FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Kobelt [2016] FCA 1327

File number:	SAD 100 of 2014
Judge:	**WHITE J**
Date of judgment:	9 November 2016
Catchwords:	**CONSUMER LAW** – alleged contravention of s 29 of the *National Consumer Credit Protection Act 2009* (Cth) by engaging in a credit activity without a licence – sale of second hand vehicles on credit – whether the National Credit Code applied to the provision of credit – whether the difference between the price at which the vehicles were sold on credit (the Book-up price) and the lesser price at which they were sold for cash constituted a charge for the provision of credit within the meaning of s 5 of the Code – whether repayments made at varying times and in varying amounts constituted "instalments" within the meaning of s 11 of the Code. **Held:** The difference between the cash price and the Book-up price constituted a credit charge and the repayments were instalments for the purposes of s 11. Contraventions of s 29 established. **CONSUMER LAW** – alleged contravention of s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) – Respondent provided credit to indigenous customers by way of "book-up" – whether his conduct constituted a system of conduct or pattern of behaviour which was unconscionable – elements of the system included the Respondent taking possession of the customers' debit cards and PINs and transferring to himself in repayment of the customers' debt the whole, or nearly the whole, of the credit balance in the customers' accounts from time to time – consideration of factors within s 12CC of the ASIC Act. **Held:** Respondent's conduct in the book-up system was unconscionable.
Legislation:	*Australian Curriculum, Assessment and Reporting Authority Act 2008* (Cth) ss 5, 6 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CB, 12CC, 12GH, 19, 76, 155

Consumer Credit (New South Wales) Act 1995 (NSW) s 5

Consumer Credit (Queensland) Act 1994 (Qld)

Credit Act 1984 (NSW) s 14(2)(b)

Credit Act 1985 (ACT) s 14(2)(b)

Credit Act 1987 (Qld) s 16(2)

Credit Act 1984 (WA) s 14(2)(b)

Evidence Act 1995 (Cth) ss 53, 54, 59, 60, 64(3), 69, 87(1), 135, 136, 140

National Consumer Credit Protection Act 2009 (Cth) ss 5, 6(1), 29, 36

National Credit Code ss 3, 4, 5, 10, 11, 12, 13, 17, 65, 204, 325

Second-Hand Vehicle Dealers Act 1995 (SA) ss 16(1), 17, 23

Second-hand Vehicle Dealers Regulations 1995 (SA)

Second-hand Vehicle Dealers Regulations 2010 (SA)

Cases cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) [2009] HCA 41; (2009) 239 CLR 27

Attorney General of New South Wales v World Best Holdings Ltd [2005] NSWCA 261; (2005) 63 NSWLR 557

Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd [2003] HCA 18; (2003) 214 CLR 51

Australian Competition and Consumer Commission v Lux Distributors Pty Ltd [2013] FCAFC 90

Australian Securities and Investments Commission v Cash Store Pty Ltd (in liq) [2014] FCA 926

Australian Securities and Investments Commission v National Exchange Pty Ltd [2005] FCAFC 226; (2005) 148 FCR 132

Blomley v Ryan (1956) 99 CLR 362

Bridgewater v Leahy (1998) 194 CLR 457

Briginshaw v Briginshaw (1938) 60 CLR 336

Ceva Logistics (Australia) Pty Ltd v Redbro Investments Pty Ltd [2013] NSWCA 46

Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447

Dasreef Pty Ltd v Hawchar [2011] HCA 21; (2011) 243 CLR 588

Daw v Toyworld (NSW) Pty Ltd [2001] NSWCA 25

Fry v Lane (1888) 40 Ch D 312

Geeveekay Pty Ltd v Director of Consumer Affairs Victoria

[2008] VSC 50; (2008) 19 VR 512

Guthrie (as liq of Ult Ltd (Rec Apptd) (In Liq)) v Radio Frequency Systems Pty Ltd [2000] WASC 152; (2000) 34 ACSR 572

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 2) [2003] FCA 893; (2003) 130 FCR 424

Helby v Matthews [1895] AC 471

Hoare v Rennie (1859) 5 H&N 19; 157 ER 1083

Howell v Evans (1926) 134 LT 570

Johnson v Smith [2010] NSWCA 306

Jones v Barkley [1781] 2 Dougl 685; 99 ER 434

Kakavas v Crown Melbourne Ltd [2013] HCA 25; (2013) 250 CLR 392

Kingston v Preston [1773] 2 Doug KB 689; 99 ER 487

Lee v Butler [1893] 2 QB 318

Lee v The Queen [1998] HCA 60; (1998) 195 CLR 594

Louth v Diprose (1992) 175 CLR 621

Paciocco v Australian and New Zealand Banking Group Ltd [2015] FCAFC 50; (2015) 236 FCR 199

Paciocco v Australian and New Zealand Banking Group Ltd [2016] HCA 28; (2016) 333 ALR 569

Provident Capital Ltd v Bortolin Papa (No 1) [2011] NSWSC 460

Quick v Stoland (1998) 87 FCR 371

Reynolds v Katoomba RSL All Services Club Ltd [2001] NSWCA 234; (2001) 53 NSWLR 43

Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd [2002] FCAFC 157; (2002) 234 FCR 549

Tonto Home Loans Australia Pty Ltd v Tavares [2011] NSWCA 389; (2011) 15 BPR 29,699

Walker v Consumer, Trader and Tenancy Tribunal of New South Wales [2013] NSWSC 1432

WJ Allan and Co Ltd v El Nasr Export and Import Co [1972] 2 QB 189

Date of hearing:	9-12, 15-18 and 23-26 June 2015 and 1 and 2 July 2015
Date of last submissions:	10 July 2015
Registry:	South Australia
Division:	General Division
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Sub-area:	Regulator and Consumer Protection
Category:	Catchwords
Number of paragraphs:	627
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Solicitor for the Respondent:	Lempriere Abbott McLeod

ORDERS

SAD 100 of 2014

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Applicant
AND:	**LINDSAY KOBELT** Respondent
JUDGE:	**WHITE J**
DATE OF ORDER:	**9 NOVEMBER 2016**

THE COURT ORDERS THAT:

1. The matter is adjourned to a date to be fixed by the Court for determination of relief and costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

WHITE J:

Introduction

1 The respondent, Mr Kobelt, conducts a general store at Mintabie under the name "Nobbys Mintabie General Store" (Nobbys). Mintabie is in the far north of South Australia, being about 1,100 km north of Adelaide. It is located on an opal field which is part of an area excised by lease to the Government of South Australia from the Anangu Pitjantjatjara Yankunytjatjara Lands (APY Lands).

2 As part of his business, Mr Kobelt sells second hand motor vehicles and provides credit to customers by way of "Book-up".

3 The applicant (ASIC) alleges that Mr Kobelt's conduct since 1 July 2011 in providing credit to purchasers of motor vehicles contravenes s 29 of the *National Consumer Credit Protection Act 2009* (Cth) (NCCP Act). Section 29 prohibits a person from engaging in a "credit

activity" if the person does not hold a licence authorising the person to engage in the credit activity.

4 In addition, ASIC alleges unconscionable conduct by Mr Kobelt in contravention of s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act) by his conduct since at least 1 June 2008 in requiring, as a condition for his provision of credit to purchasers of cars or goods at Nobbys, that the customers provide him with a debit card linked to a bank account into which their income is paid together with the customer's personal identification number (PIN) relating to the card, and his later conduct in using the card and the PIN periodically to withdraw all or nearly all of the monies in the account in reduction of the customer's debt. With one exception, each of the customers in question is an indigenous resident on the APY Lands or in adjacent regions.

5 ASIC's primary allegation is that Mr Kobelt's conduct since at least 1 June 2008 in providing credit and in making use of the debit card in the way just outlined in relation to at least 117 of his indigenous customers constitutes a system of conduct or pattern of behaviour within the meaning of s 12CB(4) of the ASIC Act which is unconscionable. This part of ASIC's case did not turn on the circumstances of any individual customer. ASIC's secondary allegation was that Mr Kobelt's conduct in relation to Book-up in the case of four customers was unconscionable. In order to protect the privacy of these customers, they were referred to in the pleadings and in the evidence as Customers A, B, C and D. In fact, two persons comprise Customer A as they are a husband and wife. I will refer to the husband as AH and to the wife as AW.

6 Ultimately, ASIC did not press for findings on its secondary case.

7 ASIC seeks by way of relief the grant of declarations and injunctions, the imposition of civil penalties and publicity orders.

8 For the reasons which follow, I am satisfied that ASIC has made good its allegations. Mr Kobelt did, in the period commencing on 1 July 2011 and continuing until at least April 2014, contravene s 29(1) of the NCCP Act by engaging in credit activity within the meaning of s 6(1) of that Act when he did not hold a licence authorising him to do so.

9 Further, Mr Kobelt did, in the period commencing on 1 June 2008 and continuing until at least July 2015, engage 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. The system is the Book-up system which Mr Kobelt implemented at Nobbys. I have said that the conduct continued until July 2015, because that is when the trial in the action was concluded.

The evidence in the trial

10 A large amount of documentary evidence was tendered at the trial. ASIC led evidence from 15 witnesses. With the exception of six Anangu witnesses, the evidence in chief of these witnesses was provided in writing, although in some cases there was some additional oral evidence in chief. Four of the witnesses were not required for cross-examination. These were Ms Bretherick from the Commonwealth Bank of Australia (CBA), Mr Grant from Australia Post, Mr Holmes who was previously employed by ASIC, and Mr Mills from Westpac Banking Corporation (Westpac). The witnesses who were required for cross-examination were Mr Marchese and Mr McCabe (both from ASIC), Mr Stauner, Mr Kilpatrick and Dr Martin. I indicate now that I regarded the evidence of Mr Marchese, Mr McCabe, Mr Stauner and Mr Kilpatrick as being honest, reliable and useful. Given the criticisms made by Mr Kobelt of aspects of Dr Martin's evidence, I will defer consideration of his evidence to later in these reasons. I observe, however, that notwithstanding his criticisms, Mr Kobelt's final submissions relied to a not insignificant extent on the evidence of Dr Martin.

11 The evidence of the six Anangu witnesses was taken in Marla.

12 Mr Kobelt gave evidence himself and adduced evidence from his former solicitor, Mr Proud, Professor Glonek (who has expertise in mathematical statistics) and from Mr Jorgensen (a forensic accountant).

13 In making my assessment of the evidence and of ASIC's claims, I have had regard to s 140 of the *Evidence Act 1995* (Cth) and to the approach discussed in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-3.

14 The transcripts of an examination of Mr Kobelt by ASIC pursuant to s 19 of the ASIC Act was admitted into evidence pursuant to s 76 of the ASIC Act.

15 Much of the evidence concerning Mr Kobelt's Book-up system and its operation was not contentious. There were, however, distinct differences between the parties on some aspects, and it will be necessary to make findings concerning them.

16 For reasons of convenience, I will describe Mr Kobelt's Book-up system using the past tense. It is to be noted, however, that except when noted otherwise, the system remains current.

17 During the course of his final submissions, Mr Kobelt asked that the Court provide reasons for some of the rulings made at the commencement of the trial rejecting his objections to some of ASIC's evidence. Those reasons are contained in Appendix One of these reasons.

Mintabie and Nobbys Store

18 Mintabie is part of a gazetted precious stones field (opals) and is, in effect, an enclave within the southern portion of the APY Lands. It is 45 km west of Marla, which is located on the Stuart Highway.

19 Mr Kobelt has operated Nobbys since the mid-1980s. He does so with the assistance of his partner, Sonia Kobelt, his son, Timothy Kobelt, and some employees. Nobbys sells a range of goods including food, groceries, general goods, fuel and second hand cars.

20 When Mr Kobelt went to Mintabie in the early 1980s, it had a population of about 1,800 people, nearly all of whom were engaged in one form or other of opal mining. Most were of European descent. Mintabie continued as an active opal field until the early 2000s. The amount of opal mining has declined and the permanent population of Mintabie was about 70 people at the time of the trial. These included one Aboriginal family.

21 Mr Kobelt estimated that presently Nobbys has a customer base of about 600 Aboriginal persons each year, of whom about 200 frequented the store each week and I infer that that has been the case throughout the period relevant to these proceedings. The majority of customers who use Book-up come from Mimili and Indulkana, both being communities in the APY Lands to the north-west of Mintabie. By late 2011, residents of the APY Lands (the Anangu) comprised about 80% of the store's patronage.

22 Nobbys is one of three general stores in Mintabie, the others being Sam's and Scrooge's.

23 Sonia and Timothy were either employees or agents of Mr Kobelt acting at the times which are material in these proceedings within the scope of their actual or apparent authority, so that their knowledge and states of mind can be attributed to Mr Kobelt: ASIC Act s 12GH(3); NCCP Act s 325(3) and, for similar reasons, their conduct can be attributed to Mr Kobelt: ASIC Act s 12GH(4); NCCP Act s 325(1).

Book-up system

24 A significant part of the business of Nobbys since about 2000 has been the sale of second hand cars. Some customers pay cash but most have bought their cars on Book-up.

25 In the period between 6 July 2011 and 31 October 2012, Mr Kobelt made 105 car sales using Book-up. The 105 sales involved 92 different customers. Nearly all of these sales were made to Anangu as Mr Kobelt said that, in the whole period during which he has been selling second hand cars, he had sold only about half a dozen to persons of European descent. The prices of the cars ranged from $2,500 to $7,800. The average and median prices were $5,600 and $5,800 respectively.

26 Generally, the statutory duty to repair defects (commonly referred to as the "used car warranty") imposed by s 23 of the *Second-Hand Vehicle Dealers Act 1995* (SA) (the 2H Dealers Act) does not apply to cars sold by Mr Kobelt. That is because in most cases the vehicles have already been driven more than 200,000 km before the sale (s 23(7)).

27 All of the 105 sales were by credit on the Book-up system but, as previously noted, there were in addition a small number of other customers who paid the full price at the time of purchase. Those purchasing using Book-up would usually pay a deposit. These varied between $440 and $3,500.

Elements of the Book-up system

28 Mr Kobelt required, as a condition of the provision of credit, that his Book-up customers provided him with a debit card (referred to as a "key card") linked to the bank account into which their wages or Centrelink payments were made as well as their PIN. A key card is not a credit card. It can be used only to debit amounts from funds present in the customer's account. Withdrawals cannot be made using a key card without entering the customer's PIN. The PIN is a unique identifier provided by the issuing financial institution to the customer and, as is well-known, customers are expected to maintain the confidentiality of their PINs in order to prevent fraud or misuse of their key cards.

29 Mr Kobelt retained possession of the key card, generally until the debt was paid. He used the key card and the PIN in one of two EFTPOS machines in Nobbys to access the customer's account, usually on the day on which payments were made into the account or shortly afterwards. Generally, Mr Kobelt withdrew the whole, or nearly the whole, of the available funds. This amount was applied in reduction of the customer's debt to him.

30 Mr Kobelt explained that his Book-up system operated in the following way:

> 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.

31 As can be seen, Mr Kobelt's evidence was that he agreed with the Book-up customers that he would take the whole of the money in their account from time to time on the basis that he would then allow them to use half for their own purposes. However, he retained that half in his own account. He did not transfer it elsewhere for the customer's use. With relatively few exceptions, the customers could obtain access to that money only by coming back to Nobbys to make their purchases of food or groceries, or to obtain cash, or, by a process which I will describe later, having Mr Kobelt send a "purchase order" to another store. This was the general position, but some customers would place limits on the amounts he was authorised to withdraw. The 50:50 arrangement was not recorded in writing.

32 ASIC disputed Mr Kobelt's evidence about the 50:50 arrangement, and it will be necessary to return to that topic.

33 In his examination by ASIC pursuant to s 19 of the ASIC Act, Mr Kobelt said that he would not provide Book-up unless the customer provided his or her key card and PIN, although there is one couple whom he trusted enough not to require this. Mr Kobelt said that he

required the key card and PIN as "security". Later, in his s 19 examination, Mr Kobelt said that he did not ask customers for their PIN, instead "they just give it to you". Similarly, in his evidence, Mr Kobelt said that it was the customers who had offered him their key cards and PINs. I accept that that may have occurred but, as I will indicate later, I am satisfied that, when it does, it is because the customers knew Mr Kobelt's requirements even without him saying so expressly, and that they provided their PINs only because of those requirements. I do not accept that it was the indigenous customers who initiated the idea of handing over their key cards and PINs in exchange for the provision of credit.

34 Although there was no explicit evidence on this topic, I infer that use of Book-up was the only means by which Mr Kobelt provided credit to his Anangu customers. That is to say, the Anangu customers did not have a choice between Book-up and an alternative credit facility offered by Nobbys.

35 Mr Kobelt did not grant credit to all who sought it. If he did not know the customer, he would ask them their name, where they lived, what their income was and when it was paid and make his assessment by reference to that information. Sometimes he would refuse credit because one or more members of the customer's family had previously defaulted in Book-up arrangements or because the customer came from a community in the APY Lands whose people he regarded as unreliable. In the last 10 years, Mr Kobelt has declined Book-up to about 12-15 persons.

36 If Mr Kobelt did know the customer, he would ask them questions about their income and when it was paid. Sometimes Mr Kobelt refused Book-up to customers known to him, usually because they had previously frustrated his ability to access the funds in their account by, for example, cancelling the key card or by having their income paid into another account.

37 Mr Kobelt did not ask customers wishing to use Book-up (whether they were known or not known to him) to complete any application form. In his s 19 examination, Mr Kobelt said that apart from enquiring about the amount of the customer's weekly or fortnightly income and when it was paid, he did not make other enquiries such as whether they had Book-up elsewhere, or had other debts, liabilities or commitments. He said that he did not have to ask about the number of their children or their other commitments because, having been at Mintabie for 27 years, he knew the majority of the customers fairly well.

38 As indicated, when Mr Kobelt agreed to provide credit, he would require the customer to hand over to him their key card and to tell him the PIN relating to its use. 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 plastic bag on which he would write the customer's name, their PIN and, in most cases, some details of when payments would be made into the accounts, for example, "Chq Wed", "Pen Thurs", and "Pen Fri". Entries like this indicated that the customer expected a cheque to be paid into the account on Wednesdays, or that he or she received a payment on the Thursday or Friday in pension week. These were not necessarily payments of pension as Mr Kobelt would use the same descriptor if the person received their wages on the Thursday or the Friday, as the case may be, in pension week. Several of the entries contained terms such as "Chic", "Chicy", "Chicky", "Chichs", "Chn" and "Ch". Some of these entries indicated that the customer received Child Support payments in the alternate week to pension week and others that the customer received the payment from some other source on the same day that Child Support payments were made. The entries indicated to Mr Kobelt when funds would be available in the accounts for his withdrawals. I accept Mr Kobelt's evidence about these matters and that, contrary to ASIC's submission, the entries did not always indicate that the customer was a Centrelink recipient. However, I also find that at least half of Mr Kobelt's customers were recipients of Centrelink benefits.

39 In four cases, the entry on the piece of masking tape was "Bungala" or an abbreviation of that name. This was a reference to Bungala Aboriginal Corporation which, for a time, administered the Commonwealth Development and Employment Project (CDEP). That is an employment training program in respect of which participants receive payment. Some witnesses described it more colloquially as "Work for the Dole". It seems that another entity, Career Employment, commenced administering the program at a later time.

40 In some cases, the detail on the masking tape was "Pen Mon 300" or "Bungala $250". It is not clear whether these entries were an indication of the amount which the customer expected to be paid into their account or a limit which they were imposing on the amount which could be withdrawn by Mr Kobelt from the account.

41 When Mr Kobelt provided credit in relation to the purchase of a car, he commenced a handwritten record, using for this purpose unused 365 day diaries (the Diaries). Three of these diaries were in evidence (Diary One, Diary Two and Diary Three). Diaries One and Three were unused 2007 and 2010 diaries. Diary Two had no printed days, months or year.

The entries which Mr Kobelt made in Diaries One and Three had no correlation with the printed dates in those diaries. The entries in Diary One commenced on 7 May 2009; those in Diary Two on 25 September 2011; and those in Diary Three in November 2012 (and continued to April 2014). The transaction details recorded in the diaries related only to customers who had bought a car on credit although, as will be seen shortly, Mr Kobelt also recorded the purchases by these customers of groceries and fuel, as well as cash advances.

42 Mr Kobelt entered the name of the customer in the diary, the registration number of the car purchased, the sale price and the amount of the deposit. The corresponding details for each succeeding customer to whom he granted credit would be entered about five centimetres below. Mr Kobelt used the intervening space to record the transactions relating to the first customer.

43 The next step in relation to the first customer occurred later, usually on the day the customer had indicated that payment into the account was expected. In the customer's absence, Mr Kobelt would use the customer's key card and PIN in one or other of the two EFTPOS machines at Nobbys to make withdrawals from the customer's account. Sometimes the withdrawals were made by Timothy or Sonia Kobelt, but it was not suggested that anything turned on that. For convenience I will continue to refer to Mr Kobelt only.

44 By one or more withdrawals, Mr Kobelt would take all, or nearly all, of the credit balance in the customer's account and transfer the money to his own account. He would record (in handwriting and in an abbreviated manner) in a column on the left hand side of the diary, under the customer's name, the date of the withdrawal and the total withdrawn. For example, an entry of "8/5 500" indicated that Mr Kobelt had withdrawn a total of $500 on 8 May. The withdrawals on subsequent days were recorded in a like manner. When Mr Kobelt ran out of space under the customer's name in the diary, he would start a second column immediately to the right of the first column and, sometimes, a third column.

45 The great majority of withdrawals were made on the day on which the customer had informed Mr Kobelt that monies would be paid into the account, ie, pension payment day or the day on which the customer's wages were paid. Since about mid-2014, it has mostly been Timothy who has carried out the withdrawals. Before then, it was mostly Mr Kobelt.

46 Both Mr Kobelt and Timothy generally made the withdrawals early in the day, before or shortly after Nobbys opened. It was also common for Timothy to make withdrawals between

midnight and 1 am. I am satisfied that the Kobelts made the withdrawals at these times so as to preclude the customers having the opportunity, or at least any practical opportunity, to access the monies by other means, for example, by internet or telephone banking. Both in his s 19 examination and in his evidence in chief, Mr Kobelt acknowledged that that was his purpose. In the period between 1 July 2010 and 30 November 2012, approximately two-thirds of the withdrawals from customers' accounts were made by Mr Kobelt or his agent outside the usual trading hours of Nobbys.

47 At the time of making the withdrawals, Mr Kobelt did not know, and had no means of ascertaining, the balance in the customer's account. Accordingly, the process of withdrawal usually involved trial and error. Mr Kobelt would attempt a withdrawal of a certain amount, say $200. If that was successful, he would attempt to withdraw a like amount or perhaps a little less and continue in this way until the attempted withdrawal was unsuccessful because the customer's account then held insufficient funds. Mr Kobelt would then seek to withdraw a lesser amount, perhaps as little as $50, or even $20, until further attempts were unsuccessful. By this means, Mr Kobelt was able to "interrogate" the account and to take the whole, or nearly the whole, of the credit balance in the account.

48 Some customers placed a maximum on the amount which Mr Kobelt could withdraw from their account. Mr Kobelt said that he complied with the requests or directions from his customers as to the amount to be withdrawn from their accounts. If they asked him to take the whole amount, he would do so; if they asked him to leave some, he would so. However, the evidence did reveal several occasions when Mr Kobelt had not complied with his customers' directions and, as already indicated, it was evident that he and Timothy regarded themselves as being in competition with many of the customers as to who could make withdrawals first.

49 Mr Kobelt put the EFTPOS printed record of the transfer in the plastic bag containing the customer's key card. He kept these until the bag became too full (usually after two or three months), at which time they were simply discarded. This meant that Mr Kobelt no longer had the means of showing customers the documents evidencing his withdrawals.

50 Mr Kobelt did not provide any printed record of the withdrawals to the customers, although they had the means of seeing what had occurred from the periodic account statements provided by their bank. Nor did Mr Kobelt provide his customers with periodic account statements.

51 Until the end of 2010, the arrangements which Mr Kobelt made with his customers for Book-up appear to have been wholly verbal. Commencing in January 2011, Mr Kobelt had his customers provide an authority which he wrote out using a standard form of expression:

> I [name of customer] give Lindsay permission to take money from my Key Card [number of card].
>
> [Signature]

These authorities were written consecutively in an unused 2010 diary. One hundred and fifty one customers gave permission in this way, although there were 21 instances in which the authority, although written in the diary, was not signed by the customer, and there were two instances of customers having signed the diary without any authority having been written above their signature. Mr Kobelt said that the former occurred when a customer left the store before he had completed writing out the authority, and the latter because he had asked the customer to sign following his oral explanation but before writing out the authority. I am prepared to accept those explanations.

52 Apart from obtaining these authorities and making the entries on the masking tape, Mr Kobelt did not otherwise record in writing the terms and conditions on which he provided Book-up.

53 As at 5 November 2012, Mr Kobelt held the key cards of 85 customers which had been provided to him as part of Book-up. None of the cards had reached its expiry date.

54 The amounts of money which Mr Kobelt withdrew from the accounts of his customers using their key cards and PINs were substantial. In the period 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 in respect of the sale of second hand cars.

55 One of the consequences of Mr Kobelt's withdrawals of all, or nearly all, of the credit balances in the customers' accounts, was that they then had no means of acquiring food, groceries and the other necessities of life. Without their key card, it was, in any event, difficult for them to access any remaining balance in their account. Mr Kobelt addressed this circumstance by supplying goods to his customers by way of further Book-up (or "Book-down" as it was sometimes called) at Nobbys but, subject to a qualification, generally, he limited the credit allowed for this purpose to no more than 50% of the amount which he had withdrawn from the customer's account on the occasion of his most recent withdrawal.

This meant that the customers had to travel to Nobbys to acquire food and groceries rather than acquiring them from, say, the community stores at Mimili and Indulkana. The amount of credit Mr Kobelt allowed by way of Book-down was at his discretion, having regard to the amount which the customers booked up and their payment record.

56 The qualification mentioned in the previous paragraph is that Mr Kobelt would not, generally, allow the customers to access at the one time the whole of the notional 50% which was their entitlement. Instead, his practice was to limit customers' Book-down to amounts of $100, $150 or $200, depending on the customer and the amount withdrawn, rather than to 50% of the amount withdrawn, even when that amount exceeded those figures. Mr Kobelt said that he did this in order to ensure that his customers did not spend all their money at once and so would have "something" at the end of the week. In this way, Mr Kobelt controlled the expenditure of his Book-up customers.

57 Mr Kobelt did not maintain any record showing the balance available to each customer by reason of the 50% of the withdrawals he had said would be available to them. He said that he was not inflexible in the amount he allowed customers to Book-up for food and groceries. However, if he had not been able to withdraw money from a customer's account for a month, he would not allow any further Book-up of groceries or fuel.

58 As already noted, ASIC disputed Mr Kobelt's account that he had agreed, or would allow, Book-up customers to have 50% of the amount he had withdrawn from their accounts. It pointed to the absence of any separate recording of the amount available to the customers with the consequence that Mr Kobelt could not have known at any one time the amount of a customer's accumulated or residual entitlement. It also pointed to the absence of any discernible pattern in the amounts for Book-down recorded in the diaries. Further, several of the Anangu witnesses referred only to being able to Book-down "a little bit" and not to an understanding that they had an entitlement to 50%. With one exception, none said that their agreement with Mr Kobelt was for them to have access to 50% of the money he withdrew. I note that Mr Kobelt's own calculations of the amounts he had allowed by way of Book-down to four customers (to whom he referred in final submissions on this topic) were less than 50%, although in two cases, only marginally so. ASIC pointed to evidence showing that the amounts of Book-down were in some cases well less than 50%.

59 It is obvious that the 50% entitlement was not applied in a literal way. Instead, I consider that the Kobelts used it as a guideline as to the maximum amount of the Book-down which they

would allow. On occasion, some customers were allowed more, but generally the Kobelts tended to limit the amount of Book-down allowed so that it did not exceed 50% of the amounts which they had withdrawn from the customers' accounts.

60 I am prepared to accept that, in some cases, Mr Kobelt may have referred, when putting in place a Book-up arrangement, to a "50:50" or "half and half" split in his discussions with the Book-up customers but think it probable, and so find, that more often than not Mr Kobelt told the Book-up customers only that they could have "a little bit", or even only that they could have "some" food or groceries. In my assessment, the absence of any formal recording by Mr Kobelt of the amount to which the customers were entitled counts very much against him having agreed expressly that they were entitled to 50%.

61 When Mr Kobelt allowed a customer Book-down for food, groceries or fuel, he recorded the credit allowed in the same page in the diary on which he had recorded the Book-up for the car purchase, but in a column on the right side of the page. When this column was full, Mr Kobelt started a second column to its immediate left.

62 Thus, at least nominally, the diary entries were a rudimentary form of running account, with a succession of credits and debits, but with the limit on the amount which a customer could Book-up each fortnight having the effect that the customer's indebtedness to Mr Kobelt decreased over time.

63 Mr Kobelt did not record in the diary the balance owed by the customer after each transaction. However, he would calculate the balance from time to time, sometimes when prompted by a customer's request or when the customer was using Book-up to acquire another vehicle, and he would record that balance in the Book-down column. Because Mr Kobelt did not himself know the balance without calculating it, he would sometimes withdraw more from a customer's account than the customer owed him. That is to say, Mr Kobelt was making withdrawals from customers' accounts which were unauthorised. This could happen on successive paydays before he realised that the customer's debt had already been cleared. Mr Kobelt would make a reimbursement when he realised that too much had been taken from a customer's account.

64 When the customer had cleared the debt, Mr Kobelt would record "Pd" in the diary page, as an abbreviation for "paid".

65 It is difficult to discern from the evidence the average or typical periods for which Mr Kobelt retained his customers' key cards. Other than in circumstances in which Mr Kobelt returned the cards temporarily, to which I will refer shortly, he retained possession of them until the customers' debts had been discharged. This was usually for an extended period, that is to say, extending for at least several months. The customers were, correspondingly, without possession of their key cards for that period.

66 The Book-up diaries did not contain any entry relating to 19 customers for whom Mr Kobelt held a debit card. In one case, a customer's card was held in the plastic bag relating to another customer altogether, suggesting possibly that the card may have been held and used in relation to the debt of another, although there was no evidence from Mr Kobelt about that.

67 Sometimes Mr Kobelt would return, temporarily, a key card to a customer before the customer's debt had been paid in full. This occurred when the customer wished to travel away to, say, Alice Springs, Port Augusta or Adelaide and wished to have their key card with them as a means of obtaining cash. Mr Kobelt generally permitted this. Most customers, but not all, returned their card to Mr Kobelt on their return to the APY Lands.

68 On other occasions, Mr Kobelt would accede to a request from a customer intending to travel that money be left in the customer's account, allowing them to withdraw funds personally at a bank.

69 As is evident from the above, Mr Kobelt's system of recording transactions on Book-up was rudimentary. Not only was the system itself rudimentary, but the manner in which Mr Kobelt made the entries makes it difficult to understand the state of a customer's account at any one time. The handwritten entries were made in a cramped and somewhat chaotic manner and often Mr Kobelt would make entries over printed portions in the diaries. Many of the entries were illegible or only barely legible. Despite this, there is no suggestion that Mr Kobelt maintained his records dishonestly.

70 In 2014, Mr Kobelt commenced using ledger cards instead of diaries to record the Book-up transactions. Each customer had his or her own card. Mr Kobelt recorded the name of the customer and, in some cases, the customer's PIN on the card. Some of the ledger cards contained columns with the printed headings "Date", "Particulars", "Debit", "Credit" and "Balance". In the column headed "Particulars", Mr Kobelt recorded very brief details of the transaction, for example, "food" (to indicate the purpose of the Book-down), "Pd" (to

indicate an amount credited to the customer's account), or "cash" (if the customer had been advanced cash). The amounts shown in the debit and credit columns were the total amount debited or credited to the account, as the case may be, on the identified date. The entries in the "Balance" column, recorded the balance following that day's transactions.

71 As already noted, all but one of the customers to whom Mr Kobelt provided the Book-up facility were indigenous persons, and nearly all of these were residents of the APY Lands. Mr Kobelt did extend credit to non-Aboriginal persons, but on different arrangements. He did not require non-Aboriginal customers to provide security and relied on them to pay his account at the end of the week in which the credit was provided or, at the least, at the end of the following week.

72 The travel by Anangu customers to Nobbys often involved considerable distances. This can be illustrated by reference to the distance of Mimili and Indulkana (where many of the Book-up customers resided) from Mintabie. The more direct route from Mimili to Mintabie is by a back road, which is often rough, and is approximately 70 km one way. The route by the main road which is mainly on graded roads but includes a segment on the Stuart Highway is approximately 165 km one way. The route from Indulkana to Mintabie by the main road is approximately 116 km one way. Going by a rough back road is about 30 km less. Sometimes customers required fuel for the return journey. Mr Kobelt would provide Book-down for this purpose, but again generally subject to the amount of credit being provided not exceeding his 50% limit.

73 Some of the Book-up customers resided in communities which were much further distant than Mimili and Indulkana. These included Docker River, Uluru, Ernabella, Pipalyatjara, Kanpi, Finke and Wingellina. It is reasonable to infer that for customers residing in those places, a weekly or fortnightly trip to Mintabie was often impractical.

74 The system of Book-up I have described above is that applied by Mr Kobelt in relation to credit provided for the sale of cars. Most of the Book-up related to such sales. However, Mr Kobelt also provided Book-up for food and groceries to some customers who had not purchased a car. The system by which he did so was the same as that which I have recorded except that Mr Kobelt did not keep records of such Book-up transactions within the diaries. Instead, Mr Kobelt kept EFTPOS printed records of transfers made in a plastic bag containing the customer's key card.

75 Mr Kobelt contended that he had developed the system of Book-up at Nobbys to meet the needs of his Anangu customers. He referred in this respect to the decline in opal mining at Mintabie. Until the 1990s, some of the Anangu had derived income from "noodling" and selling the opal that they located. Very little noodling occurs now with the consequence that the Anangu no longer have income from that source. Mr Kobelt claimed that he commenced providing Book-up to address this circumstance, that is, to satisfy a demand from his customers.

76 This history may explain in part how Book-up developed, but I doubt that it is a complete explanation. I consider it likely that Mr Kobelt saw that providing Book-up was a means by which Nobbys could attract and retain customers as the population in Mintabie declined. However, whatever its historical origins, the conscionability or otherwise of Mr Kobelt's conduct is to be assessed by more contemporaneous circumstances.

77 A book-up system is not unique to Nobbys. I will refer later to evidence that forms of book-up are used elsewhere, both in Aboriginal communities and in rural and regional Australia. It is evident that book-up arrangements can take a variety of forms. It is appropriate to record therefore that this judgment concerns only Book-up at Nobbys, and not book-up systems more generally.

Purchase orders

78 Some of Mr Kobelt's customers lived in, and others from time to time travelled to, other communities in the APY Lands. It was often impractical for customers in these circumstances to travel to Mintabie to purchase food and groceries, or it was more convenient for them to make the purchases in their own community or the community they were visiting. In each of these circumstances, the customers had no ready access to cash or credit because Mr Kobelt held their debit card and PIN. Mr Kobelt had a system by which he could make credit available to some of these customers at some community stores in the APY Lands. This involved him issuing, at the customer's request, a "purchase order" to the store at which the customer wished to shop.

79 Customers would contact Mr Kobelt by telephone and ask for a purchase order to be issued to a store in a particular community. If Mr Kobelt agreed, he would send by facsimile to the relevant store a purchase order which named the customer, the amount of credit he authorised and often the nature of the authorised purchase, for example "goods" or "cash". The amounts so authorised varied between $20 and $500. The recipient store would then allow the

customer to purchase food or would issue cash to the customer to the amount stated in the purchase order and, in due course, Mr Kobelt would pay the store the amount it had allowed on credit or advanced in cash.

80 Thus, the purchase orders were in the nature of promissory notes pursuant to which Mr Kobelt undertook to pay the debt owed by the customer to another store in the APY Lands for the purchase of goods or the issue of cash.

81 Mr Kobelt said that he had never refused a request for a purchase order if it was to be used to purchase food. He has, however, on occasion, sent a purchase order for a lesser amount than that requested by the customer, say, $100 instead of $200, and had told the customer "you've already had plenty".

82 When Mr Kobelt honoured a purchase order, he made an entry in the Book-up diary showing the amount he had paid. This was in the nature of a debit to the customer's account with Mr Kobelt.

83 In the period between 6 April 2011 and 31 October 2012, Mr Kobelt issued 425 purchase orders for 121 customers with whom he had Book-up arrangements. The aggregate amount issued was $58,175.98 (Average: $136.68).

84 Mr Kobelt charged $10 for each purchase order. Accordingly, he earned $4,250 from the 425 purchase orders he issued between 6 April 2011 and 31 October 2012. I observe, however, that Mr Kobelt's system of providing purchase orders was cheaper than the comparable express money order service provided by Australia Post.

85 Not all stores in the APY Lands agree to purchase order arrangements with Mr Kobelt. In fact several do not. These include the stores at Fregon (Kaltjiti), Amata, Indulkana and Mimili. The service cannot be used in those cases. Mostly, that is because of decisions made by those stores. However, in the case of the Mimili Store, it is a consequence of a decision by Mr Kobelt in about 2007 after the Mimili Store had defaulted in making payment to Nobbys for goods it had supplied to customers, at the request of the Mimili Store, on credit. This is a significant limitation, given that many of Nobby's Book-up customers reside in Mimili. I add that, with the exception of the Mimili Store, Mr Kobelt is willing to send purchase orders to all community stores in the APY Lands.

Cash Advances

86 From time to time, some customers asked for a cash advance on Book-up. That is, they asked Mr Kobelt for cash instead of, or as well as, booking up food, groceries and fuel. The amounts involved were generally modest. Subject to the customer not exceeding the 50% limit he had imposed, Mr Kobelt generally accommodated requests of this kind.

87 I will refer later to evidence indicating that Mr Kobelt charged at least some of these customers a fee for providing cash advances.

Travel expenses

88 Mr Kobelt has allowed customers to use Book-down to purchase Greyhound bus tickets to travel away from the APY Lands. In fact, he has arranged the purchase of the tickets for customers as he has a 1300 number to Greyhound. On other occasions, he has sent money via Australia Post to customers so as to allow them to purchase bus tickets to return to the APY Lands. He said that it was rare for him to refuse a request of this kind.

Cancellation of key cards

89 It is open to the Book-up customers to cancel their key cards or to have their income paid into a different account. From time to time some did so. Usually action of this kind was taken without any prior notice to Mr Kobelt. The effect was that Mr Kobelt's next attempt at making withdrawals was unsuccessful.

90 With one exception, Mr Kobelt did not take enforcement action against these customers. He appreciated that it was not in his commercial or reputational interest to do so. Instead of confronting the customer, Mr Kobelt thought it better to wait and hope that the customer would in time wish to resume Book-down arrangements with him. At that time he would then insist that he be provided with the customer's key card and PIN so that he could resume making withdrawals.

91 Mr Kobelt's diaries contain a number of derogatory entries concerning customers, for example, "Bitch", "Slut" and "Get [expletive deleted] No More". Some of these entries were made by Mr Kobelt and some by his son Timothy. In particular, Mr Kobelt said that the "Slut" entries had been made by Timothy and that he had made the entries of "Bitch". Entries of these kinds were made when the Kobelts found that the customer had acted to preclude them from accessing the funds in their account, for example, by cancelling the key card or by having their income paid into another account. In later periods, Mr Kobelt stopped

using derogatory remarks of these kinds and, instead, used the numerical codes used by the banks to indicate that a withdrawal was not permitted.

The withdrawals on 14 December 2010

92 Mr Kobelt's conduct on 14 December 2010 provides an insight into his approach. Many of his Book-up customers had key cards issued by CBA. On 14 December 2010, CBA had an issue with its cash transfer system (CTS) which meant that some authorised transactions could not be processed by CBA that day. They were instead processed by CBA on the following day.

93 CBA effected the transfers on 14 December 2010 by a "forced process" which involved an overriding of its normal controls. One consequence of this was that withdrawals and transfers from debit accounts were approved, even though the withdrawals and transfers exceeded the available balance in the customers' accounts.

94 In its final submissions, ASIC referred to this temporary condition as a "glitch" in CBA's CTS.

95 Mr Kobelt must have been aware of the glitch on 14 December 2010. By a process of withdrawals extending over several hours, he withdrew a total of $56,944 from his customers' CBA accounts. Although the evidence did not disclose the aggregate amount which Mr Kobelt was usually able to withdraw from the CBA accounts of his customers, I am satisfied that $56,944 was much more than normal, and that Mr Kobelt must have appreciated at the time that that was so.

96 One of the consequences of Mr Kobelt's conduct on 14 December 2010 was that some of his customers' accounts were then in debit, with the further consequence that CBA would not permit any further withdrawals until the accounts were restored to a credit balance. In some cases this took two or more pension payments, that is, four or more weeks. The affected customers were necessarily without any income during this period.

97 I accept ASIC's submission that Mr Kobelt could not have thought that his customers authorised him to make these extra withdrawals. That is because there had been no forewarning of the glitch. Mr Kobelt could not have understood that the extra money which was available were pension "bonus payments" and could not, despite his evidence to the contrary, have heard his Anangu customers talking about extra money coming into their

accounts. His conduct reveals that his attitude was to transfer to himself whatever funds were available in a customer's account at any one time.

The February 2011 incident

98 In February 2011, five Anangu men (Brenton Edwards, Mr Doolan, Customer D, Mr Thornhill and Customer B) went to Nobbys with their employer, Tony Rogers. Mr Rogers is a non-Aboriginal man and was apparently assisting the five Anangu, as he himself did not use Book-up at Nobbys. The Court received only limited accounts of what occurred.

99 Mr Kobelt could recall only one of the five men (Brenton Edwards) asking for his key card to be returned. The fact that Mr Rogers accompanied five Anangu suggests that each may have been making a request of a similar kind to Mr Edwards.

100 Mr Kobelt said that on the occasion of the attendance of the men, both he and his son Timothy were present. He said that the Anangu were being "dragged around" by Mr Rogers and that he had been "putting the act on". However, when Timothy said that Mr Edwards' card would be returned to him if Mr Rogers was "prepared to take the money out of his pay and pay us", Mr Rogers "just bolted". Mr Kobelt denied that he or Timothy had refused to return Mr Edwards' card.

101 Customer D did not give evidence of this incident but instead gave evidence of another incident when he and other Anangu had gone to the police station at Marla. I will return to the evidence concerning that incident shortly.

102 Customer B's account was that Mr Kobelt had returned his card to him at the time but had declined to return the key cards of the others. I think it fair to describe his evidence about the February 2011 incident and the attendance at the Marla Police Station as being vague.

103 It is not possible to make detailed findings about the events when the Anangu attended Nobbys with Mr Rogers. I am, however, satisfied that Mr Rogers did accompany five Anangu and it seems that he acted as a spokesperson on their behalf. Mr Rogers demanded the return of at least one key card, but that was refused by the Kobelts unless Mr Rogers put alternative arrangements in place. In his evidence, Mr Kobelt acknowledged that he would have been satisfied with Mr Rogers deducting an amount from his employee's wages and remitting it to Nobbys.

104 There was also evidence that the South Australian Police at Marla intervened in February 2011 by obtaining at least some of the key cards held at Nobbys and then returning them to their owners. I infer that this occurred after Mr Roger's attendance at Nobbys and that he may have been instrumental in the making of the complaints.

105 Again, the evidence about the involvement of the South Australian Police was limited. In his cross-examination, Customer AH said that he remembered the police at Marla taking key cards away from Nobbys and giving him his key card. He said that later he took his key card back to Nobbys so that he could use it again for Book-up. Customers B and D gave disjointed accounts which seemed to be to the same effect.

106 ASIC sought to tender, pursuant to s 64(3) of the Evidence Act, affidavits made by the Customers AH and D in December 2010 and February 2011 to the police concerning Mr Kobelt's retention of their key cards. These affidavits were marked for identification (Exhibits MFI A24 and MFI A25). I did admit the affidavit of Customer B (Exhibit A26) but invited further submissions as to its use.

107 I have determined that the affidavits of Customers AH and D should not be admitted into evidence and do revise the ruling with respect to Exhibit A26. It is unnecessary to consider s 64(3) in detail, as I consider that the affidavits should be excluded in any event, pursuant to s 135 of the Evidence Act, as being more prejudicial than probative. The evidence does not disclose in any detail how the deponents came to make the affidavits, whether they had the assistance of an interpreter, and whether anyone else was present when the affidavits were made. Having regard to the evidence from the Customers AH, B and D in the trial, I consider that there is a real possibility that others had a significant hand in the preparation of the affidavits so that their content cannot be regarded as reliable.

108 Having ruled that the evidence is inadmissible, I have not had regard to the affidavits or to the incident concerning the Police at Marla in February 2011.

Nobbys' profit and loss statements

109 The profit and loss statements for the financial years ending 30 June 2010 and 30 June 2011 show that Nobbys is a successful business:

	2010	2011
Sales	$1,834,600	$1,936,694
Gross profit from trading	$370,160	$450,814
Expenses	$160,850	$156,244
Profit	**$234,782**	**$334,935**

110 The financial statements did not indicate the extent to which the sale of vehicles on Book-up contributed to the gross profit.

111 Against this background, I turn first to ASIC's claim that Mr Kobelt had contravened s 29 of the NCCP Act.

Section 29 of the NCCP Act

112 Section 29(1) of the NCCP Act, which prohibits a person from engaging in a credit activity without an appropriate licence, came into operation on 1 July 2011. It provides:

> A person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity.

It was common ground that Mr Kobelt has never held a licence to which s 29(1) refers.

113 A person engages in a "credit activity" for the purposes of s 29(1) if (relevantly) the person is a "credit provider", that is, a person who provides "credit" under a "credit contract". This is a consequence of the definition of "credit activity" in s 6(1) of the NCCP Act and the definition of "credit provider" in s 5 of the NCCP Act and in s 204 of the National Credit Code (the Code), which is Sch 1 to the NCCP Act. The term "credit contract" is defined in s 4 of the Code to be a contract under which credit is or may be provided "to which this Code applies".

114 The term "credit" is defined in s 3 of the Code as follows:

> (1) For the purposes of this Code, ***credit*** is provided if under a contract:
>
> (a) payment of a debt owed by one person (the ***debtor***) to another (the ***credit provider***) is deferred; or
>
> (b) one person (the ***debtor***) incurs a deferred debt to another (the ***credit provider***).

Section 3(2) of the Code specifies that, for the purposes of the Code, the "amount of credit" is the amount of the debt actually deferred.

115 Section 5 of the Code identifies the provision of credit to which the Code applies as follows:

> (1) This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered into or (in the case of precontractual obligations) is proposed to be entered into:
>
> (a) the debtor is a natural person or a strata corporation; and
>
> (b) the credit is provided or intended to be provided wholly or predominantly:
>
> (i) for personal, domestic or household purposes; or
>
> (ii) to purchase, renovate or improve residential property for investment purposes; or
>
> (iii) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and
>
> (c) a charge is or may be made for providing the credit; and
>
> (d) the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.
>
> ...
>
> (4) For the purposes of this section, the predominant purpose for which credit is provided is:
>
> (a) the purpose for which more than half of the credit is intended to be used; or
>
> (b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

116 ASIC alleges that between 1 July 2011 and 31 October 2012, Mr Kobelt contravened s 29(1) of the NCCP Act by his provision of credit to some 92 customers. Each of these customers purchased at least one vehicle from Mr Kobelt on Book-up. They are subset of the group of at least 117 customers to whom Mr Kobelt has provided credit since 1 June 2008.

117 Mr Kobelt admits that the 92 customers purchased vehicles from him after 1 July 2011 on the respective dates alleged by ASIC. He also accepts that, having regard to authorities such as *Geeveekay Pty Ltd v Director of Consumer Affairs Victoria* [2008] VSC 50; (2008) 19 VR 512 at [34], he provided credit to these customers. Thus, it was common ground that subparas (a), (b) and (d) of s 5(1) of the Code were satisfied in this case. The dispute as to the application of s 5(1) and, accordingly, as to whether Mr Kobelt had contravened s 29(1), went to whether Mr Kobelt had made any "charge" for his provision of credit to vehicle purchasers.

118 ASIC's case is that Mr Kobelt did impose a credit charge within the meaning of s 5(1)(c), being the difference between the sale price of vehicles when payment in full was made at the time of sale (the cash price) and the sale price when they were sold on Book-up. In the former case, the sale price was at least $1,000 less than the Book-up price, and often much less.

119 The term "charge" is not defined in either the NCCP Act or in the Code.

120 ASIC relied on the presumption contained in s 13(1) of the Code:

> (1) In any proceedings (whether brought under this Code or not) in which a party claims that a credit contract, mortgage or guarantee is one to which this Code applies, it is presumed to be such unless the contrary is established.

121 As can be seen, s 13(1) has the effect that it is to be presumed that Mr Kobelt's credit contracts with his customers were contracts to which the Code applied unless the contrary is established. Mr Kobelt accepted that he had the onus of establishing the contrary position.

122 In its opening submission, ASIC indicated that, in addition to relying on the presumption in s 13, it would rely on the decision in *Walker v Consumer, Trader and Tenancy Tribunal of New South Wales* [2013] NSWSC 1432 as authority for the proposition that a difference between the cash price and the price when sold on credit amounts to a credit charge. It is not necessary to refer to *Walker* presently as, in its final submissions, ASIC's primary position was that s 11 of the Code applied in Mr Kobelt's case.

123 Section 11 provides:

> (1) This section applies to a contract for the sale of goods if the amount payable to purchase the goods under the contract:
>
> (a) is payable by instalments; and
>
> (b) exceeds the cash price of the goods.
>
> (2) This section does not apply to a contract for the hire of goods even if the hirer has a right or obligation to purchase the goods.
>
> (3) For the purpose of deciding whether the contract is a credit contract and, if it is a credit contract, of applying this Code (including Part 6) to it:
>
> (a) a debt is to be regarded as having been incurred, and credit provided, in the circumstances mentioned in subsection (1); and
>
> (b) the debtor is the person who is to make the payments; and
>
> (c) the credit provider is the person who is to receive the payments; and
>
> (d) the charge for providing the credit is the amount by which the amount payable to purchase the goods, together with any other

> amount payable under the contract, exceeds the cash price of the goods.
>
> (4) This section does not affect the application of this Code to a contract that is, apart from this section, a credit contract.

As can be seen, s 11(1) provides that the section applies to "a contract for the sale of goods" if the amount payable to purchase the goods has the two features specified in the subsection, namely, the amount to be paid to purchase the goods is payable by instalments and that amount exceeds the cash price. In addition, subs (3)(d) provides that, for the purpose of deciding whether the contract is a credit contract and, if it is, of applying the Code to it, the charge for providing the credit is the amount by which the amount payable to purchase the goods exceeds their cash price.

124 ASIC submitted that s 11 is applicable because the price of the vehicles sold on Book-up was payable by instalments (subs (1)(a)) and it exceeded the cash price (subs (1)(b)). Mr Kobelt contended that neither element was satisfied.

125 Before addressing the parties' submissions about these matters, it is appropriate to identify the contracts in the present case to which s 11 is said to apply and the evidence concerning the price differential for cars sold on Book-up.

The contracts between Mr Kobelt and his customers

126 The sale of second-hand motor vehicles in South Australia is governed by the 2H Dealers Act. Section 17 of that Act imposes requirements in respect of contracts for the sale of such vehicles. Amongst other things, the contracts must be in writing (subs (1)(a)); comprised in one document (subs (1)(b)); contain prescribed information (subs (1)(d)); and a dealer must not submit a contract to a purchaser for signature unless it contains all the material terms of the contract (subs (4)). Until 31 August 2010, Form 3 in the *Second-hand Vehicle Dealers Regulations 1995* (SA) was the prescribed form of contract. Since then, Form 5 in the *Second-hand Vehicle Dealers Regulations 2010* (SA) has been the prescribed form.

127 ASIC tendered copies of 168 contracts relating to the sale by Mr Kobelt of second-hand vehicles. It is apparent that Mr Kobelt continued to use Form 3 from the 1995 Regulations until at least 23 November 2011. However, it was not suggested that anything turned on his continued usage of this form after the repeal of the 1995 Regulations became effective on 31 August 2010.

128 None of the 168 contracts referred to Book-up, or to the fact that the sales were by credit. Indeed, on one view, some of the printed terms in the Form 3 and Form 5 contracts may be inconsistent with the arrangements which were in fact contemplated by Mr Kobelt and his customers. I refer in particular to cl 4 in the Conditions of the contract:

> The buyer agrees that the property in the goods does not pass to the buyer until the price of such goods is paid in full to the seller. The buyer acknowledges that they hold the goods as bailee of the seller until payment is made for the goods supplied by the seller to the buyer. Such goods are held at the risk of the buyer. The buyer is obliged to store the goods so that they are clearly identifiable as the property of the seller.

129 Although this term suggests that Mr Kobelt retained ownership of the vehicle until the last payment was made on it, the parties to the contracts conducted themselves on the basis that there was a transfer of ownership at the time of initial purchase.

130 It is possible that the appropriate analysis is that there are two concurrent contracts: one relating to the purchase of the vehicle comprised of the Form 3 and/or Form 5 contract; and another relating to the provision of credit by Mr Kobelt. It is not necessary to explore that question because the term "contract" is defined in s 204(1) of the Code to include "a series or combination of contracts, or contracts and arrangements". Accordingly, even if there are two separate contracts, s 11 is capable of applying to them as a combination.

131 If that view be incorrect, then it would be necessary to consider the application of s 12 of the Code which applies to "related contracts" in respect of which the supplier of goods provides credit in respect of their purchase and when the amount to be paid under the contracts is payable by instalments. Section 12 seems to have the same effect (relevantly) as s 11. However, neither party suggested that s 12 may be applicable and it need not be addressed further.

The price differential

132 The question of whether the amount payable to purchase the second-hand vehicles on Book-up exceeded their cash price is essentially one of fact. However, it is appropriate first to have regard to the definition of "cash price" in s 204(1) of the Code:

> ***cash price*** of goods or services to which a credit contract relates means:
>
> (a) the lowest price that a cash purchaser might reasonably be expected to pay for them from the supplier; or
>
> (b) if the goods or services are not available for cash from the supplier or are

> only available for cash at the same, or a reasonably similar, price to the price that would be payable for them if they were sold with credit provided—the market value of the goods or services.

The first limb of this definition refers to the price at which the goods may be obtained for cash from the same supplier, whereas the second limb requires a comparison with market value. It is the former which is pertinent in this case.

Mr Kobelt's determination of the purchase price

133 Mr Kobelt acquires second-hand vehicles from a wholesaler in Adelaide. Sometimes he has them transported by truck to Mintabie but it is cheaper for them to be driven. Sometimes Mr Kobelt pays persons to drive the vehicles to Mintabie. On occasion, the drive to Mintabie reveals work which must be done before the vehicles are sold and Mr Kobelt arranges for that to be done in his yard.

134 When Mr Kobelt offers a vehicle for sale, he attaches to the vehicle the form containing the details required by s 16(1) of the 2H Dealers Act. That includes the price at which the vehicle may be purchased (the list price).

135 Mr Kobelt determines the list price by first aggregating the price he paid for the vehicle, the transport cost (if any) and the cost of any significant repair work he had caused to be carried out, and then doubling that sum. He then compares the figure so obtained with the prices for comparable vehicles being charged by car dealers in Alice Springs and by a competitor in Mintabie. This may lead him to adjust the figure so that it is a little less than the prices of his competitors. The resultant figure is then displayed in the vehicle as the list price.

136 This method of price fixation has not changed over the years and Mr Kobelt continues to apply it presently. As can be seen, it does not include any component calculated or identified specifically as a credit charge.

137 However, ASIC's case is that the sale price of vehicles embodies a charge for the provision of credit. It says that this is evidenced by Mr Kobelt charging a higher price to those who purchase cars on Book-up than the cash price. It contends that the difference is a credit charge for the purposes of s 5(1)(c) of the Code.

An alleged change of practice

138 Mr Kobelt acknowledged that in the past it had been his practice to have different amounts for the cash price and the Book-up price, but said that he had ceased doing so several years

ago. For reasons which I will give shortly, I do not accept Mr Kobelt's evidence concerning the time at which he ceased the practice.

139 ASIC relied first on statements made by Mr Kobelt and his son Timothy in the examinations it conducted pursuant to s 19 of the ASIC Act on 4 November 2011. The statements by Timothy Kobelt are to be taken as an admission of Mr Kobelt: Evidence Act s 87(1)(b).

140 Mr Kobelt gave the following answers in his examination:

> Q: ... What's your average profit margin to make sure that it's profitable for you up there for selling cars?
>
> A: I don't look at – it's a hard one to answer. I don't look at it – what's my average profit margin. I try to make – on a car, it all depends what – you know, I put the price on the car anyway, so – and *if they give me cash, it comes down quite a bit, you know, for a quick turnover*, but if ...
>
> Q: If it's on credit?
>
> A: If it's on credit, well, I try and make a couple of thousand at least.
>
> Q: On the car?
>
> A: Two and a half – yes.
>
> (Emphasis added)

141 Later in the examination, Mr Kobelt said as follows:

> Q: ... You mentioned that you – if you're selling cars on credit, you try to make a profit of about two and a half thousand dollars each, but if they give you cash for a car, the price comes down quite a bit. Can you give us an approximate – what's the approximate sort of profit margin you look for in a cash sale for a car? Obviously less than two and a half thousand for ...
>
> A: The other day – I'll give you an example. On two four-Wheel Drives that were sold, we virtually made nothing on one – and I mean virtually nothing – and the other one I made 1,700.
>
> Q: Ok.
>
> A: And they were done two weeks apart.

142 In his cross-examination in the trial, Mr Kobelt said that he had given this example for the purpose of pointing out the difference between a cash sale and a sale on Book-up. Later, Mr Kobelt appeared to retract this answer in so far as it referred to his practice at 4 November 2011, but acknowledged that his practice in the past had been to charge one price for a cash sale and another when providing credit on Book-up.

143 In his s 19 examination, Mr Kobelt also gave the following answers:

Q: In regards to food, do you have – is there a cash price and a book-up price for food and fuel?

A: A cash price? No, it's all the same price.

Q: And cars?

A: Well, I've explained that. *Cars – they get them cheaper if they pay cash*.

(Emphasis added)

144 Timothy Kobelt gave the following answers in the course of his s 19 examination:

Q: So who's got the final say on how much you sell the cars [for]?

A: [My father's] got the final – yes, yes. *Unless they've got cash, then whatever is on the paperwork I know I can drop a thousand dollars off straightaway (sic) without asking him*.

Q: If it's cash?

A: Mm' Hm.

Q: *So if its book-up you're looking at least a one thousand dollars more on the price. Is that ...*

A: *Because it takes longer to pay and that, but they've got the cash, so we give them a fair price, a reasonable price.*

Q: Leaving aside book-up prices and cash prices ... from your experience, what's the price range you see the cars at?

A: Between four and a half to seven thousand, seven thousand, seven thousand price range.

Q: All right. *So seven thousand, if it's a cash price you're looking at six ... and so forth*.

A: *Yeah*.

Q: *Is that right*?

A: Yes. It just all depends what sort of vehicles. I had a 2001 Mitsubishi four-wheel drive, I think – or a Ford Challenger there the other day *and that went for a cash price. I actually dropped $2,000 off that*.

(Emphasis added)

145 ASIC also adduced evidence of a statement made by Timothy Kobelt to its investigators one year later when they attended at Nobbys on 5 November 2012 as part of its investigation. Timothy Kobelt told the investigators:

> If they bring in the whole amount of money for a car, we will drop at least $1,000 off the price straight away.

As can be seen, these statements by Mr Kobelt and Timothy Kobelt suggested that the practice of applying a price differential between the cash price and the Book-up price was current at 4 November 2011 and at 5 November 2012.

The statements of Mr Kobelt's solicitor

146 As part of its case that Mr Kobelt had a higher price for Book-up than he did for cars sold for cash, ASIC also relied upon statements made by Mr Kobelt's solicitor, Mr Proud, in relation to an application by Mr Kobelt for a credit licence in late 2013 and early 2014.

147 On 4 October 2013, Mr Kobelt lodged with ASIC an application under s 36 of the NCCP Act for a credit licence. It seems that this application was unsigned and did not provide all of the information and attachments which ASIC required. Under cover of a letter dated 30 October 2013, Mr Proud provided ASIC with the signed and dated application form together with a "Systems Plan", supporting documents and a document entitled "LG Kobelt – Summary of Business". Mr Proud's covering letter included the following:

> With respect to paragraph 3 of the attachment no terms for the loan [are] stated as the customer's income may vary from time to time and that will govern the terms of the loan. No interest or fees are charged but as stated in the Application, *a credit charge applies being the difference between the cash price for the vehicle and the full price*.
>
> (Emphasis added)

148 On a page in the Systems Plan headed "Background", Mr Proud stated:

> The business will hold an Australian Credit Licence in respect of that part of its business of selling second hand motor vehicles on credit.
>
> The business only operates from the store at Mintabie and the only people involved in motor vehicle sales are its principal, Lindsay Kobelt and his son Timothy who is an employee of the business. The business has been selling vehicles on credit for over 20 years. Timothy Kobelt has been employed in the business for about seven years during which time he has been involved in selling vehicles on credit and he is experienced in that role. ...
>
> The majority of customers are aborigines from nearby aboriginal communities and are generally known to the Licensee through dealings at the store.
>
> Dealings with customers are relatively straightforward. *The credit charge forms part of the sale price of the vehicles being the difference between the cash price and the full price of the vehicle*. There is no interest charged. Payment is made via Keycards which the customers deposit as security for the instalment payments to be made by the customer and they provide the PIN and authorisation to make withdrawals from the card.
>
> ...
>
> (Emphasis added)

149 On a page entitled "LG Kobelt – Summary of business", Mr Proud said:

> It is the car sales business which requires a credit licence. The vehicles are in the lower price bracket and the main source of customers is the nearby aboriginal community. The vehicles are either sold on credit or [for] cash. *In the event of a cash sale Mr Kobelt is prepared to sell the vehicles for [a] slightly discounted price, more often than not being $1,000 or so. Under the Code the difference between the cash price and the credit sale price is regarded as a credit charge and hence he needs to be licensed under the Act.*
>
> ...
>
> Mr Kobelt does not require any external borrowings for his business to enable him to finance the cars for sale. All the stock in trade is purchased by Mr Kobelt *and the finance charge is part of the sale value of the vehicles*.
>
> (Emphasis added)

150 In his instructions in early 2014 to counsel retained on behalf of Mr Kobelt in relation to the credit licence application, Mr Proud referred to the price differential between cash and credit sales and told counsel that, because of that differential, Mr Kobelt was required to hold a credit licence under the NCCP Act. It is reasonable to conclude that Mr Proud, as a conscientious solicitor, had satisfied himself of the currency of these instructions to counsel, especially as Mr Proud regarded it as "highly desirable" for instructions to counsel to be as accurate as possible.

151 Mr Proud and Mr Kobelt appeared before an ASIC delegate on 2 April 2014 for the purpose of providing evidence and submissions in support of the application for a credit licence. On the previous day, Mr Proud had provided a written submission to the delegate in support of the application in which, under the heading "Qualifications, experience and training", Mr Proud stated:

> [Mr Kobelt] has not previously been required to be licensed. It is because under the National Credit Legislation *the difference in prices which Mr Kobelt will charge for vehicles sold on credit as opposed to those which are sold for cash* is regarded as a credit charge and because of that he is required to be licensed.
>
> (Emphasis added)

Statements to similar effect were made in paras 2.7 and 4 of the written submission.

152 As the same time as providing the written submission, Mr Proud also provided an updated Systems Plan. Although the updated plan differed in several respects from that provided in October 2013, the sections under the headings "Background" and "Contractual

Documentation" were unchanged. Accordingly, Mr Proud repeated the statement that there was a credit charge forming part of the sale price of the vehicles, it being the difference between the cash price and the full price of the vehicle.

153 At the hearing before the ASIC delegate on 2 April 2014, Mr Kobelt gave the following answers to questions from Mr Proud:

> Q: Now, you've of recent – up until the recent times, continued to sell cars on credit?
>
> A: Yes.
>
> Q: It is the position that until you had me investigate things, you didn't realise – you didn't believe that there was a requirement for you to be licensed?
>
> A: No, definitely not.
>
> Q: And now that when I've gone through things thoroughly with you, you reluctantly agree that you will have to pursue your licence application?
>
> A: Oh, yes, oh, definitely, because it's a good part of my business and I've got to do it and I've started doing it.
>
> Q: And you've engaged me to prepare loan documentation which will comply with the requirements?
>
> A: Yes.

Assessment of the evidence concerning the alleged change of practice

154 The inference which arises strongly from the whole of this evidence is that in November 2011, November 2012 and in late 2013 and early 2014, it was Mr Kobelt's practice to charge one price when selling a car on Book-up but a reduced amount for a cash sale. However, in his cross-examination, Mr Kobelt resisted this inference, saying that it would have been "four years ago or more" since he applied a price differential for cash and credit contracts.

155 I formed an unfavourable view of Mr Kobelt's evidence on this topic. I considered that he was not being frank with the Court and was instead seeking to establish, falsely, that the price differential practice had ceased by at least 1 July 2011 when the prohibition in s 29 of the NCCP Act became operative. Both the documentary evidence and the manner in which Mr Kobelt gave the oral evidence justify that conclusion.

156 I observe first that the answers of both Mr Kobelt and his son in the s 19 examinations on this topic were expressed in the present tense. Not only that, but Mr Kobelt prefaced the example which he gave of the margin he had made on the two 4-Wheel Drives with the words "the other day", thereby implying recency. Mr Kobelt said in evidence that by that expression he could have meant "two or three months before". I note, however, that Mr Kobelt's

handwritten list of the vehicles he had sold includes the sale of two vehicles in October 2011 which match the description of the vehicles he had given in the example. In my opinion, these matters indicate that Mr Kobelt was referring to a practice which was still current in October and November 2011.

157 Secondly, it is highly improbable that Mr Kobelt would have applied for a credit licence in October 2013 if he had ceased applying a price differential between cash and credit sales some years earlier. The making of the application was an occasion of some expense for Mr Kobelt: not only did he have to pay an application fee of $605, he had to pay the costs of Mr Proud's representation of him in relation to the application. Mr Kobelt did not present as a man who would incur expenses of this kind unnecessarily. The fact that he made the application, for the reasons given by Mr Proud to ASIC, is highly probative of the fact that Mr Kobelt was still applying a price differential at the time. In fact, Mr Proud acknowledged in his evidence in chief that if he had not understood that Mr Kobelt applied a price differential that "we wouldn't have filed the application".

158 Mr Kobelt accepted that Mr Proud had provided him with a copy of his letter on 30 October 2013 at or about the time he had provided it to ASIC. Accordingly, he had had the opportunity to correct any misapprehension by Mr Proud but did not do so.

159 In his evidence, Mr Proud said that Mr Kobelt had told him "some time between November 2011 and [October 2013]" that there was a difference between the cash price and the credit price of his cars. He was also certain that he had been told in the latter part of 2011 that Mr Kobelt was applying a price differential.

160 There seemed to be a hint in some of the submissions made on Mr Kobelt's behalf that Mr Proud had relied on dated instructions from Mr Kobelt when preparing the documents which he submitted to ASIC. That is to say, that Mr Proud had unwittingly represented as the current position that which Mr Kobelt had told him about some time previously.

161 I reject that suggestion, to the extent that it was made. It was open to Mr Kobelt to have led evidence from Mr Proud to this effect if that was the case, and (with the exception of one ambiguous question) he did not. It appears in any event to be contradicted by an email from Mr Proud to Mr Kobelt on 10 April 2014, to which I will refer shortly, in which he said that he had pointed out "on numerous occasions" that the a difference between the price for a cash sale and a sale by instalments was deemed to be a credit charge. It can be inferred from this

evidence that Mr Proud and Mr Kobelt had discussed the position on more than one occasion. If, at the time of those discussions, Mr Kobelt had changed his practice, it is inconceivable that he would not have informed Mr Proud of that fact. Having regard to these matters, the suggestion is inherently implausible.

162 I find that Mr Proud's instructions had not have changed by the time he prepared and provided the two Systems Plans to ASIC in October 2013 and April 2014 respectively. I am confident that Mr Proud would have been endeavouring, as a conscientious solicitor, to record and convey accurately his instructions. It is highly improbable that Mr Proud would have drafted the Systems Plan or the Summary of Mr Kobelt's business in the way that he did had he been told by Mr Kobelt that his practice of applying a price differential in the case of cash and credit sales was historic only.

163 I am also confident that Mr Proud would not have referred to the price differential in the written submissions he presented to ASIC's delegate on 1 April 2014 if he had had instructions from Mr Kobelt that he no longer applied that practice. Similarly, the fact that Mr Proud did not alter the section in the Systems Plan dated April 2014 under the heading "Background" is confirmatory of the fact that he had instructions from Mr Kobelt at the time that this was a current practice. The fact that Mr Kobelt did apply a price differential was the very rationale for the credit licence application. That being so, it is implausible that Mr Kobelt kept his change in practice secret from Mr Proud.

164 The impact on Nobbys' business of a refusal of the credit licence application anticipated by Mr Kobelt and Mr Proud in 2014 is pertinent. Mr Proud told ASIC's delegate, in the presence of Mr Kobelt, that the effect of a refusal of the grant of a licence would be "to force him out of business and [would] have serious impact[s] not only on Mr Kobelt but on the surrounding community". Again, I am confident that Mr Proud would not have made a submission to that effect if the instructions from Mr Kobelt were that he had changed his practice some years earlier.

165 Next, the events occurring after ASIC informed Mr Proud of the refusal of the credit licence by letter dated 7 April 2014 are informative. Mr Proud telephoned Mr Kobelt on the following day. During the course of the conversation, Mr Proud advised Mr Kobelt that he should sell all of his vehicles at the same price, so that there was no difference between those sold on Book-up and those sold by cash. He said that this was the *first* time he had told Mr Kobelt about the possibility that he (Mr Kobelt) could change his practice in relation to

car prices. Mr Kobelt's answer was to the effect that he "could easily do that", that is, change his practice. Further, Mr Proud agreed with Mr Kobelt in the telephone call that he would discuss the proposal that all vehicles be sold at the one price with Mr Waters, Mr Kobelt's accountant, and call Mr Kobelt back. Mr Proud said that he did not remember speaking to Mr Waters but accepted that it was likely that he had discussed with Mr Waters the effect of the proposal on Mr Kobelt's business.

166 On 10 April 2014, Mr Proud sent an email containing advice to Mr Kobelt. The email contained the following:

> I have pointed out to you on numerous occasions that where there is a difference in the selling price between a cash sale and a sale by instalments the difference in Price is deemed to be a credit charge.
>
> I quoted to you the following passage from a book I have on the legislation –
>
> > "Where the product price does not vary according to whether the customer pays upfront or by instalments, obviously no charge has been imposed."
>
> Earlier there is this passage –
>
> > "Credit will not be regulated unless a charge is or may be made for providing it."
>
> Therefore, if you are able to change your business practice to ensure there is no difference in the selling price between a cash sale and an instalment sale your business will not require you to be the holder of a credit licence.

The terms of Mr Proud's advice are inconsistent with him having been told previously by Mr Kobelt that he had ceased the practice of a price differential between vehicles sold for cash and on Book-up.

167 The evidence of Mr Proud's communications with Mr Kobelt in April 2014 indicates that they discussed then a proposal that Mr Kobelt *commence* selling all vehicles at the one price, irrespective of whether they were sold on credit or for cash, with a view to overcoming the difficulty arising from the refusal of the grant of a credit licence.

168 Counsel for Mr Kobelt submitted that Mr Proud's understanding that the price differential in Mr Kobelt's case meant that a credit charge was made for the provision of credit was incorrect. The submission seemed to be that, in this circumstance, Mr Proud's statements about there being a credit charge could not constitute a form of admission binding Mr Kobelt. I accept that Mr Proud's understanding of the position is not conclusive. The characterisation of the price differential as a credit charge or otherwise is to be determined in this Judgment, irrespective of the view previously taken by Mr Proud. However, Mr Proud's recording of

his instructions from Mr Kobelt as to the way he priced his vehicles is capable of constituting evidence of an admission by Mr Kobelt as to the factual basis upon which the Court should make its determination and is, in any event, material by which the reliability of Mr Kobelt's evidence on this topic is to be assessed.

169 The inferences arising from the whole of this evidence are overwhelming. They contradict Mr Kobelt's assertion in evidence in the trial that he had changed his practice up to four years previously. I am not prepared to attribute Mr Kobelt's oral evidence on this topic to faulty memory, as his counsel submitted. It is implausible that this is a matter about which Mr Kobelt could have been honestly mistaken.

170 Counsel for Mr Kobelt advanced other explanations: that Mr Kobelt may have changed his practice without informing Mr Proud; or that he may have suspended the price differential practice with the intention of resuming it if granted a credit licence. The first difficulty with these submissions is that Mr Kobelt did not give evidence supporting either and could not even say whether he had told ASIC's delegate on 2 April 2014 of a change in practice. The second is that they are in any event implausible. I am not willing to accept that they reflect the truth of what occurred.

171 Accordingly, I find that, until at least April 2014, it was Mr Kobelt's practice when selling vehicles to do so at a reduced price in respect of customers who could pay the purchase price in full at the time of purchase and the list price to those to whom he provided credit by way of Book-up. The difference between these two prices was a charge for credit. Accordingly, I am satisfied that the s 11(1)(b) element is established.

172 Strictly speaking, a finding that the practice continued until at least April 2014 is not necessary in respect of the 92 purchasers who were the subject of ASIC's pleading. As noted, those persons purchased the vehicles from Mr Kobelt in the period between 1 July 2011 and 31 October 2012. It may, however, bear on ASIC's application for injunctions.

The sale by instalments

173 Section 11(1)(a) requires that the amount payable to purchase the goods be payable by "instalments". That amount is not necessarily the same as the sale price, but the distinction is not important in this case.

174 ASIC submitted that the periodic withdrawals of money from customers' accounts by Mr Kobelt amounted to payment by instalments for the purposes of s 11(1) even though the

amounts withdrawn varied from fortnight to fortnight or, by reason of Mr Kobelt's provision of further credit until the next payday, were not equal in effect. Mr Kobelt, on the other hand, submitted that the word "instalments" is used in s 11(1) with the meaning of "separate fixed amounts [payable] at successive fixed periods". As the payments by his customers did not answer that description, he contended that the s 11(1)(a) requirement was not satisfied.

175 Mr Kobelt submitted that the proper construction of the term "instalments" was "informed by certain distinctions historically drawn by contracts for the sale of goods or real property between executory and executed contracts, and how obligations to pay were treated". This led his counsel to refer to 18th and 19th Century authorities concerning executed and executory contracts and to decisions concerning contracts for the sale of goods by instalments.

176 In my opinion, considerations of this kind are unhelpful. The task for the Court is the conventional one of statutory interpretation in which the starting point should be the text, context and purpose of the provision (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 at [47]) and not ancient authority. In particular, it would be inappropriate to approach the task of statutory interpretation with the view that the Parliament intended, when enacting the NCCP Act and the Code in 2010, to use terms with the meaning discussed in 18th and 19th Century English authorities (in the context in some cases of the sale of goods by instalments) and not their ordinary and natural meaning. Similarly, it would be inappropriate to take as a starting point the view that the term "instalments" has a fixed meaning in the law and that the Code uses the term "instalments" with that meaning only.

177 The term "instalments" is not defined in either the NCCP Act or in the Code. It is defined in the Macquarie Dictionary relevantly as follows:

> **instalment … 1.** any of several parts into which a debt or other sum payable is divided for payment at successive fixed times; *to pay for furniture by instalments.* **2.** a single portion of something furnished or issued by parts at successive times; *a serial in six instalments*.

Mr Kobelt referred to definitions in similar terms in *Wharton's Law – Lexicon*, Stevens & Sons Limited (1892), the *Shorter Oxford English Dictionary*, (3rd ed) and *Butterworths Australia Legal Dictionary*, (1997). On their face, these definitions provide some support for

Mr Kobelt's submission that an instalment in the context of a contract for purchase is a part payment determined in advance and payable at a pre-determined time.

178 However, in my opinion, that is not the only meaning of the word "instalments". It is also used in common parlance and in the law to refer to successive part-payments, even when the amount of each part-payment may vary. See for example, *Provident Capital Ltd v Bortolin Papa (No 1)* [2011] NSWSC 460 at [19]; *Guthrie (as liq of Ult Ltd (Rec Apptd) (In Liq)) v Radio Frequency Systems Pty Ltd* [2000] WASC 152; (2000) 34 ACSR 572 at [129]; and *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234, (2001) 53 NSWLR 43 at [76]. Further, the former Credit Acts in some States referred to instalments in the context of lay-buy arrangements in a way which assumed that both the number and amount of the instalments may be left to the discretion of the purchaser. For example, s 14(2)(b) of the *Credit Act 1984* (NSW) referred to a purchase price which was "payable by instalments (whether the number of instalments or the amount of all or any of the instalments is fixed by those conditions or is left at the option of the purchaser) payable over a fixed or ascertainable period". Section 14(2)(b) of the *Credit Act 1984* (WA) and of the *Credit Act 1985* (ACT) and s 16(2) of the *Credit Act 1987* (Qld) contain or contained counterpart provisions in similar terms.

179 In 1971, the Crowther committee in the United Kingdom provided its report on consumer credit. In [1.2.10], the committee reported:

> As broad rule of thumb, short-term credit is usually repaid in one lump sum – this is true of account credit, and of pawn brokers' and some money lenders' loans. Medium and long-term credit is more usually repaid by instalments, usually of equal size and at regular intervals over an agreed period. *But there are many exceptions to both statements*.
>
> (Emphasis added)

180 These authorities, statutes and sources indicate that the term "instalments" does not have a fixed and immutable meaning. They also indicate that understanding the term "instalments" in s 11 as referring to payments of varying amounts at unspecified intervals is not necessarily to impute a strained or unnatural meaning to the legislation.

181 As to context, some assistance may be gained from other sections in the Code. Most of the other usages of the term "instalments" are consistent with either meaning. However, the terminology in ss 10 and 65 is pertinent. Section 10 of the Code is the counterpart provision

to s 11, it being concerned with contracts concerning land and s 11 being concerned with contracts concerning goods. Other than in its heading, s 10 does not use the term "instalments". Instead, it refers to a person who is "bound to make a payment or payments" to, or in accordance with the instructions of the vendor without thereby becoming entitled to a transfer of the land. This may suggest that the concept of instalments in the Code is capable of encompassing any periodic or successive payments which a purchaser of land is bound to make. Ordinarily, one would expect a payment which a purchaser is "bound" to make to be an identified amount, but this need not be so necessarily. It would, for example, be surprising if a part-payment lost its character as an instalment merely because it exceeded the minimum amount which the purchaser was then bound to pay.

182 Sections 17(7) and (9) of the Code contain provisions concerning changes in the amount and frequency of the repayments and instalments to be paid under a credit contract.

183 Section 65 of the Code is concerned with notification to consumers of changes in repayment arrangements. Subsection (3) provides:

> (3) If the amount or frequency or time for payment of instalments or minimum repayments is not specified in the credit contract but is determined by a method of calculation so specified, this section requires the credit provider to give particulars only of any change in that method of calculation.

As can be seen, subs (3) contemplates that the amount, frequency or time for payment of instalments may not be specified in a credit contract, although a method of calculation of those matters may be so specified. This is consistent with the term instalments referring to amounts whose quantum may vary and which are paid at non-regular intervals.

184 The Code enacted in 2009 took the place of the Uniform Consumer Credit Code adopted in the legislation of the States and Territories. That Uniform Consumer Credit Code was set out in the Appendix to the *Consumer Credit (Queensland) Act 1994* (Qld). The counterparts to ss 10, 11 and 12 of the Code were ss 10A, 10B and 10C of the Uniform Consumer Credit Code which were inserted by amendment in 2008. The enabling legislation of the other States and Territories had the effect that, once the Queensland Code had been amended, those amendments also applied throughout Australia.

185 In the Second Reading Speech introducing the Bill for the amendments to the Uniform Consumer Credit Code, the Attorney-General in Queensland said:

> The amendments in this bill have been recommended by a Post Implementation

> Review of the Code undertaken by the Ministerial Council on Consumer Affairs and by a National Competition Policy review.
>
> The amendments ensure credit arrangements known as 'terms sale of land contracts', 'conditional sale agreements' and 'tiny terms contracts' are clearly brought within the scope of the Code.
>
> A terms sale of land contract involves the sale of land where the purchase price is payable to the vendor in instalments. A conditional sale agreement is similar to a terms sale of land except that this form of agreement involves the sale of goods. Tiny terms contracts are contracts where the cost of credit is incorporated into the cash price and transaction is represented as a sale of goods by instalment without any credit charges.
>
> It is arguable these types of arrangements are already covered by the Code. There have been a number of court decisions which have confirmed this view, including a decision in the Victorian Supreme Court earlier this year. However, due to the doubts raised in the reviews, the Ministerial Council on Consumer Affairs approved amending the Code to ensure that consumers utilising these credit arrangements are protected under the Code.

The decision of the Victorian Supreme Court to which the Minister referred appears to be *Geeveekay* to which I referred earlier.

186 As can be seen, the purpose of the amendments was to enlarge the application of the Code and to increase the protections available to consumers. The same purpose can be imputed in relation to s 11 of the Code. There is no indication that the Attorney-General intended the word "instalments" in s 10B of the former Uniform Consumer Credit Code to have a narrow meaning.

187 I have looked at the 18th and 19th Century cases to which counsel for Mr Kobelt referred, being *Jones v Barkley* [1781] 2 Dougl 685 at 689-91, 99 ER 434 at 437-8; *Kingston v Preston* [1773] 2 Doug KB 689, 99 ER 487 (referred to in *Jones v Barkley*); *Hoare v Rennie* (1859) 5 H&N 19, 157 ER 1083; *Lee v Butler* [1893] 2 QB 318; and *Helby v Matthews* [1895] AC 471. I do not regard any of these authorities as being of assistance in the present context.

188 Following the completion of the final submissions, the solicitors for Mr Kobelt provided, by leave, references to two further authorities which were said to concern the concept of "instalments". I have read both authorities, or at least the passages to which counsel referred, and do not regard them as being of assistance presently. The first was the decision of the Court of Appeal in *WJ Allan and Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189. The case concerned different issues from those in this case and the passage at 217G-218B to which counsel referred was a discussion of a purchaser's rights when one instalment in a series of instalments falls short of the prescribed quality.

189 The second was *Howell v Evans* (1926) 134 LT 570. That case concerned a contract for the sale of good by instalments. It is an illustration of the unsurprising proposition that, when goods are delivered by instalments which are to be paid for separately, the buyer is bound to accept and pay for each instalment when delivered. The case does not, on my understanding, bear on the issues arising under s 11 of the Code.

190 Finally, counsel for Mr Kobelt drew attention to the fact that contraventions of s 29(1) of the NCCP Act have penal consequences. He submitted that this has the consequence that s 11 of the Code should, if there is doubt about its proper construction after other methods of interpretation have been exhausted, be construed narrowly. Counsel referred to the authorities now summarised in Pearce and Geddes, *Statutory Interpretation in Australia* (Lexis Nexis 8th ed, 2014), at [9.8]-[9.10]. It is not necessary to refer to those authorities in detail as it is uncontentious that the fact that penal consequences attach to breaches of a statutory provision may be relevant to its proper construction: *Alcan* at [57]. However, other considerations are also pertinent, including the evident protective purpose of the legislation.

191 It would be inappropriate in my view for the obvious beneficial purpose of the NCCP Act and of the Code to be frustrated by a narrow construction of the term "instalments". I observe in this respect that there does not seem to be any apparent reason to understand the Code as being intended to apply only to contracts involving instalments of some kinds, and not to others. In particular, it is difficult to see why it should be understood as applying only to contracts which require payments of fixed and regular amounts. Section 65(3) to which I referred earlier is inconsistent with such an intention.

192 The focus of s 11 appears to be on contracts for the sale of goods in which the price is paid by a series of successive payments. In my opinion, the term "instalments" is used as a convenient way of describing such payments. Provisions such as s 17(7) and (9) of the Code may indicate that, ordinarily, the amount, timing and frequency of the payments will be specified in the contract but it is not appropriate to regard s 11 as referring only to contracts in which these matters are specified.

193 Having regard to these considerations and the approaches to statutory constructions which I have endeavoured to apply, I consider that the present case is not one in which it is necessary to apply the "last resort" approach concerning the consideration of penal statutes discussed in the authorities.

194 I conclude that, having regard to the text, context and purpose, the term "instalments" in s 11(1)(a) is used in the sense of a succession of part-payments whether or not those part-payments vary in amount, time or frequency.

195 For these reasons, I conclude that Mr Kobelt's contracts for the sale of cars on Book-up were contracts for the sale of goods in which the purchase price was payable by instalments to which s 11 refers.

The effect of the application of s 11

196 As noted earlier, s 11 applies to a contract for the sale of goods if the amount payable to purchase the goods under the contract is both payable by instalments and exceeds the cash price of the goods. On my findings, both these elements are satisfied in Mr Kobelt's case. This means that, for the purposes of s 5(1)(c), the "charge" for the credit provided by Mr Kobelt is the amount of the price differential.

197 Accordingly, the Code applied to the contracts. Mr Kobelt has not established the contrary position. It can, accordingly, be concluded that Mr Kobelt breached s 29(1) of the NCCP Act in relation to each of the 92 customers.

198 In this circumstance, it is not, strictly speaking, necessary to consider ASIC's submission that the change in practice claimed by Mr Kobelt would not in any event have had the effect that there was no longer a credit charge contained within the credit contracts. ASIC's submission was to the effect that, if the Court is satisfied that the credit contracts prior to the claimed change of practice included a credit charge, then the circumstance that Mr Kobelt no longer sold for a reduced amount on cash sales would not alter that circumstance. The credit charge was still there, but more disguised. ASIC submitted that the change in practice, if it occurred, may have made it more difficult to prove the existence of a credit charge, but would not have altered the fact of its existence. It would mean only that those purchasing by cash sales would have been paying for the provision of credit which they did not use.

The position without applying s 11

199 I add that, even without s 11, I would have found that Mr Kobelt made a charge for his provision of credit for the purposes of s 5(1)(c). Section 11(4) provides expressly that s 11 does not affect the application of the Code to a contract which is, apart from s 11, a credit contract. It contemplates expressly that s 11 is not to confine the application of other provisions in the Code.

200 As already noted, the term "charge" as used in s 5(1)(c) is not defined. There is, however, no need for the term to be construed narrowly so as to be confined, say, to an interest charge or even to a charge in the nature of interest. The term is capable of encompassing amounts paid on account of the provision of credit. In determining the meaning of s 5(1)(c), it should be read as a whole. Section 5(1)(c) uses the expression "a charge is or may be made for providing the credit". In my opinion, this can be understood naturally as meaning an amount which must be paid by the customer in consideration of the provision of the credit. In the case of Mr Kobelt's sale of cars on Book-up, that amount is the difference between the price customers pay if purchasing their vehicles for cash and the price they pay if purchasing on Book-up. This is the amount to which s 11(3)(d) refers. The circumstance that the differential is not identified in advance by Mr Kobelt and may be determined at his discretion on a case by case basis does not alter its character. It remains an amount, however disguised in the purchase price, which represents a charge for Mr Kobelt's provision of credit.

201 Mr Kobelt's explanation for the price differential is significant to the assessment of the position if s 11 is put to one side. He gave the following evidence:

> Q: Now, I'm not asking you about any transactions or sale in respect of cars that took place after June 2011. Okay. Do you understand?
>
> A: Yes.
>
> Q: Now, when a customer comes in to buy a car and you offer to sell it for a lesser price than the marked price on the sheet in the car, why do you do that?
>
> A: I would sooner have a little bit of money than put it on the book-up and get the card cancelled on me.

I understood Mr Kobelt to be saying in this passage that he had been prepared to accept the reduced price in order not to run the risk of the customer defaulting in the Book-up arrangement if the vehicle was sold on credit.

202 As can be seen, this explanation of Mr Kobelt related only to the period before 30 June 2011. Mr Kobelt did not give any explanation for a price differential since that date, it being his position that there had been no such price differential. Counsel submitted, however, that it should also be understood as the explanation for the price differential since 1 July 2011, if that was the Court's finding.

203 Counsel for Mr Kobelt submitted that he (Mr Kobelt) had elected to take less than the "market" price for vehicles "for his own commercial reasons", namely, to obviate the risk of default. This was different, he submitted, from loading a "market" price with a credit charge.

204 In my opinion, this is not a material distinction. The effect of Mr Kobelt's own evidence just quoted is that customers to whom he provided Book-up paid more in order to provide compensation to him for the risk that he undertook that they may default in the payment arrangement. That is a charge of a typical kind "for" the provision of credit.

205 Counsel for Mr Kobelt also emphasised that this was not a case like *Walker*. This had the effect, it was submitted, that the reasoning applied in that case was inapplicable in the present.

206 In *Walker*, a consumer had purchased a vehicle for a net price of $20,285. In order to make that payment, the consumer entered into an agreement with a financier (a related company of the vehicle's vendor) for a loan of $20,285. This loan agreement was supported by a bill of sale over the vehicle. The agreement provided for the loan amount to be repaid in instalments and made no provision for interest. The issue in the case was whether the Uniform Consumer Credit Code, made applicable in New South Wales by s 5 of the *Consumer Credit (New South Wales) Act 1995* (NSW), applied to the sale contract and the bill of sale. The resolution of that issue turned on s 6 of the Uniform Consumer Credit Code, the terms of which are relevantly similar to s 5 of the Code and, in particular, whether any charge had been made for the provision of credit.

207 The Court found that there was a distinct differential between the vehicle's sale price and its retail value at the time of sale and that this differential was a concealed credit charge. That is, that although there was no separate and distinct identified amount imposed for the provision of credit, such a charge was incorporated in the vehicle's sale price, evidenced by the fact that it well exceeded the market value of comparable vehicles at the time. Put more shortly, the vehicle's sale price had been inflated to include an unspecified credit charge. This engaged para (b) of the definition of "cash price" set out earlier in these reasons.

208 Counsel for Mr Kobelt emphasised that ASIC had made no attempt to establish that Mr Kobelt was making a charge for the provision of his credit by inflating the sale price of the vehicles he sold beyond their *market value*. I accept that that is so. However, it is not conclusive of whether there is a charge for credit in Mr Kobelt's contracts with his consumers. *Walker* is not to be understood as evidencing the only means by which the existence of a charge for credit may be demonstrated. The terms of s 11 and para (a) of the definition of "cash price" make that plain.

209 *Walker* does however, provide support for ASIC's contention that a charge may be made for the provision of credit even though the exact amount of the charge cannot be established: at [137]. That is to say, ASIC may succeed if it establishes that a charge is made, whatever the amount of that charge may be.

Summary on s 29

210 For these reasons, I am satisfied that ASIC has made good its claim that, in the period between 1 July 2011 and 31 October 2012, Mr Kobelt contravened s 29(1) of the NCCP Act in respect of the 92 customers listed in Schs B and C to the Amended Statement of Claim. His contraventions continued until at least April 2014.

Unconscionable conduct – the "system" case

211 As noted at the commencement of these reasons, ASIC's unconscionability case is in two parts. Its primary case (and the case which ASIC pursued) is that, by his conduct since at least 1 June 2008 in relation to the credit provided to at least 117 customers, Mr Kobelt engaged in "a system of conduct or pattern of behaviour" which was unconscionable, in contravention of s 12CB(1)(a) of the ASIC Act. ASIC's secondary case was that Mr Kobelt's conduct in relation to the Book-up provided to each of four particular customers between 2010 and 2013 was unconscionable, again in contravention of s 12CB(1).

212 For the reasons already mentioned, it is not necessary to make findings in ASIC's secondary case.

Section 12CB of the ASIC Act

213 Section 12CB(1) prohibits unconscionable conduct in trade or commerce in connection with the supply of financial services. It was amended with effect from 1 January 2012 but neither party submitted that the amendments were material to the outcome in the present case. In the form in force since 1 January 2012, s 12CB provides (relevantly):

> (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.

...

214 As can be seen, the prohibition on unconscionable conduct imposed by s 12CB relates to conduct in "trade or commerce" in connection with the supply or acquisition of "financial services". Subsection (4) indicates a legislative intention that the prohibition may apply to "a system of conduct or pattern of behaviour". There was no counterpart to s 12CB(4)(b) in the ASIC Act before 1 January 2012. However, it was established before the introduction of that provision on 1 January 2012, that a system or pattern of conduct by a trader could constitute unconscionable conduct without the need to identify the circumstances of, or the effect on, any particular consumer: *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226, (2005) 148 FCR 132 at [33]. Mr Kobelt did not contend to the contrary.

215 Mr Kobelt accepted, appropriately, that his provision of credit to the 117 purchasers of second hand vehicles was conduct in "trade or commerce" and was conduct in connection with the supply of "financial services" to individuals. Accordingly, the sole issue arising in relation to ASIC's allegation is whether Mr Kobelt's conduct in the implementation of his Book-up system is "unconscionable". Mr Kobelt's counsel acknowledged that that was so.

216 The term "unconscionable" used in s 12CB(1) is not defined in the ASIC Act. Its meaning has been discussed in a number of authorities concerning the application of s 12CB and

counterpart provisions in consumer protection legislation. Section 12CB(4)(a) indicates that the meaning is not limited by the unwritten law of the States and Territories. This has the consequence that the concept of unconscionability in the present context should not be constrained by cases in general law and equity: *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389, (2011) 15 BPR 29,699 at [291]; *National Exchange* at [30]; *Paciocco v Australian and New Zealand Banking Group Ltd* [2015] FCAFC 50; (2015) 236 FCR 199 at [283] (Allsop CJ, with whom Middleton and Besanko JJ agreed).

217 In a number of cases, it has been said that in order for conduct to be characterised as "unconscionable" it must demonstrate a high level of moral obloquy on the part of the person said to have acted unconscionably: *Attorney General of New South Wales v World Best Holdings Ltd* [2005] NSWCA 261, (2005) 63 NSWLR 557 at [121]; *Tonto Home Loans* at [291]; and *Paciocco v Australian and New Zealand Banking Group Ltd* [2016] HCA 28, (2016) 333 ALR 569 at [188] (Gageler J). In *Paciocco*, Allsop CJ (with whom Besanko and Middleton JJ agreed), emphasised that the use of the term "moral obloquy" should not become a substitute for the application of the statutory criterion, and is instead a means of informing the content of that criterion.

218 Allsop CJ also emphasised that Spigelman CJ had used the term "moral obloquy" in *World Best* so as to indicate that the moral or normative standard in unconscionability is higher than that of unfairness or unjustness, at [261]. Allsop CJ then continued at [262]:

> That a degree of morality lies within the word "unconscionable" is clear. "Unconscionability" is a value-laden concept. "Obloquy" is "the condition of being spoken against; bad repute; reproach; disgrace; a cause of detraction or reproach,"; "obliquity" is "a deviation from moral rectitude, sound thinking or right practice; a delinquency; a fault or error.": *The Shorter Oxford English Dictionary on Historical Principles* (3rd Ed, Oxford, 1969) Vol 2 p 1428. That unconscionability contains an element of deviation from rectitude or right practice or of delinquency can be readily accepted, as long as the phrase "moral obloquy" is not taken to import into unconscionability a necessary conception of dishonesty. The statutory language is "unconscionable": that is, against conscience. A sense of moral obloquy or moral obliquity can be accommodated within the meaning or conception of unconscientious or unconscionable conduct. That said, an understanding of the meaning conveyed by the word "unconscionable" in the statute is not simply restated by substituting other words for those chosen by Parliament; danger easily lurks in the use of other words to capture the meaning of the statutory language. The task involved is not the choice of synonyms; rather, it is to identify and apply the values and norms that Parliament must be taken to have considered relevant to the assessment of unconscionability: being the values and norms from the text and structure of the Act, and from the context of the provision. …

219 In the paragraphs which followed, Allsop CJ discussed a number of the values and norms by which the characterisation of conduct as unconscionable or otherwise is to be made. At the heart of those norms and values, is the concern of equity to protect the vulnerable from exploitation by the strong: *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461-2 (Mason J), 474-5 (Deane J); *Blomley v Ryan* (1956) 99 CLR 362 at 405 (Fullagar J), 415 and 428-9 (Kitto J); *Louth v Diprose* (1992) 175 CLR 621 at 626-7 (Brennan J), 637 (Deane J) and 650 (Toohey J); *Bridgewater v Leahy* (1998) 194 CLR 457 at 485-6 (Gaudron, Gummow and Kirby JJ); and *Kakavas v Crown Melbourne Ltd* [2013] HCA 25, (2013) 250 CLR 392 at [117], [161].

220 In the earlier Full Court decision in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, the Court stated at [41]:

> ... The word "unconscionability" means something not done in good conscience: Notions of moral tainting have been said to be relevant, as often they no doubt are, as long as one recognises that it is conduct against conscience by reference to the norms of society that is in question. The statutory norm is one which must be understood and applied in the context in which the circumstances arise. The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty.
>
> (Citations omitted)

Earlier, at [23], the Court said:

> The task of the Court is the evaluation of the facts by reference to a normative standard of conscience … . That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers. The content of those values is not solely governed by the legislature, but the legislature may illuminate, elaborate and develop those norms and values by the act of legislating, and thus standard setting. The existence of State legislation directed to elements of fairness is a fact to be taken into account. It assists the Court in appreciating some aspects of the publicly recognised content of fairness, without in any way constricting it. *Values, norms and community expectations can develop and change over time*. *Customary morality develops "silently and unconsciously from one age to another", shaping law and legal values: Cardozo, … . These laws of the States and the operative provisions of the ACL reinforce the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure. These considerations are central to the evaluation of the facts by reference to the operative norm of required conscionable conduct*.
>
> (Citation omitted and emphasis added)

221 Both s 12CB(4)(b) and the authorities indicate that conduct may be characterised as unconscionable even without the examination of the circumstances concerning its effect on a particular person: *National Exchange* at [33]; *Australian Securities and Investments Commission v Cash Store Pty Ltd (in liq)* [2014] FCA 926 at [83]. This means that it is not necessary for ASIC to show that individual customers of Nobbys were in a situation of special disadvantage of the kind discussed in *Blomley v Ryan* by Fullagar J at 405 and by Kitto J at 415 and in *Commercial Bank of Australia v Amadio* by Mason J at 462 and 467. Nevertheless, proof that those to whom a system is applied do suffer from disadvantages such as poverty, need, illiteracy, lack of education, or lack of assistance when assistance is necessary (see *Blomley v Ryan* at 405) will be relevant.

222 An absence of immoral or dishonest motives does not preclude the characterisation of conduct as unconscionable: *Johnson v Smith* [2010] NSWCA 306 per Allsop P at [5] and Young JA at [98]-[102] and *Paciocco* per Allsop CJ at [305]. However, in equity a predatory state of mind, and not mere heedlessness of, or indifference to, the best interests of the weaker party, is required: *Kakavas* at [161].

223 Subsection (4)(c) indicates some matters to which the Court may have regard in determining whether conduct to which a contract relates is unconscionable and makes it plain that the Court is not limited to consideration of the circumstances relating to the formation of the contract. The Court may, in addition, have regard to the manner in which, and extent to which, the contract is carried out.

224 Section 12CC(1) also lists of a number of matters to which the Court may have regard for the purpose of determining whether a supplier has contravened s 12CB. Section 12CC was also amended with effect from 1 January 2012. Neither party suggested that the amendments were material presently, so that it is convenient to refer only to s 12CC in its current form. The matters listed in s 12CC include the relevant strengths of the bargaining positions of the supplier and the service recipient (subpar (a)); whether the service recipient was required to comply with conditions which were not reasonably necessary for the protection of the legitimate interests of the supplier (subpar (b)); whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services (subpara (c)); whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient by the supplier (subpara (d)); the amount for which, and the circumstances under which, the service recipient could have acquired equivalent

financial services from someone else (subpara (e)); 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 (subpara (f)); the extent to which the supplier failed unreasonably to disclose matters which might affect the service recipients' interests (subpara (i)); the extent to which the supplier was willing to negotiate the terms of the contract (subpara (j)(i)): and the extent to which the supplier and the service recipient acted in good faith (subpara (l)).

225 The list of factors contained in s 12CC(1) which may be taken into account is not exhaustive. They and any other relevant matters should be considered and weighed as a whole. Some may weigh in favour of the characterisation of the conduct as unconscionable and others may not: *National Exchange* at [40].

226 Finally, in identifying the principles to guide the Court's approach, it is appropriate to refer again to passages in the reasons of Allsop CJ in *Paciocco*:

> [296] The working through of what a modern Australian commercial, business or trade conscience contains and requires, in both consumer and business contexts, will take its inspiration and formative direction from the nation's legal heritage in Equity and the common law, and from modern social and commercial legal values identified by Australian Parliaments and courts. The evaluation of conduct will be made by the judicial technique referred to in *Jenyns*. It does not involve personal intuitive assertion. *It is an evaluation which must be reasoned and enunciated by reference to the values and norms recognised by the text, structure and context of the legislation, and made against an assessment of all connected circumstances*. The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; 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 respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.
>
> [297] The variety of considerations that may affect the assessment of unconscionability only reflects the variety and richness of commercial life. It should be emphasised, however, that faithfulness or fidelity to a bargain freely and fairly made should be seen as a central aspect of legal policy and commercial law. It binds commerce; it engenders trust; it is a core element of decency in commerce; and it gives life and content to the other

> considerations that attend the qualifications to it that focus on whether the bargain was free or fair in its making or enforcement.
>
> (Emphasis added)

I do not understand the principles and approach outlined above to have been affected by the decision of the High Court in *Paciocco*.

227 Having regard to these authorities and principles, it is necessary to make factual findings concerning the number of the features upon which ASIC's case, and Mr Kobelt's defence, relied.

The conduct in question

228 Earlier, I said that it was Mr Kobelt's conduct in relation to the Book-up provided to 117 customers which ASIC alleged was unconscionable. The 117 customers are identified in Schedule A to the Amended Statement of Claim. It is appropriate to identify more particularly the aspects of Mr Kobelt's conduct which are the subject of this allegation. ASIC alleged that it was the combined effect of these aspects which made the conduct unconscionable.

229 The first aspect upon which ASIC relied was Mr Kobelt's requirement in relation to his provision of credit that the customers provide him with a debit card linked to a bank account in the customer's name and into which the customer's income (whether it be social security payments or wages) was paid, together with the PIN for that debit card.

230 Next, it relied on Mr Kobelt's conduct in taking and retaining possession of the card and recording the PIN.

231 The third aspect was Mr Kobelt's conduct in periodically, and usually on the customer's payday, using the key card and PIN to withdraw the whole or nearly the whole of the credit balance in the customer's account in reduction of the debt owing to him, thereby leaving no, or only limited, funds available to the customer. ASIC referred to this as the "Withdrawal Conduct".

232 The fourth aspect was the effect which this conduct had in making the customers dependent on Mr Kobelt then providing credit for them to obtain the everyday necessities of life. Usually this involved the customers having to travel substantial distances to make purchases at Nobbys. Alternatively, the customers were dependent on Mr Kobelt providing, at his

discretion and for a fee, purchase orders enabling them to make purchases at other stores or, alternatively, advancing them cash.

233 Next, ASIC relied upon Mr Kobelt's knowledge of, or at least reckless indifference to, a number of matters, including that the customers were indigenous residents of the APY Lands and, in the overwhelming majority of cases, had no or only limited assets, only limited incomes and low levels of financial literacy; and the consequences for the customers of his conduct outlined above.

234 Finally, ASIC alleged that Mr Kobelt was recklessly indifferent as to the affordability to the customers of the amounts of repayments which he intended to extract by the Withdrawal Conduct.

Nobbys' Book-up customers

235 ASIC's pleaded case concerning the circumstances of the 117 customers was as follows:

> [13] Nobbys' customers were at all relevant times Indigenous residents of the APY Lands and in the overwhelming majority of cases:
>
> [13.1] had very limited or no net assets;
>
> [13.2] had very limited net income; and
>
> [13.3] had low levels of financial literacy;
>
> (the "**Circumstances of Nobbys' customers**").
>
> [13A] At all relevant times the APY Lands was comprised of remote and impoverished communities.

There then followed particulars derived from ABS statistics and NAPLAN data to which I will refer shortly.

236 Mr Kobelt acknowledged that the 117 customers who used Book-up to purchase cars were indigenous residents of the APY Lands. He said, however, that he did not know, and could not admit, ASIC's pleaded allegation that, in the overwhelming majority of cases, these customers had no, or only very limited, assets, had very limited net incomes, and had low levels of financial literacy. This dispute led to the Court receiving a considerable amount of evidence bearing upon ASIC's characterisation of Nobbys' customers.

237 However, in his final submissions, counsel for Mr Kobelt acknowledged that it would be appropriate for the Court to find that the majority of the customers (but not the overwhelming majority) had very limited, or no, assets and had limited or very limited net incomes. With

respect to their financial literacy, counsel submitted that the Court should find that the customers had a sufficient degree of financial literacy to understand the basic terms of the Book-up arrangement offered by Mr Kobelt, that they did in fact understand the arrangements and their consequences, and that they had entered into the Book-up arrangements in the exercise of their free will.

238 ASIC maintained that the Court should conclude that the overwhelming majority of Mr Kobelt's Book-up customers were indigenous residents in remote communities who were impoverished (in the sense of having no, or only limited assets and only limited income) and with low levels of financial literacy. ASIC relied on evidence of a variety of kinds to support this submission.

239 Before referring to that evidence, I record my acceptance of ASIC's submission that proof of its "system" case does not require proof of the individual circumstances of each customer to whom the system applied.

Remoteness

240 The remoteness of the communities and, in particular those of Mimili and Indulkana from where the majority of Mr Kobelt's customers came, was not in issue. At the commencement of this judgment, I referred to Mintabie being 1,100 km north of Adelaide. It is about 45 km west of Marla. The communities mentioned in the evidence, including Indulkana, Mimili, Fregon (Kaltjiti), Amata, Docker River, Uluru, Ernabella, Pipalyatjara, Kanypi, and Wingellina are to the north or the northwest from Mintabie and Finke is to the northeast. That is, they are still further from Adelaide. Three communities, Docker River, Finke and Uluru, are in the Northern Territory. Wingellina is in Western Australia.

241 The Stuart Highway which connects Adelaide and Darwin is at the eastern end of the APY Lands and, in part, traverses it. It is a well-made sealed highway but, with the exception of streets in the communities themselves, no other roads in the APY Lands are sealed.

242 Mimili has a sealed airstrip which is used by the Royal Flying Doctor Service in emergencies, and twice a week by a mail plane. The truck supplying the Mimili Store comes once per week.

243 Earlier in these reasons, I noted that travel by the main road from Mimili and Indulkana to Mintabie involved, respectively, journeys of 165 km and 116 km one way. There are more

direct routes by backroads but these are often rough. The distances from Mimili and Indulkana by these backroads are, respectively, 70 km and 86 km one way.

244 Mr Stauner, to whose evidence I will refer shortly said that only one community on the APY Lands had mobile phone access, that being Pukatja (Ernabella).

245 It is plain that these are remote communities. This remoteness has a number of consequences of present relevance. First, travel from one community to another involves journeys over significant distances. Public transport between the communities is not available. Journeys from Mimili and Indulkana, and from the other communities, to Mintabie, are accordingly occasions of some expense, just for fuel (said to cost $2.30 per litre on the APY Lands), and the road conditions are such that the wear and tear on vehicles is significant. However, Dr Martin, the anthropologist, said that it was not uncommon for Aboriginal residents in remote communities to travel significant distances to access goods and services and that significant travel is not ordinarily seen as a disincentive for Aboriginal consumers.

246 Secondly, mainstream banking services are not available on the APY Lands. An Anangu wishing to do business with a bank will have to travel to Coober Pedy, Port Augusta or Alice Springs, each of which would involve a journey of considerable distance. This makes it difficult for APY residents to develop familiarity with the use of financial institutions.

247 The lack of ready access to mainstream banking facilities may in part be an explanation for an absence of financial awareness of some residents as revealed in some of the evidence. For example, Customer AW, a resident of Mimili, gave the following evidence (with the assistance of an interpreter):

> Q: Apart from using Book-up to buy a car, do you know of any other ways to buy a car?
>
> A: No.
>
> Q: Have you heard of something called a bank loan?
>
> A: No. She never heard about it.

The view

248 At the request of ASIC and in the presence of the parties and their representatives, the Court conducted, pursuant to s 53 of the Evidence Act, a view at Mimili, Indulkana and Mintabie. Section 54 of the Evidence Act authorises the Court to draw any reasonable inference from what it sees, hears or otherwise notices during such a view.

249 At Mimili, the Court was shown first the Mimili Family Centre. The Centre opened in August 2013. Before then it operated out of smaller premises which are now used for a Church Sunday school. The Centre is a well-appointed facility which provides a number of services and activities, including administering the Home and Community Care (HACC) Program for youth and disabled, providing breakfasts and lunches for the aged and disabled, a meeting place for groups within the community, and playgroups for children. The Centre serves breakfast to about 20 people each morning. The Centre also provides toilets, showers and washing machines for use by the community as well as a service washing the blankets of the old people. A "Men's Shed" is being developed. Many service providers who visit Mimili use rooms in the Centre. One of these service providers is Bikes Palya, an organisation based in Adelaide, which provides both bicycles and instruction on their repair and maintenance.

250 The Centre is open from 9 am to 5 pm seven days a week. It employs six Anangu, each of whom works 25 hours a week, as well as some casuals who work three hours per week. The employer is the Department for Communities and Social Inclusion (DCSI).

251 Secondly, the Court viewed the Mimili Maku Store, which is managed by Outback Stores Pty Ltd. Its manager is non-Aboriginal. The Court observed that the store (which is small to medium sized and well-established) sells a range of food, groceries, fresh fruit and vegetables, household items, toys, equipment and car products. It has an ATM, a facsimile machine and internet connection. The Mimili Maku Store is owned by the community which elects a Board of Directors annually. The Board sets the long-term goals and aspirations for the store.

252 Thirdly, the Court viewed the office conducted by the PY Ku Aboriginal Corporation (the PY Ku Centre). This was described as a "rural transaction centre" and a number of transactions concerning "Government business" are conducted at it. These include Centrelink, Skill Hire (a job network provider) and Australia Post (for the distribution of mail). Community members may make free use of a computer in the PY Ku Centre, including for internet banking. At the time of the view, there was also an internet centre in Mimili but that was to close on 30 June 2015. The PY Ku Centre was established in Mimili in about 2009 as a means of making more services available to residents in the community. Centrelink officials who visit Mimili about every five weeks, and the Magistrates Court of South Australia which visits Mimili three times a year, make use of rooms in the PY Ku

Centre. The Centre also contains a pay phone available for use by those community members who do not have a home phone. There is no mobile phone access to Mimili. There is frequent use of the pay phone.

253 The employees in the PY Ku Centre are employed by PY Ku Aboriginal Corporation which has contracts with a number of Government agencies for the delivery of services.

254 Fourthly, the Court viewed the MoneyMob Talkabout (MoneyMob) office which was staffed by one non-Aboriginal and one Anangu. It was apparent that the latter works under the close supervision of the former. A third person was said to be "available". MoneyMob provides advice and information to community members in connection with matters of finance, including payment of fines, banking, debt recovery, referrals to financial counsellors, budgeting and making the money last until payday. MoneyMob may see between 25 and 50 people each day.

255 Fifthly, the Court viewed the Internet centre. It was managed by a coordinator of non-Aboriginal descent. The Internet Centre provides internet services which may be used for banking, Centrelink, online shopping, and access to Skype, social media and computer games.

256 As the Court party walked to the next viewing point, it observed employees of the Regional Anangu Service (RAS) at work. The RAS provides municipal services in the APY Lands and has a unit based in Mimili. It attends to maintaining roads and the airstrip, picking up and disposing of rubbish, street cleaning, gutter cleaning and the like. RAS provides employment for the local Anangu. The Court noted that there were five Anangu working in the four wheel drive and trailer at the time.

257 The sixth viewing point was the Mimili Maku Arts Centre. It is managed by a coordinator (a non-Aboriginal) who reports to the Centre's Board of Directors. The Centre, which commenced in 2008, has about 20 current artists, although not all were present at the time of the Court's view. It was of a kind commonly seen in communities on the APY Lands but with separate men's and women's painting areas. The Centre employs four permanent part-time arts workers who are Anangu and some casual staff. The coordinator described the Centre as being a "really successful business and economy for [the] Mimili community".

258 Next, the Court viewed the Mimili Maku Accommodation Centre. The Centre is a well-appointed facility which provides self-servicing accommodation for the employees of

Government and private organisations carrying out work in, or in the vicinity of, Mimili. A number of the facilities such as the kitchen and lounge areas are shared.

259 Finally, the Court viewed the Police Station which had opened in 2009. Four police officers are engaged at the Station. In addition, there is a Police Aboriginal Liaison Officer who may become a Community Constable.

260 The Court observed generally the streets and housing in Mimili (but did not enter any private home). The streets were clean and tidy.

261 With the exception of the school (which the Court walked past), the Court viewed all the public and community facilities in Mimili and those providing employment. It was obvious that most of the employment available in Mimili is, whether directly or indirectly, publicly or community funded. There were no industries and, with the exception of the Arts Centre, no other forms of productive enterprises. Economic opportunities are, accordingly, limited.

262 The Court stopped at Indulkana on the way to Mintabie and viewed the Indulkana Store. It too sells a range of food, groceries, fresh fruit and vegetables, household items, vehicle products and toys. The Court noted that street and road making and maintenance seemed to be a source of employment in Indulkana. Mr Kobelt described Indulkana as being "rougher" than Mimili. That description is consistent with the Court's own observations (noting that these were external observations only).

263 Finally, the Court viewed Nobbys and the other two stores in Mintabie (Sam's and Scrooge's). Mintabie had mobile phone reception. Nobbys had a range of goods for sale, including frozen meat, frozen takeaway food, fresh fruit and vegetables and a generally similar range of food and grocery items as sold by the Mimili and Indulkana Stores. The other two stores also had a generally similar range of goods for sale, but their ranges did not correspond entirely with that of Nobbys, nor did the range of goods sold at Nobbys correspond entirely with theirs. Given its small population, Mintabie appears to be well serviced with stores and it seems reasonable to infer that there is competition for the available trade. Mr Kobelt thought that Nobbys does more trade than Sam's or Scrooge's.

264 The Court observed that, on the road between Mimili and Indulkana, there were numerous cars at the side, or just off, the road. These appeared to be broken down, abandoned or derelict. Some seemed to have been pushed off the road by the grader carrying out road maintenance. Many of the vehicles seemed to be of the kind sold by Nobbys.

265 In both Mimili and Indulkana, the Court noted that there were large numbers of residents standing about, apparently unoccupied. The Court did not itself observe signs of material wealth in either community. None were pointed out by counsel for Mr Kobelt. Dr Martin, a social anthropologist, said that an overriding characteristic of the Aboriginal population in the APY Lands is their poverty. The Court's observations were to similar effect. It is obvious that the various services at Mimili described above are directed, in large part, to addressing aspects of poverty and disadvantage and the lack of ready access to mainstream facilities.

Evidence from a financial counsellor

266 ASIC led evidence from Mr Stauner, a financial counsellor who, between 13 May 2013 and 14 December 2014, was employed by MoneyMob. He provided education and assistance to the Anangu on the same range of money matters as did MoneyMob in Mimili. Mr Stauner was based at Amata but also provided financial counselling services to the communities at Pipalyatjara, Kanpi, Kalka, Nyapari and Murpatja. From time to time, he assisted residents at the Pukatja and Mimili communities. Several of the persons whom Mr Stauner assisted had no, or only limited, English.

267 I considered his evidence and opinions to be reliable and accept them.

268 In the 12 month period from November 2013 to November 2014, Mr Stauner assisted approximately 30 indigenous persons to cancel their existing key cards and to obtain replacement key cards and PINs. Some he assisted more than once. Mr Stauner said that between three and five of those he had assisted had told him that the cancelled key card had been "left" at Mintabie, or words to a similar effect. I infer (as did Mr Stauner) that by this statement, the client was explaining to Mr Stauner that they had left the key card at a store in Mintabie as part of a Book-up arrangement. Others told Mr Stauner that they had "lost" their key card. Mr Stauner agreed in cross-examination that it was common for Amata residents to travel to Mintabie, a journey of about two and a half hours.

269 Mr Stauner described low levels of financial literacy among those whom he assisted (more than 150). He said, by way of example, that many Anangu incurred telephone and internet debts because of a lack of understanding that there is a limit to the amount of usage, and because they allowed others to use their mobile phones when they travelled from the APY Lands.

270 Mr Stauner described 90-95% of MoneyMob's clientele as receiving some form of welfare payment, mostly Newstart Allowance, Disability Support Pension or Family Tax Benefits A and B. He tried to assist them in preparing a budget in order to manage their income and expenditure. Mr Stauner found that most of his clientele had difficulty in understanding the concepts of budgeting and planning for the future. He expressed the following opinions based on his experience:

> There is an exceptionally low level of financial literacy (sophistication) and awareness of financial matters of the clients who have come to see me, with many having trouble understanding the contracts and what they mean. …
>
> This is then compounded by the fact that up to 70-80% of the communities have very low numeracy skills and most Anangu have difficulty doing mental arithmetic.
>
> The communities have a poor perception or understanding of access to credit facilities generally and do not understand there are ways of acquiring whitegoods, cars and other household requirements other than book-up.
>
> ….
>
> Many of the communities have poor verbal and written English literacy and numeracy skills.
>
> My clients have difficulty in understanding basic sentences, as I have experienced when trying to explain what they have signed … means.
>
> The concept of saving money from their fortnightly Centrelink payments to last the next two weeks is not appreciated as they do not understand basic budgeting.
>
> … Bank statements and Superannuation statements are brought into the office for explanation and whilst the level of understanding is increasing many of the communit[ies] still cannot read or understand these statements unassisted.

271 In relation to the understanding generally amongst the Anangu of credit facilities, Mr Stauner gave the following evidence:

> The impact of not being able to do basic arithmetic makes understanding credit providers' brochures or websites extremely difficult, or indeed the long term responsibilities of taking out loans as detailed in this literature.
>
> As there are no banks in the APY Lands it is hard for the community to understand where and how credit can be obtained. My experience with several clients shows that applying for loans on line is difficult for many clients who are not computer literate and there is still a requirement (even if computer literate) to sign paperwork and have the originals forwarded to the closest bank or building society and then wait for the financial institution to give approval and deposit the funds in the client's account.
>
> It is seldom that Anangu qualify for credit cards as they have difficulty in providing the 100 point identification requirement or [in supplying] the necessary income documentation.
>
> This is compounded as the closest bank or building society branches are 500 kilometres away and there is no easy access to public transport.

272 In relation to the understanding amongst the Anangu of the possible financial consequences of Book-up arrangements such as those applied at Nobbys, Mr Stauner deposed:

> Unfortunately, Anangu (members of the APY Lands) do not have a long-term outlook and live a more reactionary (day to day) lifestyle than one of planning for the future, so understanding the consequences of using Nobbys or other book-up agencies is not in their long-term outlook.
>
> Anangu do not appreciate that these arrangements can cause a shortage of money on their day to day finances over a long period.
>
> The community members I have dealt with have little understanding of the long-term effects of taking out credit and having a long-term repayment schedule.

273 In determining the use which can be made of Mr Stauner's evidence, I have kept in mind that the persons to whom he provided assistance with financial counselling and budgeting were persons who may have had particular trouble in controlling their own finances. The great majority of MoneyMob's clients were on one form of Government benefit or another with less than 10% being in paid employment. This means that the experience upon which Mr Stauner drew in making his assessments may not necessarily reflect the circumstances in the APY Lands more generally, nor the circumstances of the 117 customers. In fact, Professor Glonek, to whom I will refer shortly, described the clientele serviced by Mr Stauner as "a very good example of biased sample selection".

274 I also keep in mind that, by reason of his location at Amata, Mr Stauner's contact with customers using Book-up at Nobbys may not have been extensive.

The Mimili Store manager

275 Mr Kilpatrick worked as the manager of the store at Mimili between April 2009 and April 2012. The store is owned by the Mimili Maku Store Aboriginal Corporation (Mimili Corporation), whose members are the Anangu residing in Mimili. Mr Kilpatrick was an employee of Outback Stores Pty Ltd, which had contracted with Mimili Corporation to provide the management of the store.

276 It is evident that Mr Kilpatrick was very much a hands-on manager, having been involved in all aspects of the store's operations. I considered Mr Kilpatrick to be an honest witness and accept his evidence as reliable.

277 Mr Kilpatrick said that the Mimili Store sold a range of products including basic food and household products, fresh fruit and vegetables, meat, general merchandise such as clothing and toys, basic car maintenance products including fuel, and personal health and hygiene

products. The Court's observations on the view at Mimili indicated that this continues to be the case. Mr Kilpatrick said that, in addition, the store sold whitegoods, furniture and electrical items which were ordered as required.

278 The most common means by which customers paid for goods at the Mimili Store was cash. The customers could obtain cash from the ATM within the store or by taking cash out using EFTPOS. Often, customers would cash their Centrelink or pay cheque in the store and use the cash for shopping. Some customers used their debit card to make payments. Some used Centrepay, a facility provided by Centrelink which I will describe later in these reasons.

279 The Mimili Store did not provide book-up or other forms of credit because Outback Stores prohibits the use of forms of book-up in the stores which it manages. Mr Kilpatrick said that there were 10 stores on the APY Lands and that all, other than the Watinuma Roadhouse, were community owned. He was not aware of any of the stores on the APY Lands offering book-up, although he had heard that the stores at Indulkana and Fregon may have offered it in the past.

280 Mr Kilpatrick said that "a lot" of the customers at the Mimili Store were on Centrelink. Of those that were employed, some were on CDEP. He agreed in cross-examination that, during his time in the Mimili Store, some Anangu customers spent their money within a few days, thereby leaving their family short of cash until the next pay or pension payment day.

281 During the period that Mr Kilpatrick was manager of the Mimili store, it had purchase order arrangements with some stores, but not with Nobbys.

282 Having regard to what the Court saw and heard during the view and in the evidence, I consider that the situation described by Mr Kilpatrick continues to apply in Mimili to the present day.

Mr Kobelt's evidence as to customer characteristics

283 In his evidence at the trial, Mr Kobelt said that more than half of his customers could read. However, when examined by Mr Proud before the ASIC delegate on 2 April 2014 in relation to his application for a credit licence, Mr Kobelt had said that half of the customers to whom he sold cars on credit could not read and that, because of the documentation he had learnt was required of a licenced credit provider, he had taken to insisting that the customers be accompanied by a person who could read. In his evidence, Mr Kobelt accepted (in effect)

that his statements to ASIC's delegate were correct at the time that they were made. He also accepted, that more than half of his customers could not add up.

284 Mr Kobelt said that he thought that more than half of his customers were working and less than half were in receipt of social security benefits. With the assistance of his solicitors, he prepared, out of Court, a schedule which indicated that 61 of the customers who are the subject of ASIC's claim had been in employment. On its face, the schedule does suggest that just over half of the 117 customers were in employment and would allow the inference that just under half were in receipt of Centrelink benefits.

285 Mr Kobelt's evidence in chief did not indicate the time at which the customers had been in employment nor whether the employment was full-time or part-time. In cross-examination, Mr Kobelt said that he had stated the position as at the time he had taken the customers' key cards. In some cases, this was many years previously. Mr Kobelt also acknowledged that the work of some had been Bungala (which, as indicated earlier, was a form of work for the dole) and that, in at least one case, the work was camel mustering which, of its nature, is not a regular activity. He accepted that approximately 50% of those in employment were also in receipt of a Centrelink benefit and that the employment of some of his customers was not continuous.

286 I have some doubts about the reliability of Mr Kobelt's evidence as to who was in employment given my assessment of his credibility generally (to which I will return later), given that he acknowledged that in some instances he did not know the nature of the work nor the identity of his customer's employer, and given that Mr Kobelt perceived it to be in his interest to maximise the number of Book-up customers who were in employment. At one stage, he denied that there were any Book-up customers whose only income was social security benefits but, under further cross-examination, retreated from that position.

287 Another indication of the possible unreliability of Mr Kobelt's schedule is that in some instances, he had sold more than one car to a customer on Book-up. His schedule did not indicate whether or not the person was still in some form of work at the time of the later sale(s) and Book-up. I also note Mr Kobelt's evidence that, when he commenced offering Book-up for food shortly after acquiring Nobbys, the majority of his customers had been on social security. Accordingly, I do not consider that Mr Kobelt's schedule can be treated as reliable in every respect. I consider that it indicates, at best, that about 50% of those to whom Mr Kobelt provided credit on Book-up had employment of some kind at some time.

288 On my assessment of the whole of the evidence, at least one-half of Mr Kobelt's customers were dependent on Centrelink benefits as their principal source of income.

289 Mr Kobelt agreed that "a lot" of his customers did not have assets, that some have a "limited income", that most could not add up and that these matters collectively could indicate a low level of financial literacy. He also acknowledged that most of his customers had only one source of funds.

290 Some aspects of Mr Kobelt's evidence and submissions did not sit comfortably with the notion that his customers are financially literate and capable. His evidence that some Anangu are prone to a boom-bust style of expenditure so that he was, in effect, providing assistance in that respect is one example.

The Anangu witnesses

291 The Court heard evidence in Marla from six Anangu witnesses. These were the Customers AH, AW, B, D, Mr Brumby and Ms Pearson. Customer C did not give evidence. With the exception of Mr Brumby and Ms Pearson, the witnesses gave their evidence with the assistance of an interpreter. Some were able to give some evidence in English but mostly this was of a limited kind. Customer B in particular gave some of his evidence without the interpreter. Part way through his cross-examination, Mr Brumby sought the assistance of an interpreter. It was very evident that the facility of the witnesses, other than Mr Brumby and Ms Pearson, with the English language is limited.

292 The evidence of these witnesses indicates the characteristics of at least some of the 117 customers.

293 For the reasons previously given, I will continue to use the letters B, C and D to refer to the customers given those designations and the letters AH and AW to refer to the two customers comprising Customer A.

294 I record now that I considered that the Customers AH, AW, B and D were honest witnesses. Counsel for Mr Kobelt did not suggest otherwise. I regard their evidence as being generally reliable, although for reasons which will become apparent in relation to Customer D, some extra care is necessary in evaluating his evidence. Further, it was apparent that some of the witnesses' evidence concerning matters of time, frequency, distance and quantities were not necessarily reliable. I had the impression that imprecision of this type was of a "cultural" kind, rather than indicating a more general unreliability.

AH and AW

295 AH was born in 1969 and has lived in Mimili since he was a child. From at least 2010 and probably longer, he has been in receipt of a Centrelink pension. Since at least 2013, that has been the Disability Support Pension. That is his only source of income. At some time in the past (possibly 10 years or so ago), AH worked in the Mimili Store. In fact, in his evidence he described his occupation as that of "storekeeper" but I am satisfied that that is a historic description only. AH is married to AW.

296 When asked if he had any assets, AH said that he had "my TV and my blankets and I've got cooking utensils and fridge and some other things as well and everything". He does not own a car and rents his house. The TV is the most expensive of his assets. AH and AW have a landline telephone at their home but no internet. AH does not own a mobile phone.

297 AW was born in 1966. She grew up in Indulkana but now lives in Mimili. AW had some schooling in Adelaide but could not remember the highest grade she reached. She worked for a time in the store at Indulkana but last worked in 1995. AW is presently in receipt of a Newstart Allowance. In the past, she received Family Support payments in respect of her two children, but both are now adults. AW has also received other forms of social security payments in the past.

298 Each of AW and AH has their own bank account with a debit card. AH's Centrelink pension is paid into his account and AW's Newstart Allowance (and previously her Child Support payments) are paid into her account. AH's Centrelink pension is paid fortnightly as is AW's Newstart Allowance. The payments in each case are made on the same dates. The Family Support payments were also paid fortnightly but on alternate fortnights. The amounts of the pension and Newstart Allowance varied from time to time.

299 ASIC's evidence indicates that AH and AW were engaged in book up for cars and food with Mr Kobelt from at least May 2009. However, its allegations related to the credit which Mr Kobelt had provided to them in relation to the purchase of two cars and subsequently.

300 To the extent that they were legible, Mr Kobelt's diaries indicated that AH and AW had used Book-up at Nobbys for the purchase of cars as follows:

Date	Car	Car Registration No.	Deposit $	Book-up Amount $
20/05/2009	Commodore	OUF 469	610	4,000
20/10/2009	Red Holden 4x4	S758 AEG	Unknown	8,000
03/07/2010	V8 Statesman	WSU 723	600	5,000
30/11/2010	Ford AU	WPW 398	Unknown	5,400

301 AW explained the purchase of so many cars within a relatively short period of time by saying "the car broke down, we get another car, and another car".

302 ASIC's allegations concern the transactions on and after the third purchase of a vehicle (on 3 July 2010). I record some of these transactions as they indicate the manner in which Book-up (and Book-down) operated at Nobbys.

303 On 10 August 2010, Centrelink made payments of $505.60 and $377.95 into the respective bank accounts of AH and AW. This meant that their accounts then had balances of $507.48 and $387.64 respectively. Commencing at 8.10 am on 10 August, Mr Kobelt or his agent used the debit cards and PINs of AH and AW to withdraw $500 and $350 respectively from the two accounts, thereby reducing their indebtedness to him by $850. In AH's case, the $500 was withdrawn by successive transactions of $100, $200 and $100 each at 8.10 am, and a further $100 at 8.11 am. Mr Kobelt or his agent made two further attempts at 8.11 am to withdraw sums of $200 and $100, but, given that the earlier transactions had reduced the balance in the account to $7.48, these attempts were unsuccessful. After three withdrawals totalling $350 from the AW's account, Mr Kobelt or his agent made no further attempts of withdrawal from her account on that day. The balance in AW's account was then $37.64.

304 The effect of these transactions was that from 8.13 am on 10 August 2010 (the first day of the fortnightly Centrelink payments cycle) AH and AW had a total of $45.12 in their accounts. An unexplained bank transfer was made from AW's account the next day, reducing the total in their accounts to $15.12. This was the position until 17 August 2010 when Centrelink made Family Support payments of $16.38 and $182.84 into AW's account.

305 Mr Kobelt advanced credit of $360 to Customer A over the fortnightly payment period as follows: $170 on 11 August; $125 on 14 August, and $65 on 15 August.

306 On 24 August 2010, Centrelink paid $355.60 into the AH's account and $217.65 into AW's account. On the following day, Mr Kobelt or his agent used AH's debit card and PIN to withdraw $360 from his account and AW's debit card and PIN to withdraw $220 from her account. As can be seen, each of these withdrawals was a few dollars more than the total of the Centrelink payments each had received on 24 August 2010 and just less than the then existing balance in each account.

307 This pattern continued on each of the subsequent fortnightly Centrelink payment dates.

308 The attempt by Mr Kobelt or his agent to remove the whole, or nearly the whole, of the respective balances is evidenced by the succession of attempts to withdraw further amounts from each account. The later attempts on each day were unsuccessful because the amounts sought to be withdrawn exceeded the balance of each account. Mr Kobelt did not know the available balance in the account so that his removal of the whole, or nearly the whole, of an available balance was a matter of trial and error. The evidence indicates that, if an attempt to remove $100 was unsuccessful, Mr Kobelt or his agent would then immediately attempt to withdraw $50. Sometimes that attempt was successful and sometimes not. Generally, if an attempt to withdraw $50 was unsuccessful, no further attempt at withdrawal was made.

309 On 14 December 2010, when the glitch in the CTS of CBA occurred, CBA allowed two withdrawals, each of $300, to be made from AH's account even though there were insufficient funds in the account. The effect was that AH's account then had a negative balance. His pension payment on 24 December 2010 was insufficient to restore the account to a credit balance. AH's account did not return to a credit balance until the pension payment made on 11 January 2011. Mr Kobelt's withdrawals from the account on that same day, the last of which was $20, then reduced the balance in the account to $2. AH was charged "debit excess interest" by CBA in respect of the overdrawing of his account.

310 In respect of AW, CBA allowed two withdrawals of $400 from her account which resulted in the account having a negative balance. AW's account did not return to a credit balance until the Family Support payments were received on 1 January 2011.

311 AH gave the following evidence in relation to his Book-up at Nobbys:

Q: What is Book-up?

A: He said food, car.

Q: And how does Book-up work?

A: I think key card.

…

Q: When you did it for the first time did Lindsay explain to you how it worked?

…

A: He just spoke to me.

…

Q: Did you give Lindsay your card?

A: Yes, I did.

Q: Why did you do that?

A: I don't know but because of food. Because I didn't have no food.

Q: Did he ask for your card?

A: Yes, Lindsay said well, put you key card here and then you can get food.

Q: Did he ask for any other information.

A: No.

Q: Did you give him a PIN number to the key card.

A: Yes.

Q: Were you worried about giving him the PIN number?

A: No.

Q: Why did you give Lindsay your key card and PIN number?

A: I don't know. Only food. That's because I've got the key card there to get food … only because I wanted to get food. He said – he's just saying that he – Lindsay said that oh well, you give me your key card, and I can give you some food.

His Honour: And what did you think he was going to do with your key card and PIN?

A: I don't know.

312 AH was shown by ASIC's counsel the handwritten authority contained in one of Mr Kobelt's diaries:

> I [AH] give Lindsay Permission to Take money from my Key Card no [number omitted].
>
> [AW Signature]

AH said that he had written his name in the diary "a long time ago … because they said you got to write your name down and we don't know".

313 When shown a copy of the bank statement provided by the CBA for the period 1 July to 31 December 2010, AH was unable to identify it. He could read some entries in the statement but could not add the numbers. He understood that the bank statement recorded payments into his account and withdrawals from it but said that usually he did not read his statements.

314 AH said that there were times when Mr Kobelt limited the amount of food which he could Book-up, by saying things like "just put a little bit on book-up because your – you got a big bill there". On occasions, Mr Kobelt told AH that he could not purchase goods because they would take him past "the limit".

315 In the cross-examination, AH said that he knew Mr Kobelt as "Tjilbi" and accepted that he (Mr Kobelt) had always been good to him. He said that the name "Tjilbi" means "old man". When he went to Nobbys, Mr Kobelt was "happy" to see him. AH said that he had commenced using Book-up at Nobbys because the Mimili Store did not allow Book-up. He had also used Book-up at Sam's in Mintabie, providing the proprietor there with his key card and PIN. AH said that he preferred to buy food at Nobbys rather than at the Mimili Store because he could use Book-up and for this reason it was better to drive to Mintabie. He acknowledged that he was aware that Mr Kobelt would use his key card to take money from his account and was happy for that to occur, even when Mr Kobelt took the whole of the available balance. He said that this was because he knew that he could use Book-up again before the next pension payment day. AH acknowledged in cross-examination that he had agreed with Mr Kobelt, when buying a car on Book-up, that Mr Kobelt would use about half the amount taken from his account to pay for the car and the other half should be available for further Book-up.

316 AW said that she had not heard of something called a bank loan and did not know of any way of buying a car other than by using Book-up. She said that she had given her key card and PIN to Mr Kobelt "for food" and had understood at the time that she had a choice about whether to do so. AW could read the handwritten authority she had given to Mr Kobelt permitting him to use her key card. She said that, during the times that Mr Kobelt held her key card, she did not go to other shops for food because Mr Kobelt held her key card. She had not had experience of Mr Kobelt refusing Book-up for food or limiting the amount she could Book-up.

317 AW confirmed that she and AH do not have the internet at home and said that she does not use the internet in Mimili. Sometimes she uses the telephone to check her account balance and sometimes her daughter will use the internet to check the balance. It was evident that AW had difficulty in understanding her bank statements. AW's evidence indicated that when she checked the balance of her account, she expected that some money would be left in the account. She said that she had told Timothy Kobelt that "leftovers" should be left in her account.

318 In cross-examination, AW said that Mr Kobelt (to whom she also referred as Tjilbi) was good to her and was "happy" when he saw her in Nobbys. AW said that she still does Book-up at Nobbys but owes Mr Kobelt only a small amount. She agreed that she uses Book-up because it is a means of getting "tucker" and because Mr Kobelt is "OK". AW agreed that she knew that Mr Kobelt would take money from her bank account on the pension payment days to pay for the Book-up.

319 AW said that in the past she had from time to time rung Mr Kobelt to tell him how much of the money to take out of her account on pension day, that Mr Kobelt had complied with her requests, and that sometimes he had left money in her account as she had requested. AW said that she was happy to go to Nobbys at any time because she loves the shop and will be willing to use Book-up again at Nobbys once she has paid off her current debt.

Customer B

320 Customer B is aged 30 years, married to Customer C and has two children. He resides in Mimili and is in receipt of a Newstart Allowance. In 2011, he had work as a fencer, and was earning about $500 per fortnight. He has only one bank account, no other assets, rents his house and cannot use a computer.

321 Customer B did not give evidence about his education but I infer that it was limited. He gave some of his evidence in English but it soon became apparent that his comprehension was limited and the balance of his evidence was given through an interpreter. Customer B said that he could read a little English but could not add up numbers.

322 To the extent that can be discerned from Mr Kobelt's diaries, it appears that Customer B has purchased vehicles from Nobbys as follows:

Date	Car	Car Registration No.	Deposit $	Book-up Amount $
19/08/2010	VR Commodore	S739 AHS	1,500	4,800
18/08/2012	VR Commodore	OGR 238	1,500	4,200
06/12/2012	White VP Commodore	VPH 721	800	3,750

323 As Customer B is married to Customer C, I will also set out her car purchases from Nobbys. The records of Mr Kobelt show some interchangeability between references to Customer B and Customer C in relation to these purchases.

Date	Car	Car Registration No.	Deposit $	Book-up Amount $
03/05/2010	Blue VT Commodore	WCU 847	1,000	$7,000
27/02/2011	VT White Ute	S137 AKF	1,000	Unknown
02/06/2012	Blue Ford AU	QZX 427	1,500	$7,000

One car is shown as having been bought jointly by Customer B and Customer C.

Date	Car	Car Registration No.	Deposit $	Book-up Amount $
01/03/2010	White Ute	S737 AKA	1,000	Illegible

324 Customer B gave the following evidence in chief (via an interpreter) about the first time he entered into Book-up arrangements at Nobbys:

Q: Now, the first time you did car Book-up with Lindsay, did Lindsay explain to you how Book-up worked?

A: Yes.

Q: Yes. What did he say?

A: To get a car on Book-up and to get a car, and cash.

Q: And did he say how much money he would take from your account?

A: No.

Q: Did he explain to you when you would get your card back?

A: No.

325 However, in cross-examination, Customer B acknowledged that he had known from others in Mimili that he would have to give his key card to Mr Kobelt in order to use Book-up at Nobbys. He said that Mr Kobelt told him that he could have "a little bit" of food on Book-up. He also agreed that Mr Kobelt told him that he would take money out of his bank account every payday to pay off the Book-up. He had understood that he was giving Mr Kobelt permission to do so.

326 Customer B said that he thought Book-up was good because it allowed him to buy food and fuel between pension days and paydays. He said, however, that there had been times when Mr Kobelt had told him that he could not have food on Book-up.

327 Customer B said that at the time he had been using Book-up at Nobbys, he had not shopped at the Mimili Store "because my key card was at Mintabie".

Customer D

328 Customer D was born in Indulkana but educated (at the "big school") in Mimili, where he still resides. He could not state his date of birth nor his age, and said that he could read English and numbers "a little bit" but could not add up. He said that he had been a petrol sniffer for a long period in the past and had suffered some brain damage. His presentation when giving evidence seemed consistent with such a condition. Customer D receives a Disability Support Pension and it is his only source of income.

329 Customer D had had employment on Bungala collecting firewood and cleaning rubbish and later had been employed in fence repair. He lives with his nephew (the Campbell family) and has no assets, not even a television, refrigerator or furniture. Customer D said that he does not own, and does not know how to use, a computer and does not own a telephone.

330 Customer D had bought one car on Book-up from Mr Kobelt but that was a long time ago. The transactions relating to that Book-up were not included in the Book-up diaries tendered in evidence. Customer D agreed under cross-examination that, when he had commenced using Book-up at Nobbys, he had given Mr Kobelt his key card, knowing that he would use it to take all the money from his bank account to pay for the Book-up, and was happy to do so. He first used Book-up to buy food. Mr Kobelt had asked for his key card and PIN and said that when the Book-up was finished he would return the key card. Mr Kobelt had not sought any other information from him but said that he could Book-up food and petrol.

331 Customer D also said that when he had used Book-up at Nobbys in early 2011, he had not known how much money was being taken out of his bank account and had not checked the account statements for this purpose.

332 Customer D continues to use Book-up from time to time at Nobbys, having done so only a few weeks before giving evidence in June 2015. He also uses Book-up at Sam's Store in Mintabie. Customer D acknowledged that, without the ability to use Book-up, there would be times when he would go hungry between pension days. That has occurred even when he has had the key card in his own possession.

333 Customer D recognised his name in the authorities which Mr Kobelt had had his Book-up customers sign but could not read the authority itself. Nor was he able to read a bank statement relating to his account.

334 Customer D said that he had told Mr Kobelt that he had suffered brain damage as a result of petrol sniffing "a long time ago". He thought that the effects of the petrol sniffing sometimes made it difficult for him to remember things and that he had difficulties of that kind while giving evidence.

335 On occasion, Customer D has obtained cash from Mr Kobelt to give to the family with whom he resides. He said that Mr Kobelt told him how much cash he was allowed to take on each occasion.

Ronny Brumby

336 Mr Brumby was born in 1954 and educated at Ernabella. Although it was unclear, it seems that he left school after Grade 7. In the past, he has had a variety of employments including bricklaying, house building, car repairs, and work with Nganampa Health. In addition, he was a Community Constable with the police in Marla for about five years. At some stage in the past, he served as Indulkana's representative on the Executive Board for the APY Lands and, in mid-2015, was re-elected as that representative. It was evident during his evidence that Mr Brumby has reasonable facility with the English language and an understanding of the arrangements for Book-up which he had made with Mr Kobelt.

337 Mr Brumby has sources of income other than from Centrelink or wages.

338 As a member of the Executive Board of the APY Lands, Mr Brumby receives an allowance of $600 per meeting (there are approximately six meetings per year) as well as his travel expenses.

339 The members of the Brumby family are some of the traditional owners of the land around Uluru and, accordingly, share in the proceeds from the payments made by visitors to Uluru. The evidence as to the amount which Mr Brumby received from this source was a little unclear. On my understanding, it is an amount of about $15,000 per annum but this is shared between Mr Brumby and his family.

340 Mr Brumby also receives income from cattle agistment. The APY Lands permit some pastoralists to agist cattle on designated parts of the land. Some of that land is regarded as "belonging" to particular families. Mr Brumby's family is one of those families. It is the APY executive which receives the money for cattle agistment and distributes it amongst the families who have an entitlement to it.

341 To the extent that can be discerned from Mr Kobelt's diaries, it seems that Mr Brumby has bought cars from Mr Kobelt as follows:

Date	Car	Car Registration No.	Deposit $	Purchase Price $
02/07/2009	1984 Green Ford Falcon Station Wagon	8040 FDB	1,000	7,500
16/07/2009	1992 Commodore	4BB 294	800	4,500
22/05/2011	Ford Station Wagon	RBS 129	Unknown	Unknown
08/11/2011	Station Wagon All green	XTK 011	Unknown	7,500
11/11/2011	1989 White Nissan Patrol	S467AMK	Unknown	7,500
16/12/2011	Mitsubishi 4x4	NSS 109	Unknown	Unknown
25/10/2012	EL Green	WIT 640	650	5,000
15/11/2012	EL	Unknown	Unknown	4,200
17/12/2012	96 White	VVF 113	Unknown	Unknown
08/11/2013	VX Red	WTI 661	Unknown	Unknown
08/11/2013	Black Ford Station Wagon 4x4	UZK 666	Unknown	Unknown
25/07/2014	Unknown	VWV 018	1,000	2,800

This is considerably more than the "two or three" which Mr Brumby mentioned in his evidence in chief.

342 Sometimes Mr Brumby paid cash for vehicles and at other times he purchased them using Book-up. Mr Kobelt's records did not always make clear the basis on which the vehicles had been bought. I infer however that, when the Book-up diaries did not include details of the purchase and the payments, Mr Brumby had paid cash.

343 I mention in particular the purchase on 25 July 2014. It was put to Mr Brumby in cross-examination that in about mid-2014 he had bought a Ford car from Nobbys on Book-up; that he had paid a deposit; that he had paid the balance of the purchase price on Book-up; and that he had cancelled the Westpac key card he had provided to Nobbys about a week after making the purchase. Mr Brumby's evidence about this was vague. It was not clear whether this was attributable to lack of memory, to uncertainty, or because Mr Brumby recognised that his having made a purchase at this time was inconvenient for his overall evidence about Mr Kobelt. The entries on Mr Kobelt's card warrant the conclusion that Mr Brumby did purchase a car (Reg No. VWV 018), petrol and food for a total cost of $2,800 on 25 July 2014, and that he paid a deposit of $1,000 leaving a balance owing of $1,800. Mr Brumby paid $200 on 30 July 2014 and cancelled his key card shortly afterwards.

344 Mr Brumby is one of the 117 customers who are the subject of ASIC's "system" case, although some of the submissions on Mr Kobelt's behalf appeared to overlook that that was so.

345 Mr Brumby said that he had started using Book-up at Nobbys because he had been "friends" with Mr Kobelt, because he had no food at the time, because the shops were closed on Saturday, and because it was good for his children in avoiding the problems between paydays. He knew when he handed over the key card that Mr Kobelt would use it to take money from his account.

346 It was evident that antipathy has arisen between Mr Brumby and Mr Kobelt, in particular, following an incident in which Mr Kobelt cut up one of Mr Brumby's key cards. It is necessary to take account of that antipathy in assessing Mr Brumby's evidence, as I consider it coloured Mr Brumby's evidence to some extent.

347 I mentioned earlier that Mr Kobelt would from time to time allow his customers to use Book-up for the purchase of bus tickets. Mr Brumby was one such customer. As at

24 December 2013, the balance of Mr Brumby's Book-up at Nobbys was $998. On that day, Mr Kobelt allowed Mr Brumby to Book-up $440 for the purchase of bus tickets for travel to Adelaide, bringing his Book-up balance to $1,438.

348 A short time later, Mr Brumby telephoned Mr Kobelt and asked to use Book-up in order to purchase return tickets. Mr Kobelt refused, saying "Well, Ronny, you've Book-down enough, you know. I can't do it". This upset Mr Brumby and, on the next occasion Mr Kobelt went to withdraw money from Mr Brumby's account, he found that the key card had been cancelled. However, in May and June 2014, Mr Brumby made payments totalling $1,430, thereby all but clearing his outstanding balance. Mr Kobelt said that he regarded the account as "square". Mr Brumby then resumed using Book-up at Nobbys.

349 Mr Kobelt's refusal of Mr Brumby's request to Book-up the return tickets occurred in the context that Mr Brumby was a regular purchaser of cars from Mr Kobelt, mostly paying cash. There was no suggestion of Mr Brumby having defaulted in repayments in the past and he had sources of income which were, seemingly, not available generally to other Anangu. In his closing submissions, counsel for Mr Kobelt submitted that this refusal of further Book-down to Mr Brumby was an example of Mr Kobelt's attempts to guard against his customers incurring debts beyond their means. I do not regard that as a plausible explanation in Mr Brumby's case.

350 In my opinion, Mr Kobelt's conduct in relation to Mr Brumby's request to Book-down the cost of the return bus tickets provides an illustration of the control which he could exercise over his Book-up customers. It also contradicts Mr Kobelt's evidence that Mr Brumby was entitled to Book-up "whatever he wanted". I note that Timothy Kobelt entered the word "Slut" in the diary next to Mr Brumby's name after he found that Mr Brumby had cancelled his card.

351 Mr Brumby's account of the card cutting incident was to the following effect. At some stage, be had bank accounts with both Westpac and CBA, with key cards attached to each. He gave both cards to Mr Kobelt in an attempt to conclude his indebtedness earlier. Later, he asked Mr Kobelt to return the CBA key card. Instead, Mr Kobelt cut the key card with scissors, in his presence and that of his wife and children. This upset Mr Brumby, prompting him to cancel the Westpac key card still held by Mr Kobelt. The effect was that Mr Kobelt could make no further withdrawals.

352 In the cross-examination, it was put to Mr Brumby that after the card cutting incident he had taken a new CBA key card to Nobbys and handed it to Mr Kobelt. In some answers, Mr Brumby denied this but other answers seemed to indicate that he may have. Although he was pressed on this topic, Mr Brumby's evidence was not clear. My overall impression was that Mr Brumby accepted that he had taken a second CBA key card to Mr Kobelt in relation to his Book-up at Nobbys but that that had occurred before the day of the card cutting incident. The CBA card which Mr Kobelt cut was, on Mr Brumby's evidence, the second of the CBA key cards which he had provided to Nobbys. In particular, Mr Brumby denied that the key card which Mr Kobelt had cut up was the earlier CBA key card which he had cancelled.

353 On Mr Kobelt's account, the card cutting incident occurred on or about 20 June 2014 when Mr Brumby resumed using Book-up (following his cessation for a period after the Greyhound bus ticket incident). Timothy Kobelt prepared a ledger card to record the Book-up transactions. It is evident that Mr Brumby had presented Mr Kobelt (or Timothy) with two key cards at that time, one for a Westpac account and one for a CBA account and PINs for each key card were recorded on the ledger card. Mr Kobelt said that he had offered to cut up the old card because it would not be needed any more and that Mr Brumby had agreed. On Mr Kobelt's account, his cutting up of the old CBA key card had been amicable and had occurred on the same occasion on which Mr Brumby had presented his new CBA key card.

354 It does seem that the card cutting incident upset Mr Brumby. It was evident from his evidence that he had felt a degree of humiliation, especially as the cutting up occurred in the presence of his family. I thought that his evidence about being upset was genuine. I consider it improbable that Mr Brumby would have become upset at all if the cutting up had occurred in the circumstances described by Mr Kobelt. On the other hand, it does seem improbable that Mr Kobelt would have thought it appropriate to engage in such provocative conduct with a customer whose goodwill he wished to retain.

355 The ledger card indicates that Mr Brumby used Book-up until 30 July 2014 and that a number of credits were made to the account. I am satisfied that the credits were the result of withdrawals by the Kobelts from Mr Brumby's accounts (the evidence did not indicate from which account). The fact that Mr Brumby continued to use Book-up at Nobbys until 30 July 2014 is, to my mind, inconsistent with him having become upset on 20 June 2014, as it is likely that he would there and then have stopped shopping at Nobbys. The fact that

Mr Brumby continued to use Book-up for a period of five to six weeks suggests that he did not become upset until after 30 July 2014. That is consistent with Mr Brumby's account that it was only after he asked for the return of his CBA card that the card cutting occurred.

356 It is difficult to be confident as to what occurred. It is possible that Mr Brumby has conflated events in his mind. There were respects in which his evidence was not reliable. Ultimately, I am not persuaded that the card cutting happened in the way described by Mr Brumby.

357 Mr Brumby said that he had been concerned during the period in which he was using Book-up that Mr Kobelt had been taking too much money from his account and had been "ripping me off". He had argued with Mr Kobelt about this. He knew that Mr Kobelt was recording entries in the diary but was concerned that Mr Kobelt did not do that in his presence.

358 On one occasion when Mr Brumby was in Port Augusta, he had gone to the bank on the day he expected to receive his payment in an endeavour to withdraw money from his account before Mr Kobelt made his withdrawal. He was unable to do so because Mr Kobelt had already withdrawn the money. I accept Mr Brumby's evidence on this topic.

359 It was evident that Mr Brumby has developed a firmly held adverse view of Mr Kobelt so that he is now critical of many aspects of the conduct in which he perceives Mr Kobelt to have engaged. It addition to his evidence that Mr Kobelt had taken too much from his account and had been "ripping me off", Mr Brumby said that Mr Kobelt had been "not doing right things for people", had been "a bit rough and [a] bit bossy and not really happy with people", that he was "too sharp" and "not really good for people". He said that for these reasons he did not go back to Nobbys, although he acknowledged that he still owed Mr Kobelt money on Book-up. In his evidence in chief, Mr Brumby said that he had not been back to Nobby's since the card cutting incident**.** However, in the cross-examination, Mr Brumby seemed to accept that he had been back to Nobbys since the card cutting incident, albeit paying cash for the food and groceries he had bought.

360 Given the antipathy between Mr Brumby and Mr Kobelt, I consider it appropriate to be circumspect before accepting all of Mr Brumby's evidence.

Rhoda Pearson

361 Ms Pearson is aged 32 and was educated to Year 11 level in Indulkana. She has one child who is 12 years old. After leaving school, she worked for eight years as a teacher at the

Indulkana School. The kind of teaching carried out by Ms Pearson was not explored in the evidence. As Ms Pearson does not have any of the formal qualifications usually required of teachers, I infer that it was not teaching of the conventional kind. At the time of giving evidence, Ms Pearson had been employed for four years by Centrelink in Indulkana.

362 Ms Pearson said that she can use a computer now and knows how to use telephone banking but did not know how to use either at the time that she entered into Book-up arrangements at Nobbys.

363 Ms Pearson has one bank account and a key card is attached to it. Her wages and the benefits she receives from Centrelink (namely, a Family Tax Benefit and, at one stage, a Newstart Allowance) are paid into that account. She rents the home in which she lives in Indulkana.

364 Ms Pearson thought that she had bought three cars from Nobbys, one for cash and two on Book-up. However, Mr Kobelt's records show that it is four, one for cash, and three on Book-up. Ms Pearson's memory in this respect is mistaken.

Date	Car	Car Registration No.	Deposit $	Book-up Amount $
07/05/2009	Commodore	VAJ 569	500	5,000
22/06/2012	1992 Green Ford EB Station Wagon	WBB 509	Unknown	Paid in full in cash 3,000
08/09/2012	White Falcon	XOG 556	1,300	5,000
23/04/2013	VS Commodore	VXR 873	1,000	4,600

365 Ms Pearson is one of the 117 customers who are the subject of ASIC's "system" case.

366 In relation to the Book-up arrangements, Ms Pearson said that when she first left her key card and PIN at Nobbys, neither Mr Kobelt nor Timothy had told her how much money would be taken from her account but that Mr Kobelt had told her that she could Book-up to a limit of $200 on food and groceries. She purchased her food and groceries from Nobbys during the period that she was Booking up there because she did not know anywhere else where she could do so. She had not known how much she owed Nobbys at any one time but would, from time to time, ask Mr Kobelt or Timothy. Ms Pearson said that she accepted their answers because she thought they were being honest with her. She did not place a limit on the amount Mr Kobelt could take from her account but told him to take what she owed.

Despite saying this, Ms Pearson said that she felt that Mr Kobelt had taken more money than had been agreed when she noticed that no money had been left in her account. She had not said anything about this however to Mr Kobelt or to Timothy. When asked why she had not said something to them about it, Ms Pearson answered "because I didn't know … because I didn't realise that I was being rip off – ripped off".

367 There were times when Ms Pearson was using Book-up at Nobbys when she needed cash. She gave the following evidence on this topic:

Q:	When your card was at Nobbys' store, if you wanted some cash, what did you do?
A:	I thought I was going to ask him for a little bit of cash.
Q:	And did you ever ask him for cash?
A:	Yes, for – I think sometimes I did ask him for cash.
Q:	And what did he say?
A:	You lend me cash, yes.
Q:	How much cash would he give you when you asked for cash?
A:	About 200 or 150.
Q:	Sometimes did you want more cash than the amount he gave you?
A:	Yes.
Q:	And did you ask him for more?
A:	No.
Q:	Why not?
A:	Because I was thinking he might say no, that was the only limit I was allowed for.
…	
Q:	How did you feel about asking for more money from Lindsay and asking for cash from Lindsay?
A:	I was scared.
His Honour:	Why were you scared or, if you prefer, what were you scared of?
A:	So that he might say "no" or – because I know what he was like.

368 In the cross-examination, Ms Pearson agreed that she had thought at the time that Mr Kobelt would not advance more than the $150 or $200 because she would then be taking more on Book-up than she could repay the next payday and her debt would then increase.

369 In relation to her purchase of food and groceries, Ms Pearson said that when she went into Nobbys her practice was, first, to ask how much she was allowed to Book-up. Either Mr Kobelt or Timothy would tell her that. She would then go to the shelves and select the

food and groceries she needed and then take them to the cash register. On occasion, Mr Kobelt told her that she had reached her limit with the goods she had selected so that she could not buy more.

370 Initially, Ms Pearson had been happy to use Book-up but her attitude changed over time. In particular, it changed because the cars she purchased had broken down soon after purchase and she had felt that Mr Kobelt had not helped in repairing them. For example, the green station wagon for which she had paid cash of $3,000 broke down within four weeks of purchase. She had the car towed back to Nobbys for repair but Mr Kobelt had said that she would have to pay the cost of repair. She did not think that she should have to pay those costs. She has not done any further Book-up at Nobbys since cancelling her key card in mid-2013. This was at a time when she still owed money to Mr Kobelt.

371 In her cross-examination, Ms Pearson's account concerning the repair of the green station wagon was a little different. She said that Mr Kobelt had fixed the gear box and that she had been able to drive it away but that the engine "blew up" three months later. It is not clear who paid for the initial repairs. Ms Pearson said that, after the engine had blown up, she had cancelled her key card.

372 It was obvious that Ms Pearson did not find the experience of giving evidence to be easy and that she was a little overawed. In some respects, Ms Pearson was confused about the sequence of events. In particular, some events seem to have coalesced in her memory. Generally, however, I was impressed with Ms Pearson as a witness and regarded her evidence as credible. It is, however, necessary to mention two matters.

373 The first is that I consider Ms Pearson to have been mistaken in saying that it was her experience with the green station wagon purchased on 22 June 2012 which prompted her to cancel her key card. I think it more likely that it was the accumulation of experiences with the three cars purchased in the 10 month period between June 2012 and April 2013. The fact that Ms Pearson bought a second card, a Falcon, on 8 September 2012, less than three months after she had bought the green station wagon on 22 June 2012, confirms, in my opinion, that she had experienced problems with the green station wagon very shortly after its purchase. The evidence did not suggest any other explanation for Ms Pearson purchasing a second car so soon after the purchase of the green station wagon. Further, the fact that Ms Pearson bought a VS Commodore on 23 April 2013, only seven months after the purchase of the Falcon, is also consistent with her having experienced problems with the Falcon.

374 It can be inferred from the Book-up diaries that Ms Pearson cancelled her key card very soon after the purchase of the VS Commodore on 23 April 2013. There is evidence that this was associated with the breakdown of a vehicle which she had purchased. In her cross-examination, Ms Pearson said that the last car she had bought (which the cross-examiner wrongly thought was the white Falcon) had broken down as she was driving it home.

375 Ms Pearson attributed her decision to cancel her key card to the fact that she wasn't "getting much help" from Mr Kobelt and her evidence in chief seemed to relate this to her experience with the green Falcon purchased on 8 June 2012. However, as indicated, I consider it more likely, and so find, that it was Ms Pearson's accumulated experience with the three cars purchased between June 2012 and April 2013 which soured her attitude to Mr Kobelt, and led her to cancel her key card shortly after the purchase of the third of these cars.

376 Ms Pearson was clear in her evidence that she had paid cash for the green station wagon purchased on 22 June 2012. Mr Kobelt's counsel, having taken instructions from Mr Kobelt in the courtroom, put to her that she was mistaken in that respect and that she had instead paid cash for the white Falcon. Ms Pearson maintained that it was the green station wagon. As it happens, Mr Kobelt's own records confirm the correctness of Ms Pearson's evidence and contradict the proposition put to Ms Pearson by counsel on his instructions.

377 I have taken into account that Ms Pearson's attitude towards Mr Kobelt appears to have hardened over time. In particular, I have considered whether that has coloured her evidence. Nevertheless, I consider that Ms Pearson's evidence was generally reliable and, save for those matters on which the objective evidence indicates that she was mistaken, accept her evidence.

ABS statistics

378 ASIC tendered a number of statistics derived from the 2011 Census and other surveys conducted by the Australian Bureau of Statistics (ABS) in support of its case concerning the characteristics of the 117 customers. The 2011 Census is the most recent Census. These showed the following:

	APY Lands	**Mimili**	**South Australia**	**Australia**
Total number of residents	2,440	281		
Number of Indigenous residents	2,105	246		
Median age (years)	26	24		37

Number of families	546			
Average number of children per family	2			
Average household size (number of people)	4.9	3.7		2.6
Median weekly household income (people aged more than 15 years)	$1,117	$1,031		$1,234
Median weekly personal income	$277	$307		$577
Education				
Number in pre-schools	69	11		
Number in primary schools	316	30		
Number in secondary schools	181	22		
Number in technical or further education institution	27	Nil		
Number in tertiary education	23	Nil		
Number of indigenous residents whose highest level of schooling was Year 12 or equivalent	103	37		
Number of indigenous residents whose highest level of schooling was Year 10 or equivalent	290	66		
Number of indigenous residents whose highest level of schooling was Year 8 or below	407	22		
Number of indigenous residents who did not go to school	145	16		
Internet access at home				
Internet connection to home (dwellings)		16		
No internet connection at home (dwellings)		49		
Employment				
Number in labour force	808			
Number in full-time employment	366	43		
Percentage in full-time employment	45.3%		56.7%	59.7%
Number in part-time employment	272	26		
Percentage in part-time employment	33.7%		31.6%	28.7%
Percentage away from work	9.3%		6.00%	5.9%
Number unemployed and not in labour force	940	112		
Percentage unemployed	11.8%	12.2%	5.7%	5.6%
Percentage 15 and over in labour force		37.7%		61.4%
Accommodation				
Number of private dwellings	851			
Percentage homes owned	7.4%		32.8%	32.1%
Percentage homes rented	82.2%		27.9%	29.6%
Median weekly rental	$20	$40	$220	$285
Median weekly household mortgage	$0		$0	$415

I note that this data, including the data for Mimili under the heading "Education", does not differentiate between the Indigenous and non-Indigenous residents on the APY Lands except when otherwise indicated.

379 The numbers shown in employment in the APY Lands and at Mimili are likely to be overstated, as the ABS counts as employed those who are engaged in CDEP. Dr Martin estimated that just under 20% of those recorded by the ABS as being employed in the APY Lands were in fact engaged in CDEP.

380 Data published by the ABS in 2012 indicates relatively low levels of attainment in education of residents in the APY Lands as shown in the table below.

Highest year of school completed for those 15 and over	APY Lands (Indigenous)	Australia (Indigenous)	Australia (non-Indigenous)
Year 12 or equivalent	6.9%	25%	52.1%
Year 11 or equivalent	8.4%	11%	9.3%
Year 10 or equivalent	19%	28.6%	21.7%
Year 9 or equivalent	20.1%	11.7%	5.8%
Year 8 or below	28.5%	11.3%	6%
Did not go to school	10.5%	1.6%	0.9%
Not stated	6.6%	10.8%	4.3%
	100%	**100%**	**100%**

381 This table suggested that a little less than 40% of the Anangu have either never attended school at all or had attended only to Year 8 or below. Only about 7% of the Anangu had completed Year 12.

382 The ABS Census of Population and Housing for Aboriginal and Torres Strait Islander Australians published in 2012 permits the following breakdown of the income of the Anangu aged 15 and more who reside in the APY Lands:

Total personal weekly Income	Percentage
Negative/Nil - $199	23.7%
$200-$299	44.4%
$300-$399	17%
$400-$599	7.8%
$600 or more	7%

383 As can be seen, only 14.8% of Anangu had incomes of over $400 per week and 61.5% had incomes between $200 and $399 per week. This is consistent with a number of Anangu being unemployed and/or in receipt of social security benefits.

NAPLAN results

384 ASIC tendered data published on the "My School" website by the Australia Curriculum Assessment and Reporting Authority (ACARA) derived from the National Assessment Program-Literacy and Numeracy (NAPLAN). NAPLAN is an annual assessment for students in years 3, 5, 7 and 9 and tests such skills as reading, writing and numeracy. I summarise some of the data revealed by the NAPLAN reports as follows:

Description	Mimili Anangu School	Ernabella Anangu School	Amata Anangu School
Year range	R-12	R-12	R-12
Total enrolments	60	126	135
Indigenous students	98%	95%	100%
Language background other than English	69%	81%	68%
Student attendance rate	68%	52%	56%
Completed Year 12	-	1	-

385 The NAPLAN results for 2009 showed the following percentages of Year 7 students who scored below the NAPLAN National Minimum Standards (NMS):

School	Reading	Numeracy
All Australian Schools	5%	4%
Mimili Anangu School	78%	44%
Ernabella Anangu School	83%	85%
Amata Anangu School	67%	80%

386 In summary, 78% of Year 7 students at Mimili School in 2009 were below the NMS in reading compared with 5% for Year 7 students in all Australian Schools. For Year 9 students in Mimili, 73% were below the NMS for reading, compared with 7% for all Australian Schools. In the case of numeracy, 44% of Year 7 students at Mimili School were below the NMS, compared with 4% for Year 7 students in all Australian Schools. For Year 9 students in Mimili, 18% were below the NMS for numeracy, compared with 4% for all Australian Schools.

387 The 2011 Census reported that some 14.2% of APY Land residents spoke only English at home. The other languages spoken at home included Pitjantjatjara (72.1%) and Yankunytjatjara (5.6%).

Anthropological evidence and statistical analysis

388 Dr Martin is a well-qualified social anthropologist, having obtained, amongst other things, a PhD in Anthropology from the Australian National University in 1993 and a Masters degree in Social Anthropology from the London School of Economics. He is also very experienced, having worked as an anthropologist since 1985. He gave evidence at the instance of ASIC.

389 In addition to expertise as an anthropologist, Dr Martin has had a range of other experiences which assisted him in forming opinions on the matters requested by ASIC. Amongst other things, he has worked (part-time) in the Centre for Aboriginal Economic Policy Research (CAEPR) at the Australian National University. Before studying anthropology, Dr Martin worked for eight years as a Community Advisor in Aurukun with the Wik People. Dr Martin said (and I accept) that this experience gave him a deep understanding of the attitudes among Aboriginal people in a remote community towards money and financial transactions, about appropriate procedures to ensure that Aboriginal people entering into financial transactions are properly informed about them, and 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. Dr Martin also said (and I accept) that much of his work as an anthropologist has been concerned with understanding the engagement between remote-resident Aboriginal people and general Australian society, including the impact of money and welfare payments on Aboriginal communities and, conversely, the cultural constructions which Aboriginal people place on money and the ways in which it is used within their communities.

390 As will be seen, although Mr Kobelt led expert evidence from a statistician which was critical in some respects of Dr Martin's approach, he did not dispute Dr Martin's qualifications and expertise and, indeed, relied on some of his opinions in his own case.

391 In April 2014, ASIC retained Dr Martin to provide an opinion concerning the Customers A to D who are the subject of its secondary allegation. Dr Martin was asked at that time to provide a report in relation to Customers A to D and in relation to "any other Aboriginal customers of Nobbys with whom you speak as part of your field trip" on whether there are any facts and circumstances affecting the "customer's" ability or willingness to question or

negotiate the terms of Book-up at Nobbys, and to complain about the terms of the Book-up and its associated aspects. Dr Martin was also asked to consider and report upon identified characteristics and understandings of each "customer" to whom he spoke and whether each of those customers had a "deferential attitude" to Mr Kobelt or to Timothy or Sonia Kobelt.

392 In July 2014, ASIC expanded its request to Dr Martin as follows:

> In preparing your report, would you please address the following additional question:
>
> 3. What, if any, social or cultural matters affect the ability or willingness of Aboriginal residents of the APY Lands to:
>
> 3.1 understand the nature, terms, advantages and disadvantages of credit arrangements generally;
>
> 3.2 understand the nature, terms, advantages and disadvantages of the specific credit arrangement provided under Nobbys' Credit Facility or similar facilities;
>
> 3.3 question or negotiate the terms of transactions (including credit arrangements) with traders;
>
> 3.4 complain about the terms of transactions (including credit arrangements) with traders.

ASIC went on to instruct Dr Martin to address this question in relation to "the Aboriginal residents of the APY Lands generally and not exclusively in respect of persons identifying themselves as Nobbys' customers".

393 As can be seen, Dr Martin was not asked on either occasion to express an opinion with respect to the 117 customers who are the subject of ASIC's "system" case. ASIC requested instead that he provide an opinion in relation to APY residents generally. It did not identify to Dr Martin the 117 customers, let alone provide him with contact details for them.

394 The facts and circumstances which ASIC instructed Dr Martin to assume for the purposes of his opinion included that, for the majority of the Anangu customers who entered into Book-up arrangements at Nobbys, the following applied:

(a) periodic payments into the customer's bank account are the customer's only source of income;

(b) use of a debit card and PIN is the primary or exclusive means by which the customer accesses their bank account; and

(c) the customer is a resident of a remote community in the APY Lands, has very limited or no assets and has a very limited net income.

These were matters which Dr Martin was asked to assume, rather than to report upon.

395 In April and May 2014, Dr Martin conducted three field trips to the APY Lands: to Indulkana on 9 April; to Mimili on 5-8 May; and to both Mimili and Indulkana between 25 and 27 August. In the course of these trips, he spoke to a total of 23 indigenous residents in those communities.

396 The first topic which Dr Martin addressed in his report dated 8 December 2014 was the existence of social or cultural matters pertaining to the Aboriginal residents of the APY Lands generally, which may impact on their ability or willingness to understand credit arrangements as well as Book-up at Nobbys and like facilities, to question or negotiate the terms of transactions with traders, or to lodge complaints about such terms. He said that it was appropriate to identify such social and cultural factors because the values and understandings of individuals develop through socialisation within family and peer groups and through formal and informal educative processes.

397 In forming his opinions, Dr Martin had regard to:

(a) his own observations during his field trips;

(b) the discussions he had with some of the 23 indigenous residents (most of whom lived in Mimili);

(c) the facts and circumstances which he had been instructed by ASIC to assume;

(d) publically available socio-economic data and, in particular, statistics published by the ABS and the NAPLAN results (much of which was summarised above); and

(e) socio-cultural features of remote-dwelling Aboriginal people, including the Anangu, derived from his own anthropological understanding and experience.

398 In his report, Dr Martin expressed a number of opinions about the characteristics of Aborigines generally, that is, not just the Anangu. These included:

(a) very few indigenous people educated entirely in schools located in remote Aboriginal communities attain a level of literacy, numeracy or other skills which enable them to engage fully with the institutions of general Australian society;

(b) those factors by themselves limit indigenous people to employment in relatively unskilled and often casual jobs;

(c) this has the consequence that indigenous residents in remote communities must, and often do, depend upon welfare payments as their sole source of income;

(d) lack of facility with the English language is another limiting factor, especially in those communities in which the first language is an Aboriginal language;

(e) the dependence on welfare as a source of income is accompanied by a "boom and bust" manner of expenditure, with a chronic shortage of money towards the end of each fortnightly pay cycle;

(f) significant sums of money can be expended on the valued consumer goods, motor vehicles and other expensive items without consideration of the medium to long-term consequences of such expenditure; and

(g) aboriginal people in remote communities develop strategies to obtain food or to procure desired consumer goods when they do not have the cash available to do so, including by demand sharing (referred to sometimes in the evidence as "humbugging").

399 In relation to the Anangu, Dr Martin said:

(a) an overriding characteristic is their poverty;

(b) socio-economically, the Anangu, in comparison with the Australian population generally, have significantly lower incomes, higher unemployment rates, markedly lower levels of literacy and numeracy, poor educational attainment, poor command of standard English and poor financial literacy;

(c) very few Anangu People educated entirely in schools located in communities on the APY Lands will have attained a level of literacy, numeracy or other skills which enables them to engage in an informed manner with financial institutions generally; and

(d) socio-cultural features contribute to these detriments.

400 Having identified these characteristics of Aboriginals living in remote communities generally and having made these observations of the Anangu, Dr Martin then said that he believed it to be a reasonable inference that the characteristics of the Aboriginal people in remote communities generally also applied to the Anangu residents in Mimili and Indulkana and in the APY Lands more generally. He said:

> [39] *On the basis of the assumed facts and circumstances for the Anangu customer of Nobby's set out in my instructions* … and on the basis of my own observations and the interviews I conducted during my field visits to Mimili and Indulkana, I believe it to be a reasonable inference that the general characteristics I outlined in paragraphs 29-36 and 38 above [concerning

> Aboriginal residents in remote communities] also apply to the Anangu residents of those communities, and the APY Lands more generally. …

401 As can be seen, Dr Martin's conclusion as expressed was based on the assumptions he had been asked to make regarding the particular circumstances of Nobbys' customers, rather than reasoning (at least primarily) to that conclusion from statistical or other data. Dr Martin then said that, in addressing the principal topic identified in [392] above, he had relied on his own experience, observations, the assumed facts and also the demographic and socio-economic data concerning the Anangu published by the ABS and the published NAPLAN results. That was, in the main, the material summarised earlier in these reasons. Dr Martin said that he regarded the ABS and NAPLAN data as providing "additional support" for his opinions.

402 In reference to his conclusion that very few individuals educated entirely in schools located in remote Aboriginal communities attained the skills which would enable them to engage fully with the institutions of general Australian society, Dr Martin said that, on the basis of his observations and interviews conducted in Mimili and Indulkana, he considered it to be a reasonable inference that this was also the case in those communities and, by extension, in other communities in the APY Lands. He noted, by way of example, that a number of his interviewees needed help to check their bank balances and that none could read or understand a bank statement or even the authorisations for Book-up at Nobbys which they themselves had signed. Dr Martin regarded this conclusion as supported by the ABS and NAPLAN statistics.

403 Dr Martin also reported on the relatively low levels of ability to speak the English language and recorded his experience that an individual's competency in English has a direct bearing on literacy and (to a lesser but still significant degree), numeracy in remote Aboriginal communities.

404 With respect to the understanding by the Anangu of Book-up arrangements at Nobbys, Dr Martin said:

> [136] It is my concluded opinion … that most Anangu residents in the APY Lands communities would not have an informed understanding of the nature and terms, and consequently of the advantages and disadvantages, of credit provision options available in the general Australian society. For this reason, it is my view that neither would most Anangu have an informed understanding of the nature and terms of the financial aspects of Nobby's Credit Facility. In my opinion, neither would most Anangu have the basis to come to an informed understanding of the advantages and disadvantages of the financial aspects of Nobby's Credit Facility, since such an understanding

> would be predicated upon a comparative knowledge of other credit facilities including those offered by general Australian credit providers.
>
> [137] It is my further opinion … that in the absence of active steps being taken by staff of a service or enterprise providing credit to Anangu customers to ensure as far as possible that each customer is as fully apprised as feasible of the details and implications of a proposed credit arrangement, that a customer is unlikely to have a basis on which to develop an appropriately informed understanding of the nature and terms of that proposed transaction, and thus of its advantages and disadvantages.
>
> [138] Nonetheless, it is my view that at a generalised level Nobby's Anangu customers do have a limited understanding of certain financial aspects of the nature and terms of Nobbys' Credit Facility. Based on my interviews, I believe it to be the case that Anangu understand that in order to book-up at Nobby's, a customer has to leave his or her card at the establishment and provide the associated [PIN]. Furthermore, I also believe it to be the case that Anangu understand that to repay the debt incurred, money will be withdrawn by Mr Kobelt from the account using that card and PIN. However, I am of the view that Anangu are not aware whether or not any charges are levied by Mr Kobelt for extending credit, as interviewees spoke only of repaying the amount charged for purchasing the goods concerned.

405 In the cross-examination, it was put to Dr Martin 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 and which he regarded as supported by the published statistics. Dr Martin accepted that that was so. He had made a similar point in his report, at [16] and [166]. Much of the cross-examination of Dr Martin was directed to the proposition that, in forming his opinions, he had overlooked the concept of biased sample selection and had thereby assumed inappropriately that the 117 customers had the characteristics of the Anangu generally, and in particular, those derived from the ABS statistics. In my respectful opinion, some of this cross-examination, at least insofar as it concerned Dr Martin's opinions, was misdirected. Dr Martin had made the point more than once in his report and again during the cross-examination, that he had accepted as accurate the circumstances of the 117 customers which ASIC had instructed him to assume; that he had not been asked to do an investigation of Mr Kobelt's customer base; and that he had used the ABS and NAPLAN data to "substantiate" the assumptions which ASIC had instructed him to make. The cross-examination was, however, more directed to the inferences which ASIC invited the Court to draw, based on Dr Martin's opinions.

406 Associate Professor Glonek of the University of Adelaide has undoubted (and unchallenged) expertise in mathematical statistics. He did not profess to have any expertise in anthropology or with the Anangu, let alone expertise concerning the Anangu who are resident in Mimili

and Indulkana. Mr Kobelt led evidence from him in order to expose errors he perceived in ASIC's, and to an extent, Dr Martin's, use of the ABS and NAPLAN statistics and in their attribution to the 117 customers of the characteristics of the Anangu more generally. Ultimately, ASIC did not contest the rectitude of Professor Glonek's statistical critique but submitted that, to a significant extent, it misunderstood Dr Martin's use of statistics and did not, in any event, undermine the conclusions it contended should be drawn by the Court.

407 I record at the outset that Professor Glonek's critique was confined to matters within the field of statistical analysis. He did not himself proffer any opinion about the characteristics of the 117 customers. Professor Glonek understood his task as being to report on "statistical arguments" bearing upon "the validity" of the assertions in [13] and [13A] of the amended statement of claim, set out earlier in these reasons.

408 At the heart of Professor Glonek's opinion was the recognised fallacy in arguing from the general to the particular unless close attention is given to the composition of these comprising "the particular" in comparison with those comprising "the general". This meant, in the present case, that one could not draw inferences as to the net income, asset position and financial literacy of the 117 customers who are the subject of ASIC's System case from the characteristics of the Anangu generally, or even from the characteristics of those Anangu who reside in Mimili and Indulkana, unless one could be confident that the subgroup comprising the 117 customers was truly representative of the larger population of Anangu. In order for that to be so, the 117 customers had, in statistical terms, to be randomly selected and to be a sufficiently large group of the Anangu population so as to allow conclusions to be drawn within recognised statistical confidence intervals. Professor Glonek considered that ASIC's pleaded case and, to an extent, Dr Martin's opinions were affected by a failure to recognise this statistical truism. In particular, he considered that both had overlooked that the 117 customers could not be regarded as randomly selected but were instead the subject of a form of "sample selection bias". The selection bias meant that the 117 customers could not, at least without further analysis, be regarded as a randomly selected sample of the whole Anangu population. Professor Glonek stated the principle underlying this critique of ASIC's approach as follows:

> A biased sampling method is one that preferentially selects members of the population with certain characteristics. Samples obtained by such a method will generally not be representative of the population. Some sampling methods, such as simple random sampling, are known to avoid such bias. If the method of sample selection is unknown, there is no basis to conclude that a sample will be

representative of the population, as it may or may not be biased.

409 Professor Glonek gave the following explanation for his opinion that the 117 customers could not, uncritically, be regarded as a random (and therefore representative) sample of all Anangu, but instead a group to whom sample selection bias applied:

> - Proximity to [Mr Kobelt's] shop. It would seem reasonable to suppose that APY residents for whom the Nobbys Store is the most convenient option will be more likely to visit the shop frequently and, in some cases, as their regular shopping destination. Conversely, APY residents living in communities large distances from Mintabie and with other shops nearby would appear less likely to visit [Mr Kobelt's] shop. Therefore the geographical distribution of customers who frequent the shop could be expected not to be representative of the distribution of the population of APY residents.
> - Capacity to travel. Amongst the APY residents who would have to travel a significant distance to the shop, it could be expected some residents would not have the capacity for the necessary travel and therefore not visit the shop. The capacity to travel could be expected to be influenced by characteristics such as ownership of a vehicle and adequate levels of physical and mental functioning. The distribution of these characteristics could be expected to differ between the customers who frequent the shop and the population of APY residents.
> - Intention to acquire certain goods. The shop stocks a number of items including durable goods. Individuals wishing to acquire such items would therefore have more reason to travel to the shop than those who do not. The desire to acquire items such as certain durable goods could be expected to correlate with characteristics such as age, income as well as a greater level of responsibility. The distribution of these characteristics could be expected to differ between the customers who frequent the shop and the population of APY residents.

410 Professor Glonek concluded that for these reasons the Anangu customers of Nobbys could not be regarded as a random sample of the Anangu population overall:

> The individuals who frequent [Mr Kobelt's] shop are a self-selected group and could not considered to be a simple random sample from the population of Indigenous residents of the APY Lands aged 15 years and over. As a group, they could be expected to differ from the general population with respect to the distribution of characteristics such as place of residence, vehicle ownership, physical and mental health, age, income and level of responsibility within their household.

411 Professor Glonek also considered that the 117 customers could not be assumed to be representative of Nobbys' customers generally because some of the latter did not use Book-up, whether as a result of their own decision or because Mr Kobelt had refused them credit.

412 In his oral evidence, Professor Glonek gave further reasons why the 117 customers should not be regarded as a random sample of the whole Anangu population. He noted that ABS statistics indicated that 37.7% of the Anangu population aged 15 years and over were in the labour force (either working, away from work or unemployed) whereas Mr Kobelt's evidence (to which I referred earlier) indicated that some 61 of the 117 customers had work. Professor Glonek said that, if Mr Kobelt's evidence be correct, then it was obvious that the 117 customers were not representative of the whole Anangu population and so could not be regarded as a random sample of that population.

413 Finally, Professor Glonek considered that for a number of reasons, including the smallness of their numbers and sample selection bias, no valid inferences as to the characteristics of Nobbys' customers generally could be drawn from the circumstances of Customers A to D.

414 As indicated, Professor Glonek's opinions were not contested by ASIC. I accept that his criticisms of ASIC's case and, to an extent, of Dr Martin's approach, are well made. In doing so, I am not overlooking Dr Martin's response in his cross-examination that he had not sought to extrapolate from the ABS statistics relating to the Anangu generally the profile of any individual customer of Nobbys.

415 Accordingly, care must be taken before accepting ASIC's submissions concerning the characteristics of the 117 customers, insofar as they are dependent upon inferences being drawn from the characteristics of the Anangu population generally. That does not mean that the profile of the Anangu or of residents of Mimili derived from the ABS statistics and the NAPLAN results is of no utility. While it cannot be inferred, at least without further enquiry, that all of the 117 customers had the difficulties with the English language, the limited education, the limited incomes, the limited assets and the limited financial literacy of the general Anangu population, the ABS surveys and the NAPLAN results do bear on the probability that they have all or most of these characteristics. The 117 customers constitute just less than 5% of the overall Anangu population. If the elderly and children are excluded from the numbers constituting the general Anangu population, the 117 customers probably constitute 5-10% of the overall Anangu residents. The circumstance that the 117 come from a population which has the general characteristics for which ASIC contended makes it more likely that at least several of them will also have those characteristics. The converse would also be true. If the Anangu population was generally literate, numerate, experienced in

financial transactions and familiar with the means by which credit may be obtained generally, one would be less inclined to conclude that the 117 customers lacked those abilities.

416 I indicate that, subject to the exercise of care which I have mentioned arising from Professor Glonek's evidence, I consider Dr Martin's evidence to be generally helpful and reliable.

Findings as to the characteristics of the 117 customers

417 ASIC's submissions concerning the 117 customers did not depend only on the inferences to be drawn from the characteristics of the Anangu generally. I have summarised earlier the other evidence bearing on this topic. That included Mr Kobelt's own acknowledgement that less than half of his customers are able to read. I also consider it appropriate to infer that the reading ability of those who can read is also compromised.

418 A finding that the majority of the 117 customers were impoverished in the sense of having no, or only limited assets, and only limited incomes is inevitable. The concession in final submissions by Mr Kobelt's counsel about these matters was appropriate, and it is in any event well-justified by the evidence.

419 I am satisfied that the majority of the 117 customers also had low levels of financial literacy. This is an overwhelming inference arising from the evidence as a whole including that of the Anangu witnesses other than, perhaps, Mr Brumby. By reason of the limitations on their literacy, numeracy and ability to communicate in English, the Anangu do not have the competence of most Australians in the wider community to make informed decisions concerning the use of financial services. Dr Martin gave the following example, which I consider to be apt:

> If any of us were to purchase a car, we would do so looking at our capacity to pay a certain price. We would look at comparative prices. We would see whether it's "a good deal" at that price and so forth. We would also, if we were taking out a loan, we would look at whether we could afford the weekly payments on that loan and we would also look at what the overall cost, that is, if a car – we are buying a car at $10,000, what are we going to end up [with]. My opinion that I am expressing here is that … none of those factors, by and large, are looked at by Anangu people. They don't have the financial capabilities to do so, the knowledge of such matters when they are purchasing a car from Nobbys …

420 I also accept the opinion of Dr Martin that most Anangu have not attained a level of literacy, numeracy and the other skills which enable them to engage in an informed manner with the institutions of general Australian society, including its financial institutions. The following passage in the cross-examination of Dr Martin seemed to accept, implicitly, that this was so:

> Q: You gave the example of you and me entering into credit arrangements with a mainstream credit provider, a few minutes ago?
>
> A: Mmm.
>
> Q: … [W]e would expect, using your example, to sign some quite complicated documentation. *Do you see any point in asking an Anangu to sign complicated legal documentation in respect of the provision of credit*?
>
> A: Mr Trim, manifestly not. Language and literacy levels are such that – well, I shouldn't say "you and I" – say – I have difficulty with the fine print of contracts. That would be doubly – triply so for Anangu; there's no doubt about that.
>
> (Emphasis added)

421 In the wider Australian community, most persons with credit or debit cards are well aware that it is essential to maintain custody of their cards and to protect the confidentiality of their PINs. The risks of misuse, misappropriation and fraud if others gain possession of a card and knowledge of the PIN attached to it, are so well known as to be ingrained.

422 The circumstance that Nobbys' Book-up customers so willingly hand over their key cards and disclose the PINs is, in my opinion, a marker by itself of their lack of financial literacy. That lack of literacy is not to be explained away solely by reference to "cultural differences" or to trust of Mr Kobelt. Whatever the explanation for the willingness to hand over the card and to disclose the PIN may be, it seems to reflect a lack of understanding of the basis upon which key cards and PINs are issued, and of the steps which the customers should take in their own self-interest. The customers thereby put themselves in jeopardy of misconduct by those who have access to the key cards and the PINs at Nobbys. These include the Kobelts and the other persons who work in Nobbys. I add immediately that there is no suggestion of dishonest use of the key cards and PINs in the present case, but the fact that that has not occurred does not justify a conclusion that, by ordinary standards, it is not imprudent for customers to provide Mr Kobelt with both their key cards and the attached PINs.

423 So far, I have couched my findings in terms of "the majority" without adding an adjective such as "overwhelming" used by ASIC in its pleading. Adjectives of that kind necessarily involve imprecision and a level of subjective value judgment. I would prefer to say that I am satisfied that *most* of the 117 customers are of this kind. This allows for there being some exceptions. It is not possible to be more particular other than to say that I consider the exceptions are likely to be a clear minority. I am also satisfied that Mr Kobelt knew of these characteristics of his 117 customers as it must have been obvious from the interactions which he had with them.

424 I do not accept the submission made on Mr Kobelt's behalf that the process by which he had selected the persons to whom he advanced credit resulted in Book-up being provided to the "more literate and less vulnerable persons". Mr Kobelt's own evidence as to the way he assessed requests for Book-up provides no justification for such a conclusion. Literacy and absence of vulnerability did not form any part of his selection criteria, and Mr Kobelt acknowledged that half of these to whom he sold cars could not read. I note, further, that Mr Kobelt acknowledged that, in the "last few years", he had declined Book-up to only two or three persons, and in the last 10 years, to only "a dozen to 15".

425 That said, I accept the submission of Mr Kobelt that the 117 customers did understand that they could purchase a vehicle or other goods from Nobbys on credit. Further, they understood that the credit arrangement involved them paying later for the vehicle or goods by their 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. They also understood that the disadvantage arising from the arrangement of them not having access to money for the necessities of life could be addressed by Mr Kobelt advancing further credit from time to time. I accept that the 117 customers had an awareness of these aspects of the arrangement at the time that they entered into Book-up with Nobbys and chose voluntarily to do so. I also accept that it is probable that there were some amongst the 117 customers who had had a reasonable education, who were reasonably articulate and who had some financial awareness but who, nevertheless, found Mr Kobelt's Book-up arrangements, at least for a time, to be convenient. On my assessment, the number of customers satisfying this description was limited.

Mr Kobelt's evidence

426 Mr Kobelt was born in 1943 at Cleve on the West Coast of South Australia. He left school part-way through Year 10 and commenced work on his family's farm. Mr Kobelt was involved in farming work for about 15-16 years and thereafter worked as an owner/driver of trucks for several years. At about the time he commenced the truck driving, Mr Kobelt invested in some holiday units and, as I understand it, managed them as an investment. Mr Kobelt then engaged in a cray fishing business for about four years, by acquiring a cray fishing boat and licence and employing a skipper.

427 In 1985, Mr Kobelt, his wife and Timothy moved to Mintabie and he commenced opal mining. After a year or so, he acquired Nobbys and running the store became his principal occupation.

428 From the above summary, it can be seen that Mr Kobelt has had a limited education and that he himself has lived in a remote community for significant parts of his working life. He has an unsophisticated approach to many matters. This is manifest, amongst other things, in his Book-up arrangements. Nevertheless, I had the firm impression during his evidence that Mr Kobelt had a keen appreciation of where his interests lay in this litigation.

429 I also had the impression that Mr Kobelt has come to believe that his provision of Book-up is justified because it meets the practical needs of his indigenous customers in remote communities. Mr Kobelt feels that this is not appreciated by an "outsider" such as ASIC and he has come to develop a certain amount of resentment at its "intrusion" into what he believes to be acceptable business practices.

Mr Kobelt's credibility

430 I have kept the matters just mentioned in mind in assessing Mr Kobelt's evidence. I have accepted much of his evidence but there are several aspects of it which have caused me to have doubts about its overall reliability.

431 Earlier, I rejected Mr Kobelt's evidence that he had ceased charging a reduced price for cars sold for cash (and not on Book-up) in about mid-2011. I said that I did not consider that this was a matter about which he could be honestly mistaken. I also rejected his evidence that he had heard his Anangu customers talking about extra money coming into their accounts before 14 December 2010, when the CBA glitch occurred.

432 There were other matters causing me to doubt the reliability of aspects of Mr Kobelt's evidence.

433 In his evidence in chief, Mr Kobelt gave evidence that, on at least some occasions, he had charged a fee when advancing cash to a customer under the Book-up arrangements. This evidence emerged when Mr Kobelt was explaining that he had ceased recording the Book-up transactions in a disused diary and was now using ledger cards for that purpose. He explained the way he recorded some transactions in the cards. The entries under the headings "Particulars", "Debit" and "Balance" for one customer (who I will refer to as LT) for 9 April 2014 were, respectively:

Cash food	55+162	3117

Mr Kobelt said that this indicated that LT had, on 9 April 2014, obtained both cash and food on Book-up with the effect that the balance of his indebtedness to Nobbys was then $3,117. In relation to the "55+" Mr Kobelt gave the following evidence:

> Q: What's the "+55" mean?
>
> A: He has come back afterwards and I would say he has asked for $50 cash, which is a $5 charge on a loan.
>
> ….
>
> His Honour: … I think this might be the first time I have heard about you making a charge when you do a cash advance. Do I understand correctly that he asked for a cash advance of $50 and you gave him that, but charged a fee of $5 for doing so?
>
> A: That's what it looks like there. Yes.
>
> Q: And is that what happened?
>
> A: No. Not all the time, no.

434 On the following day, Mr Kobelt returned to this topic in his evidence in chief and said that he did not charge "interest" for any monies advanced by cash to a customer. In terms, this was only evidence that Mr Kobelt did not charge "interest" for a cash advance. However, in the cross-examination, Mr Kobelt denied that he had either charged interest or imposed a charge for cash advances. He acknowledged, however, that it was possible that Timothy had done so. Mr Kobelt explained his evidence in chief by saying that he had been thinking about purchase orders for which he does impose a charge.

435 The cards recording transactions for other customers also contained entries consistent with Mr Kobelt having imposed a charge of 10% of the amount of a cash advance. The following are examples:

Date	Customer	Entry	Amount
05/04/2014	BL	Cash	$110
09/04/2014	SG	Cash	$220
02/09/2014	LD	Cash	$55
12/09/2014	DR	Cash	$110
17/04/2015	MC	Cash	$55

436 As can be seen, the amounts shown as advanced for cash are not round sums. They are consistent with a charge of 10% having been imposed for the advance of cash. I add,

however, that there are also numerous instances recorded in the cards of cash advanced to a customer without any indication that a 10% charge was levied.

437 Nevertheless, it is difficult to think that Mr Kobelt was mistaken when he said that there had been a $5 charge for a cash advance. It was something he volunteered in answer to a question from his own counsel. My question which followed drew Mr Kobelt's attention to the fact that this was the first mention of him charging customers when making a cash advance. It would have been easy then for Mr Kobelt to say that he had made a mistake, if that was the case, and he did not do so. Instead, the effect of his answer was to confirm that there may have been a charge, although this was not the case "all the time". Mr Kobelt's explanation that he had been thinking about purchase orders is implausible. Those orders did not form any part of the context to which counsel's questions related and, in any event, Mr Kobelt charged $10 for purchase orders and not $5.

438 I also note that Mr Kobelt acknowledged that he had charged Ronny Brumby $40 (10% of the purchase price) for purchasing the Greyhound bus tickets on 24 December 2013, to which I referred earlier, although he then said that he did not know what had been charged**.**

439 Accordingly, I do not regard this part of Mr Kobelt's evidence as having been truthful. I consider that Mr Kobelt did charge at least some of his customers 10% of the amount he advanced in cash, or which he outlayed on their behalf.

440 As indicated earlier, I had the firm impression while Mr Kobelt was giving his evidence that he had a good appreciation of where his interests lay in this litigation. I considered that, on occasion, Mr Kobelt's evidence was adapted to fit in with those interests. His evidence on the two topics just discussed provides illustrations.

441 On numerous occasions Mr Kobelt spoke of what "would have" happened. Many witnesses use this manner of expression when they mean that the event in question had in fact happened and without intending to convey that it is a surmise on their part. On other occasions, witnesses will use the expression when they are relying on custom or practice to describe what occurred. I have considered whether either of these accounts for Mr Kobelt's manner of expression in the present case. I accept that they may explain some of his usage but there were several occasions when I considered that Mr Kobelt was simply reconstructing in order to explain aspects of the evidence which he found inconvenient.

442 One example concerned his conduct with respect to the witness, Ms Pearson. When Mr Kobelt allowed Ms Pearson to use Book-up for the purchase of her car on 7 May 2009, he had her sign an authority in the diary in the following terms:

> Rhoda Pearson give Lindsay permission to take money from key card number [omitted] to pay car + cooker every fortnight.

443 In the cross-examination, it was pointed out to Mr Kobelt that his own records showed that he had taken money from Ms Pearson's account more frequently than every fortnight as she had authorised. Mr Kobelt proffered the explanation "she would have told me to take the money out when it was there or she would ring up or she would come in". This suggested explanation sounded implausible at the time it was made, even though Ms Pearson had, earlier in the trial, appeared to confirm that there had been times when she had asked Mr Kobelt to take more than originally agreed so as to reduce her debt more quickly. ASIC submitted that the suggestion is made even less plausible by evidence indicating that it was unlikely that Ms Pearson had even been at Nobbys on the days of the withdrawals in question so as to give the instructions which Mr Kobelt claimed. Moreover, Mr Kobelt had no record of these additional instructions. Ultimately, when pressed, Mr Kobelt acknowledged that he had no specific recollection of Ms Pearson giving him some additional authority.

444 In relation to another customer, Mr Pearson, Mr Kobelt recorded on the masking tape fixed to the plastic bag containing his key card, the instruction that he withdraw only $200 on the Tuesday in pension payment weeks. Despite that instruction, withdrawals were made from Mr Pearson's account in 2012 as follows:

28 June	$250	28 August	$300
5 July	$250	1 September	$250
12 July	$250	5 September	$250
19 July	$250	11 September	$250
27 July	$250	19 September	$300
2 August	$250	4 October	$300
9 August	$250	17 October	$300
16 August	$100	31 October	$300

445 It is apparent that, Mr Kobelt made withdrawals from Mr Pearson's account more regularly than fortnightly, and of amounts exceeding those which Mr Pearson had authorised. Mr Kobelt's explanation was that Mr Pearson had "probably come in and told me to change it".

When cross-examined further, he acknowledged that he had no recollection of him doing so, and could not explain why he had not recorded the changed instructions (if they had been given) on the masking tape. To my mind, it is implausible that Mr Pearson would have changed his instructions so soon after 22 June 2012.

446 Another example concerns the customer Mr Doolan. Mr Kobelt recorded in the Book-up diary relating to Mr Doolan that he had withdrawn $100 from his account on 14 December 2010. Mr Doolan's bank statement indicated, however, that $1,000 was withdrawn from his account on 14 December 2010. In the cross-examination, Mr Kobelt said that he could not remember that occurring. However, on the following day in re-examination, Mr Kobelt gave the following evidence:

> Q: Might there be an explanation for the difference between the credit of $100 and the withdrawal of $1,000?
>
> A: That 14.12 was when all that bonus money come out and Mark would have asked for $900 and left $100 to me.
>
> His Honour: And you say "he would have". Do you have any specific recollection of that occurring?
>
> A: Knowing Mark, yes.
>
> Q: No. Do you have a specific recollection of that occurring?
>
> A: Yes.
>
> …
>
> Q: You can think back to the occasion when there was a withdrawal of $1,000 and he said "you keep $100 and give me the rest"?
>
> A: Yes.
>
> …
>
> RE-EXAMINATION
>
> Q: Is there something about Mr Doolan's characteristics as a customer that assists with your recollection?
>
> A: Yes. Mark would've demanded the money and I gave it to him.

447 Leave was granted to ASIC's counsel to cross-examine Mr Kobelt further on this topic. In that cross-examination, he denied that he had made up the account of giving Mr Doolan $900 and crediting only $100 to the Book-up.

448 I consider that Mr Kobelt's evidence about the withdrawal from Mr Doolan's account was unconvincing. I had the firm impression at the time that he was reconstructing. It is not easy to understand why Mr Kobelt did not give the explanation he did in his re-examination when asked about this transaction in the earlier cross-examination, had it been true. I also note that

the withdrawal on 14 December 2010 appears to have occurred as part of Mr Kobelt's exploitation of the CBA glitch which occurred that day.

449 Another example concerns the customer Mr Clothier who purchased a car on Book-up on 14 September 2012. Mr Kobelt recorded Mr Clothier's instruction with respect to the withdrawals from his account as being "Chicky Thursday 500 only", ie, that he could withdraw only $500 from Mr Clothier's account on the Thursday in the week in which the family allowance was paid. The Book-up diary and the merchant reports relating to the use of the EFTPOS machine at Nobby showed that Mr Kobelt did not comply with this instruction as withdrawals were made from Mr Clothier's account as follows:

20 September 2012	$500
28 September 2012	$1,000
29 September 2012	$300
4 October 2012	$500

450 Significantly, the withdrawal of $1,000 was not recorded in the Book-up diary. When cross-examined about this, Mr Kobelt initially said that he was not aware that the $1,000 had been withdrawn "by us", but then advanced other explanations: that Mr Clothier may have brought cash and given it to him; that Mr Clothier may have withdrawn the $1,000 himself; and that possibly something "had gone wrong with [his] record keeping". It was very apparent that Mr Kobelt was reconstructing and that he had no actual recollection. The suggestion that Mr Clothier had brought in cash was not an explanation at all, because what was being put to Mr Kobelt was that $1,000 had been withdrawn from Mr Clothier's account and not credited to Mr Clothier in the Book-up diary, rather than that Mr Clothier had made a cash payment. As to the suggestion that the cash withdrawals had been taken by Mr Clothier, Mr Kobelt acknowledged that the merchant copy receipt did not include the word "taken" which he had adopted as the usual practice in late 2011 when customers took cash.

451 I accept, in fairness to Mr Kobelt, that his withdrawals from Mr Clothier's account after 4 October do seem to have conformed with the instructions which Mr Clothier had given.

452 Mr Kobelt's willingness to reconstruct sometimes resulted in him giving inconsistent explanations. An example relates to the different explanations he gave in evidence in chief and in cross-examination concerning the entries in the Book-up diary for Customers AH

and AW. In evidence in chief, he claimed that the entries indicated that he had withdrawn $490 from one of their accounts on 10 July 2010 and had paid $405 of that amount to AH and/or AW. However, in the cross-examination he gave a different account, namely, that he had applied the whole of the $490 in reduction of their Book-up debt. Then, when it was pointed out to Mr Kobelt that his own merchant report indicated that a further $360 had been withdrawn from AW's account on 10 July 2010, which he had not recorded in the Book-up diary, Mr Kobelt returned to the explanation "they've probably taken the money and I didn't have to put it in [the Book-up diary]". He acknowledged, however, that he had no memory of that occurring and that he did not have any document to indicate, one way or the other, that AH or AW had taken the money.

Practices at Nobbys

453 Mr Kobelt said that he had never refused food to a customer from whose account he had withdrawn all the money. He did, however, limit the goods which customers with a significant Book-up debt could take by way of Book-down. Generally, such customers were limited to milk, bread and meat and were not permitted to purchase items like sweets and chips. I accept that evidence as accurate. Mr Kobelt may in part have been motivated by kind heartedness but I consider that he was well aware that it would not be in his commercial or reputational interest to have refused a customer food altogether in the circumstance that the customer had no money because he (Mr Kobelt) had withdrawn all the money in the customer's account. Mr Kobelt acknowledged as much when he said that he understood that if he did not treat his customers well, they would cease patronising Nobbys.

454 Mr Kobelt's appreciation of his own commercial interest was also evident in his evidence concerning his practice in the release of key cards to customers who wished to travel away from the APY Lands temporarily. If the customer's account was clear, Mr Kobelt would release the card. If the customer's account was not clear, he would still generally release the card, although he did not do so in all cases. Mr Kobelt though it sensible to release the card because, if he refused, "they would cancel it and get another one". Although the customers were expected to return the key card to Mr Kobelt on coming back to the APY Lands, some did not do so. However, Mr Kobelt would not press them to return the card, saying "I just wanted them to come in the shop and spend the cash if [they've] got it. It's no good crying over something that they've made a decision on". He would, instead, decline further Book-up to the customer until the key card was returned.

455 Mr Kobelt was asked in his evidence in chief to respond to ASIC's allegation that he had been recklessly indifferent to his customers' ability to afford the amounts he withdrew from their accounts. He said that he was responsible as he does not let his customers Book-up "too much". However, as the following evidence indicates, Mr Kobelt was referring in that answer to the amounts he allows customers to Book-up on food, and not to the initial Book-up in connection with the purchase of a car:

> Q: How do you ensure that [they don't book-up too much]?
>
> A: Well, when they come in and book-down and put their food up I will tell them they've got to slow down because they've booked up too much or pick out the stuff that's not necessary and cut them back.
>
> Q: What do you mean "not necessary"? What sort of goods are you talking about?
>
> A: Chips, lollies, sometimes … Coke.
>
> Q: And how do you determine what's the level of affordability for the customer?
>
> A: Well, I know what money they get, I know what money they're paying, so I keep it below that.
>
> Q: In respect of customers who have car booked up, does the same process apply?
>
> A: Yes.

456 Mr Kobelt did not otherwise indicate an exercise of oversight by him of the amount which customers could Book-up in connection with the initial purchase of a car. He seems to have been indifferent to whether his customers could afford the commitment which they were undertaking, having regard to their financial position more generally. I accept the submission of ASIC on this topic.

457 As previously noted, Mr Kobelt acknowledged that there were occasions on which he had taken more out of a customer's account than the outstanding Book-up balance. He said that when that occurred, it was because the customers had requested it. He acknowledged, however, that there had been occasions when Timothy has made a mistake in that respect. When that occurs, a retransfer into the customer's account is made.

Mr Kobelt's record keeping

458 Earlier in these reasons I described the manner in which Mr Kobelt recorded in unused diaries the Book-up transactions for each customer. I characterised Mr Kobelt's system as "rudimentary" and said that many of the entries were illegible or only barely legible. That description does not convey adequately the incomprehensibility of many of Mr Kobelt's diary

entries. In addition to being illegible, the diary entries are cramped and chaotic so that it is difficult, even in retrospect, to understand fully the state of the running accounts of the 117 customers at any one time.

459 The difficulties to which Mr Kobelt's method of record keeping gives rise were made apparent in the evidence of Mr McCabe and of Mr Jorgensen.

460 Mr McCabe is a certified practicing accountant and a senior investigator employed by ASIC. He holds a Bachelor of Economics (Honours) degree from the University of Adelaide. He has had considerable experience in reading and analysing books of account. I considered Mr McCabe to be an honest and reliable witness and accept his evidence.

461 In late 2014, Mr McCabe prepared eight schedules summarising the transactions between Nobbys and eight of its customers. Four of these were Customers A to D. The schedules are in the nature of spreadsheets showing, in relation to each customer, all of the transactions occurring on any one day. In preparing the schedules, Mr McCabe incorporated the information contained in Mr Kobelt's Book-up diaries to the extent to which he was able to understand them, as well as the information contained in the bank statements relating to each customer's account and in the merchant reports prepared by Mr Kobelt's bank regarding his use of the EFTPOS terminals at Nobbys to access the customers' accounts. He carried out this task without any input from Mr Kobelt.

462 It is evident that it was a task of complexity and difficulty, particularly because of the manner in which Mr Kobelt maintained the records in the diaries. I am satisfied that Mr McCabe carried out the task conscientiously in an attempt to present, in a useful summary form, the transactions which had occurred in relation to each customer. He also attempted to cross reference entries in the diaries with the entries in the customers' bank records and in the merchant reports relating to Mr Kobelt's EFTPOS terminals.

463 In a number of instances, Mr McCabe was unable to decipher the date or the amount of a transaction recorded in the diaries. In those cases he entered "illegible" in the schedules. In other cases, he entered "not matched" to indicate his inability to match a transaction recorded in the customer's bank statement with an entry in the Book-up diaries, and vice versa. A feature of Mr McCabe's schedules is the number of times the terms "illegible" and not matched" appear.

464 Mr Kobelt's solicitors retained Mr Jorgensen, an experienced chartered accountant, to provide an opinion regarding aspects of the Book-up arrangements at Nobbys and to prepare spreadsheets detailing the transactions concerning Customers A to C as recorded in the Book-up diaries. This was a much more confined task than that carried out by Mr McCabe. In fact, much of the work in preparing Mr Jorgensen's report was carried out by less senior staff within Mr Jorgensen's firm.

465 In preparing the schedules, Mr Jorgensen's staff held meetings with Mr Kobelt and his solicitor on 10 and 11 February 2015 at which Mr Kobelt explained the diaries (using photocopies). Subsequently, on 22 April 2015, Mr Jorgensen's staff met with Mr Kobelt again to obtain his assistance in interpreting some of the entries in the Book-up diaries, this time with access to the originals. Given the assistance which Mr Jorgensen's staff had from Mr Kobelt, it is unsurprising that they were able to make sense of more of the entries than had Mr McCabe. Even so, Mr Jorgensen said that there was "some subjectivity" involved in interpreting figures in the diaries due to the state of the records and that, without Mr Kobelt's assistance, the figures in the diaries "would have looked different". He also said that some of the entries were not legible either to Mr Kobelt or to his staff. In some instances, the difficulty in reading the diaries had the consequence that Mr McCabe and Mr Jorgensen interpreted the entries differently.

466 I am willing to proceed on the basis that the tables prepared by Mr Jorgensen of the diary entries are more accurate than those of Mr McCabe, to the extent to which they purport to record the same data. That is because Mr Jorgensen's staff had the assistance of Mr Kobelt, who was the author of many of the diary entries, in making sense of them, whereas Mr McCabe did not. In addition, Mr Jorgensen and his staff were able to review and refine their tables in the light of the very detailed critique which Mr McCabe made of their first attempt. That critique had revealed numerous instances in which Mr Jorgensen's tables did not reflect accurately entries in the diaries, whether because of errors, omissions or the inclusion of figures which did not appear in the diaries at all. Even at the end of the trial after all forensic endeavour by Mr McCabe and Mr Jorgensen (and his staff), the Court did not have schedules reflecting the diary entries relating to Customers A to C which could be regarded as complete. Amongst other things, Mr Jorgensen's own analysis revealed some 11 instances in which the balance of the accounts of Customers A to C calculated from time to time by Mr Kobelt did not match those which he had calculated.

467 I agree with Mr McCabe's assessment that these differences by themselves mean that one cannot be confident that the balances in the customers' accounts as recorded by Mr Kobelt are accurate. The illegibility and uncertainty about many of the entries adds to this lack of confidence.

468 I accept that some of the illegibility may be a consequence of the aging of the diaries and the absorption of ink into the paper. Nevertheless, I considered it to be a reflection of the poor quality of Mr Kobelt's record keeping that two experienced accountants, acting independently, could not understand all of the entries. Even with Mr Kobelt's assistance, Mr Jorgensen's staff could not reconcile completely the balances for each customer which they calculated with those calculated by Mr Kobelt. There is no difficulty in concluding that even a literate and numerate person within the 117 customers would have found it almost impossible to understand Mr Kobelt's record keeping, let alone to engage in the kind of check carried out by Mr McCabe and Mr Jorgensen (and his staff).

469 Mr Jorgensen was asked by Mr Kobelt's solicitors to express an opinion whether, on the assumption that the schedules prepared by Mr McCabe recorded accurately information from the bank statements of Customers A to C, the Book-up diaries permitted an accurate record to be kept of amounts advanced to Customers A to C from time to time. In response, Mr Jorgensen gave the following opinion:

> [3.1.8] In my opinion, based on the assumptions mentioned earlier, the Book Up diaries do permit an accurate record to be kept of amounts advanced to Customers A to C from time to time. As stated earlier, there are minor errors or illegible entries leading to errors amounting to [0.33%] of transactions. In my opinion, the Book-up diaries are still reliable despite these minor errors.

470 However, Mr Jorgensen acknowledged in cross-examination that he had not checked at all whether the figures recorded in the diaries were a true record of the underlying transactions. He also acknowledged that an audit of the reliability of the transactions recorded in the diaries would require a check on the legibility of the entries, the arithmetic used by Mr Kobelt and whether the entries recorded accurately the underlying transactions. Mr Jorgensen accepted that, of those three elements, he had checked only the arithmetic.

471 Mr Jorgensen made an analysis of all the drawdowns and repayments for Customers A to C in the period from 20 May 2009 to 1 November 2012 and calculated the closing balances on the customers' accounts at the same date as had Mr Kobelt. Some of Mr Jorgensen's balances were over, and some under, those of Mr Kobelt. The net effect of the "unders" and

"overs" was initially identified as $620, which Mr Jorgensen calculated to be 0.33% of the total of the transactions (both payments and further Book-down). On this basis, Mr Jorgensen expressed the opinion quoted above that the Book-up diaries "do permit an accurate record to be kept of the amounts advanced to Customers A to C from time to time". Mr Kobelt relied on this opinion in defending the claim of unconscionability.

472 Mr McCabe said that he did not regard this analysis of Mr Jorgensen as being meaningful. I agree with that assessment. The reliability of Mr Kobelt's records is not demonstrated by showing that an error in one direction in the calculation of the balance for one customer is wholly or substantially offset by an error in the opposite direction for a different customer, or even by an error in a different direction in respect of the same customer but at a later point in time. An adaption of an example used by counsel in the cross-examination of Mr Jorgensen illustrates the difficulty with such an analysis. On Mr Jorgensen's approach, Mr Kobelt's diaries could be regarded as completely reliable even if, in the case of one customer, he had incorrectly recorded a repayment of $500 as $250 and, at a different time in the case of another, had incorrectly recorded a payment of $250 as $500. The examples could be multiplied.

473 It cannot reasonably be held that records with these kinds of mistakes in them are reliable simply because, in the net position, Mr Kobelt was neither advantaged nor disadvantaged. I was surprised that Mr Jorgensen advanced this as serious proposition, as I consider that an experienced chartered accountant acting with objectivity would have recognised immediately that a small net difference between the aggregate of "unders" and "overs" says very little by itself about the reliability of the multiple transactions relating to individual customers which produced that result. From the customer's perspective, it would be of no comfort to know that an error which had the effect of increasing his or her liability to Mr Kobelt had been notionally offset (from Mr Kobelt's perspective) by a separate error which reduced the liability of another customer.

474 Mr McCabe's analysis revealed numerous instances of withdrawals from customers' accounts with no corresponding credit to the customer in Mr Kobelt's diary.

475 A further matter which Mr Jorgensen's opinion overlooked is that the balances of individual customers calculated by Mr Kobelt, with which he (Mr Jorgensen) compared his own calculated balances, had been made from time to time, usually as and when requested by a customer, or when the customer had purchased a further vehicle on Book-up. The error made

by Mr Kobelt (assuming it be his error) was made at that point in time in relation to the particular customer's Book-up, and not in relation to the net position as to all customers. In my opinion, this adds to the unreality of Mr Jorgensen's attempt to draw inferences as to the reliability of Mr Kobelt's records from the size of the difference in the two calculated balances.

476 In my opinion, the conclusion that Mr Kobelt's manner of record keeping was inadequate is inescapable. I consider that Mr Jorgensen should have recognised that that was so.

477 There were other aspects of the Book-up arrangement of which Mr Kobelt did not keep appropriate records. He acknowledged that Nobbys did not generate itemised receipts relating to the sale of goods to customers in the period 1 July 2010 to 31 October 2012. This meant that the customers could verify the amounts they were being charged for goods only by watching the swivel screen on the cash register as each item was entered. They were not given a document which they could take away so as to check the amounts they had been charged and which they could compare with the amount recorded in the diaries as Book-down. Mr Kobelt said that he had not retained the tapes within the cash register which had kept an itemised record of the sales made to each customer. He was unable even to say when he had introduced the cash register producing an itemised record of the goods sold.

478 The way in which Mr Kobelt recorded the occasions when he used a customer's key card to withdraw cash which was given to the customer was also rudimentary. Until the time that ASIC commenced its investigation of the practices at Nobbys (in 2011), Mr Kobelt kept very little record that a customer had taken cash. Thereafter he commenced writing the word "taken" on the EFTPOS printout to indicate that the customer had taken cash. However, this practice was not applied uniformly. Further still, Mr Kobelt did not uniformly record in the Book-up diaries amounts taken by way of cash. Even when Mr Kobelt commenced using ledger cards as records in 2013, he did not always distinguish between the amounts withdrawn from customers' accounts which were applied to the purchase of food or groceries, on the one hand, and the advance of cash to the customer, on the other. The effect, as Mr Kobelt acknowledged was that there is no way of knowing from his records whether or not a customer had taken cash.

479 The inadequacies of Mr Kobelt's record keeping were revealed in other ways.

480 Customer D had never purchased a car on Book-Up and so details concerning his use of Book-up did not appear in the Book-Up diaries. It is not clear what record Mr Kobelt kept in relation to Customer D. He did not produce any record with respect to Customer D, either to ASIC in response to notices it had served on him pursuant to s 155 of the ASIC Act, or in his evidence. This is remarkable given that Customer D's own bank statements indicate numerous withdrawals from his account via the EFTPOS machine in Nobby's store, which I infer were made by Mr Kobelt or his agents.

481 Mr Kobelt recorded that he had sold a VR Commodore, Reg No OGR 238 to Customer B on 18 August 2012 for $4,200. This sale is recorded in both the Book-up diary and in Mr Kobelt's summary of the vehicles he sold. The Book-up diary recorded Mr Kobelt making withdrawals from Customer B's account in reduction in the amount of Book-up until 1 November 2012. Then, on 6 December 2012, Customer B purchased another car (a white VP Commodore, Reg No VPH 721) for $4,750. It was common ground that Customer B had experienced difficulties with the computer, ignition and wiring in the VR Commodore, Reg No OGR 238 and had returned it to Nobbys. Mr Kobelt claimed that he had paid $500 to Customer B to repurchase the car and had waived the balance of his debt.

482 There are a number of curiosities about the record keeping in relation to these transactions. The first is that Mr Kobelt's records show that he had also sold the VR Commodore, Reg No OGR 238 to another customer, Ms Kenny, on 27 July 2012, only three weeks before it was sold to Customer B and that withdrawals had been made from her account until 31 October 2012, that is, continuing even after the same car was said to have been sold to Customer B. Mr Kobelt could not explain that circumstance.

483 Secondly, despite Mr Kobelt's assertion that he had waived Customer B's outstanding debt (and that Customer B had not purchased any further cars) his own records showed that the outstanding balance on OGR 238 was incorporated into Customer B's debit with respect to the purchase of the VR Commodore Reg No VPH 211 and that withdrawals were made from Customer B's account in reduction of that balance. Despite that, Mr Kobelt maintained that he had waived the balance owing on the car registration number OGR 238. The entries in Mr Kobelt's diary are not the kind of transactions one would have expected to see had Mr Kobelt given effect to his waiving of the balance of Customer B's debt. These matters have added to the general impression that Mr Kobelt's record keeping was unreliable.

484 Mr Kobelt did not make any periodic reconciliation of the amounts deposited into his account against the amounts which he had withdrawn from the customers' accounts so as to check that he had recorded accurately each transaction. ASIC submitted that Mr Kobelt conducted his business with "little or no insight into the importance of providing a true and proper account to his customers". I consider that submission to be well justified.

Comparative interest rates

485 Mr Jorgensen was asked by Mr Kobelt's solicitor to indicate the fees or interest which Customers A to C would have paid to a commercial credit provider if they had borrowed amounts of the size advanced to them by Mr Kobelt for "similar terms". Mr Jorgensen provided rates for two kinds of borrowings. First, he said that a commercial lender providing a variable unsecured personal loan in the period January 2010 to December 2012 would have charged interest in the range of 14%-15.2% per annum. This range was derived from the RBA statistics for loans of this kind.

486 Secondly, he said that a payday lender would charge the equivalent of 92% annually if compounded monthly, taking into account a 20% establishment fee plus 4% interest per month. In my opinion, the Book-up facility at Nobbys is not comparable to payday lending arrangements (at least as they are commonly understood) and these rates can be ignored.

487 I observe that Mr Jorgensen did not provide evidence as to the interest rates applicable under line of credit or overdraft facilities.

488 In cross-examination, Mr Jorgensen acknowledged that a credit charge of $1,000 for vendor finance on a vehicle purchase of $4,000 for a term of 12 months was equivalent to an interest rate of 25%. He also accepted that, in the event that the total of $5,000 was repaid progressively over the 12 month period, the effective interest rate would be still higher.

489 Although there was no evidence of the actual effective interest rates in this or like circumstances, they are a matter of mathematical calculation. Assuming a $4,000 vehicle purchase and a $1,000 credit charge, with the aggregate of $5,000 being repaid by regular monthly instalments over a 12 month, 18 month and 24 month period, the effective annual interest rates are 43.4%, 29.5% and 22.4% respectively. Each of these is significantly in excess of the rates for personal loans to which Mr Jorgensen referred.

490 Obviously enough, the effective interest rates in this example would be higher still if the difference between Mr Kobelt's listed and cash prices was greater than $1,000.

491 Mr Jorgensen was asked to calculate the interest which Customers A to D would have paid to a commercial credit provider for the credit provided to them by Mr Kobelt. He calculated that interest using the personal loan rates, as aggregating $2,886.14 for all three customers. However, this related to Book-up for a total of nine vehicles purchased by these customers. If the price differential in relation to the purchase of each of the nine vehicles was $1,000, the difference between the credit charged by Mr Kobelt ($9,000) and the amount which would have been charged by a commercial lender on the assumed hypotheses ($2,886.14) is stark. I also observe that none of the interest amounts which Mr Jorgensen calculated for each of the nine purchases exceeded $1,000, and yet this seems to have been the minimum amount of Mr Kobelt's credit charge.

492 I conclude that Mr Kobelt was providing credit of a very expensive kind.

493 In his final submissions, counsel for Mr Kobelt identified a number of features which he contended indicated that Mr Kobelt's conduct in the Book-up arrangements should not be characterised as unconscionable. One matter identified by counsel in this respect was that "[t]he report of Mr Jorgensen demonstrates that the interest free terms were better than customers could obtain from traditional finance institutions". For the reasons just given, that submission cannot be accepted. Mr Kobelt was making a charge for his provision of credit, and his charges were, comparatively, very expensive.

494 Mr Kobelt's opening submissions contained an acknowledgement of the relevance of high fees and charges to an assessment of unconscionability:

> Clearly, where high fees and interest are charged the conduct of the provider may well be unconscionable …

The submissions went onto to say:

> [10] The expert report of Mr Jorgensen shows that compared [with] other commercial lenders, the customers as particularised in ASIC's case, have obtained credit on materially better terms than exist in the market place with specialist commercial credit providers. The defence case is that the transactions were manifestly righteous ones (ie, beneficial in accordance with the rule in *Fry v Lane*).
>
> (Citations omitted)

495 The reference to *Fry v Lane* (1888) 40 Ch D 312 was, as I understood it, a reference to the particular onus to show that a transaction was fair, just and reasonable which Equity places

on a party to a transaction who transacts with the knowledge that the other party was under a special disability. That onus is not directly applicable in the context of s 12CB of the ASIC Act. I accept, however, that proof by Mr Kobelt of the reasonableness of his credit charges would be a matter bearing upon the conscionability of his conduct. However, the extent of Mr Kobelt's credit charges, as indicated by the analyses above, counts against Mr Kobelt's conduct being characterised as "righteous".

496 There is one further aspect of the evidence to note. Mr Kobelt's position throughout was that he did not charge interest nor impose any charge for his provision of Book-up. Consistently with that position, he did not disclose to his Book-up customers the existence of any charge. I consider it probable that in most cases, the customers were not aware that they were being charged for the Book-up which Mr Kobelt provided, let alone the amount of that charge.

Use of Book-up by others

497 Mr Kobelt emphasised that a form of book-up is not unique to Nobbys. I accept that that is so. Amongst other things, it is evidenced by a report prepared in 2002 by Gordon Renouf for ASIC entitled "Bookup: Some consumer problems" and by the evidence of Dr Martin.

498 Mr Renouf reported that "some form of bookup is available in a large number of rural and regional towns in most States of Australia and the Northern Territory, on Aboriginal communities, at stores on pastoral stations and in some regional cities".

499 The book-up described by Mr Renouf in his report has taken various forms, including customers being required to have their social security cheques posted to a store with the expectation that the cheque would be cashed at the store; customers providing direct debit authorities, and customer providing key cards and PINs. It seems that book-up developed as the entitlement of Aboriginal people to social security payments was recognised in the period between 1958 and 1975 and the consequent receipt by them of such payments. The progression to the provision of key cards and PINs seems to be a consequence of the change in the way in which financial payments are now paid, and financial services provided.

500 Mr Renouf noted in his report the need to take account of different cultural practices in indigenous communities when assessing book-up arrangements. He said:

> Indigenous use of financial services and bookup systems occurs in the context of specific cultural practices and attitudes. The behaviour and preferences of Indigenous consumers cannot be assumed to be the same as "consumers in general". This has particular effects on the attitudes and practices Indigenous consumers bring

to bear on their choice and use of financial services. Westbury … notes that:

> "The pattern of sharing food, cash and other resources within Indigenous communities is strategically determined by kinship ties and social alliances which extend beyond families and physical households. … These rules and how they are applied in everyday life are often overlooked or misunderstood and result in policy approaches by service providers that fail to take account of existing community structures and expectations. … For example banks are seen as cash outlets and not savings facilities, there is low cultural emphasis on savings and Centrelink is viewed as a de facto banking service."

In this context, a key card is seen both as a resource to be shared and a pledge to secure a bookup arrangement. In the same way, if it is necessary to disclose a PIN number to facilitate meeting a cultural obligation, then it should be disclosed regardless of the bank's strictures, even in cases where they have been perfectly understood.

501 I accept the appropriateness of the caution, which Mr Kobelt emphasised, that regard should be had to the features which differentiate Nobbys' Anangu customers, on the one hand, and consumers in general, on the other. These features include different traditions concerning individual and communal property, different conceptions about the entitlement to retain for oneself payments received as an individual, and different practices in the management of money. Account should be taken of those differences in applying the norms which underpin the assessment of the conscionability of Mr Kobelt's conduct.

502 Mr Renouf noted that book-up can offer some advantages to customers in remote communities and in some regional areas. It is often the only way by which indigenous residents can obtain access to credit; it provides a means of managing money over the weekly or fortnightly pay cycle to those who lack financial management skills; and it is a means by which demand sharing (humbugging) can be addressed.

503 Mr Renouf also identified that problems can result from the way in which many traders operate book-up. He summarised these problems or disadvantages as including:

(a) consumers are tied to one retailer for all purchases;

(b) there may be additional or hidden costs;

(c) there are opportunities for price exploitation;

(d) excessive credit may be advanced to consumers;

(e) credit may be advanced to third parties without the consumer's authority;

(f) the trader may allow the purchase of alcohol on credit in breach of licensing laws;

(g) there may be a lack of transparency or poor record keeping;

(h) consumers have no or limited access to their card or their funds especially when the store is closed;

(i) consumers have no opportunity to learn and practice electronic banking or money management skills;

(j) consumers may remain unaware of Centrelink breaches;

(k) book-up can be a sources of resentment in indigenous communities;

(l) when key cards and PINs are handed to the trader, consumers are in breach of the bank's conditions of use of the card and may expose themselves to additional liability if an unauthorised transaction is made on their account.

504 There was no evidence of matters (e) and (f) in the present case and ASIC did not rely upon any breach by the Anangu of their contracts with the banks which had issued the key cards (Item (l)). However, some of the other disadvantages identified by Mr Renouf are apparent in the Book-up arrangements at Nobbys.

505 It is appropriate to take account of the advantages which Mr Kobelt's Book-up system provides to the indigenous residents in the remote regions in which they live. As noted earlier, there are no banks, credit unions or like institutions in or immediately adjacent to the APY Lands, with the consequence that the means of obtaining credit are not readily available to the Anangu. They would have to travel considerable distances to access such services: Coober Pedy to the South and Alice Springs to the North.

Evaluation

506 As previously noted, s 12CC(1) of the ASIC Act indicates several matters which may bear upon the assessment of the conscionability of a supplier's conduct. It is convenient to commence the evaluation of Mr Kobelt's conduct by reference to those of the listed matters which are presently pertinent.

Relative strength of bargaining positions: s 12CC(1)(a)

507 One of the matters which usually bears on the relative strength of the bargaining positions of contracting parties is the availability of alternatives.

508 The evidence suggested that book-up was also available at least at one of the two other stores in Mintabie, and that a condition of doing book-up at that store was that customers provide their key cards. I think it reasonable to infer (and do) that the terms and conditions of the

other store were not materially different from those imposed by Mr Kobelt, or at least not different in a way which was beneficial to the customers.

509 The evidence did not indicate whether the car dealers in Alice Springs and Port Augusta, with whom Mr Kobelt compared the prices for his cars, and who he regarded as his competitors, sold cars to Anangu customers on credit and whether, if so, that was by a form of book-up. No comparison can be made in that respect.

510 I am satisfied that the majority of the Book-up customers did not have assets which could be proffered to a credit provider as security for a loan. I am satisfied in turn that this would make it difficult for the customers to obtain loans from commercial lenders. One of the advantages of Mr Kobelt's system for the Book-up customers is that it was a relatively simple means by which they could obtain a form of credit which was not otherwise available to them. This by itself gave rise to a significant difference in the respective bargaining positions. The vulnerabilities of the Book-up customers arising from their low levels of literacy and numeracy and difficulty in accessing alternative forms of credit added to the disparity in bargaining positions.

511 As part of his submission that there was no significant disparity between his bargaining position and that of his Book-up customers, Mr Kobelt emphasised their ability to frustrate his ability to make withdrawals by taking action to cancel their key card or to have their income paid into a different account. There was evidence that several had done so without ever resuming Book-up arrangements at Nobbys. These constituted bad debts for Nobbys. As the key card and PIN were his only security, Mr Kobelt had to rely on the good faith of his customers not to engage in conduct of this kind. Mr Kobelt's submission was that, just as the customers had to trust him to behave responsibly in the use of their key cards and PINs, so also he had to trust them. This inter-dependence of trust meant, he submitted, that there was no significant disparity in the respective bargaining positions.

512 I accept that the Book-up customers did have the ability to frustrate the arrangements and that some did so. However, I am not willing to regard these circumstances as indicating equality of bargaining position.

513 The exercise by the customers of their power to frustrate the arrangement required them to act in breach of their agreement with Mr Kobelt, that is, to act in a way which was dishonourable, if not dishonest. Probably, although it is not appropriate to express a

concluded view, the conduct constituted a breach of contract, thereby exposing those customers to enforcement action. The derogatory remarks which Mr Kobelt and Timothy made in the diaries are an indication of their assessment that the customers' conduct was reprehensible. I consider the Court should be slow to conclude that the ability of customers to engage in forms of wrongful conduct had the effect of correcting or ameliorating what was otherwise an imbalance of bargaining power.

514 Mr Kobelt recognised that it was open to him to take enforcement action against the defaulting customers if he chose. There were pragmatic and economic reasons why he chose not to do so.

515 I conclude that Mr Kobelt's bargaining position was relatively stronger than that of his Book-up customers.

516 Of course, inequality of bargaining power is not sufficient to indicate that the conduct of the party who enjoys the superior power is unconscionable. Something more is required: *The Commercial Bank of Australia Ltd v Amadio* at 462 (Mason J); *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18, (2003) 214 CLR 51 at [11]-[12] (Gleeson CJ); and *Paciocco* [2016] HCA 28 at [293] (Keane J).

Conditions not reasonably necessary to protect Mr Kobelt's legitimate interests: s 12CC(1)(b)

517 Mr Kobelt submitted that his Book-up system did not require the Book-up customers to comply with conditions which were not reasonably necessary for the protection of his legitimate interests. He submitted:

> The condition of obtaining the key cards and PINs is clearly necessary to the operation of a successful book-up arrangement, as is made clear by the industry standards identified in ExR11.

Exhibit R11 is Mr Renouf's 2002 report to ASIC to which I referred earlier.

518 In my opinion, this submission should not be accepted. In the first place, the "Traders Checklist" in Appendix 6 to Mr Renouf's report is not a statement of industry standards and, in any event, Mr Kobelt's arrangements do not satisfy that Checklist. Mr Renouf's report does not identify "industry standards" in any conventional sense. On the contrary, Mr Renouf indicated that Book-up can take different forms. It is not reasonable to

characterise his description of those various forms as an identification of "industry standards". No "industry standards" have been proven.

519 It is not readily to be supposed that a requirement that customers hand over debit cards and confidential PINs to a retailer is reasonably necessary to protect a legitimate interest of the retailer.

520 There is another feature of Mr Kobelt's arrangements which goes beyond that which was reasonably necessary for the protection of his own legitimate interests. That was Mr Kobelt's insistence, absent a contrary instruction from the customer, that he be permitted to withdraw the whole, or nearly the whole, of the available balance in the customer's account on each payday. Mr Kobelt transferred that money into his own account and he had the use of it. The interest which Mr Kobelt earnt on the money in his own account appears to have been miniscule but it does seem likely that the money which Mr Kobelt transferred from his customer's account into his own account saved it from going into debit.

521 Counsel for Mr Kobelt submitted expressly that Mr Kobelt did not hold the notional 50% of the amount transferred on trust. Nor did ASIC contend for such an analysis. I proceed therefore on the basis that the whole of the amounts withdrawn became Mr Kobelt's, and that he was in the positon to control the manner in which that money could be used.

522 There was no need for Mr Kobelt to take the whole of the customer's money because, even on his own account, he contemplated that 50% of the amount he had withdrawn would be available for the customer's use. That 50% could have been left in the customer's account for their use as and when they chose and free from Mr Kobelt's control. He did not point to any feature of the arrangement which made it necessary in the protection of his own legitimate interests for him to withdraw the whole of the available balance, even if it had been reasonable for him to withdraw 50% of that balance.

523 I am not overlooking that it suited some customers to have Mr Kobelt take the whole of the available balance and that some may have asked for this to occur. In some cases it helped the customers deal with humbugging. It may also have reduced the transaction fees they had to pay to their bank. But those matters do not bear on whether the withdrawal of all the money in the accounts was reasonably necessary in Mr Kobelt's own interests.

524 Further still, there were other means by which Mr Kobelt could have had appropriate repayment arrangements without requiring that the customers hand over both their key cards and their PINs. I mention some of these alternatives.

Centrepay

525 The Centrepay facility was first introduced by the Commonwealth Government in 1998. Under the facility, eligible suppliers of goods and services are permitted to apply for acceptance as "Participants". Once a supplier has been accepted as a Participant, Centrelink recipients may authorise Centrelink to pay part of their benefits to the Participant. The decision of a recipient to do so is entirely voluntary. The monies received by the Participant may then be applied by it to reduce a customer's existing indebtedness or as a source of credit against which further goods or services may be supplied. The stated objective of the facility is "to enhance the well-being of [Centrelink's customers] by improving their social capacity and encouraging their movement towards financial self-management". The Centrepay facility seeks to do this by:

(a) enabling Centrelink recipients to access a fee-free method of payment of their household and associated living expenses;

(b) providing Centrelink recipients with a means to budget and to plan for their household and living expenses; and

(c) assisting Centrelink recipients to meet their financial commitments through the use of regular payments.

526 Not all suppliers of goods and services are eligible to become Participants. In general, the Centrepay facility is directed to essential services and a selection of "additional services".

527 Mr Stauner said that "a lot of people" used Centrepay for the payment of their utilities, rent and fines.

528 In his s 19 examination, Mr Kobelt said that he had enquired about participating in Centrepay when the facility was first introduced, but considered that it was "too hard … too much bookwork". In his evidence, Mr Kobelt gave a different account, saying that he had put an application in "probably up to three years ago" and had been "knocked back". Recently, he has received some further information about Centrepay and considers that he will take up that option if it is offered to him.

529 It is not clear that a stand-alone used car business would satisfy the published criteria for acceptance as a Participant. Mr Stauner thought that it might. Whether that be right or wrong, I note that the Mimili Store has been accepted as a Participant. That being so, it is possible that Nobbys as a supplier of food and groceries may be eligible for acceptance as a Participant.

530 It is true that an arrangement of this kind would not provide Mr Kobelt with security in the conventional sense, because it is open to the customers at any time to alter the arrangement. However, that is no different from the customers' present ability to cancel their key cards or to cause their income to be paid into a different account. I also note Mr Kobelt's acknowledgement that he provided credit to non-indigenous customers without requiring security, on occasion for significant amounts.

Direct debit

531 Another alternative was for Mr Kobelt to agree on a direct debit arrangement with the purchasers of his vehicles. Mr Kobelt said that he had not investigated using direct debits from a customer's account. He did, however, give evidence of a direct debit arrangement put in place with a customer at Mimili with the assistance of a MoneyMob financial advisor. He said that the arrangement had worked appropriately ("very good actually") and that his debt had been fully discharged.

532 Mr Kobelt agreed that a system of instalment payments by direct debits from the customers' accounts would work well "if [the customers] could organise it". Later, when talking about the possibility of a customer who was working missing a payment, Mr Kobelt said:

> That's why I like your idea if they could be direct debited. At least we know we get it then. We don't have to worry about it.

533 Mr Kobelt did not provide any explanation for not having made use of direct debit arrangements with other customers, other than implying that it was for the customer, and not him, to put the arrangement in place. I note, however, that Mr Kobelt has not suggested direct debit arrangements to any customer, let alone attempted himself to facilitate it. There seems no reason why he could not have enlisted the assistance, if necessary, of the MoneyMob advisors in relation to other customers.

Payday payments

534 In his cross-examination, Mr Kobelt accepted that a system by which the customers provided him with the key card but not their PINs could also work well in the case of some customers. As I understood it, this alternative would have the effect that Mr Kobelt had the "security" of holding a key card which he would hand back to the customer on each occasion that they came to Nobbys with the expectation that, on or shortly after each payday, they would themselves (while maintaining the confidentiality of their PIN) effect a transfer to Nobbys in reduction of their debt. Once they had completed their transactions, including any purchases, the card would be returned to Mr Kobelt's possession.

535 Mr Kobelt accepted that a payday system of the kind described "would work well for the people close [by]", for example, those who reside in Mimili and Indulkana, but said that it would be more difficult for those who resided "out by the West Australia/Northern Territory border: it would be hard for them because they don't come in every week". This may well be so, but this evidence was also an implicit recognition by Mr Kobelt of the difficulties which his conduct causes to those Book-up customers who live at greater distances from Mintabie.

536 The evidence did not disclose whether the provision by customers of their key cards would breach their contracts with the issuing banks, so it is not possible to take account of that factor in assessing this alternative. I also observe that a system of this kind would appear to have many of the same disadvantages as does Mr Kobelt's present Book-up system.

Employer deductions

537 As noted earlier, Timothy Kobelt had told Mr Rogers, on the occasion of his attendance around February 2011 at Nobbys with some of the Anangu customers, that he would return Mr Edwards' key card if Mr Rogers agreed to deduct and remit amounts from Mr Edwards' wages. Mr Kobelt said in his evidence that he thought such an arrangement would be satisfactory. There was no indication that he had considered such arrangements in relation to other customers.

The alternatives: summary

538 I accept that arrangements of the kinds just outlined may not have been available in all cases, or, even if available, may not have been satisfactory in all cases. I am satisfied, however, that they 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.

539 The existence of the alternatives which I have described indicates, by itself, that the following submission made on Mr Kobelt's behalf is untenable:

> [28] If the bookup the subject to this proceeding is deemed unconscionable, then persons such as the residents of the APY Lands would for all time be excluded from access to many of the commercial services of banks, such as pledging bank accounts, or perhaps even obtaining credit cards. The implications would be extraordinary. In circumstances where there is an inability to save money in bank accounts, how would such residents ever be able to purchase consumer durable products, such as motor vehicles and whitegoods? Their standards of living would inevitably decrease.

540 In my opinion, this submission as to the indispensability of Mr Kobelt's provision of Book-up to his Anangu customers constituted a significant exaggeration.

Understanding of documents: s 12CC(1)(c)

541 Section 12CC(1)(c) refers to the ability of the service recipient to understand any documents relating to the supply of the financial services. Counsel for Mr Kobelt submitted that "[a]ny inability of customers to understand documents, loses its force given the simplicity of the system, that Mr Kobelt explained the authority to the customers, and they had knowledge of the institution before attending at Nobbys".

542 There is a sense in which this submission is correct but that is not a matter which redounds to Mr Kobelt's advantage. It is because there are very few documents recording the arrangement for Book-up which Mr Kobelt makes with each customer. That by itself detracts from the conscionability of Mr Kobelt's conduct.

543 As previously indicated, I accept that the customers have an understanding of the basic elements of the Book-up system.

544 However, the submission cannot stand given Mr Kobelt's inadequate and often illegible record of the Book-up transactions. There is no evidence that any one of the 117 customers asked to examine Mr Kobelt's diaries or ledger cards but, if they had, I am satisfied that they would have had considerable difficulty in understanding them, let alone in checking the accuracy of the matters recorded by Mr Kobelt.

545 As previously noted, Mr Kobelt did not provide the EFTPOS printed record of the transfers he made using customers' key cards to the customers. These were retained in plastic bags until they became too full, and then discarded. Customers could of course have monitored Mr Kobelt's withdrawals by reference to the periodic bank statements relating to their account, but the manner in which Mr Kobelt kept the diaries would have frustrated any attempt by a customer to reconcile their bank statements with his records.

546 In making these findings, I am not overlooking Mr Kobelt's explanation that the legibility of the diaries entries has diminished over time with the absorption of ink into the diary pages, smudging and some fading. However, even making allowance for that, Mr Kobelt's sole method of recording the Book-up transactions meant that it was unrealistic that the 117 customers, even if so minded, could have understood, let alone checked, the reliability of his recording keeping.

Absence of undue influence or pressure or unfair tactics: s 12CC(1)(d)

547 ASIC did not contend that Mr Kobelt had adopted forms of undue influence or exerted undue pressure. It did, however, draw attention to some of Mr Kobelt's tactics in administering the Book-up system.

548 First, it is very evident that the Kobelts endeavoured to make their withdrawals using the customers' key cards and PINs before the customers had had any opportunity themselves to access those monies. I refer in this respect to the evidence indicating that many withdrawals were made in the early hours of the morning or, at least, before or shortly after Nobbys opened for business each morning. I am satisfied that the Kobelts did this in order to "get to" the money before the customers did. They understood that there was some "competition" for that access. The effect is that the Kobelts worked actively to avoid the possibility of the customers having access even to the 50% of the weekly or fortnightly payments which was otherwise to be available to them.

549 Another aspect of the Kobelts' conduct which is pertinent in this respect is the withdrawal, in some instances, of amounts which exceeded those which the customer had authorised and in making withdrawals more frequently than some customers had authorised. I refer to my earlier findings on these topics.

550 A further matter is Mr Kobelt's conduct on 14 December 2010 at the time of the CBA glitch. As noted earlier, Mr Kobelt took advantage of that glitch so as to withdraw a total of $56,944

from his customers' CBA accounts, even though he had no authority to do so (at least with respect to a significant proportion). Mr Kobelt's attitude was to transfer to himself whatever moneys were available in the customers' accounts, and it is difficult to avoid the conclusion that he was on this occasion preying on the customers with CBA accounts to his own advantage**.**

The cost of alternative but equivalent financial services: s 12CC(1)(e)

551 As already noted, Mr Kobelt submitted that "the report of Mr Jorgensen demonstrates that the interest free terms were better than customers could obtain from traditional financial institutions". For the reasons given earlier, I do not accept that submission. It is obvious that the credit provided by Mr Kobelt was expensive, and that this was not made explicit to the Book-up customers.

Consistency of conduct to like service recipients: s 12CC(1)(f)

552 Mr Kobelt submitted that the customers to whom he provided Book-up were treated equally. He accepted that he had refused to allow some persons to Book-up because of bad experiences with their families or with members of the communities in which they resided. However, this was consistent with him making an assessment of credit risks of a conventional kind. I accept that that is so.

553 I note, however, that Mr Kobelt provided goods and services to non-indigenous customers on credit without requiring them to provide a key card and PIN or other security. In addition, some customers were allowed to Book-up more than others. In these respects, Mr Kobelt did not treat his customers equally.

Willingness to negotiate terms and conditions: s 12CC(1)(j)

554 Next, Mr Kobelt emphasised the flexibility of his Book-up arrangements. He said that he complied with any instruction given by his customers as to the amount to be withdrawn from the account and, when asked from time to time to leave an amount in the account, he would do so. Flexibility was applied in other aspects of the Book-up system. He complied with customers' requests to vary the amount initially agreed upon as the withdrawal amounts; customers were never refused food; they could have their card back temporarily if they wished to travel away from the APY Lands (on the expectation that the card would be returned); sometimes customers telephoned Mr Kobelt and asked for increased amounts to be withdrawn; and Book-up could be used for the purchase of other services, such as bus tickets.

555 I accept that these matters were features of the Book-up system, subject to the qualifications which I noted when addressing the evidence concerning them. However, Mr Kobelt was not flexible in his underlying requirement that customers provide both their key card and their PINs. As indicated, this was a significant intrusion into the matters which customers generally are entitled to, and should, keep confidential.

556 The Kobelts also implemented the Book-up system with some rigidity. When they realised that some customers wished to access their own money, they took active (and, to an extent, extraordinary) steps to prevent that occurring. As noted earlier, it was commonplace for Timothy Kobelt to make the withdrawals shortly after midnight on the day when funds became available in the customers' accounts in order to preclude the customers having any practical opportunity to access their own money. The Kobelts were not willing to allow the customers access even to the 50% which was notionally theirs.

Acting in good faith: s 12CC(1)(l)

557 Mr Kobelt submitted, in effect, that he had acted in good faith in the arrangements. He acknowledged that some mistakes had been made in record keeping but, when identified, these had been willingly corrected. On these occasions when he had been unaware that a customer's indebtedness had been discharged and had continued to make withdrawals, the position had been rectified upon him becoming aware of that circumstance. I accept that that is so, but, nevertheless, I have made findings that, on more than one occasion, Mr Kobelt did not comply with his customers' instructions concerning the amount or frequency of the withdrawals from their accounts.

558 Mr Kobelt emphasised that there was a good deal of trust in the arrangements he had with the customers and that there was no suggestion that he had acted fraudulently or dishonestly by misusing the key cards and PINs. I also accept his submission that conduct by the customers in cancelling their key card or in diverting their income to another bank account can be seen, at least in some instances, as conduct not in good faith on their part.

559 I accept that Mr Kobelt acted with a degree of good faith. However, I do not accept that he acted in an altruistic or disinterested way. He was at all times pursuing his own interests, and did so even when that was to the detriment of his customers. His conduct on the occasion of the CBA glitch is one example and the steps he and Timothy took to ensure that the customers did not have any opportunity to access their own money is another.

Other factors listed in s 12CC(1)

560 It is not necessary, in the circumstances of this case to address the factors listed in s 12CC(1)(g)-(i), and (k).

561 There are, however, a number of other matters bearing upon the conscionability of Mr Kobelt's conduct.

Non-compliance with the Code

562 I consider it pertinent to take into account that Mr Kobelt provided credit to the Book-up customers without complying with the requirements of the Code. This meant that the customers did not have the protections which the Code seeks to achieve. For example, s 17(8) of the Code requires that the credit contract be in writing and state the total amount of credit fees and charges payable under the contract.

563 Had Mr Kobelt been licensed, he would also have been required to comply with the General Rules relating to responsible lending conduct contained in Ch 3 of the NCCP Act. Amongst other things, those guidelines would have required Mr Kobelt to make an assessment of whether the advance of credit would be unsuitable for the customer having regard to the customer's ability to comply with the financial obligations imposed and other matters (s 131). As already noted, Mr Kobelt did not make any assessment of this kind, as he limited his questions to customers to the nature and amount of their income, the date upon which the income was received and the account into which the income was paid. These enquiries were directed to matters concerning Mr Kobelt's own interests and, in particular, to the prospect of his being able to obtain repayment. This is reflected in the answer which he gave to a question concerning Ms Pearson:

> Q: At the time you sold her the third car did you ever, in your own mind, think about whether or not she could afford a third car in one year?
>
> A: She was working so there was no drama. You know, if she missed a payment it didn't matter, you know. Everyone is the same. That's why I like your idea if they could be direct debited. At least we know we get it then. We don't have to worry about it.

564 In consequence, the Book-up customers did not have the protections for which the law provides. This is a matter bearing upon the conscionability of Mr Kobelt's conduct as is my earlier finding that Mr Kobelt had been indifferent to his customers' ability to afford the transactions into which they were entering.

Improvident spending

565 Mr Kobelt referred to Dr Martin's evidence to the effect that many indigenous people in remote communities spend improvidently. This was referred to colloquially as a "boom and bust" style of expenditure. Mr Kobelt submitted that his Book-up system limited the opportunities for this kind of spending.

566 Dr Martin said:

> [34] It is also common in my experience for Aboriginal residents of remote communities to spend money as it becomes available, with a boom and bust expenditure cycle mirroring that of the welfare payments most depend upon for their incomes. Significant sums of money can be expended on valued consumer goods, motor vehicles, and other expensive items without consideration of the medium to long term consequences of such expenditure.

567 Mr Stauner also gave evidence of Anangu at Amata dispersing available funds reasonably quickly with the effect that they had insufficient money in their accounts to buy food and other necessities at the end of the fortnightly payment cycle.

568 Despite Mr Kobelt's criticisms that Dr Martin had drawn inferences from the general to the particular without reference to the concept of biased sample selection, his submission, as I understood it, was that at least a significant number of the Book-up customers were affected in this way. It was for this reason that Mr Kobelt limited the amount which the customers could purchase on any one visit to Nobbys with, accordingly, a beneficial effect for the customers.

569 I accept that the Book-up system does ameliorate the boom-bust cycle of expenditure to an extent. If the customers could purchase on or shortly after their payday goods to the full extent of 50% of the amount Mr Kobelt had withdrawn from their accounts, there may well have been no effect on the boom-bust cycle of expenditure. The submission was that Mr Kobelt avoids that consequence by restraining the rate of their expenditure during the fortnightly pay period. He does this by limiting the amount which the customers can Book-up at any one time. This involves Mr Kobelt being able to exercise a significant degree of control over the day to day lives of his customers. It also has the consequent effect that the customers must return to Nobbys regularly during the fortnightly pay period, despite the inconvenience and expense involved.

570 There were other means by which some of the Book-up customers could have obtained assistance in controlling the boom-bust cycle of expenditure without submitting themselves

to Mr Kobelt's control and tying themselves, in effect, to shopping at Nobbys. Mr Stauner said that Centrelink could, on request, make payments of pension weekly, rather than fortnightly and that when this occurred customers have been able to manage their funds appropriately "to get to the next payment". 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.

571 Centrelink provides another facility which might assist its recipients in managing their money. The Centrelink BasicsCard can be used for the purchase of some goods (such as food and groceries) but not for others (such as alcohol and tobacco).

572 It is evident that the MoneyMob advisors also provide assistance and counselling to the communities concerning the tendency to spend too quickly.

573 In these circumstances, I do not regard the avoidance of improvident spending as a justification for Mr Kobelt's conduct, even though it may in part be an incidental benefit resulting from it.

Demand sharing

574 Mr Kobelt also submitted that Book-up helps address the issue of demand sharing.

575 An embedded social obligation of the Anangu and of other indigenous communities requires members in a community to share their resources with specific categories of kin. Dr Martin described demand sharing as part of the "foundational principles of reciprocity, exchange and sharing within a hunter gatherer society". The practice is such that the giver has a responsibility to share and the recipient the right to share, even to the point of demanding a share. Although the tradition developed long before money become known in Aboriginal communities, it is commonplace for money to be the subject of demand sharing. There was evidence in the proceedings, which I accept, that the cultural practice can give rise to the importuning of those perceived to have available money, to the extent on occasions, to the bullying of those persons, and to the exploitation of community members.

576 Mr Stauner gave evidence of his observations of demand sharing, saying:

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

Mr Stauner said that on occasion he had seen residents withdraw cash from the ATM at the Amata Store and then be subject almost immediately to demands that the cash be shared. One of the reasons that he did not himself carry cash when he was working in Amata was to avoid being pressed for a loan. Mr Stauner also described strategies which he had put in place to help some of his clients deal with humbugging.

577 Mr Kilpatrick said that he had been aware of humbugging when he was running the Mimili Store. On some occasions he had seen demands for cash withdrawn from the ATM to be shared and, on other occasions, demands that a resident use cash withdrawn from the ATM to purchase goods for another. This had been very common and was not confined to the kin of the resident withdrawing the cash or to the kin of the person making the demand.

578 Dr Martin's answers when asked whether Nobbys' customers may regard leaving their key cards at Nobbys as part of a strategy to avoid demand sharing were qualified. He said that he thought it "reasonable to come to that view … plausible, but I have no firm evidence to come to that view …".

579 Mr Kobelt also gave some evidence on this topic:

> Q: In the majority of cases, were you asked by the customer to take all the money in the account?
>
> A: Yes. Definitely asked to take it all out.
>
> Q: And were reasons given for you by customers for that? Why they wanted you take the whole amount?
>
> A: Well, some of them knew, but it was extra fees if it was taken out in dribs and drabs, and the others just wanted to take it out before some of the family got their hands on it somehow or other with their transactions that happened up there.

580 Given my assessment of Mr Kobelt's evidence, I am not prepared to attach much weight to these answers. I considered at the time that Mr Kobelt gave this evidence that they had a self-serving quality. For the reasons already given, I do not accept that it was the Anangu who initiated the idea of handing over their key cards and PINs. It was Mr Kobelt's requirement, and this had been made known to the Anangu, whether explicitly or implicitly. Accordingly, the Anangu did not have to provide Mr Kobelt with a justification for doing so.

581 As I understood it, there were two aspects to Mr Kobelt's submission about demand sharing. The first is that, once Mr Kobelt had transferred all the money out of a customer's account, it

was beyond the reach of those members of the customer's community who sought to share in it. It was, accordingly, a means of avoiding pressure to share. Secondly, when the customers came to Nobbys to shop, they could do so away from others and free of demands that they also purchase goods for them.

582 There is, however, very little evidence from the Anangu customers themselves that they handed over their key cards and PINs to Mr Kobelt *in order to* achieve either of these outcomes. Although all of the Anangu witnesses gave evidence of sometimes sharing their money with others or of using it to buy goods which they shared with others, none did so in terms indicating that they had felt pressured or overborne, let alone that they had been bullied. I also observe that, with one exception, none said that it was the desire to avoid this kind of sharing which was the reason they engaged in Book-up or that they shopped at Nobbys. The exception is Ms Pearson who said that one of the reasons for her starting Book-up was because she thought that she had to share money in her account.

583 Other Anangu witnesses, including Customers AH and D, did acknowledge that they felt an obligation to share and that one of the reasons they liked shopping at Nobbys was because they could do so away from the gaze of others. To my mind, however, evidence of that kind falls short of a statement that the reason they engaged in the Book-up arrangement with Mr Kobelt was to avoid these outcomes.

584 Further, consideration of the effect of Mr Kobelt's Book-up arrangements on humbugging should take account of the overall circumstances, and not just those circumstances which happen in, or near, Nobbys itself. Given the smallness of the communities like Mimili and Indulkana, and their remoteness, it is likely that most members in those communities were aware when one of their number left to travel to Mintabie. That being so, one would expect that the members of the communities could, if so minded, subject those returning to forms of demand sharing with respect to the goods and groceries they had purchased. Further still, it is reasonable to suppose that those who had acquired cars on Book-up might also be subject to demand sharing with respect to use of their cars. There is also the prospect that Mr Kobelt's conduct in depriving his customers of access to their own funds increased the likelihood that they themselves then had to engage in a form of demand sharing with those who still had access to funds. One of the pleas in Mr Kobelt's filed defence, to which I will refer shortly, seemed to constitute an implicit acknowledgement that this may be so.

585 In summary, I accept that the Book-up system may have some advantages in addressing demand sharing (humbugging) but consider that these should not be overstated. It is also appropriate to take into account the availability of alternative strategies (of the kind discussed by Mr Stauner) which can be adopted by those wishing to avoid demand sharing.

Customers' voluntary conduct

586 Mr Kobelt emphasised that he did not apply pressure to customers to enter into Book-up arrangements with him. It was a matter for their choice. The evidence of the Anangu witnesses indicated that they understood that they had a choice and made their arrangements with knowledge of the way in which the Book-up system worked.

587 I accept that these matters are so, and that they are matters to be taken into account in making the assessment of the conscionability of Mr Kobelt's conduct.

588 In particular, I accept the submission of Mr Kobelt that the evidence in the trial of the Anangu witnesses indicated that each understood the basic elements of their Book-up arrangement with Nobbys and had consented to him making withdrawals from their account using their key card and PIN. Whether rightly or wrongly and whether well informed or not, each must have considered it appropriate to their needs. With the exception of Mr Brumby and Ms Pearson, the customers considered that Mr Kobelt had treated them well and were well-disposed towards him. It is evident that they appreciated, in particular, the ability to buy food in between their respective paydays or pension days.

589 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.

Absence of complaints

590 In [16.6.6] of his filed defence, Mr Kobelt pleaded that none of the Book-up customers complained to him about his conduct in withdrawing the whole of the balance from their accounts on the day when payment was made into the account. It seems that this plea was

made to support an inference that the Book-up customers were content with the arrangements.

591 I accept that many of the Book-up customers were satisfied with the arrangements. That is evidenced, in part, by the fact that several used the Book-up arrangement more than once and had returned their key cards and PINs to Nobbys. There are undoubtedly features of the Book-up system which several of the Book-up customers find attractive.

592 However, there were a number of indications of dissatisfaction by some customers with the arrangements. Plainly, Mr Brumby and Ms Pearson were dissatisfied customers. Further, the conduct of several customers in cancelling their key card or diverting the payment of their income into another account may well, in a number of instances, have reflected their dissatisfaction with the arrangements. The circumstance that Mr Kobelt and Timothy made the withdrawals as soon as funds in the account became available so as to frustrate any attempt by the customers to gain access to their own monies also suggests that they were aware of some dissatisfaction by the customers with the arrangements.

593 I also note that Mr Kobelt acknowledged in his evidence in chief that he had received up to six complaints from customers about the Book-up arrangements in the last five to six years.

Centrelink loans

594 By [16.6.5] of his defence, Mr Kobelt pleaded that those Book-up customers who were left without money in their accounts could obtain money from relatives and by way of short term interest free advances from Centrelink. This was said to be a factor indicating that there was "nothing inappropriate" in his conduct.

595 As already noted, the first of these alternatives seems to involve, implicitly, a recognition by Mr Kobelt that his conduct could have the effect of increasing demand sharing and is, accordingly, at odds with the claim that use of his Book-up system relieves his customers from demand sharing.

596 There was only limited evidence concerning the availability of Centrelink loans. AW said that she had once had a Centrelink loan of $500 and Mr Stauner spoke of an interest free loan of $500 by Centrelink to another customer which had been repaid by deductions of $38.50 from the customer's fortnightly pension payments.

597 In my opinion, the circumstance that the Book-up customers were placed in a position in which they might need, regularly, short term loans is, by itself, a matter pointing to the unconscionability of Mr Kobelt's conduct. That is especially so having regard to the remoteness of the communities in which the Book-up customers lived, the difficulties they would face in contacting Centrelink, and the frequency with which they would require such loans.

Mr Kobelt's discretionary control

598 Mr Kobelt's system created a circumstance in which his Book-up customers were dependent on a favourable exercise of his goodwill. They were placed therefore in a position of some vulnerability. Mr Kobelt controlled how much the customers could spend at any one time (even when they had not used the whole of the notional 50% said to be available for them) and the kinds of goods or services they could purchase. Ms Pearson's evidence about how this control was exercised in practice, and her demeanour when giving that evidence, made it apparent that she found this aspect of shopping at Nobbys humiliating.

599 In some situations, Mr Kobelt's exercise of control seemed to involve arbitrary decision-making. The decision to refuse Book-down to Mr Brumby for the purchase of return bus tickets to the APY Lands appears to be in this category.

600 In order to access the 50% of the withdrawals made by Mr Kobelt, the customers had to come to Nobbys. The principal alternative was for them to make use of purchase orders but, at a cost of $10 per purchase order, this was relatively expensive. In any event, the purchase order facility could not be used at many of the community stores in the APY Lands.

601 While the customers were not compelled to do their shopping at Nobbys, it was in practice difficult for them to shop elsewhere without access to their key card and the money in their accounts. They could of course ask Mr Kobelt for cash but, as noted previously, some of those who were advanced cash were charged 10% of the amount provided.

602 Mr Kobelt does not seem to have any insight into the disadvantageous position in which he placed customers by appropriating all of their income for himself as soon as it became available. It may be that these are aspects of Mr Kobelt's conduct which can be regarded as benevolent but he too was a significant beneficiary of the system. In my opinion, Mr Kobelt's benevolence was really an incident of the arrangement he had put in place for

the benefit of Nobbys. Objectively speaking, Mr Kobelt's conduct involved a form of paternalism by which he exercised considerable control over his customers.

The "tying" effect of the conduct

603 A significant feature bearing upon the conscionability of Mr Kobelt's conduct is that it "tied" his Book-up customers to Nobbys and thereby secured significant advantages for him and a corresponding freedom of action by customers. The combined effect of Mr Kobelt taking possession of the customers' key cards, and using them on the first day of the pay periods, was to deprive the customers of independent means of obtaining the necessities of life. Even when customers imposed a limit on the amount which Mr Kobelt could withdraw from the account, it was, in practice, difficult for them to obtain access to the residue so long as Mr Kobelt held the key card. If they wished to acquire food and groceries, they had to travel to Mintabie to shop at Nobbys. They could not shop in their own communities such as Mimili or Indulkana because they had no means of effecting payment. If they wished to shop in, say, Marla or Coober Pedy, they had to travel to Mintabie in order to retrieve their card and, even then, were subject to a favourable exercise of the discretion by the Kobelts to release the card. If they wished to shop in either of the two competing stores in Mintabie, they had first to obtain a cash advance from Mr Kobelt and, in some instances, were charged a fee for doing so. It is also reasonable to suppose that some customers would find it uncomfortable, if not embarrassing, in making a request for cash to the Kobelts for the purpose of shopping in a competitor's store.

604 In making these findings, I am not overlooking the evidence that the extent of the ties to Nobbys were mitigated to some extent by Mr Kobelt's issue of purchase orders and his provision of cash. Nevertheless, the Book-up system involved a significant tie by the Kobelts of the customers to Nobbys Store.

605 Counsel for Mr Kobelt acknowledged that the Book-up system did involve ties of the kind outlined, but submitted that it was a tie of the customers own making by voluntarily entering into the Book-up arrangement. In my opinion, an analysis of this kind does not reflect fully the circumstances of the arrangements, nor the circumstances of Nobbys' Book-up customers.

606 Mr Kobelt's conduct in tying the customers to Nobbys has a number of dimensions. It is of course very much to Mr Kobelt's own commercial advantage in that he secures trade for Nobbys. Were the customers not tied to Nobbys, they may well have chosen to shop at one

or other of the community stores in the APY Lands or in Marla. The tying of such a significant number of customers to Nobbys constituted, in my opinion, a form of exploitation of the Anangu customers. It may account for the profitability of Nobbys as disclosed by its financial statements, as set out earlier in these reasons, even though Nobbys is one of three general stores servicing the relatively small population of about 70 permanent residents in Mintabie.

607 Another dimension is that it creates a prolonged dependence by the customers on the continued exercise of discretions by Mr Kobelt in their favour. As already noted, Mr Kobelt exercises a form of *de facto* control about where the customers shop and explicit control of the amounts which they can spend on any one shopping trip as well as of the kinds of items they can buy. As I have already indicated, it may be that in some respects, Mr Kobelt's conduct can be characterised as a form of benevolent paternalism but it involves, nevertheless, the prolonged maintenance of his customers in a situation of dependence and consequent vulnerability. In a sense, Mr Kobelt perpetuates the vulnerability of his customers.

Paciocco

608 Counsel for Mr Kobelt referred to *Paciocco* at [347] in which Allsop CJ identified particular matters indicating that the conduct of ANZ in the particular circumstances of that case had not been unconscionable. The matters Allsop CJ mentioned were "the lack of any proven predation on the weak or poor, the lack of real vulnerability requiring protection, the lack of financial or personal compulsion or pressure to enter or maintain accounts, the clarity of disclosure, the lack of secrecy, trickery or dishonesty, and the ability of people to avoid the fees or terminate the accounts". Counsel submitted that those features were not present in this case either and, as I understood it, that this warranted the conclusion that Mr Kobelt's conduct should not be characterised as unconscionable.

609 The assertion that none of the features identified by Allsop CJ in this passage in *Paciocco* are present in this case is contestable. Mr Kobelt's requirement that he have access to the whole of the customers' incomes, and his tying of the customers to Nobbys, is a form of predation. So also was his conduct on the occasion of the CBA glitch on 14 December 2010. The charge of $10 for each purchase order and a charge for a cash advances (when such a charge was levied) might be similarly regarded. Mr Kobelt's Anangu customers were in a position

of vulnerability and there was a lack of disclosure of all the elements of the arrangement (eg, the high credit charges).

610 However, I do not think it helpful to engage in a point by point comparison of this case with *Paciocco*. The conduct in question in this case is not comparable with the conduct in question in *Paciocco*.

Conclusion on unconscionability – the "system" case

611 I remind myself of the principles relating to the assessment of unconscionability summarised earlier. The assessment must be made by reference to the values and norms evident in the ASIC Act and which are recognised by the community generally. The conduct must be contrary to good conscience. It is not sufficient that I take the view that there is some unfairness in Mr Kobelt's conduct. Regard must be had to the cultural practices of the Anangu and of their circumstances more generally which differentiate them from customers in the rest of Australia.

612 On my assessment, a number of matters, considered in combination, indicate that Mr Kobelt's conduct should be characterised as unconscionable. The very fact that Mr Kobelt requires the Book-up customers not only to hand over their key cards, but to disclose their confidential PINs, is significant. It runs counter to one of the very purposes of the issue of PINs in connection with the use of key cards. Mr Kobelt requires his customers to trust not only himself, Timothy and Sonia, but also those employees who have access to the key cards and PINs in Nobbys, not to make inappropriate use of them.

613 As indicated, Mr Kobelt's periodic use of the key cards and PINs to withdraw, in most cases *all* of the available funds in the customers' accounts is a stark feature of his system. No objective justification for Mr Kobelt doing so has been established in the evidence. It is extraordinary that a commercial credit provider should provide consumer credit on the basis that he or she will be entitled to *all* of the customer's periodic income, even more so when the customer has no (or limited) assets and no other source of income.

614 It is true that some other actions of Mr Kobelt ameliorate some of the effects of his having deprived the customers of all their income. But those actions are discretionary and involve the customers being subject to the exercise of Mr Kobelt's goodwill and his control in their everyday lives in a number ways. I have referred to these matters in earlier sections of these reasons. The purchase order system may ameliorate some of these detriments but Mr Kobelt

imposes a charge for each purchase order and they are not available in any event at several of the community stores in the APY Lands. In addition, some customers are charged for cash advances.

615 Mr Kobelt himself recognised that for many customers it is impractical to travel regularly to Mintabie.

616 Mr Kobelt's arrangements go well beyond what can be regarded as reasonably necessary to protect his own legitimate interests. It may be true that the arrangements mitigate to some extent the boom-bust cycle of expenditure of some of the Anangu, but there are other methods by which the customers can address that circumstance. They are not dependent on Mr Kobelt for that purpose.

617 Similarly, the Book-up system might reduce some opportunities for humbugging of the customers but seems likely to increase the prospect of humbugging in other ways.

618 The credit provided by Mr Kobelt is of a particularly expensive kind.

619 I am conscious that the Court should not impose a view of what is appropriate for the Anangu which could be regarded as paternalistic, that is to say, imposing its own view of what is in their best interests. The freedom of action of the Anangu as citizens of Australia and their entitlement to make decisions in their own interests is to be respected.

620 Nevertheless, I consider it appropriate to take account of the vulnerability of many of the Book-up customers arising from a combination of factors: the remoteness of their communities; the limitations on their education; their impoverishment; and the limitations on their financial literacy. As noted earlier, the ready willingness of the Book-up customers to hand over their key cards and their PINs seems to reflect a lack of understanding of the precautions which they should take in their own self-interest. Mr Kobelt's Book-up system involves taking advantage of these circumstances. The circumstances of the customers giving rise to these disadvantages must have been apparent to Mr Kobelt in most cases. The limited education and level of literacy of most must, I find, have been very evident. Mr Kobelt chose in these circumstances to implement and maintain a system which, while providing some benefits to the customers, provided considerable advantages to himself. It is particularly pertinent in my opinion that Mr Kobelt maintains a continuing dependence by the customers on Nobbys, by the tying effect of his conduct. The customers had little practical alternative but to continue shopping at Nobbys despite the inconvenience in doing so. As

already indicated, these aspects of Mr Kobelt's conduct constituted a form of exploitation of his customers, to his advantage, and to their detriment.

621 Mr Kobelt was indifferent as to whether his customers could, having regard to their financial position generally, afford the commitment to him. I refer to my earlier findings on this topic.

622 It is not realistic to regard the bargaining positions of the Book-up customers and Mr Kobelt as being relatively evenly balanced.

623 The way in which Mr Kobelt implements his Book-up system adds to the strong impression of unconscionability. The arrangements are largely undocumented; the transactions are poorly recorded; the customers have, at best, only a limited ability to check on the reliability of Mr Kobelt's records of the transactions he has effected on their accounts; the withdrawals often operate to the customers' detriment (for example, when Mr Kobelt withdraws amounts to which he is not entitled or does not record in the Book-up diaries or ledger cards the amounts he has withdrawn); and any audit of what has occurred is not feasible (at least without considerable difficulty). I also observe in this respect that Mr Kobelt does not provide his customers with the protections contemplated by the NCCP Act and the Code.

624 For these reasons, I consider that ASIC has established that Mr Kobelt contravened s 12CB of the ASIC Act by his conduct in his Book-up system.

Unconscionable conduct – the secondary case

625 As noted at the commencement of these reasons, ASIC's case on unconscionability was made in in two parts. The primary part of the case concerned the Book-up system generally. ASIC's secondary case was that Mr Kobelt's conduct in relation to four customers, A, B, C and D was unconscionable. However, in its final submissions, ASIC did not press for findings on its secondary case.

626 I am conscious that the prospect of an appeal can, in some circumstances, make it desirable for a trial Judge to address all issues so that the Full Court has findings of fact on all matters. In the present case, given ASIC's attitude, I consider it unnecessary to prolong the delivery of this judgment by addressing ASIC's alternative claim.

Conclusion

627 In summary, ASIC has established that Mr Kobelt did from 1 July 2011 until at least April 2014, contravene s 29 of the NCCP Act in providing credit to purchasers of his motor

vehicles and has by his conduct since at least 1 June 2008, contravened s 12CB of the ASIC Act by his conduct in providing Book-up. I will hear from the parties as to the relief to which ASIC is entitled in light of these findings.

I certify that the preceding six hundred and twenty-seven (627) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White.

Associate: 

Dated: 9 November 2016

Appendix One

Evidence Ruling

1 As mentioned in the substantive reasons, the evidence in chief of ASIC's witnesses, other than its Anangu witnesses, was in written form. As part of the pre-trial directions, I put in place a regime for the notification of objections to the written evidence and for written responses by ASIC to those objections. Mr Kobelt's objections to ASIC's written evidence occupied approximately 100 pages.

2 In order that the progress of the trial not be disrupted unduly, I informed the parties that I would consider the objections and ASIC's responses to them in advance of the trial in Chambers and on the papers, and would announce my rulings at the commencement of the trial. That course contemplated the rulings being made in a "summary" way. I did, however, hear oral submissions on the first day of the trial on Mr Kobelt's objection that much of ASIC's evidence concerned matters which were outside the scope of its pleaded case. I rejected Mr Kobelt's submission to that effect and then continued:

> His Honour: Now, I haven't invited, Mr Trim, submissions in relation to [the] other objections and unless you indicate that you wish to be heard now in relation to some of those other objections, what I will do is indicate a ruling on those based on your written material. I say to [the] parties, when I proceed this way, that …
>
> Mr Trim: We don't want to be heard further.
>
> His Honour: That that doesn't preclude them making further submissions in respect of particular matters. I emphasise "particular matters". It is not a chance just to rehearse the whole matter all over again, but I'm conscious that the dealing with objections on the papers perhaps doesn't give counsel the full opportunity to make objections. The written system is designed to expedite the process. So it's not to be frustrated, in other words, by a party simply making wholesale submissions on all objections in respect of which the ruling has been indicated. … So in light of that, Mr Trim, do you wish to make any further oral submissions in support of the notified objections?
>
> Mr Trim: No, your Honour.

3 As can be seen, despite my announced intention to make rulings in a summary way, counsel for Mr Kobelt were given the opportunity to make oral submissions in support of the objections before the Court announced its rulings. The Court then went on to announce the rulings. The parties also had the opportunity to make submissions on particular objections after I had announced the rulings. Neither party sought to take up that opportunity.

4 The objections to the evidence of Dr Martin were dealt with separately but in the same manner. I upheld some of the objections and disallowed others. In doing so, I indicated again my willingness, given the means by which the Court had determined the objections, to allow Mr Kobelt to renew his objections with submissions concerning particular matters. Counsel did not seek to take up that opportunity.

5 There matters rested until the penultimate day of the trial when, during the final submissions, counsel for Mr Kobelt requested reasons for the Court's rulings on his objections to certain documents in the Book of Documents tendered by ASIC (Exhibit A2) and to certain passages in Dr Martin's report.

6 This request was puzzling for a number of reasons:

(a) if Mr Kobelt was dissatisfied with a ruling made in the summary way outlined above, his counsel had had the opportunity to renew particular objections and to make oral submissions concerning them. Had counsel adopted that course, the particular objections could have been the subject of more detailed consideration than was possible when the multiple objections were considered in a summary way, and oral reasons for the rulings which were maintained could have been given more conveniently at the time;

(b) counsel's request was not accompanied by any application that the rulings be reconsidered in the light of the evidence which ASIC had led from the Anangu and which was relied upon by ASIC in responding to the objections;

(c) many of the objections were to the effect that a proper basis had not been established for Dr Martin's opinions because the matters on which he relied constituted inadmissible hearsay. Yet Mr Kobelt's closing submissions did not identify particular matters on which Mr Martin's opinions should not be accepted, or given little weight, on this account. The challenge by Mr Kobelt to Dr Martin's evidence was instead based on the evidence of Professor Glonek concerning Dr Martin's use of statistics to which I referred in the principal reasons: see [108]-[123] of Mr Kobelt's written closing submissions. Moreover, Mr Kobelt's own submissions relied, to a significant extent, on Dr Martin's opinions. See, for example, [10], [13]-[18], [23]-[28], [30]-[32], [40], [91], [93] and [96]-[97] of his written closing submissions;

(d) counsel did not seek any order pursuant to s 136 of the *Evidence Act 1995* (Cth) or otherwise limiting the use to which particular evidence could be put.

7 In these circumstances, I have considered it appropriate to give the reasons which I considered, at the time of the rulings, warranted the objections being disallowed. I will do so as briefly as possible.

ASIC's Book of Documents

Exhibit A2: Tabs L25, L27 and L93

8 Mr Kobelt sought reasons with respect to the Court's rulings on the documents in Exhibit A2 behind Tabs L25, L27 and L93. ASIC did refer to Tab L93 in a footnote in its final closing submissions but did not otherwise indicate the use to which it should be put. I have not relied upon the documents contained behind Tabs L25 and L27 at all. In these circumstances, any reasons for the rulings would serve no practical purpose. Mr Kobelt's interest appears to be academic only.

Exhibit A2: The documents behind Tabs L50-L74

9 These documents in Exhibit A2 comprised reports, summaries, explanatory memoranda and analyses of the NAPLAN results in a number of years for schools in the APY Lands, in particular the schools at Mimili, Ernabella and Amata as well as the school at Yalata.

10 As recorded in the principal judgment, NAPLAN is the acronym for National Assessment Program – Literacy and Numeracy. It is the annual assessment of all students in schools in Australia in Years 3, 5, 7 and 9. The documents in question were compiled and published by the Australian Curriculum, Assessment and Reporting Authority (ACARA). This entity is identified in the documents (L71) as the "independent statutory authority responsible for the overall management of the Australian National Assessment Program, in collaboration with representatives from all States and Territories and non-Government school sectors".

11 ACARA is established by s 5 of the *Australian Curriculum, Assessment and Reporting Authority Act 2008* (Cth) (the ACARA Act).

12 The functions of ACARA are set out in s 6 of the ACARA Act:

> The functions of the Australian Curriculum, Assessment and Reporting Authority are to:
>
> (a) develop and administer a national school curriculum, including content of the curriculum and achievement standards, for school subjects specified in the Charter; and
>
> (b) develop and administer national assessments; and
>
> (c) collect, manage and analyse student assessment data and other data relating

> to schools and comparative school performance; and
>
> (d) facilitate information sharing arrangements between Australian government bodies in relation to the collection, management and analysis of school data; and
>
> (e) publish information relating to school education, including information relating to comparative school performance; and
>
> (f) provide school curriculum resource services, educational research services and other related services; and
>
> (g) provide information, resources, support and guidance to the teaching profession; and
>
> (h) perform such other functions that are conferred on it by, or under, this Act or any other Commonwealth Act; and
>
> (i) perform such other functions that are ancillary or incidental to the functions mentioned in the preceding paragraphs.

13 As can be seen, these functions include the development and administration of national assessments; the collection, management and analysis of student assessment data and other data relating to schools and comparative school performance; and the publication of information relating to school education, including information relating to comparative school performance.

14 ACARA's documents describe NAPLAN as:

> [A]n annual assessment for all students in Years 3, 5, 7 and 9. It tests the types of skills that are essential for every child to progress through school and life. The tests cover skills in reading, writing, spelling, grammar and punctuation, and numeracy. The assessments are undertaken every year in the second full week in May.

15 ACARA's documents also indicate that, as part of the National Assessment Program, Australia participates in three international sample assessments.

16 I have relied on some of the documents behind Tabs L50-L74 published by ACARA. Dr Martin also relied on some of those documents, many of which he had located for himself.

17 Mr Kobelt objected to the admission of this material on hearsay grounds. The initial objection was couched as follows:

> The non-ABS statistics cannot be admitted by s 159 [of the Evidence Act], and constitute double hearsay.

18 When ASIC pressed the tender of the NAPLAN results, Mr Kobelt then elaborated his objection as follows:

> The student presumably answers questions, which are marked by teachers, giving results. The results are presumably forwarded to the reporting authority (First degree hearsay, as the teachers are not providing sworn evidence). Someone in the reporting authority then summarises the data and posts it on a website (Second degree of hearsay as the functionary from the reporting authority is not providing sworn evidence). Indeed, who knows how many persons the data is passed through in the reporting authority who are not sworn – it could be 5th or 6th degree hearsay, and could contain errors that cannot be established by cross-examination.
>
> If adduced for a non-hearsay purpose, the data [is] meaningless. So soon as a degree of "*truth*" is asserted, it becomes a hearsay purpose. The mere fact that figures were placed on the internet proves nothing.
>
> The building blocks for the reliability are in issue, and as soon as that occurs, it become inadmissible as survey evidence: *Milisits v State of South Australia* [[2014] SASCFC 67]; (2014) 119 SASR 538 at [20]. If the results of the census in Aboriginal communities are unreliable (Report of Dr Martin at Annexure 6, para [6]), then there is a clear basis to question the reliability of the NAPLAN testing. See also Professor Glonek's expert report at pp8-9.

19 I took the view that the hearsay rule in s 59 of the Evidence Act did not preclude the admission of the documents behind Tabs L50-L74 because they were business records of ACARA, and therefore within the exception to which s 69 refers. The activities of ACARA come within the definition of a business in the Dictionary Pt 2 cl 1 of the Evidence Act. The reports, summaries, explanatory memoranda and analyses form part of the records kept by ACARA in the course of and for the purposes of its functions. Despite the submissions made on Mr Kobelt's behalf to the contrary, I do not regard the ACARA documents as containing any representation from an individual student or from a teacher marking the assessments. Instead, they comprise a form of analyses by employees of ACARA of the results of the testing of students who participated in the NAPLAN. Those results may be accurate or inaccurate but they are the product of a systematic form of testing of all students for which ACARA has the overall administration in the exercise of its statutory functions.

20 I observe that Mr Kobelt's final submissions did not include any submission to the effect that the NAPLAN analyses published by ACARA should be regarded as unreliable.

Dr Martin's Report

21 Mr Kobelt objected, on a diverse range of grounds, to a number of passages in Dr Martin's report.

Paragraph 50

22 In this paragraph, Dr Martin said that he considered it to be a reasonable inference that members of the communities at Mimili and Indulkana, and by extension other communities in

the APY Lands, had not obtained "a level of literacy, numeracy or other skills which enable[d] them to engage fully with the institutions of the general Australian society".

23 Mr Kobelt did not object to the admission of that opinion. His objection was to the examples of the opinion which Dr Martin gave in the immediately following two sentences:

> For example, a number of interviewees acknowledged that they needed help to check their bank balances, including some whose key cards were at Nobby's and would drive there or phone to check their balances. None of the specific individuals to whom I showed variously their own authorisations for book-up at Nobbys, or a redacted copy of such an authorisation, or a redacted copy of my own bank account statement could read or understand the documents.

24 Mr Kobelt objected to the evidence of these examples, saying that "the opinion expressed is based upon assertions of unidentified persons, who are acknowledged to be potentially unreliable by the deponent … [t]he respondent is unable to test the basis of the opinion in cross-examination, which is unfairly prejudicial, within s 135 of the *Evidence Act 1995* (Cth). The evidence is of such little residual value is to be irrelevant … ". Counsel gave the objection on this ground the shorthand label "modified basis rule". Counsel referred to *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157; (2002) 234 FCR 549 at [10]-[11]; *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 2)* [2003] FCA 893; (2003) 130 FCR 424 at [25]; and *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; (2011) 243 CLR 588 at [90] for the purpose of establishing, as I understood it, that an opinion of an expert will have so little value as to be irrelevant if there is not a sufficient correspondence between the facts proved or admitted in the trial and the facts assumed by the expert.

25 As already indicated, the Court was asked to make the rulings at (or very close to) the commencement of the trial. At that stage, the Court had made arrangements to travel to Marla, near the APY Lands, in order to facilitate the taking of evidence from members of the Anangu from whom ASIC had foreshadowed leading evidence. These included some of the persons to whom Dr Martin had spoken. I took the view in this circumstance that it would, at the very least and without regard to s 60 of the Evidence Act, be premature to uphold Mr Kobelt's objection, because of the prospect that the Court would receive evidence in the trial on the very examples given by Dr Martin.

26 When ASIC indicated that it pressed the tender of the two sentences in [50] which were the subject of the objection, Mr Kobelt added a further basis for objection, namely, hearsay. I

considered that an objection on this basis did not warrant a ruling that these portions of Dr Martin's report were inadmissible. First, Dr Martin was entitled to state the basis for his opinion, even though that comprised in part of what he had been told by the Anangu. Once the evidence was admitted for this purpose, s 60 of the Evidence Act applies.

27 Section 60 provides:

> **60 Exception: evidence relevant for a non-hearsay purpose**
>
> (1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.
>
> (2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of subsection 62(2)).
>
> Note: Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.
>
> (3) However, this section does not apply in a criminal proceeding to evidence of an admission.
>
> Note: The admission might still be admissible under section 81 as an exception to the hearsay rule if it is "first-hand" hearsay: see section 82.

28 This meant that Dr Martin's report of what he had been told by the Anangu could constitute proof of the facts stated. See *Quick v Stoland* (1998) 87 FCR 371 at 377-8, 382; *Lee v The Queen* [1998] HCA 60, (1998) 195 CLR 594 at [39]-[40]; *Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25 at [70]; *Ceva Logistics (Australia) Pty Ltd v Redbro Investments Pty Ltd* [2013] NSWCA 46 at [142]-[143].

29 Secondly, and in any event, the Court expected to hear evidence from members of the Anangu who could, at least in part, establish the matters reported by Dr Martin. The Court did not know, at the time of the ruling, the extent of that evidence. That is because ASIC had not been required to provide the evidence in chief of its Anangu witnesses in writing. In that circumstance it would, putting s 60 to one side, have been premature to have ruled that these portions of Dr Martin's report were inadmissible.

30 At the time of the ruling, it seemed that the opinion which Dr Martin expressed in [50] was a matter about which he had considerable experience. It was apparent that Dr Martin relied not just on what he was told by members of the Anangu whom he interviewed in Mimili and Indulkana but upon his own observations and previous experience. It is pertinent to quote in this respect the following passages from Dr Martin's report:

> [8] I lived and worked for 8 years as a community advisor in Aurukun before I trained as an anthropologist. My experience over that period provided me with a deep understanding of a range of matters which are of a direct relevance to this Report. These include understandings of and attitudes towards money and financial transactions amongst Aboriginal people in a remote community, appropriate procedures for a non-Aboriginal person to ensure that Aboriginal people entering financial transactions are properly informed about them, and the particular mechanisms by which Aboriginal people typically seek to structure and personalise relationships with outsiders in order to access valued goods and services.
>
> [9] The experience also provided a highly relevant grounding for my subsequent training as an anthropologist, and formed an important resource of knowledge which I drew on in the ethnographic background for my doctoral thesis. My anthropological training and subsequent work as an anthropologist, both as a consultant and at CAEPR, have provided me with the tools to extend from that detailed knowledge to a consideration of other Aboriginal groups and communities.

31 I note again that the passages in [50] to which Mr Kobelt objected were only examples of the matters upon which he relied for an opinion to which objection was not otherwise taken.

32 Mr Kobelt did not seek any revision of the Court's ruling following the completion of ASIC's evidence. Nor did he contend that s 136 of the Evidence Act should be invoked. It had been open to him to do either, given that the whole of ASIC's evidence was then known. Had Mr Kobelt done so, his objection could have been determined by reference to that evidence.

Paragraph 58: Communication through a translator

33 In [58] of his report, Dr Martin referred to data in the 2011 Census indicating that "73.9% of the Aboriginal residents of the APY Lands spoke English 'well or very well'". He then continued:

> However, in my own interactions with Aboriginal people from the APY Lands, including those I interviewed formally or from whom I sought information for the purposes of this Report the majority did not communicate with me in English but rather through a translator.

34 Mr Kobelt did not object to Dr Martin stating as a fact that he had communicated with the majority interviewees using a translator. He objected, however, to what he described as the "implicit opinion" in this passage. I understood Mr Kobelt to be contending that Dr Martin's statement constituted an opinion that it had been *necessary* for the majority of his interviewees to communicate using a translator because of a lack of facility with the English language. Mr Kobelt contended that this opinion was based on hearsay.

35 I considered that it was permissible for Dr Martin to give evidence of his own experience and observations when speaking to the Anangu, namely, that he had spoken to the majority of his interviewees using an interpreter. That is a statement of fact. Once the evidence was admitted for this purpose, s 60 applied.

36 The Anangu may have had a variety of reasons for wishing to communicate using an interpreter. I considered that that would be a matter for the Court's assessment in the trial.

37 As it happened, there was no cross-examination of the Anangu witnesses who did give evidence to the effect that they were understating their facility in the English language.

Paragraph 62

38 In [62], Dr Martin gave a "summary opinion" as to the financial literacy of the Anangu. He said "very few Anangu people educated entirely in schools located in communities on the APY Lands will have attained a level of literacy, numeracy or other skills which enables them to engage in an informed manner with the institutions of general Australian society, including in its financial institutions". Dr Martin said that this opinion was based on his own experience and observations in remote Aboriginal communities, and on his observations and interviews in APY Lands' community. He went on to say that it was supported by publically available socio-economic data. He referred in particular to the "non-standard English" spoken by many in the APY Lands and said that that had the consequence that many more technical English terms and concepts which native English speakers take for granted are not necessarily understood.

39 Mr Kobelt's objection proceeded on the premise that the whole of Dr Martin's opinion was based on the English spoken by the Anangu as being "non-standard" and that technical terms and concepts are not necessarily understood. Mr Kobelt then relied upon the same matters which had formed the basis for his objection to [50] and [58] and contended that the "publically available socio-economic data" did not provide a proper basis for the opinion. To the extent that this objection turned on the same matters upon which Mr Kobelt relied in relation to [50] and [58], my reasoning was the same. In relation to the inferences which could properly be drawn from the publically available socio-economic data, I considered this to be a matter for submissions in the substantive trial and possibly a matter going to the weight to be attached to Dr Martin's opinion.

Paragraph 63

40 In [63], Dr Martin recited some information he had learnt from a staff member in MoneyMob Talkabout. Mr Kobelt objected to this material on the basis of relevance and hearsay. I upheld his objection and excluded [63] altogether. As that ruling was favourable to Mr Kobelt, there is no need to provide reasons.

Paragraph 101

41 In [101], Dr Martin expressed the following opinion:

> Given this high value accorded motor vehicles, and the other factors discussed in this Report of low personal incomes, the difficulties in saving, and poor financial literacy, in my opinion it is reasonable to propose that potential Anangu buyers of vehicles could seek book-up as their only means to purchase one. This would be particularly the case if they wanted it immediately (for example, to attend a funeral).

Dr Martin then added:

> This concluded opinion is consistent with what a number of interviewees told me.

42 Mr Kobelt objected to this last sentence, asserting that it was "[h]earsay use of information, to bolster opinion".

43 I disagreed with that characterisation of the last sentence in [101]. Dr Martin was doing no more than saying that the opinion which he had formed, independently, concerning the way in which Book-up was viewed by the Anangu was not inconsistent with what he had been told by a number of interviewees. Dr Martin was, in effect, informing the Court that he had not withheld a matter of significance (that is, any contrary statements by his interviewees) in accordance with the undertaking which he gave in compliance with Practice Note CM7 cl 2.2. For this reason alone, the statement was admissible for a non-hearsay purpose and, accordingly, not excluded as hearsay: Evidence Act, s 60.

Paragraph 105

44 In [105], Dr Martin recounted the response of Ms Pumani, a community counsellor and senior Anangu woman to his conducting an interview with a community member outside the Mimili Art Centre. Although Dr Martin had been conducting the interview in full public view, he said that Ms Pumani had insisted that the interview take place in the Art Centre itself where all could hear and make comment on what was being said. Mr Kobelt's objection to this evidence, as I understood it, was a hearsay objection.

45 I took the view that that objection was not soundly based. ASIC was not leading the evidence for the purpose of proving the truth of what Ms Pumani had asserted, but instead to provide an explanation of the circumstances in which Dr Martin had conducted interviews. That evidence was admissible in the same way that evidence that Dr Martin had conducted interviews on a one on one basis in an office, with the assistance of an interpreter, would have been admissible.

Paragraph 153

46 In [153], Dr Martin said:

> It is my experience in Aurukun and other remote Aboriginal communities that interpersonal negotiation and contestation are among the intrinsic characteristics of Aboriginal social process. Related to this in my experience is a strong preference when dealing with service providers to engage with individuals rather than through formal institutional processes. On the basis of my observations and discussions in Mimili and Indulkana, I consider it a reasonable inference that this feature applies also to Anangu in the APY Lands.

47 Mr Kobelt objected to the final sentence in this passage on two grounds. First, he contended that it was an opinion based upon hearsay discussions. That of course does not necessarily make the opinion inadmissible. The second objection was that there was "[n]o identification of what hearsay discussions are relied upon (given that various are double hearsay) and the paragraph fails to disclose [the] reasoning process to arrive at [the] opinions expressed". I considered that those matters went to the weight to be attributed to Dr Martin's evidence rather than to its admissibility.

Paragraphs 176-178

48 In these paragraphs, Dr Martin summarised his interview with Customer D, which he had conducted entirely through a translator.

49 I upheld Mr Kobelt's objection to [179] in which Dr Martin expressed an opinion about the understanding of Customer D (who, as I noted in the principal reasons, has a history of petrol sniffing). I did so because I was not satisfied that Dr Martin had the expertise to express the particular opinion about Customer D.

50 I considered that it was permissible for ASIC to lead evidence from Dr Martin as to what he had been told by Customer D. ASIC proposed calling Customer D to give evidence in the trial (and did call him). In this circumstance, it seemed that ASIC was not relying upon Dr Martin's account of what he had been told by Customer D for a hearsay purpose.

Annexure 7

51 Annexure 7 to Dr Martin's report comprised a report entitled "Baseline Community Profile Mimili" prepared by Langford Consulting Pty Ltd in 2009 pursuant to a commission from the Department of Family Services, Housing, Community Services and Indigenous Affairs.

52 I upheld Mr Kobelt's objection in relation to the whole of this report, other than Table 5.4. That Table contained a summary of the NAPLAN results for Mimili in the year 2009.

53 This was the same data which had been published by ACARA itself. Its admission or exclusion would have made no difference in the trial given that I had overruled Mr Kobelt's objections to the admission of the NAPLAN results. In that circumstance, I do not regard it as necessary to publish separate reasons for the admission of Table 5.4. I note, however, that neither party referred to Table 5.4 in the final submissions.

Annexure 8

54 In Annexure 8 to his report, Dr Martin summarised his discussions with, and attempts to interview, some 25 residents of the APY Lands on his visits to Mimili and Indulkana. The summary included a record (in summary form) of what he was told by each interviewee, his own observations of the interviewees and, in some cases, details of the circumstances in which the interviews took place.

55 Mr Kobelt objected to numerous passages in Appendix 8, principally on the basis of hearsay and relevance. I do not intend to give reasons in relation to each individual objection separately. I overruled Mr Kobelt's objections to Appendix 8 because I did not consider that its contents were being tendered for a hearsay purpose. ASIC, on my understanding, was tendering Appendix 8 as part of its identification of the matters on which Dr Martin had relied in preparing his opinion. Dr Martin himself made this plain in the following passages of his report:

> [23] … I took my task to be (in essence) to establish the sociocultural, socioeconomic, and other factors which informed the ways in which the Aboriginal residents of the APY Lands engaged with Nobby's credit facilities and those of the other Mintabie establishments, and the ways in which they understood and spoke about that engagement.
>
> [24] This requires the recognition of the social, cultural and political context in which information is presented and obtained (for example in interviews) as amongst the factors required for the proper anthropological analysis and evaluation of that information. That is, in this Report, I differentiate between the fact that X said Y happened, from whether or not Y can be shown by evidence not available to me to be factually true.

56 I took the view that the contents of Appendix 8 were admissible for a non-hearsay purpose. Once admitted, s 60 of the Evidence Act applied.

57 Mr Kobelt's contention that the evidence was hearsay because it had been provided to Dr Martin via an interpreter failed for the same reason.

58 As to the objections based on relevance, I took the view that these could be better addressed in the final submissions. As it happens, I did not understand either ASIC or Mr Kobelt to rely upon the particular passages which Mr Kobelt had contended to be irrelevant.