture.

[88] Kobelt's son was responsible for some, and they relate to a limited period of time: AB31-32[91].

[89] AB307[260]; AB339[382]

50.2. As to SoA[39(b)] – the Withdrawal conduct is addressed by (1) the understanding of and consent to the conduct by Anungu customers; (2) the ability to redraw credit, including with cash advances and purchase orders that could be used elsewhere; (3) the disadvantages to Anungu of accumulating funds in bank accounts (especially where there were no financial institutions on the APY lands, and use of the Mimili ATM was subject to pervasive *"humbugging"* (see [28], fn50 above)) which meant possession of key cards by the account holder carried little utility;

50.3. As to SoA[39(c)] – the asserted undisclosed credit charge should be characterised as the absence of a discount (see Part VI below), which also evidences Anungu negotiating skills in an ability to seek a discount when paying by cash, but in any event the overall transactions were fair because vehicles sold on credit were sold at or below market prices;

50.4 As to SoA[39(d)] – the asserted lack of flexibility is addressed by (1) Dr Martin's evidence that Anungu had capacity to negotiate with and question Kobelt within basic parameters; (2) the flexibility with which arrangements were altered to suit the customers' particular requirements from time to time; (3) the fact that the asserted elements of inflexibility were part of a cultural institution; (4) the consequent fact, that it is unlikely that Anungu wanted the system to be different;

50.5 As to SoA[39(e)] – the taking of money as soon as possible (1) was not part of the pleaded systems case (cp Amended Statement of Claim, [15]); (2) was largely anomalous; (3) was within the authorisation; (4) was inconsequential in light of the practice of customers being able by prior arrangement to have amounts of money left in their accounts; (5) was defensive in nature, so as to keep the debt levels (and risk to Kobelt) within reasonable bounds given his policy of always allowing redraws of credit for necessities to address the boom/bust cycle.

Response to SoA – Ground 2 – System neither predaceous nor exploitative

51. Given the findings of honesty, *bona fides*, and a belief his actions were justified,[90] there is no room for a finding of commercial predation or exploitation in the requisite sense.

52. The case of *Johnson v. Smith*,[91] is inapt. It was an equity (ie not statutory) case outside the context of commerce,[92] involving large unique transactions by family members with a complete absence of consideration.

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[90] AB110[429].

[91] [2010] NSWCS 306, especially [98-102].

53. In the short term where the mediating effect of a desire to generate commercial goodwill is absent, Kobelt no doubt could have operated his system in a predatory and exploitative manner – he could have charged high fees and interest once he had the key cards and PINs; he could have denied customers necessities of life until he had extracted some further advantage; he could have denied purchase orders with other stores and cash advances for shopping at other stores to tie customers to his store; he could have refused to allow customers to take back their cards for travel; he could have refused to arrange bus tickets; he could have sued them when they left him with bad debts by cancelling the key cards or diverting income into other accounts; but he did not.

54. The asserted reasons for findings of predation and exploitation in SoA[44] are each explicable in a manner consistent with good conscience, or are not part of the pleaded and asserted system because the conduct was anomalous:

54.1. As to SoA[44(a)] – consequences of the Withdrawal conduct are addressed by (1) the understanding of and consent to the conduct by Anungu customers; (2) the ability to redraw credit, including for cash advances and purchase orders that could be used elsewhere, and including a willingness to give money back if requested (see [34] above); (3) the disadvantages to Anungu of accumulating funds in bank accounts (especially where there were no financial institutions on the APY lands, and use of the Mimili ATM was subject to pervasive *"humbugging"*) which meant possession of key cards by the account holder carried little utility;

54.2 As to SoA[44(b)] – the tying effect, is addressed above under the heading "Goodwill and "tying"". To the extent that it applied as an objective detriment, customers chose the system, nonetheless, because the detriment was exceeded by other benefits to them;

54.3 As to SoA[44(c)] – in relation to the bank glitch incident, this was isolated and not part of a pleaded systems case. ASIC produced a master excel document said to summarise all the key card transactions for the store over the relevant period based upon source documents tendered as Ex A2.[93] When printed out the summary filled some fourteen lever arch folders. All of the instances said to reflect adversely on the manner in which the system was exercised, even if relevant to the systems case, do not reflect how it truly operated and are inconsistent with the findings of Kobelt's *bona fides*. A better

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[92] Where parties are permitted within bounds to be motivated, by a desire to obtain repayment of debts (cp *Macmillan v. Bishopsgate (No 3)* [1995] 3 All ER 747, 783c), and where for a capitalist economy to flourish there must be *"a reasonable degree of certainty in commercial transaction"* (*Paciocco v. ANZ Banking Group* (2015) 236 FCR 199, [296]; *Commonwealth Bank v. Kojic & Ors* (2016) 249 FCR 421, [57]).

[93] Ex A2 included scanned documents on a CD.

reflection of the situation is the good standing enjoyed by Kobelt in the Anungu community (see [12], fnn 6, 8 and 9 above).

Response to SoA – Ground 3 – Cultural factors

55. At trial and in the Court below,[94] this matter has been litigated on the footing that historical and cultural factors were relevant to assess statutory unconscionability.

56. It would be incoherent for the law to require an investigation of all the facts and circumstances[95] including disadvantages related to culture in the situation of statutory unconscionability to establish a special disadvantage, on the one hand, yet, on the other hand, close its eyes to the mitigating factors arising from cultural issues.

10 57. If cultural factors such as the demand sharing and the boom/bust cycle are to be seen as detrimental to Anungu (which, being tied up with issues of cultural relativism, is *non constat*), then relief afforded by Kobelt's bookup system to their consequences may be a treatment of symptoms and not causes, but that does not convert a benefit into a detriment. SoA[48] seeks to characterise cultural matters, eg demand sharing, as a vulnerability (which was never pleaded), rather than a cultural preference. But it does not say way this should be so. The persistent economic demand for the Bookup system is inconsistent with ASIC's claims of exploitation, and attempt to paint the detailed facts with pejorative generalisations.

58. There was generalised evidence about bookup systems other than Kobelt's system, including ASIC's own analysis (see above [14-15, 17], contra SoA[49]).

20 59. No doubt, with the benefit of hindsight, one could design a better system of bookup, and Kobelt's system was improved over time while maintaining its simplicity.[96] But, that does not bespeak unconscionability (contra, SoA[51]).

60. In relation to issues of weight, identified in SoA[47]:

60.1 The overbroad assertion in [47(a)] about deprivation of access to, and control of, money, fails to take account of (1) the specific and tangible benefits of having access to money and the ability to make purchases through what would otherwise be the

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[94] ASIC pleaded the relevance of cultural matters (Amended Statement of Claim, [3.1.2(ii)], [13], [13A], [20.2]) and Kobelt also raised issues about culture and custom that were joined at trial in his pleadings (Amended Defence, [4.3.1] (bookup customs), [13A.3.4], [16.6.1] and [16.6.2]). The primary judge took these matters into account: AB149[611]; ASIC itself called Dr Martin to advance a case based upon cultural history and norms; ASIC's submission in the Court below (Outline of Submission, [46]), in referring *inter alia* to cultural issues such as humbugging and the boom/bust cycle, simply asserted that the primary judge had *"accepted that certain features* [of Kobelt's bookup system] *were positive"*. Cultural factors of indigenous persons were relied upon in the context of statutory unconscionability in *ACCC v. Keshow* (2005) ASAL 55-142, [85-87], although the fundamentally different perception of money and obligation in Anungu culture distinguishes this case from a case like *Bank of NSW v. Layoun* [2001] ANZ Conv R 487, [47-49] where cultural issues were held to be irrelevant.

[95] *Paciocco v. ANZ Banking Group* (2916) 258 CLR 525, [293-294]; *Commonwealth Bank v. Kojic & Ors* (2016) 249 FCR 421, [57]; in related statutory settings *Thorne v. Kennedy* (2017) 91 ALJR 1260, [41]; *Kakavas v. Crown Melbourne Ltd* (2013) 250 CLR 392, [14].

[96] Especially with the assistance of his solicitor, moving in 2014 to a system of card ledgers for record keeping; Appellant's Chronology, [21].

boom/bust cycle, by credit redraws; (2) the fact that, upon request, monies would be returned or other accommodation would be made for the customer (see [34] above); (3) the fact that key cards would be returned to customers for the purposes of travel etc upon request; (4) that money would be left in the accounts upon request;

60.2 As to [47(b)], (1) concerning customer motivations, this was the obvious inference which was never negatived by ASIC who bore the onus of proof to a *Briginshaw* standard; (2) it is not correct to say that there was no evidence of Kobelt's motivation – in his ASIC examination he was explicit about it;[97] (3) the benefits were in no way *"incidental"* – a matter that is made clear by the economic demand for the system;

10 60.3 As to [47(c)], (see above [27-28]) – *"seek to control ... , but ... keep secret ..."*;

60.4 As to [47(d)], the primary judge's comment was explicitly a supposition; The actual evidence is summarised above (see [29]) – ie *"By leaving a key card with ..."*;

60.5 As to [47(e)], this dealt with above (see [45]).

61. While contemporary standards of unconscionability evolve (SoA[50]), there is no attempt by ASIC to identify such an evolution in accordance with the particular techniques identified in authorities such as *Commonwealth Bank v. Kojic & Ors.*[98] If anything, it is submitted that community standards have moved in favour of indigenous autonomy, and away from paternalism.

Conclusions

20 62. SoA[41] criticises the use of the words *"moral obloquy"* and it may be unhelpful merely to substitute other words for those used in the legislation. However, the phrase *"high degree of moral obloquy"* as used by Gageler J[99] is, it is respectfully submitted, not merely *"a search for some synonymous definition or rule"*[100] but rather, by an emphasis in the words *"high degree"* points to the fact that proving statutory unconscionability involves traversing a very high bar. The statutory standard implied by the use of the word *"unconscionable"* is not to be used as it might be in a *"careless or partisan"* manner,[101] which is an ever present risk because by itself it is a *"standard of indeterminate reference"*.[102] If construed too broadly

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[97] Ex A2, D2, T83.10-24.

[98] (2016) 249 FCR 421, [56].

[99] *Paciocco & Anor v. ANZ Banking Group* (2015) 258 CLR 525, [188].

[100] *Commonwealth Bank v. Kojic & Ors* (2016) 249 FCR 421, [56], [69], [85].

[101] *Paciocco & Anor v. ANZ Banking Group* (2015) 258 CLR 525, [290].

[102] *Commonwealth Bank v. Kojic & Ors* (2016) 249 FCR 421, [58], [69], [85-88]. See also the comments about *"idiosyncratic or personal moral judgment"* in *Paciocco & Anor v. ANZ Banking Group* (2015) 236 FCR 199, [296].

commercial certainty is undermined.[103] It is a penal provision, and accordingly should be construed narrowly.[104]

63. The fundamental difficulty with ASIC's argument, is that it seeks to place the court in the position of evaluating whether Kobelt's bookup system on balance objectively benefited Anungu in a process of weighing acknowledged benefits against detriments: this, first, overlooks, contrary to contemporary values and in a paternalistic manner, the desires of the Anungu themselves who wish to have the service available to them; secondly, it is inconsistent with a requirement that there be something like a high degree of moral obloquy which implies something much greater than a mere tipping of the scales; and in any event Kobelt's system on balance benefitted his customers. That is why they wanted to use it.

64. The Full Court was correct to reject ASIC's claim that Kobelt had, by his bookup system, engaged in unconscionable behaviour in breach of s 12CB(1) of the ASIC Act.

Part VI: Cross Appeal and Notice of Contention

65. As to the Cross Appeal, Grounds 1 to 3[105] are directed to overturning the finding of contraventions of s 29(1) of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**), which were upheld by the Court below.[106]

66. At trial identification of the relevant provisions of the NCC and NCCPA was not in dispute.[107] The term *"charge"*, upon which the case turned, is not defined. However, s 11(3)(d) of the NCC is a provision that in effect[108] deems the existence of a *"charge"* in certain circumstances. Section 11(1), when combined with the definition of *"cash price"* in s 204(1) of the NCC, entails that any differential between the cash price, and the price at which

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[103] *Paciocco & Anor v. ANZ Banking Group* (2015) 236 FCR 199, [296] (*"importance of a reasonable degree of certainty in commercial transactions"*).

[104] *Paciocco & Anor v. ANZ Banking Group* (2015) 236 FCR 199, [300]; see also *Beckwith v. The Queen* (1976) 135 CLR 569, 576; *Waugh v. Kippen* (1986) 160 CLR 156, 164-165; *R v. Lavender* (2005) 222 CLR 67, [87-94]; and see the authorities collected by Kirby J in *Stevens v. Kabushinki Kaisha Sony* (2005) 224 CLR 193, 260 fn 182.

[105] AB469-470.

[106] AB294-295[202-203]; AB316[296]; AB342[392]. This overlaps with Ground 1 of the Notice of Contention, in relation to the implied credit charge issue: AB475

[107] It is accepted that the primary judge correctly identified the complex of provisions, and generally how they interrelated: see AB35-38[112-115], [117-120], [123]; AB39-40[132]. Section 29(1) of the NCCPA would be contravened, and provide for a civil penalty, if a person engaged in a *"credit activity"* without a licence. Section 6(1), Table Item 1, of the NCCPA relevantly provided that a person engaged in a *"credit activity"* if the person was a credit provider under a credit contract, or carried on a business of providing credit, being the provision of credit to which the NCC applied, or performed obligations and exercised rights under such contracts. For the purposes of the NCC, *"credit"* is provided, if, *inter alia*, under a contract, ***"payment of a debt by one person (the debtor) to another (the credit provider) is deferred."*** A *"credit contract"* is defined in s 4 of the NCC, as a contract under which credit is or may be provided *"to which this Code applies"*. Identification of which provision of credit the NCC applied to the contract, is governed by s 5 of the NCC. By s 5(1)(c) of the NCC, it was a necessary element for the NCC to apply to the provision of credit, that *"a charge is or may be made for providing the credit"* (emphasis supplied). Thus the issue joined in this case is whether there was a *"charge"* for the provision of credit. If there was no actual or deemed charge, ASIC would not make out its NCCPA case.

[108] The deeming is implied by the word *"is"* in para (d); and, by the ss (3) chapeau the deeming effect operates for the purposes of deciding whether the contract is a credit contract, and if so, for identifying that the NCC applied to it.

goods were sold on credit, would enliven the deeming operation of s 11(3)(d) of the NCC, if and only if *"the amount payable to purchase the goods under the contract; ... is payable by instalments"*. The legislation does not further define the words *"payable by instalments"*.

67. Where, as here, there was a differential between the cash price and the credit price of the motor vehicles, ASIC had two alternative routes in seeking to establish the alleged contraventions. Either there was in fact a charge for the credit (hidden in the vehicle price), or if the contracts were for *"payment by instalments"*, there would be a deemed charge.

68. The interpretation provided by the Court below, and the primary judge, was in error, because it failed to give due consideration and definition to the mischief at which the NCCPA is directed; it failed to take account the structure of the legislation; and of the arbitrary results flowing from such an approach. A strained and extended meaning was given to the words in punitive legislation.

69. The mischief at which the NCCAP is directed, is the protection of debtors from the unduly detrimental aspects of credit activities, by a regulated licensing regime. For the categories in Item 1 of the Table, the demarcation of where the licensing system is intended to operate, is defined (unsurprisingly) by the existence of a *"charge"* (actual or deemed), such that generally credit provided without financial compensation to the creditor is outside the regime. There is no intention to regulate interest free, fee free credit, which selfevidently is beneficial to the consumer.

70. **There was no implicit charge:** To distinguish whether the price differential constituted an implicit cost placed on Kobelt in the case of a cash sale to avoid the risk of default, or an implicit charge on the consumer to compensate Kobelt for assuming credit risk, the only way to mediate between the competing contentions was to resort to the objective standard of the market price. Thus, there was a clear error made by the Court below, especially as ASIC bore the onus, and on occasions cash sales barely contained a profit at all (see [fn40] above). This was the antithesis of *"loading"* a price, and thereby taking it above market price, with a built in credit charge.

71. **Repayment was not by *"instalments"*:** The *"centre of* [the] *meaning"*[109] of payment by instalments is constituted by predefined amounts at predefined times.[110] However, there must be some reasonable and clear outer boundary to the meaning, especially given the wide

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[109] *FCT v. Suttons Motors (Chullora) Wholesale Pty Ltd* (1985) 157 CLR 277, 281-282.

[110] Benjamin, 7th Ed, at [16-029] likens instalments to the payment of rent; *Wharton's Law-Lexicon*, Stevens & Sons, 1892 (Lely QC), p 25, is to the same effect; The Shorter Oxford English Dictionary (3rd Ed), relevantly defines an instalment as *"the arrangement of the payment of a sum of money in fixed portions at fixed times"* and *"[t]he payment, or the time appointed for payment, of different portions of a sum of money, which, by agreement is to be paid in parts at certain times."*.

definition of *"credit"* and the consequences of deeming the existence of a charge, which might catch and penalise all manner of *ad hoc* and innocent transactions where there is a possible cash discount and otherwise a deferral of payment: but with the peculiar, incoherent and arbitrary exception of a future payment in one lump sum.

72. The legal concept of an *"instalment"* contract arose from the development of distinctions in the law of the sale of goods before the Chalmers code, concerning executed and executory contracts. The concept of an instalment payment defined the parameters of a breach of contract. To assert that a contracting party has failed to pay an instalment, is, given this history, synonymous with asserting a breach of contract. The boundary of the meaning *"instalments"* should be fixed in the legislation accordingly.

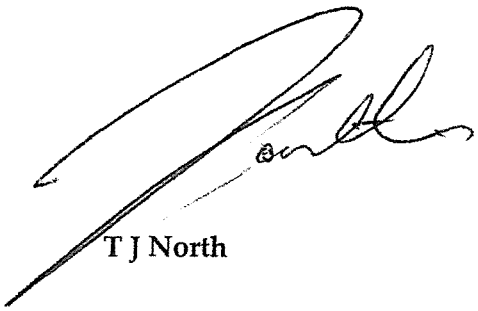
73. Thus, where the creditor controls payment, and there is no binding predefinition as to payments (see [5], [18] and [33-34] above), this could not be an instalment contract. It would be nonsensical to say that in breach a customer had failed to make an instalment due, because Kobelt had not operated the account. This conclusion is reinforced by the words *"debtor is the person who makes the payments"* in s 11(3)(b) of the NCC (emphasis supplied).

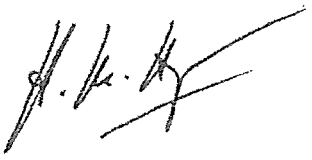
74. **Conclusion:** Accordingly, Kobelt's bookup system did not involve payment by instalments, did not involve an actual or deemed charge, and the Cross Appeal, and [1] of the Notice of Contention should be upheld.[111]

Part VII: Time Estimate

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

Dated 2 November 2018:





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[111] **Other matters:** As to [2] of the Notice of Contention, see [48] above; As to [3] of the Notice of Contention, see [20] above – the willingness to issue purchase orders was fundamentally at odds with a finding of unconscionability, and this issue clearly influenced the primary judge's findings; As to [4] of the Notice of Contention, given the findings that the primary judge probably did find that the Withdrawal conduce was authorised,[111] this ground of contentions is advanced merely out of an abundance of caution.