IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A32 of 2018

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT

BETWEEN:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Appellant

LINDSAY KOBELT
Respondent

REPLY SUBMISSIONS OF THE APPELLANT

Filed on behalf of the Appellant by:
Australian Securities and Investments Commission
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PART I CERTIFICATION

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

PART II ARGUMENT

Facts

2. After a lengthy trial, the Primary Judge made detailed findings of fact. Those findings were not disturbed on appeal, and with limited exceptions they are not challenged in this Court.[1] It is those findings that provide the factual foundation for this appeal. Yet, notwithstanding the absence of any appeal against the relevant findings of fact, Kobelt's submissions (**KS**) implicitly invite this Court to find the facts for itself, because KS [12]-[37] sets out as 'facts' many matters that were the subject of evidence that was either rejected or not accepted.[2] Other submissions mischaracterise the findings. For example, KS [18] overstates the flexibility and control Kobelt gave customers over the use of their own money, the Primary Judge having found that Kobelt's book-up system gave him extensive control over customers' finances,[3] going beyond what was necessary to protect his legitimate interests.[4] Further, the Primary Judge made no finding of fact that 'market forces and [Kobelt's] desire to generate goodwill ensured such discretion as he had was fairly exercised' (cf KS [32]), or that the provision of security in the form of key cards and PINs was 'more symbolic than commercial' (cf KS [18]). In those circumstances, the many paragraphs of the Respondent's 'closer analysis of the facts' that are supported by transcript references – as opposed to findings – are more likely to mislead than to assist. That is particularly so as the Court could not make further findings of fact by reference only to the subset of the record Kobelt has reproduced in his Book of Further Materials.

Argument

3. Kobelt's submissions advance four main overlapping arguments. *First*, book-up is commonplace, in demand, and serves the needs of Anangu customers. *Secondly*, the Anangu were able at all times to make judgments in their own best interests and they chose book-up voluntarily. *Thirdly*, Kobelt's conduct was neither predacious nor exploitative. *Fourthly*, cultural practices meant that aspects of the book-up system that objectively

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1 The exceptions are contained within the Notice of Contention (**NoC**) (egs. Grounds 1.2 and 2.2). The Respondent makes only perfunctory submissions in relation to the NoC (KS [74] and fn 111).

2 For example, KS [30] and [33] refer to evidence given by Mr Kobelt that was 'rejected' or 'not accepted', as is acknowledged in fns 57 and 60; see also KS [18] fn 29. Such evidence can form no part of the factual foundation upon which the appeal should be determined.

3 FC [569] **[AB140]**, [598]-[602] **[AB146]**.

4 FC [522] **[AB131]**, [538] **[AB134-135]**, [616] **[AB150]**. See also FC [350] **[AB88]**, [599] **[AB146]**.

appear detrimental in fact afford advantages to the Anangu and were, for that reason, not unconscionable. Each of these arguments should be rejected.

4. **An 'institution' for which there is demand:** ASIC accepts that book-up in its various forms is common in remote communities. However, Kobelt pays insufficient regard to the specific elements of his system that render it unconscionable being, in particular, the retention of key cards and PINs combined with the Withdrawal Conduct, tying and poor record keeping. In response to KS [14]-[15], ASIC refers to and repeats its primary submissions at [49]-[51]. The Court should reject the suggestion that Kobelt's book-up system was designed to meet a cultural preference among Anangu people when (a) they did not give evidence to that effect;[5] (b) nor did Kobelt;[6] and (c) there were limited alternative ways of accessing credit.[7]

5. In the prevailing circumstances of special disadvantage and a lack of alternative sources of credit, the existence of demand for Kobelt's system is not a reliable indicator of whether it was unconscionable within the meaning of s 12CB of the *ASIC Act*. Those circumstances deny the inference that the system *must* have served customers well because there was demand for it. Similarly, the relevance of Kobelt's connection to the Anangu people, and the fact that his conduct did not result in him falling out of favour with the community, is minimal. That Kobelt felt bound by a commercial imperative to 'treat his customers well' was relied on by the Primary Judge in the context of Kobelt knowing that he should not refuse his customers access to basic food having *already withdrawn all of their money*.[8] It does not support the notion that Kobelt's system as a whole involved favourable treatment of his customers and there is no finding to that effect.[9] That the customers did not perceive the system as unjust speaks to their financial illiteracy and special disadvantage.

6. **Voluntariness:** Kobelt relies heavily on the notion that his customers understood and voluntarily entered into the system. His submissions proceed on the basis that the history of that system demonstrates that 'clearly Anangu were not seriously affected by an inability to make judgments as to their own interests': KS [42]. The factual findings of the

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5 i.e. that those cultural reasons were why they used book-up at Nobby's (with one exception FC [582] **[AB143]**).

6 FC [75]-[76] **[AB29]**.

7 FC [246] **[AB67]**.

8 FC [453] **[AB116]**.

9 Cf KS [63]. The Primary Judge noted that Mr Kobelt's benevolence was really an incident of the arrangement he had put in place for the benefit of Nobby's: FC [602] **[AB146-147]**.While the Full Court considered there to be advantages and disadvantages in the system, it made no finding that the advantages outweighed the disadvantages: FFC [259], [329]-[331] **[AB307, 324-325].**

Primary Judge support the opposite conclusion. Importantly, the quote in KS [41] from the Primary Judge's reasons omits the conclusion expressed in the next paragraph, which states:[10]

> 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 … 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.

7. Kobelt's emphasis (KS [44], [47]) on distinguishing the facts in *Lux*[11] overlooks the fact that ASIC relies on that authority (and others) not as analogous factual cases, but to establish that voluntary entry into a transaction does not preclude a finding of unconscionability.[12] Kobelt fails to engage with that point of principle, which substantially undermines his repeated suggestion that voluntary entry by Anangu people into his book-up scheme answers ASIC's statutory unconscionability claim.

8. **Predation and exploitation:** Kobelt's subjective belief that his actions were justified, and the finding of the Primary Judge that he acted 'with a degree of good faith',[13] together with the absence of a finding that he acted 'dishonestly', do not undermine the conclusion that Kobelt's conduct involved forms of predation and exploitation. Bad faith, dishonesty, pressure and undue influence are not essential elements of unconscionable conduct. Further, it is clearly no answer to a case of unconscionable conduct to show that it would have been possible for the stronger party to have behaved in an *even more* predatory or exploitative way (cf KS [53]).

9. **Cultural context:** Kobelt submits that the cultural practice of demand sharing 'entails a lack of utility for Anungu in accumulating money in bank accounts' and it therefore 'suited Anungu to conduct their lives with low balances' (KS [28], [31]). That is not persuasive, both because demand sharing is not limited to cash, and also because the book-up system could exacerbate demand sharing in the community, both by facilitating demand sharing of the cars and groceries purchased by customers, and by increasing the need of customers

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10 FC [589] **[AB144]**(emphasis added).

11 *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR 42-447.

12 *Lux* is relied on by ASIC (along with *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 and *Bridgewater v Leahy* (1998) 194 CLR 457), to demonstrate that the voluntary entry into a transactions should not be taken to effectively exclude, or act as 'a powerful consideration against', a finding of unconscionable conduct.

13 FC [558] **[AB138]**.

deprived of access to their own money to demand sharing of money or food from other community members.[14]

10. The Court should not be persuaded by Kobelt's allegations of paternalism, the more concerning paternalism being the notion that the Anangu are better off having their spending totally controlled by Kobelt than by retaining financial independence. To give cultural practices significant weight in assessing whether Kobelt's book-up system is unconscionable would result in a situation in which Anangu people would be uniquely unprotected by the law, for if conduct that deprives them of control of *all* their money is not seen as unconscionable, even when that conduct has no legitimate business justification, it is hard to see what meaningful protection they could receive from s 12CB against any form of exploitative conduct in the provision of financial services.

PART III CROSS APPEAL AND NOTICE OF CONTENTION (GROUND 1)

11. No question of public importance arises on the proposed Cross-Appeal (or has even been asserted). Further, the penalties imposed for breach of the *NCCP Act* totalled just $67,500. In those circumstances, special leave to cross-appeal should be refused. If, contrary to that submission, special leave is granted, ASIC submits as follows.

12. **Cross-Appeal (Ground 1) & Notice of Contention (Ground 1) – Charge for credit:** Kobelt's customers who purchased cars on credit paid the list price and those who paid cash in full were given a discount, which was usually at least $1,000 off the list price.[15] The Primary Judge correctly reasoned that the differential paid by the customers who purchased cars on credit was a *charge* for the purposes of the NCC and application of s 29 of the *NCCP Act*. That finding was upheld by the FFC.[16] Contrary to KS [70], by reason of the presumption in s 13(1) of the NCC, it was Kobelt who bore the onus as to matters of fact concerning the application of the NCC.[17] It does not matter which of the 'two alternative routes' (KS [67]) is taken, for on either route the NCC applied.[18] Under s 11(1), the NCC is deemed to apply to contracts for the sale of cars via Kobelt's book-up system because: (a) the cars were paid for in instalments; and (b) they were sold at a higher price than the cash price. Under s 5(1) of the NCC, the only subsection in dispute is (c) – whether '*a charge is or may be made for providing the credit.*' Kobelt contends that in order to prove the

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14 See eg. FC [584] **[AB143]**.
15 As to the method of determining price see FC [133]-[136] **[AB40]**, [143] **[AB41]** – [145] **[AB42]**.
16 FFC [52] **[AB259]**, [201]-[202] **[AB294]**, [205] **[AB295]**, [325]-[326] **[AB323]**.
17 FFC [204] **[AB295]**.
18 FC [199] **[AB55]**.

existence of a charge it must first be established that the total price exceeds the market price. In effect, he submits that vendors can impose any charge for credit they see fit, whether disclosed or not, provided the total price is 'below market'. On that construction, provided the price is 'below market', one must ignore the differential between the cash and book-up prices (a differential that is precisely the type of hidden charge the NCC seeks to cover: s 11(3)(d)). This argument was correctly rejected below on the basis that there are multiple ways in which a charge for credit might be imposed. The fact that one such means is to inflate the price (above market, so as to incorporate a charge for credit) does not mean that the identification of such a charge in every case must be referable to a market price.

13. **Cross-Appeal (Ground 2) – Instalments:** The Primary Judge[18] and the FFC[19] correctly applied uncontroversial principles of statutory construction in rejecting Kobelt's argument as to the meaning of 'instalments' in s 11(1)(a) of the NCC. 'Instalments' should be interpreted as simply a series of part payments by which, over time, the total sum due is paid. Importing into the definition that instalments must be in equal amounts, evenly spaced in time, subject to pre-determined contractual terms as to amount and timing, or restricted to certain methods of payment in which the customer is actively involved, would unduly limit the application of the NCC. It would allow vendors easily to avoid the operation of the NCC (by varying the timing or amount of payments). A person *makes* a payment when their money is applied to the debt. It should not matter whether the payment comes about by the vendor accessing the customer's account or charging their credit card, by an automated electronic debit, or by the customer initiating an electronic or cash payment. The narrow construction for which Kobelt contends (KS [71]-[74]) would be inconsistent with the protective, beneficial purpose of the NCC, and inconsistent with s 65(3) of the NCC, which expressly contemplates contracts in which the frequency or minimum amount of payments are not specified.

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[18] FC [173]-[195] **[AB49-55]**.
[19] FFC [55]-[56] **[AB260]**, [202] **[AB294]**, [321]-[323] **[AB322]**.