FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Kobelt [2017] FCA 387

File number:	SAD 100 of 2014
Judge:	**WHITE J**
Date of judgment:	13 April 2017
Catchwords:	**CONSUMER LAW** – penalties to be imposed for a contravention of s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) and for contraventions of s 29(1) of the *National Consumer Credit Protection Act 2009* (Cth) (NCCP Act) - penalty imposed for a single contravention of s 12CB by engaging in a system of conduct which was unconscionable – 92 contraventions of s 29 of the NCCP Act but the contraventions formed part of a course of conduct – consideration of ss 166-7 of the NCCP Act – penalties imposed for 45 contraventions – consideration of the totality principle as applied to civil penalties
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12 CB, 12GBA, 12GD(1) *Building and Construction Industry Improvement Act 2005* (Cth) *Crimes Act 1914* (Cth) ss 4AA, 4K *National Consumer Credit Protection Act 2009* (Cth) ss 5, 6(1), 29, 37, 45, 47, 50, 51, 54, 88, Ch 3, 166, 167 *National Credit Code* s 5 *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) s 29
Cases cited:	*Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 326 ALR 476 *Trade Practices Commission v CSR Limited* [1991] ATPR 41-076 *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226, (2005) 148 FCR 132 *Director, Fair Work Building Industry Inspectorate v Cradden* [2015] FCA 614 *Director of the Fair Work Building Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 413

	Hamberger v Construction, Forestry, Mining and Energy Union [2002] FCA 585 *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70, (2008) 168 FCR 383 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181, (2017) 340 ALR 25 *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd* [2016] FCA 698 *Director Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59; (2015) 229 FCR 331 *Mill v The Queen* (1988) 166 CLR 59 *Pearce v The Queen* [1998] HCA 57, (1998) 194 CLR 610 *Johnson v The Queen* [2004] HCA 15, (2004) ALR 346 *The Queen v Bibaoui* (1997) 2 VR 600 *The Queen v Finnie* [2002] NSWCCA 533 *Thorn v The Queen* (2009) 198 A Crim R 135 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, (2015) 326 ALR 476 *Royer v Western Australia* [2009] WASCA 139 *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39, (2009) 269 ALR 1 *The Attorney General v Tichy* (1982) 30 SASR 84 *Postiglione v The Queen* [1997] HCA 26; (1997) 189 CLR 295 *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70; (2008) 168 FCR 383 *Australian Competition and Consumer Commission v High Adventure Pty Ltd* [2005] FCAFC 247; [2006] ATPR 42-091
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ORDERS

SAD 100 of 2014

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Applicant
AND:	**LINDSAY KOBELT** Respondent
JUDGE:	**WHITE J**
DATE OF ORDER:	**13 APRIL 2017**

THE COURT ORDERS THAT:

1. The Respondent pay to the Commonwealth of Australia a pecuniary penalty pursuant to s 12GBA of the *Australian Securities and Investments Commission Act 2001* (Cth) fixed in the sum of $100,000.

2. The Respondent pay to the Commonwealth of Australia pursuant to s 167 of the *National Consumer Credit Protection Act 2009* (Cth) pecuniary penalties of $1500 in respect of each of the first 25 contraventions of s 29(1) of the NCCP Act, and of $1000 in respect of each of the next 30 contraventions of s 29(1) of the NCCP Act, a total of $67,500.

3. The Respondent pay the Applicant's costs of and incidental to the proceedings other than those costs to which Order 10 made on 26 June 2014 and Orders 10 and 11 made on 10 October 2014 refer and other than the costs of investigation by the Applicant which led to the commencement of the proceedings.

4. The costs in Order 3 are to be assessed by a Registrar on a lump sum basis, and the Registrar may give any necessary directions in relation to the assessment of the lump sum.

5. Execution of Orders 1 to 4 of these orders is stayed pending the hearing and determination by the Full Court of the appeal commenced by the Respondent in Action number SAD 18 of 2017.

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

REASONS FOR JUDGMENT

WHITE J:

1 By a judgment delivered on 9 November 2016, I found that the respondent (Mr Kobelt) had contravened s 29(1) of the *National Consumer Credit Protection Act 2009* (Cth) (the NCCP Act) and s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act). On 13 December 2016, I made declarations concerning the contraventions, granted injunctions and made publication orders. The matter was then adjourned for submissions by the parties on the penalties sought by ASIC. This judgment concerns those penalties. It should be read in conjunction with the principal judgment: *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327.

Penalties under the NCCP Act

2 On my findings, Mr Kobelt contravened s 29(1) of the NCCP Act on 92 occasions between 1 July 2011 and 31 October 2012 by engaging in credit activity within the meaning of s 6(1) of the NCCP Act when selling vehicles by way of Book-up to 92 customers when he did not hold a licence to engage in that credit activity. Put more succinctly, Mr Kobelt provided credit to which the NCCP Act applied when unlicensed.

3 I also found that Mr Kobelt's contravening conduct had continued until at least April 2014, but that ASIC's claim concerned only the 92 customers. ASIC does not seek the imposition of any penalty in respect of contraventions occurring after 31 October 2012.

4 Section 167 of the NCCP Act empowers the Court to impose penalties in respect of contraventions of s 29. The maximum number of penalty units is 2,000 (s 29(1)). By virtue of the definition of "penalty units" in s 5 of the NCCP Act and s 4AA of the *Crimes Act 1914* (Cth), the maximum penalty for each contravention by an individual in the period from 1 July 2011 to 27 December 2012 was $110. That period encompasses the whole of the period in which Mr Kobelt's contraventions occurred. Accordingly, the maximum penalty for each of Mr Kobelt's contraventions is $220,000.

Penalties under the ASIC Act

5 I found that Mr Kobelt had contravened s 12CB(1) of the ASIC Act in the period from at least 1 June 2008 and continuing until at least July 2015 in connection with the supply of financial services to at least 117 customers by engaging 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). I identified a number of features giving rise to that unconscionability.

6 Section 12GBA empowers the Court to impose a penalty for a contravention of s 12CB. The maximum penalty for a contravention of s 12CB(1) is 2,000 penalty units (ASIC Act s 12GBA(3)). The penalty unit of $110 fixed by s 4AA of the Crimes Act for the period 1 June 2008 to 27 December 2012 has the effect that the maximum penalty for a contravention of s 12CB(1) is $220,000. From 28 December 2012 to 30 July 2015, the figures were $170 and $340,000 respectively.

7 ASIC submitted that the Court should impose a penalty on the basis that Mr Kobelt had contravened s 12CB(1) on at least 59 separate occasions, that is, in respect of one more than one half of the 117 customers who were the subject of ASIC's allegations. That gives rise to an issue to which it will be necessary to return.

8 It was common ground that Mr Kobelt has no record of prior contraventions.

Penalties – general principles

9 The principles bearing upon the imposition of penalties in a context like the present are relatively settled and, subject to some matters of emphasis, the parties were in agreement about them. Accordingly, it is not necessary to refer to the authorities in any detail.

10 In *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 326 ALR 476 (*Commonwealth v DFWBII*) at [59], French CJ, Kiefel, Bell, Nettle and Gordon JJ said, in relation to civil penalties generally, that they are not retributive but are "essentially deterrent or compensatory and therefore protective". Earlier, at [24], the plurality had noted that civil penalties are part of the range of enforcement mechanisms available to regulators by which to achieve compensation, prevention and deterrence. Their Honours also referred to the primary role of deterrence in the fixing of civil penalties at [55]:

> [W]hereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*, is primarily if not wholly protective in promoting the public interest in compliance:
>
> > "Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor the rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by

> Pt IV [of the *Trade Practices Act*]. ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act."
>
> (Citations omitted)

See also the observations of Keane J at [102].

11 The matters listed by French J in *Trade Practices Commission v CSR Limited* [1991] ATPR 41-076 at 52,152 have been influential. French J listed the following:

> 1. The nature and extent of the contravening conduct.
> 2. The amount of loss or damage caused.
> 3. The circumstances in which the conduct took place.
> 4. The size of the contravening company.
> 5. The degree of power it has, as evidenced by its market share and ease of entry into the market.
> 6. The deliberateness of the contravention and the period over which it extended.
> 7. Whether the contravention arose out of the conduct of senior management or at a lower level.
> 8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.
> 9. Whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention.

12 Some of these factors are better adapted to contraventions by a large commercial entity than to contraventions by a sole trader such as Mr Kobelt. Nevertheless, they provide a guide to the relevant matters.

13 The Court is to determine the appropriate penalty by a process of intuitive or instinctive synthesis taking into account all relevant factors. The penalties imposed should be no greater than is reasonably necessary to achieve the objectives of specific and general deterrence. Care must be taken to avoid the imposition of penalties which are disproportionate to the overall culpability of a contravenor's conduct or which are oppressive in the contravenor's personal circumstances.

The contraventions of s 12CB(1)

14 Section 12GBA(2) of the ASIC Act requires the Court to have regard, when fixing the appropriate pecuniary penalty for a contravention, to all relevant matters but including:

(a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission;

(b) the circumstances in which the act or omission took place; and

(c) whether the person had previously been found by the Court in proceedings under Subdiv G of Pt 2 of the ASIC Act to have engaged in any similar conduct.

15 The circumstances of Mr Kobelt's contravention of s 12CB(1) as found in the principal judgment can be summarised as follows.

16 Since about the mid-1980s, Mr Kobelt has operated a general store at Mintabie in the far north of South Australia known as Nobbys Mintabie General Store (Nobbys). A large proportion of his customers have been indigenous persons (the Anangu) who are residents on the Anangu Pitjantjatjara Yankunytjatjara Lands (APY Lands). By late 2011, the Anangu comprised about 80% of Nobbys' patronage. A significant part of the business of Nobbys since about 2000 has been the sale of second hand cars to the Anangu. Most, but not all, bought their cars on credit using Book-up.

17 The Book-up system as operated by Mr Kobelt had the following features. Mr Kobelt required, as a condition of the grant of credit, that the customers provide him with a debit card (referred to as "key card") linked to the bank account into which their wages or Centrelink payments were made as well as their personal identification number (PIN) for the use of that account. Mr Kobelt retained possession of the key card, generally until the debt was paid, as "security" for the credit he had advanced. Mr Kobelt used the key card and PIN in one of the two EFTPOS machines in Nobbys to access the customer's account, usually early on the day on which wages or Centrelink benefits were paid into the account, but sometimes shortly afterwards. Generally, he withdrew the whole, or nearly the whole of the available funds and applied the amount withdrawn in reduction of the customer's debt to him. However, some customers placed limits of the amounts which Mr Kobelt was authorised to take from their accounts and generally, but not always, Mr Kobelt complied with those limits.

18 When entering into the Book-up arrangement, Mr Kobelt agreed informally with the customers that some of the amount which he had withdrawn from their accounts and

transferred to his own account would be available for an advance of further credit which they could use for their own purposes, and the customers used this to purchase food, groceries and other necessities of life. In most cases, Mr Kobelt would allow up to 50% of the withdrawn amount for this purpose. However, with relatively few exceptions, the customers could obtain access to that money only by coming back to Nobbys to make their purchases or to obtain cash. In some instances, the customers asked Mr Kobelt to send a "purchase order" to another store in order that they may acquire goods at that store. Mr Kobelt charged a fee for that service. Generally speaking, Mr Kobelt did not allow the customers to access at the one time the whole of the additional credit he allowed. Instead, as I found at [56], his practice was to limit customers on any one occasion to amounts of $100, $150 or $200, with the amount varying from customer to customer. Mr Kobelt said that he had done 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. I found that by this means, Mr Kobelt controlled the expenditure of his Book-up customers.

19 I recorded in the principal judgment that 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.

20 The way in which Mr Kobelt operated his Book-up system is recorded in more detail in the principal judgment at [24]-[97].

21 ASIC emphasised the following matters:

(a) Mr Kobelt's conduct had occurred over a long period (since at least June 2008) and affected "most" of the 117 customers who were the subject of its pleaded case;

(b) Mr Kobelt had withdrawn all, or nearly all, of the available funds in the customers' bank accounts with the consequence that they were deprived of the means of obtaining the necessities of life and were, accordingly, dependent on him;

(c) Mr Kobelt was thereby in a position to control (and did control) what the customers purchased and their rate of expenditure;

(d) the credit provided by Mr Kobelt was expensive;

(e) the customers were persons who were financially vulnerable with little understanding of credit arrangements and who, in most cases, were unaware that they were being charged for the provision of credit by Mr Kobelt for the purchase of their vehicles;

(f) in some instances, Mr Kobelt had withdrawn more than that to which he was entitled (although the evidence showed that he made a reimbursement when he became aware that that had occurred);

(g) Mr Kobelt's manner of record keeping was inadequate.

22 I considered that a number of elements warranted the characterisation of Mr Kobelt's system of Book-up as unconscionable. The matters at the heart of ASIC's case were the disadvantaged position of most of the Anangu customers given their low levels of financial literacy; the requirement that the customers hand over both their key cards and the confidential PINs; the use by Mr Kobelt of the key cards and PINs to withdraw the whole, or nearly the whole of the customers' periodic income, especially as the customers had no (or limited) assets and no other sources of income; that Mr Kobelt's system went well beyond that which could be regarded as reasonably necessary for the protection of his legitimate interests; and the tying effect of the conduct as the customers had little practical alternative but to continue shopping at Nobbys even when it was inconvenient to do so. Mr Kobelt was aware of the financial vulnerability of his customers and yet persisted with his conduct.

23 Mr Kobelt's submissions emphasised the following aspects which it was said "locate[d]" his conduct "at the lower end of the range":

a. There was no dishonesty asserted (J[69], J[422], J[558]);

b. The system involved amounts withdrawn being applied to reduce a customer's debt to the Respondent (J[29]);

c. The customers understood the basic parameters of how the book up system worked including its salient disadvantages (including that they were authorising the Respondent to withdraw money from their bank *"as it became available"),* especially where they had used the system and returned for repeat business as there were features of the system that customers found to be attractive (J[425], J[591]);

d. The Respondent never refused to advance further money for what may loosely be termed staples (J[453]);

e. With their degree of understanding the customers voluntarily chose to enter into the credit facility (J[425]);

f. Some limited number of customers had a reasonable education , were reasonably articulate, and had some financial awareness (J[425]);

g. Mainstream banking and financial services are not available on the APY Lands (J[246]);

h. The Respondent's customers would have difficulty in obtaining loans from commercial lenders, and the Respondent's system had an advantage of being relatively simple (J[510]);

i. The Respondent would generally release cards to customers if they were needed for the purpose of travel, notwithstanding that the cards were not always returned (J[67], J[454], J[554]);

j. The Respondent's power over his customers was tempered by the ability of the customers to divert money into other accounts, and cancel their cards (J[36], J[89-91], J[268], J[371-375], J[454], J[511-512], J[530], Exs R32-R36);

k. The Respondent's power over his customers was tempered by the ability of the customers to have more than one card (T838);

l. The Respondent's customers had the ability to obtain assistance from professional financial counsellors in establishing and operating bank accounts, including the cancellation of cards (J[268], J[531]);

m. The Respondent's customers had the ability to obtain credit on book up from competitor stores (J[508]);

n. If the Respondent treated his customers poorly, it would be widely discussed in the Aboriginal community (T162);

o. The Respondent understood that if he did not treat his customers well, they would cease to patronise his store (J[453]);

p. The Respondent provided other useful services as part of the book up system, such as bus ticketing (J[88], J[554]), for a fee less than express money orders Purchase Orders (J[78-85]), and cash advances (J[86]);

q. The Respondent's system of book up credit allowed Anungu to some extent to mitigate to an extent bullying and importuning associated with cultural norms of demand sharing (J[585]);

r. The Respondent's system of providing book up allowed Anungu to spread their expenditures over payment cycles, thereby ameliorating "*boom and bust expenditure cycle[s]*" (J[566], J[569]);

s. Almost all of the credit supplied that was not for the sale of a motor vehicle, was supplied interest and fee free.

24 I agree that these matters are relevant to the overall assessment of Mr Kobelt's conduct. Many of them are part of a description of the circumstances constituting the proscribed conduct. Some of the matters seem to be in the nature of actions taken by Mr Kobelt to mitigate the harshest consequences of his unconscionable system. There is some incongruity in Mr Kobelt relying on his customers' ability to obtain assistance from professional financial counsellors given that he had not sought to involve those counsellors in his entry into the Book-up arrangements with the customers despite his awareness of their general poor financial literacy. In relation to Item (j), I mention my conclusion at [513] of the principal judgment, that the ability of Mr Kobelt's customers to cancel their key card and thereby act in

breach of the Book-up arrangements did not correct or ameliorate the imbalance of bargaining power between them and Mr Kobelt.

Identifying the contravention of s 12CB for which the penalty is to be imposed

25 As noted earlier, ASIC submitted that the Court should impose a penalty on Mr Kobelt on the basis that he had contravened s 12CB(1) on at least 59 separate occasions. That number is one more than half of the 117 customers who were the subject of ASIC's claim. ASIC's selection of the number 59 rested on the Court's finding that "most" of the 117 Book-up customers who were the subject of its claim were subject to the disadvantages it had alleged (being residents in remote communities with limited assets, limited net incomes and low levels of financial literacy). I accepted that some of Mr Kobelt's customers may not have been subject to these disadvantages but concluded that they were likely to be "a clear minority" of the overall 117 customers, at [423]. It had not been necessary at trial to make findings regarding the individual circumstances of each of the 117 customers because ASIC had pursued a "system" case.

26 Initially, Mr Kobelt did not contest ASIC's contention that it would be appropriate for the Court to impose penalties on the basis of multiple contraventions of s 12CB(1) and, understandably, did not in the light of the findings to which I have just referred, contest ASIC's selection of the number 59. However, in his supplementary submissions, Mr Kobelt seemed to contend that the Court's finding that he had contravened s 12CB by engaging in a system of conduct or pattern of behaviour meant that a single penalty could be imposed.

27 I consider that the position for which Mr Kobelt contends is correct.

28 Until its closing submissions in the trial, ASIC had made its claim of contraventions of s 12CB on a dual basis. First, it alleged that Mr Kobelt had, since at least 1 June 2008 in relation to the supply of financial services to "at least" 117 customers engaged in "a system of conduct or pattern of behaviour" which was unconscionable. As I noted in the principal judgment at [5], this part of ASIC's case did not turn on the circumstances of any identified individual customer.

29 Secondly, ASIC alleged that Mr Kobelt's conduct in relation to five identified customers was unconscionable. In fact, it was five customers because one of the four customers was a husband and wife. This aspect of ASIC's case did turn on the personal circumstances of the

five identified customers. However, ultimately ASIC did not press for findings on the second part of its case.

30 The distinction between the two ways in which ASIC pursued the claim of contraventions of s 12CB is important for present purposes. It indicates that ASIC distinguished between a claim of unconscionable conduct constituted by the implementation of "a system", on the one hand, and a claim of unconscionable conduct in relation to Mr Kobelt's dealings with specified customers, on the other. By reason of the way in which ASIC made the claim, and the fact that it did not press for findings in relation to the five identified individuals, the Court has not made any finding that Mr Kobelt's conduct was unconscionable in relation to any identified individual. Nor has it made findings identifying any particular subset of 59 customers in respect of whom Mr Kobelt's conduct was unconscionable. That by itself suggests that it would be inappropriate for the Court to impose a penalty or penalties on the basis that such a finding had been made.

31 ASIC acknowledged that the Court had made only *one* finding of systemic unconscionability. It submitted nevertheless that, when considering the maximum penalty available, it was appropriate for the Court to proceed on the basis that there had been multiple separate contraventions and, as noted, it nominated the number 59 for this purpose. ASIC submitted that "such a construction" would promote the legislative purpose of including "systemic unconscionability" into s 12CB. It also submitted that it was necessarily implicit in the Court's findings that there had been, at least, 59 separate *acts* which constitute contraventions of s 12CB with the consequence that the Court could be satisfied, in terms of s 12GBA(1)(a) that Mr Kobelt had contravened s 12CB at least 59 times.

32 I do not accept that submission. It overlooks that the conduct found by the Court to be unconscionable was a system of conduct or pattern of behaviour by Mr Kobelt and not his conduct (acts) in relation to any particular individual. Furthermore, s 12CB(4) on which ASIC relied indicates that the Court may find that a system of conduct or pattern of behaviour is unconscionable "whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour". Accordingly, a finding that a respondent has engaged in systemic unconscionable conduct does not necessarily carry with it that any particular individual had been disadvantaged by that conduct so that it could be said that the conduct was unconscionable in relation to that particular individual.

33 In the present case, ASIC pursued its "system" case on the basis that it could succeed without proving the circumstances of any particular individual. Having so succeeded, it would be inappropriate now for penalties to be imposed on the basis that ASIC had, instead, pursued a case that Mr Kobelt's conduct was, in respect of 59 customers, unconscionable.

34 ASIC's contention would give rise to a further difficulty. Given that the identity of the particular 59 customers (out of the total of the 117) in respect of whom ASIC seeks the imposition of a penalty is not known, the Court is not in a position to make any assessment of the extent of the unconscionability in their individual cases, or of the impact which the unconscionable conduct had on them.

35 As can be seen, the above reasoning relies in part on s 12CB(4) which indicates that the prohibition on unconscionable conduct 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 had been established before the introduction of s 12CB(4)(b) that a system or pattern of conduct by a trader could constitute unconscionable conduct without there being a need to identify the circumstances of, or the effect on, a 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.

36 For the reasons just given, I consider that a single penalty is to be imposed on Mr Kobelt in respect of a single contravention of s 12CB.

Mr Kobelt's personal circumstances

37 As I noted in the principal judgment, Mr Kobelt has operated Nobbys as a sole proprietor since the mid-1980s. He has done so with the assistance of his partner Sonia Kobelt and, until 27 January 2017, his son Timothy Kobelt.

38 Mr Kobelt is now 73 years old. He had a limited education having left school at Year 10. It is apparent that he has lived in remote communities for significant parts of his working life. In the principal judgment I accepted, at [428], that he has an unsophisticated approach to many matters.

39 The Court has evidence of the trading performance of Nobbys for the 2010, 2011, 2015 and 2016 financial years and for the six months ending on 31 December 2016. That evidence indicates the following:

	30/06/2010 $	30/06/2011 $	...	30/06/2015 $	30/06/2016 $	01/07/2016-31/12/2016 $
SALES	1,834,600	1,936,694	...	2,221,241	2,111,833	1,080,342
GROSS PROFIT FROM TRADING	370,160	450,814	...	698,993	737,228	280,489
EXPENSES	160,850	156,244	...	586,128	573,201	151,785
NET PROFIT	234,782	334,935	...	145,167	193,103	128,865
NET ASSETS	303,399	386,887	...	560,664	302,104	N/A

40 As can be seen from these figures, Mr Kobelt in his capacity as the sole trader at Nobbys made net profits of $234,782 and $334,935 in the 2010 and 2011 financial years and gross profits of $698,993 and $737,228 and in the 2015 and 2016 financial years. Mr Kobelt's gross profit for the 2015 and 2016 financial years was significantly higher than in the 2010 and 2011 years but the net profits of $145,167 and $193,103 were significantly less. That reduction seems attributable to Mr Kobelt's expenditure of $440,254 and $438,889 respectively for legal costs in those years. Similarly, the net profit of $128,865 for the half year ended 31 December 2016 was achieved after paying $83,494 for legal costs in that period. I infer that these legal costs were, in the main, the costs incurred by Mr Kobelt in defending the within proceedings. If those expenses are ignored, it can be seen that Mr Kobelt has generated significant profits from Nobbys. I infer that the trade in which Mr Kobelt engaged as part of his book-up system accounts for significant proportions of those profits.

41 Counsel for Mr Kobelt did not contend, correctly in my opinion, that the incurring of the expenses by way of legal costs should be brought into account as a mitigatory factor.

42 Mr Kobelt has deposed to having net assets of approximately $470,000, exclusive of his interest in Nobbys and exclusive of liabilities of undisclosed amounts to Westpac and to his lawyers.

General deterrence

43 I have already referred to the importance of deterrence in the fixation of penalties. ASIC emphasised this consideration in the present case. It drew attention to evidence indicating that forms of book-up are used elsewhere in remote parts of Australia, particularly in indigenous communities. It is reasonable to suppose that in several instances, the members of

those communities also have relatively poor financial literacy and consumer knowledge. In the principal judgment, I noted that book-up can take various forms. In several instances, the book-up elsewhere has also involved the customer handing over to the book-up provider, the customer's key card and associated PIN.

44 I accept that, in this circumstance, considerations of general deterrence are important. Those considerations suggest that the penalties should be of a sufficient size to deter others who might be minded to engage in like conduct. Further, as is well recognised in the authorities, the penalty imposed should not be such that it can be seen as a mere cost of doing business.

Amount of loss or damage caused

45 ASIC submitted that Mr Kobelt's conduct in contravention of s 12CB had caused loss or damage to his customers although it seemed to refer more to the gain Mr Kobelt had realised than to detriments to the customers. It is not easy to identify and quantify loss to the customers caused by Mr Kobelt's conduct in other than a general way. On my findings, it may have been possible for the customers to have obtained cheaper credit elsewhere and, if they had not been tied to Nobbys, they may have been able to shop more cheaply elsewhere. I note, however, in this respect some hearsay and unparticularised opinion evidence from Mr Kobelt to the effect that his prices at Nobbys were at least competitive with those charged by other stores, and in some instances, less. ASIC did not challenge that evidence. It is not possible to quantify the additional costs which Mr Kobelt's customers incurred by making the significant round trip from their home communities to Mintabie in order to shop at Nobbys.

Willingness to cooperate

46 ASIC submitted that Mr Kobelt was not entitled to mitigation of penalty on account of cooperation. It submitted that the evidence indicated that Mr Kobelt had, during the course of its investigation before commencing the litigation, failed to comply with notices which it had issued to him for the production of documents. However, the evidence to which ASIC pointed on this topic was not clear and I am not inclined to attach weight to it.

47 ASIC also pointed to aspects of Mr Kobelt's conduct in the proceedings, in particular, to the multiple blanket denials in his filed defence. I accept that Mr Kobelt is not entitled to the credit that he would have received had he made admissions, but his defence to ASIC's application is not an aggravating factor. He is not to be penalised for having defended ASIC's allegations.

48 It is necessary to mention one further matter. Mr Kobelt's solicitor, Mr Holland, gave evidence that he had told an ASIC officer (Mr Lockett) shortly after the commencement of the proceedings that Mr Kobelt and his solicitors would like to meet with ASIC to explore whether the proceedings could be resolved on the basis of enforceable undertakings. He said that Mr Lockett had responded with words to the effect of "I don't think this is a matter where ASIC will be interested in enforceable undertakings".

49 Counsel for Mr Kobelt submitted that Mr Holland's enquiry was evidence of a willingness by Mr Kobelt to cooperate with ASIC. However, I am not prepared to regard Mr Holland's exchange with Mr Lockett as having much significance for present purposes. Mr Holland's enquiry seems to be of the kind which solicitors in litigation will commonly make, that is to say, an informal sounding out of the potential for a means of resolution. It is not clear that Mr Holland had instructions from Mr Kobelt at the time to make the proposal so that credit could be given to Mr Kobelt for the approach. Nor is there evidence of a formal proposal by Mr Kobelt for resolution of the matter on the basis of enforceable undertakings, or of a willingness, let alone action, by Mr Kobelt to modify his conduct so as to avoid its unconscionable character. Instead, Mr Kobelt persisted with his conduct.

50 In short, I do not regard the evidence as indicating any cooperation by Mr Kobelt before 9 November 2016 which can be regarded as a mitigatory factor of substance.

51 Mr Kobelt has still not acknowledged the wrongfulness of his conduct.

52 However, it is to his credit that, shortly after the delivery of the principal judgment on 9 November 2016 (and before the Court had made any orders), he ceased to provide Book-up for the purchase of motor vehicles and commenced voluntarily returning the key cards to his customers. By 2 December 2016, Mr Kobelt had returned 41 key cards but still held another 80 valid (uncancelled) cards. By 13 December 2016, the number of valid cards held by Mr Kobelt had reduced still further, with the consequence that some 20-30 cards then remained in his possession.

53 On 13 December 2016, I made orders, pursuant to s 12GD(1) of the ASIC Act, restraining Mr Kobelt from receiving and retaining any customers' debit cards or PINs, and requiring him to cease using the key cards then in his possession to withdraw funds from the customers' accounts and to deliver any remaining cards in his possession to ASIC officers.

Those officers were then to return the cards to the customers or, if unable to do so, to the financial institutions which had issued them.

54 In affidavits filed on 30 January 2017, Mr Kobelt and his son Timothy deposed that they had also ceased, in November 2016, using the customers' key cards in the absence of the customers to withdraw funds from their accounts. Instead, withdrawals had been made only in the presence of the customers with their express authority and with the customers themselves entering their PINS into the EFTPOS machine. ASIC did not challenge that evidence and so I accept it, even though it is unclear how it interrelates with Mr Kobelt's evidence that the cards were being returned to the customers when they came to Nobbys in any event. I accept that this conduct is of a mitigatory kind.

Mr Kobelt's subjective belief

55 Counsel for Mr Kobelt submitted that a significant mitigatory factor was Mr Kobelt's state of mind when engaging in Book-up. Mr Kobelt had believed that his book-up was an acceptable business practice and responsive to the needs of his Anungu customers. Counsel submitted that that belief had a reasonable basis given, amongst other things, evidence that practices of a like kind were also engaged in by other traders, both in Mintabie and elsewhere.

56 As part of this submission, counsel characterised the principal judgment as establishing a new standard. I do not accept that that characterisation is appropriate. The relevant standard is set by s 12CB of the ASIC Act and the community values and mores in which it operates. Mr Kobelt was not entitled to ignore those values and mores and to engage in proscribed conduct, irrespective of whether there had been a previous judgment determining the unconscionability of the conduct.

57 However, subject to one qualification, I accept that Mr Kobelt did, albeit erroneously, hold the belief that his conduct was acceptable. Indeed, in the principal judgment I said (at [429]) that Mr Kobelt had come to believe that his provision of Book-up was justified because it met the practical needs of his indigenous customers in remote communities. I accept that this is not a case of a trader knowing that the conduct was unlawful but choosing to engage in it regardless.

58 The qualification arises from the circumstance that Mr Kobelt continued to engage in the conduct even after ASIC commenced the present proceedings. From then on, it must have

been obvious to him that the responsible regulator took the view that his provision of Book-up was unconscionable. Mr Kobelt then had the opportunity to modify his practices but did not do so. In my opinion, Mr Kobelt's knowledge of ASIC's view of his conduct undermined the reasonableness of his belief that his conduct was acceptable.

Consequential loss

59 Counsel for Mr Kobelt submitted that the Court should take into account the economic loss Mr Kobelt has suffered and will suffer in consequence of the return of the key cards to his customers. That loss is said to arise for two reasons. First, it was said that Mr Kobelt's inability now to use the key cards and PINS to withdraw funds from the customers' accounts in reduction of their indebtedness to him has the consequence that these are now bad debts.

60 In his affidavit of 2 December 2016, Mr Kobelt deposed that some $51,813 had been "presumptively written off" by reason of his voluntary return of the 41 cards since 9 November 2016. In his affidavit of 30 January 2017, he deposed that this figure would now "well exceed $200,000" given his return of all the cards or their delivery to ASIC officers. This led to a submission on Mr Kobelt's behalf that the consequence of the injunctions issued on 13 December 2016 had been "to impose a significant bad debt burden" on Mr Kobelt "to the windfall gain of [the] customers".

61 I do not accept that submission. There would be an incongruity in the Court regarding as a mitigatory circumstance, losses resulting from a trader's inability to engage in conduct which the Court has found to be unlawful. However, putting that incongruity to one side, there are a number of other matters which indicate that the submission should not be accepted.

62 First, Mr Kobelt's own evidence and submissions was that, by 13 December 2016 he had voluntarily returned all but 20-30 of the uncancelled key cards held by him and that he had, by that time ceased making withdrawals from the customers' accounts. He said that instead the withdrawals were made only in the presence of the customers and with the customers themselves entering their PINS into the EFTPOS machine. Accordingly, any losses resulting from this voluntary conduct cannot be attributed to the injunctions made on 13 December 2016. I also observe that Mr Kobelt's intention with respect to the remaining 20-30 customers was, in any event, to return the cards to the customers as soon as he could.

63 Secondly, even if the event said to be causative is the Court's characterisation of Mr Kobelt's conduct as unconscionable, I am not willing to conclude, on the evidence, that the return of

the key cards means that the debts are now irrecoverable. True it is that Mr Kobelt has lost the "hold" that he had over the customers. But there are other means available by which Mr Kobelt could, and can, pursue repayment. He has given no evidence at all of attempts to negotiate other means of repayment, for example, payments of instalments by electronic transfer, which is a commonplace arrangement by which consumers pay their liabilities, let alone evidence that those attempts have been unsuccessful.

64 Thirdly, it is not self-evident that the customers will not pay some or all of their outstanding indebtedness. If they do not, the ordinary means provided by the law for the enforcement of debts remains open to Mr Kobelt. I note in this respect, that the Court has not made any orders declaring Mr Kobelt's contracts with the customers to be void.

65 Fourthly, Mr Kobelt is now subject to a restriction which is independent of the Court's orders and which precludes him from engaging in Book-up. This arises from the circumstance that Mr Kobelt's occupancy of Nobbys and his residence in Mintabie is pursuant to a commercial licence issued under s 29 of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA). Since 31 January 2017, it has been a condition of the licence that Mr Kobelt "must not conduct business using Book-up or Centrepay at all and in any form whatsoever". This circumstance makes it difficult to attribute losses after 31 January 2017 to the decision of this Court.

66 I mention that it was not suggested that the condition attaching to Mr Kobelt's commercial licence indicates that personal deterrence no longer has the importance in the fixation of penalty which might otherwise have been the case.

67 The second source of the economic loss to which Mr Kobelt and his counsel referred is that at least some of the customers no longer shop at Nobbys or shop there only for some of their needs. Mr Kobelt deposed that, instead, some customers are now patronising his competitor stores in Mintabie. The trading figures for Nobbys for the month of January 2017 are significantly less than the counterpart figures for January 2016 and I accept that this provides some corroboration for this claim of Mr Kobelt. I note however that Mr Kobelt's own accountant has cautioned that it would be more appropriate to look at the trading figures over a longer period before concluding that the January 2017 figures are a manifestation of a trend.

68 There was a suggestion in the evidence that the customers have switched their patronage to other stores because they are continuing to offer forms of book-up. However, the evidence

does not indicate that that is in fact the case. Nor does it disclose the terms upon which any book-up system by those stores is being offered, let alone that those terms give rise to unconscionability in the way that Mr Kobelt's system did. Further still, the evidence did not disclose whether Mr Kobelt's competitors in Mintabie are also subject to the same restrictive condition which was imposed on Mr Kobelt's licence with effect from 31 January 2017. In short, it may be that the shift in patronage to which Mr Kobelt refers is the result of ordinary and acceptable competition amongst the traders in Mintabie.

69 For these reasons, I do not regard the economic losses asserted by Mr Kobelt as being mitigatory in a significant way. I will however take account of the decline in trade at Nobbys as a relevant matter bearing on Mr Kobelt's circumstances generally.

Amount of penalty

70 In the context of its submission that Mr Kobelt had committed 59 contraventions of s 12CB(1), ASIC submitted that a single penalty in the range of $300,000-$350,000 was appropriate. Given that I consider that a penalty is to be imposed for a single contravention of s 12CB(1) constituted by a system of conduct which was unconscionable, this submission cannot be accepted.

71 In fixing the single penalty, account has to be taken of the fact that the maximum penalty during the first four and a half years in which the conduct occurred was $220,000 and for the last two and a half years of the conduct, $340,000. In addition to the other matters already mentioned in these reasons, the fact that Mr Kobelt's system affected most of the 117 customers who were the subject of ASIC's allegations is an important consideration.

72 I do consider it important to keep in mind that Mr Kobelt is a sole trader who will bear personally the burden imposed by the Court's penalty. I also bear in mind Mr Kobelt's subjective belief to which I referred earlier. At the same time, however, I keep in mind that Mr Kobelt engaged in the conduct over a long period and was, when doing so, pursuing his own personal interests. His unconscionable system has been the means by which he has derived considerable financial profit.

73 I consider a penalty of $150,000 to be appropriate.

The contraventions of s 29(1) of the NCCP Act

74 The circumstances in which Mr Kobelt's 92 contraventions of s 29(1) of the NCCP Act in the period between 1 July 2011 and 31 October 2012 occurred are described in [112] to [210] of the principal judgment, and it is not necessary to repeat them in detail.

75 In summary, they are that Mr Kobelt had provided credit to some 92 of the customers who had purchased motor vehicles on book-up in the period from 1 July 2011 to 31 October 2012; that this was "credit" to which s 5 of the National Credit Code (the Code) applied because Mr Kobelt had made a "charge" for it; and that Mr Kobelt had not at any relevant time held a licence permitting him to engage in "credit activity"; and had, accordingly, contravened s 29(1) of the NCCP Act. On my findings, the fact that Mr Kobelt sold the vehicles for a cash price which was less than that paid by his book-up customers meant that he was making a "charge" for the provision of his credit. The evidence at trial indicated that this charge was usually at least $1000, and sometimes more.

A single penalty?

76 Both ASIC and Mr Kobelt submitted that the Court should impose a single penalty in respect of the 92 contraventions of s 29(1).

77 The NCCP Act does not contain any explicit authorisation to the Court to impose a single penalty in the case of multiple contraventions of the one provision. It does not, for example, contain any counterpart to s 4K of the Crimes Act which provides (relevantly):

> **Continuing and multiple offences**
>
> ...
>
> (3) Charges against the same person for any number of offences against the same provision of a law of the Commonwealth may be joined in the same information, complaint or summons if those charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character.
>
> (4) If a person is convicted of 2 or more offences referred to in subsection (3), the court may impose one penalty in respect of both or all of those offences, but that penalty shall not exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each offence.

78 In *Director, Fair Work Building Industry Inspectorate v Cradden* [2015] FCA 614, Logan J suggested, in analogous circumstances, that the term "offences" in s 4K(4) may not be confined to criminal offences and, accordingly, may be able to be invoked in circumstances

like the present. I am not willing to act on that view of s 4K(4) in this case. The reference in subs (3) to "offences" which have been joined in the same "information, complaint or summons" and the terms "convicted" and "offences" in subs (4) indicate that those provisions are directed to criminal offences. Further, there are well recognised distinctions between criminal proceedings, on the one hand, and civil penalty proceedings, on the other: see *Commonwealth v DWFBII* at [51]-[57]. See also *Director of the Fair Work Building Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 413 at [53]-[54]. ASIC, and it seems Mr Kobelt, accepted that s 4K(4) did not apply in this case.

79 In my view, it is doubtful that the Court has power to impose a single penalty for multiple contraventions of s 29(1). The Court's power to impose a civil penalty in this case derives from ss 166 and 167 of the NCCP Act. Those sections provide:

> **Application for declaration of contravention**
>
> **166** **(1)** Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for a declaration that the person contravened the provision.
>
> **Declaration of contravention**
>
> **(2)** The court must make the declaration if it is satisfied that the person has contravened the provision.
>
> **(3)** The declaration must specify the following:
>
> (a) the court that made the declaration;
>
> (b) the civil penalty provision that was contravened;
>
> (c) the person who contravened the provision;
>
> (d) the conduct that constituted the contravention.
>
> **Declaration of contravention conclusive evidence**
>
> **(4)** The declaration is conclusive evidence of the matters referred to in subsection (3).
>
> **Application for order**
>
> **167** **(1)** Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for an order that the person pay the Commonwealth a pecuniary penalty.
>
> **Court may order person to pay pecuniary penalty**
>
> **(2)** If a declaration has been made under section 166 that the person has contravened the provision, the court may order the person to pay to the Commonwealth a pecuniary penalty that the court considers is appropriate (but not more than the amount specified in subsection (3)).

Determining amount of pecuniary penalty

(3) The pecuniary penalty must not be more than:

(a) if the person is a natural person – the maximum number of penalty units referred to in the civil penalty provision; or

(b) if the person is a body corporate, a partnership or multiple trustees – 5 times the maximum number of penalty unis referred to in the civil penalty provision.

Note: This Act treats partnerships and multiple trustees as if they were persons (see sections 14 and 15).

Recovery of penalty as a debt

(4) The pecuniary penalty may be recovered as a debt due to the Commonwealth.

80 The structure of these provisions suggests that the source of the Court's power to impose a pecuniary penalty for a breach of a civil penalty provision in the NCCP Act is two-fold: first, when the Court has made a declaration under s 166 on the application of ASIC, it has a consequential power to order the person to pay a pecuniary penalty (s 167(2)); and, secondly, ASIC may apply, independently of s 166, for an order that a person pay a pecuniary penalty (s 167(1)). An alternative construction is available, namely, that, despite the terms of s 167(1), the Court may impose a pecuniary penalty *only* when it has made a declaration pursuant to s 166. However, such an alternative construction does not seem apt. If that had been the legislative intention, it is not easy to see why subs (2) incorporates the limitation of the maximum penalty which may be imposed for which subs (3) provides in any event. The fact that s 166(1) and s 167(1) each have their own limitation period of six years is another indication that s 167(1) and (2) have an independent operation.

81 Section 167 can be understood as operating in the following way. ASIC may apply under subs (1) for the imposition of a pecuniary penalty on a person for contravening a civil penalty provision. If the person is a natural person, the pecuniary penalty must not be more than the maximum number of penalty units referred to in the civil penalty provision (subs (3)(a)). If the person is a body corporate, a partnership or multiple trustees, the pecuniary penalty must not be more than five times the maximum number of penalty units referred to in the civil penalty provision (subs (3)(b)). When the Court has made a declaration under s 166 that the person has contravened a provision, s 167(2) empowers the Court to make a consequential order that the person pay a pecuniary penalty in respect of the contravention or contraventions which are the subject of the Court's declaration. However, a penalty imposed under s 167(2) is subject to the same maxima for which subs (3) provides.

82 In the present case, ASIC seeks the imposition of a penalty pursuant to s 167(2).

83 The express specification that a penalty must not exceed the respective maxima set out in subs (3) is, in my view, an indication that the Court is not empowered to impose a single penalty in respect of multiple contraventions. One would not readily suppose that the Court should be able to impose a single penalty on an individual for multiple contraventions but that, no matter how many contraventions were involved, the penalty should not exceed that applicable for a single contravention. Likewise, in the case of a corporation, it seems improbable that the legislature contemplated that any single penalty imposed for multiple contraventions should not exceed five times the maximum number of penalty units referred to in the penalty provision when that is also the maximum for a single contravention.

84 For these reasons, I doubt that the Court may impose a single penalty for multiple contraventions of s 29(1).

85 ASIC submitted that there was an alternative basis which would justify the Court imposing a single penalty, namely, that Mr Kobelt's contraventions of s 29(1) formed part of a single course of conduct. The submission seems to be that this circumstance, by itself, empowered the Court to impose a single penalty. ASIC referred to some authorities which support that approach: *Hamberger v Construction, Forestry, Mining and Energy Union* [2002] FCA 585 at [11], [27]-[28] (Cooper J); *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70, (2008) 168 FCR 383 at [49]-[58] (Stone and Buchanan JJ, but see Gyles J in dissent at [18]); *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181, (2017) 340 ALR 25 at [165] and *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd* [2016] FCA 698 at [24]-[25].

86 There is however authority to the contrary, a prominent example of which is *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59; (2015) 229 FCR 331 at [38]-[46] (*DFWBII v CFMEU*). The Full Court doubted that it was permissible, in the context of the provision of the *Building and Construction Industry Improvement Act 2005* (Cth) then under consideration, for the Court to impose a single global penalty for multiple contraventions occurring as part of a course of conduct. However, it did not express a final view and expressed a willingness to hear further submissions on the question. In doing so, the Court referred to the principles underpinning the imposition of sentences for multiple criminal offences stated in *Mill v The Queen* (1988) 166 CLR 59 at 63; *Pearce v The Queen* [1998] HCA 57, (1998) 194 CLR 610 at [45]-[49];

Johnson v The Queen [2004] HCA 15, (2004) ALR 346 at [18]-[20]; *The Queen v Bibaoui* (1997) 2 VR 600 at 603-4 (Ormiston JA) and 607 (Tadgell JA); *The Queen v Finnie* [2002] NSWCCA 533 at [54]-[57] and to *Thorn v The Queen* (2009) 198 A Crim R 135 at [39]-[47]. Those authorities are uniformly to the effect that, absent statutory authority to do so, the fact that multiple offences occurred in a single course of conduct does not authorise the imposition of a global sentence. Instead each offence is to be dealt with separately.

87 The Full Court in *DFBWII v CFMEU* has not yet delivered its further judgment following the remittal of the matter by the High Court: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, (2015) 326 ALR 476.

88 Given the state of the authorities, I consider it appropriate to proceed on the basis that the Court is not empowered to impose a single global penalty in respect of the multiple contraventions of s 29(1) by Mr Kobelt.

89 ASIC accepted that Mr Kobelt's contraventions of s 29 had occurred as part of a single course of conduct. It also accepted that, even if its submissions concerning a single global penalty were not accepted, the circumstance that Mr Kobelt's contraventions had occurred as part of a course of conduct was relevant to the imposition of penalty. It was appropriate for it to have done so: *Royer v Western Australia* [2009] WASCA 139 at [22]-[24]; *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39, (2009) 269 ALR 1 at [39].

The contraventions in context

90 A prohibition on persons engaging in defined conduct without a licence to do so is an established regulatory technique for the enhancement of consumer protection. It serves many purposes: ensuring that only those who satisfy requisite or desirable standards may engage in the conduct; providing a means of establishing and enforcing standards of conduct by those who engage in the conduct; and providing a means of regulating and enforcing appropriate conduct. Those aims are evident in the scheme established by the NCCP Act. See, for example, s 37 (who may be granted a licence), s 45 (conditions may be imposed on a licence), s 47 (obligations of licencees), ss 50 and 51 (obligations to provide ASIC with information), s 54 (power to suspend or cancel a licence), and s 88 (obligation to keep financial records). Of particular relevance for present purposes are the obligations imposed by Ch 3 of the NCCP Act with respect to responsible lending conduct.

91 By providing credit without a licence, Mr Kobelt avoided these regulatory requirements and thereby denied his customers the benefits for which they are intended. Account should be taken of this in the fixing of the penalties.

Mr Kobelt's indifference/defiance

92 Mr Kobelt was indifferent to, if not defiant of, his obligations under the NCCP Act. By letter dated 19 April 2011, ASIC drew his attention to the requirement for him to hold an Australian credit licence (ACL) if his provision of book-up amounted to the provision of credit to which the Act applied. In particular, ASIC told Mr Kobelt:

> Since 1 January 2011, the Act requires those engaging in credit activities as defined in the Act to have applied for an ACL … Among other things, ACL holders must be a member of an external dispute resolution scheme that has been approved by ASIC and comply with disclosure requirements and responsible lending obligations.

In addition, ASIC provided Mr Kobelt with a copy of its fact sheet entitled "New credit laws and book-up: What you need to know" and a copy of the ASIC document entitled "Regulatory Guide 203: Do I need a licence?"

93 Mr Kobelt did not provide ASIC with a response to this letter. Nor did he seek advice in regard to it at the time. In his s 19 examination he said that, having read its first few lines, he regarded it as "bullshit".

94 Mr Kobelt did not lodge an application for an ACL until 4 October 2013. His solicitor's letter to ASIC of 30 October 2013 in support of the application acknowledged that Mr Kobelt was applying a credit charge, being the difference between the cash price for the vehicle and the full price (principal judgment at [147]).

95 Despite having been put on notice in April 2011, Mr Kobelt continued to sell vehicles on Book-up even though he did not hold an ACL. In fact, he continued to do so even after he had lodged his application for an ACL with ASIC and while that application remained undetermined. Thus, at least for a period, Mr Kobelt's contraventions of s 29(1) were deliberate. This is an aggravating circumstance.

Fixing the penalties

96 In a well-known passage in *The Attorney General v Tichy* (1982) 30 SASR 84 at 92-3, Wells J addressed the approach of a Court sentencing for multiple offences and indicated how account may be taken of the circumstance that two or more offenses were committed in the one course of conduct. Wells J said:

> It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether sentences should be ordered to be served concurrently or consecutively. According to an inflexible Draconian logic, all sentences should be consecutive, because every offence, as a separate case of criminal liability, would justify the exaction of a separate penalty. But such a logic could never hold. When an accused is on trial it is part of the procedural privilege to which he is entitled that he should be made aware of precisely what charges he is to meet. But the practice and principles of sentencing owe little to such procedure; what is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably characterized, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with the technical offences or they may not. Sometimes, the process of characterization rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice. The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been guilty. Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate. *Where, whatever the number of technically identifiable offences committed, the prisoner was truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient.*
>
> (Emphasis added)

97 In the context of a pecuniary penalty regime, it is not apposite to speak of penalties being cumulative or concurrent. However, the Court can achieve the same effect by imposing a reduced penalty, or no penalty at all, in respect of some contraventions. Given the large number of contraventions of s 20(1) by Mr Kobelt, that is the approach which I consider appropriate in this case. The Court should fix a penalty which is appropriate for at least some of the contraventions. The penalties for some of the subsequent contraventions can be reduced because some of the deterrent effect will have been achieved by the penalties imposed for the earlier contraventions. It will not be appropriate to impose penalties in respect of later contraventions because the purposes of the penalties will have been wholly achieved by the imposition of the earlier penalties. This approach will also enable the avoidance of the multiple penalties amounting in effect to a double punishment.

98 As noted earlier, the charge made by Mr Kobelt for his credit was at least $1000 per customer. If Mr Kobelt had complied with the law while unlicensed, he would not have imposed these charges. Accordingly, the charges can be seen to reflect the profit Mr Kobelt obtained by engaging in the prohibited conduct. This means, in my opinion, that subject to

some amelioration because the contraventions formed part of a course of conduct, the penalties should not be less than the amount of the charge. By this means, they will not simply be a cost of doing business, but a real deterrent.

99 Mr Kobelt submitted that there was some overlap between his contraventions of s 12CB(1) of the ASIC Act and s 29(1) of the NCCP Act and, accordingly, the penalties for the latter should be reduced to avoid double punishment. I do not accept that submission. The conduct comprising the contraventions of s 29(1) did not form part of the conduct which led to Mr Kobelt's conduct being characterised as unconscionable. Mr Kobelt would still have contravened s 29(1) even if I had found that his Book-up conduct was not unconscionable.

100 Subject to the application of the totality principle, I would impose penalties of $2000 for each of the first 25 contraventions of s 29(1) and penalties of $1000 for each of the next 30 contraventions. That is a total of $80,000. I would refrain from imposing penalties in respect of the remaining 37 contraventions, for the reasons stated above. I have not overlooked that the aggregate of the penalties may be less than the total of the interest charges received by Mr Kobelt. Despite that, I consider these penalties to be proportionate to Mr Kobelt's contraventions, having regard especially to the fact that they occurred as part of a course of conduct.

Application of the totality principle

101 The total of the penalties I would impose is $230,000.

102 The totality principle reflects two different considerations:

(1) when an offender is sentenced for a number of offences, the Court must ensure that "the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved": *Postiglione v The Queen* [1997] HCA 26; (1997) 189 CLR 295 at 307-8 (McHugh J) (proper proportionality);

(2) sometimes, although the individual terms of imprisonment imposed in respect of each of a number of offences will be appropriate, the aggregate of all those sentences will become so "crushing" as to call for some reduction in the aggregate: *Postiglione* at 308 (McHugh), 340-1 (Kirby J) (effect on the particular contravenor).

103 Although developed originally as a principle of criminal sentencing, the totality principle is also applicable to the imposition of civil penalties: *DFWBII v CFMEU* at [41].

104 In criminal sentencing, the totality principle may lead a Court to order that some sentences of imprisonment be made wholly or partly concurrent. In the civil penalty context, the totality principle may lead to the moderation of the penalties imposed for some or all of the contraventions and, when there are numerous contraventions, perhaps to no penalty at all being imposed for some. Although a Court imposing penalties for multiple contraventions must consider the possible application of the totality principle (*DFWBII v CFMEU* at [40]), its application in the circumstances of a given case involves a discretionary judgment (*Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70; (2008) 168 FCR 383 at [58]-[59]).

105 The totality principle does not authorise the imposition of a single penalty. Instead, its application makes it appropriate for the Court to moderate the penalties which would otherwise have been imposed.

106 ASIC submitted that the importance of the Court signalling its disapproval of Mr Kobelt's conduct by imposing substantial penalties should outweigh considerations of financial hardship to him. It referred to *Australian Competition and Consumer Commission v High Adventure Pty Ltd* [2005] FCAFC 247; [2006] ATPR 42-091 at [11] as authority for the proposition that the risk that a penalty may result in insolvency or bankruptcy should not inhibit the Court from doing its duty because, otherwise, the important object of general deterrence would be undermined. On my understanding, the Full Court was not speaking to a circumstance in which the totality principle is to be applied. The possible crushing effect of a penalty on a particular offender is a well-recognised circumstance in which Courts apply the totality principle, leaving its statement of the penalty which otherwise would have been imposed to have the general deterrent effect.

107 In the present case, I do not consider it necessary to invoke the totality principle so as to ensure that the penalties reflect proper proportionality. In my opinion, the aggregate penalty of $230,000 does reflect Mr Kobelt's overall culpability.

108 However, I am concerned that the overall penalties imposed by the Court should not have a crushing effect on Mr Kobelt. It is particularly pertinent that he is a 73 year old sole trader and will bear personally the burden of the Court's penalties. There is the prospect that the penalties outlined above will have a crushing effect, taking into account his financial situation as outlined above. Although I did not regard Mr Kobelt's expenditure on legal costs in defending the within proceeding as mitigatory, his financial position now, having made that expenditure is pertinent to this aspect of the application of the totality principle.

109 In my assessment, the total penalties imposed on Mr Kobelt should be reduced to reflect the second aspect of the totality principle. There is a question as to how this is to be achieved. It is desirable that the penalties actually imposed do not lose their deterrent effect by being reduced to amounts which may be seen by others to be miniscule.

110 That being so, in the application of the totality principle, I will reduce the penalty I would otherwise impose for the contravention of s 12CB(1) to $100,000 and the penalties imposed for each of the first 25 contraventions of s 29(1) to $1500 each. The penalties of $1000 imposed for each of the next 30 contraventions of s 29(1) will stand.

Costs

111 Mr Kobelt accepted, subject to two qualifications, that on the Court's findings a costs order against him is appropriate. He disputed, however, that he should have to pay the costs of ASIC's investigation and the costs of one form of analysis carried out by ASIC. I uphold the first of those submissions but not the second. Mr Kobelt's manner of record keeping made it particularly difficult to understand the transactions which had occurred. Because of this ASIC engaged in a detailed process of constructing spreadsheets and other tools of analysis. I do not regard its conduct in doing so as unreasonable. The expense involved was reasonably incurred. By agreement of the parties, the costs to be paid by Mr Kobelt are to be assessed by a Registrar on a lump sum basis. The Registrar may give any necessary directions in relation to the lump sum assessment.

Stay of Execution

112 Mr Kobelt has commenced an appeal against the orders made on 13 December 2016. The parties were agreed that execution of the orders for payment of the penalties and costs should be stayed pending the hearing and determination of that appeal. I will make an order to that effect.

Summary

113 For the reasons given, I impose penalties on Mr Kobelt as follows:

(a) for his contravention of s 12CB(1) of the ASIC Act, a penalty of $100,000;

(b) for the first 25 contraventions of s 29(1) of the NCCP Act penalties of $1500 each, a total of $37,500;

(c) for the next 30 contraventions of s 29(1) of the NCCP Act penalties of $1000 each, a total of $30,000.

114 The total of these penalties is $167,500.

115 Mr Kobelt is to pay ASIC's costs of and incidental to these proceedings but not of the investigation which led to the commencement of the proceedings. Those costs are to be assessed by a Registrar on a lump sum basis.

116 Execution of the orders for payment of the penalties and costs is stayed pending the hearing and determination by the Full Court of the appeal commenced by Mr Kobelt against the orders made on 13 December 2016.

I certify that the preceding one hundred and sixteen (116) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White.

Associate: 

Dated: 13 April 2017