FEDERAL COURT OF AUSTRALIA

Kobelt v Australian Securities and Investments Commission [2018] FCAFC 18

Appeal from:	*Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1561
File number:	SAD 18 of 2017
Judges:	**BESANKO, GILMOUR AND WIGNEY JJ**
Date of judgment:	15 February 2018
Catchwords:	**CONSUMER LAW** – whether the primary judge erred in finding that the appellant contravened s 29(1) of the *National Consumer Credit Protection Act 2009* (Cth) by engaging in credit activity within the meaning of s 6(1) of the National Credit Act when selling second-hand vehicles by way of a book-up without holding a licence to engage in that credit activity – whether the purchase of second-hand motor vehicles under the appellant's book-up system fell within the terms of s 11 of the National Credit Code (contained in Schedule 1 of the National Credit Act) – whether there was a charge for the appellant's provision of credit within s 5(1)(c) of the National Credit Code **CONSUMER LAW** – whether the primary judge erred in finding that the appellant had contravened s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) in that, in connection with the supply of financial services to customers, the appellant engaged in a system of conduct or pattern of behaviour which was unconscionable – whether the appellant's conduct was unconscionable within the meaning of s 12CC(1) of the ASIC Act – where customers are indigenous residents of the Anangu Pitjantjatjara Yankunytjatjara Lands (APY Lands), and in most cases, have very limited or no assets, limited net income and low levels of financial literacy – where the book-up system is neither recent nor unique – where the book-up system has advantages to customers in terms of alleviating the disadvantages associated with demand sharing and "boom and bust" expenditure – where no undue influence or exerted undue influence – where no dishonest use of debit cards or personal identification numbers (PINs) – where no dishonest maintenance of records by the appellant – where customers have low levels

of financial literacy, but basic understanding of the book-up system – where customers voluntarily enter into the book-up arrangements – where customers understand the basic elements of the book-up arrangements – where conduct is not predatory in the relevant sense

CONSUMER LAW – whether the primary judge erred in granting an injunction against the appellant under s 12GD(1) of the ASIC Act

PRACTICE AND PROCEDURE – whether the orders made by the primary judge ought to be set aside – whether an order by the primary judge that the Amended Originating Application brought by the respondent ought to be dismissed

Legislation:

Australian Consumer Law (Schedule 2 to the *Australian Competition and Consumer Act 2010* (Cth))

Australian Securities and Investments Commission Act 2001 (Cth) ss 12CB, 12CC, 12GD

Evidence Act 1995 (Cth) s 140

National Consumer Credit Protection Act 2009 (Cth) ss 3, 6, 29, 131

National Credit Code ss 5, 11, 13, 17, 204

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

Cases cited:

Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd and Others (2003) 214 CLR 51

Australian Competition and Consumer Commission v Unique International College [2017] FCA 727

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

Australian Securities and Investments Commission v National Exchange Pty Ltd (2005) 148 FCR 132

Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424

Briginshaw v Briginshaw (1938) 60 CLR 336

Commonwealth Bank of Australia v Kojic and Others (2016) 249 FCR 421

Dare v Pulham (1982) 148 CLR 658

Geeveekay Pty Ltd v Director of Consumer Affairs Victoria (2008) 19 VR 512

House v The King (1936) 55 CLR 499

Kakavas v Crown Melbourne Limited and Others (2013) 250 CLR 392

Leotta v Public Transport Commission (NSW) (1976) 9

	ALR 437 *Paciocco and Another v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 *Paciocco and Another v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525 *Robinson Helicopter Company Incorporated v McDermott* [2016] HCA 22; (2016) 331 ALR 550 *Walker v Consumer, Trader and Tenancy Tribunal of New South Wales* [2013] NSWSC 1432
Dates of hearing:	14 and 15 August 2017
Date of last submissions:	28 August 2017
Registry:	South Australia
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Category:	Catchwords
Number of paragraphs:	392
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Solicitor for the Respondent:	Australian Securities and Investments Commission

ORDERS

SAD 18 of 2017

BETWEEN:	**LINDSAY KOBELT** Appellant
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Respondent
JUDGES:	**BESANKO, GILMOUR AND WIGNEY JJ**
DATE OF ORDER:	**15 FEBRUARY 2018**

THE COURT ORDERS THAT:

1. The appeal be adjourned to a date and time during the week commencing 19 February 2018 (to be fixed) for the purpose of hearing the parties as to final orders, including costs.

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

REASONS FOR JUDGMENT

BESANKO AND GILMOUR JJ:

INTRODUCTION

1 This is an appeal from orders made by a judge of this Court. The primary judge made a declaration that Mr Kobelt had contravened s 29(1) of the *National Consumer Credit Protection Act 2009* (Cth) (National Credit Act) by engaging in credit activity within the meaning of s 6(1) of the National Credit Act when selling vehicles by way of book-up without holding a licence to engage in that credit activity. The primary judge also made a declaration that Mr Kobelt had contravened s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) in that in connection with the supply of financial services to customers of Nobbys Mintabie General Store, he engaged in a system of conduct or pattern of behaviour which was unconscionable. The declaration contains eight particulars of the respects in which it was held that Mr Kobelt's conduct was unconscionable. The declaration of unconscionable conduct is set out below (at [173]). The primary judge also granted an injunction against Mr Kobelt and made an order for the publication of a notice containing information as to the findings and conclusions of the Court. The issues of penalty and costs were adjourned.

2 The primary judge delivered reasons addressing the substantive issues (*Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327). He invited the parties to make submissions concerning final relief. He then delivered reasons for the final relief (other than as to penalty and costs) he granted (*Australian Securities and Investments Commission v Kobelt* [2016] FCA 1561). Unless stated otherwise, a reference in these reasons to the primary judge's reasons, is a reference to his reasons addressing the substantive issues.

3 After the Notice of Appeal was filed and served, but before the appeal came on for hearing, the primary judge dealt with penalty and costs. His Honour made orders imposing pecuniary penalties, orders as to costs and an order staying the orders pending the hearing and determination of the appeal (*Australian Securities and Investments Commission v Kobelt* [2017] FCA 387). No application to amend the Notice of Appeal to challenge these orders has been made by the appellant and, in fact, the orders as to penalty and costs were not mentioned during the hearing of the appeal.

4 Mr Kobelt now appeals to this Court. He seeks an order that the orders made by the primary judge be set aside and an order that the Amended Originating Application brought by the Australian Securities and Investments Commission (ASIC) be dismissed. The appellant will have to amend his Notice of Appeal to include a challenge to the orders made by the primary judge as to penalty and costs. We cannot see any reason why such an amendment would not be allowed.

THE FACTS GENERALLY

5 The primary judge set out a general statement of facts. He then made further findings of fact in the context of his consideration of the particular causes of action brought by ASIC. The following is taken from the primary judge's general statement of facts.

6 The appellant conducts a general store at Mintabie under the name "Nobbys Mintabie General Store" (Nobbys). Mintabie is in the far north of South Australia, a distance of approximately 1,100 km north of Adelaide. Mintabie 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).

7 The appellant sells second-hand motor vehicles and provides credit to customers by way of "book-up" as part of his business.

8 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.

9 The appellant went to Mintabie in the early 1980s. At that time, the town had a population of about 1,800 people. Most of the population of Mintabie were of European descent and were engaged in opal mining in one form or another. Mintabie continued as an active opal field until the early 2000s. The amount of opal mining has declined and, by the time of trial, the permanent population of Mintabie was about 70 people.

10 The appellant has been operating 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 motor vehicles.

11 There are two other general stores in Mintabie known as Sam's and Scrooge's.

12 A significant aspect of Nobbys' business since 2000 has been the sale of second-hand motor vehicles. Most purchasers purchase the motor vehicles on book-up, although some pay cash. Between 6 July 2011 and 31 October 2012, the appellant sold 105 motor vehicles to 92 customers under the book-up system. Most of the sales were to Aboriginal residents of the APY Lands (Anangu) at a price of between $2,500 and $7,800. The average and median prices were $5,600 and $5,800 respectively. In most cases, the statutory duty to repair defects in s 23 of the *Second-Hand Vehicle Dealers Act 1995* (SA) did not apply to the transactions because the vehicles had already been driven 200,000 km before sale. The purchasers of the vehicles sold on book-up usually paid a deposit which varied between $440 and $3,500.

13 As a condition of the provision of credit under the book-up system, the appellant required the customer to provide to him a debit card (also referred to as a "key card") which, together with the customer's personal identification number (PIN), gave access to the bank account of the customer into which the customer's wages or Centrelink benefits were paid. The customer also provided the appellant with their PIN. The primary judge said in connection with his consideration of PINs generally (at [28]), that it is well known that customers with PINs are expected to maintain the confidentiality of their PINs "in order to prevent fraud or misuse of their key cards".

14 The primary judge considered whether the practice of the customers providing to the appellant their key card and PIN was a requirement of the appellant or something offered by the customers. He found that it was the former, even though he accepted that there might have been occasions when a customer handed over his key card and PIN without a request from the appellant. That would have occurred because the customers were aware of the appellant's requirements.

15 The appellant kept the key card until the debt was paid. There were two EFTPOS machines in Nobbys and one of those was used by the appellant to access the customer's account, usually on the day or shortly afterwards, of the customer's wages or Centrelink benefits being paid into his or her account. It is an important feature of the book-up system conducted by the appellant that the amount he withdrew from the customer's account was the whole, or nearly the whole, of the amount in the account. An issue at the trial was how the appellant treated the amount he had withdrawn. The appellant's evidence was that half of the amount he withdrew was applied in reduction of the customer's debt, and the other half was made

available to the customer, albeit that it remained in the appellant's account. The appellant's evidence was that he advised the customer of this 50:50 arrangement, although it was not recorded in writing. In order to gain access to the half held in the appellant's account, the customer would have to return to Nobbys to obtain cash or a purchase order for another store or purchase the food or groceries he or she required from Nobbys. The primary judge found that the customer's entitlement to 50% was not applied "in a literal way". He said that the appellant and his family used it as a guideline as to the maximum amount of the book-down (i.e., the provision of money or goods to the customer) which they would allow. Whilst on occasion they allowed more to some customers, generally they adhered to a maximum book-down of 50%.

16 The primary judge also found that, acknowledging some exceptions, the appellant did not expressly agree with customers that they were entitled to 50%. More often than not, he told his customers who used book-up that they could have "a little bit" or they could have "some" food or groceries.

17 Book-up was the only means whereby the appellant provided credit to his Anangu customers.

18 Customers wishing to use book-up were not required to complete an application form. They were asked by the appellant to provide details of their weekly or fortnightly payment and the day upon which it was paid. They were asked little else. The appellant had refused to make the book-up system available to about 12-15 persons over the last 10 years.

19 The primary judge found that at least half of the appellant's customers were in receipt of Centrelink benefits.

20 The primary judge described the extent to which the appellant kept records of the transactions under the book-up system. For some time, the appellant recorded information in 365 day diaries and those diaries were put in evidence. In 2014, the appellant commenced recording information on ledger cards. It is sufficient at this stage to note the following. First, the book-up diaries did not contain any entry relating to 19 customers for whom the appellant held a debit card. Secondly, the appellant's system of recording transactions under the book-up system was described by the primary judge as rudimentary and he said that the manner in which the entries were made, made it difficult to understand the state of a customer's account at any one time. Thirdly, the primary judge said there was no suggestion that the appellant maintained his records dishonestly.

21 The primary judge found that the majority of withdrawals by the appellant were on the day the payment into the account was made and early in the day, before or shortly after Nobbys opened. He also found that it was common for Mr Timothy Kobelt to make withdrawals between midnight and 1.00 am. His Honour was satisfied that withdrawals by the appellant were made at the time they were in order "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" (at [46]).

22 The appellant did not know the amount in a customer's account so the process of withdrawal by him usually involved trial and error.

23 The primary judge found that some customers placed a limit on the amount which could be withdrawn from their account, but that on several occasions, the appellant did not comply with the customer's directions (at [48]). The primary judge made further findings about this topic later in his reasons.

24 The primary judge found that the appellant did not provide any printed record of the withdrawals to the customers and nor did he provide them with periodic account statements.

25 The primary judge found that in January 2011, the appellant obtained from a number of his customers a signed acknowledgment that he had their permission to withdraw money from their accounts.

26 The primary judge found that as at 5 November 2012, the appellant held the key cards of 85 customers which had been provided to him as part of book-up. None of the cards had reached their expiry date.

27 The primary judge found that the amounts of money which the appellant withdrew from the accounts of his customers using their key cards and PINs were substantial. Between 1 July 2010 and 30 November 2012, the appellant 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 motor vehicles.

28 The primary judge noted that even on the appellant's account that he allowed the customer to access up to 50% of the amount the appellant had withdrawn, the appellant exercised control over the amount of book-downs. He would not allow the full amount to be accessed, but rather would allow access to amounts of $100, $150 or $200 so as to ensure his customers did not spend all their money at once and so would have "something" at the end of the week.

29 The primary judge said that it was difficult to discern from the evidence average or typical periods for which the appellant retained his customers' key cards. He found that it was for an extended period, "extending for at least several months" (at [65]). On occasions, the appellant would return a key card to a customer even though the customer had not repaid his or her debt in full. This might occur if the customer was leaving the APY Lands. The customer would hand back the card on their return. On other occasions, the appellant would agree 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.

30 The primary judge found that all but one of the customers to whom the appellant provided the book-up facility were indigenous persons and nearly all of these were residents of the APY Lands. The appellant did extend credit to non-indigenous persons, but on different terms involving no security and payment at the end of the week in which the credit was provided, or the end of the following week.

31 The primary judge found that travel by Anangu customers to Nobbys often involved considerable distances.

32 The primary judge noted that most of the book-up provided by the appellant related to the sale of motor vehicles. However, book-up was also provided for food and groceries to some customers. His Honour also noted that there was more than one type of book-up and that his judgment concerned only the book-up at Nobbys "and not book-up systems more generally" (at [77]).

33 The primary judge described the system whereby the appellant would issue a purchase order to a customer enabling him or her to purchase goods or obtain cash at another store. The need for this arose because of the size of the APY Lands and the fact that some customers did not find it convenient to travel to Nobbys. The purchase order named the customer and was in an amount ranging from $20 to $500. It was sent by the appellant to the store nominated by the customer. The customer could then obtain cash or food from the nominated store in the amount identified and the appellant would settle with the store in due course. The appellant charged the customer an amount of $10 per purchase order and that was cheaper than the comparable express money order service provided by Australia Post. The appellant issued 425 purchase orders totally $58,175.98 (average: $136.68) between 6 April 2011 and 31 October 2012. With the exception of the store at Mimili, the appellant was willing to send purchase orders to all community stores in the APY Lands, although he did not have purchase

order arrangements with all stores on the APY Lands. The appellant is involved in a commercial dispute with the Mimili store.

34 On occasions, customers would ask for a cash advance on book-up and the appellant would provide the advance. The primary judge found that, as to at least some of the customers who were given a cash advance, the appellant charged those customers a fee. The appellant also made book-up available to customers who wished to purchase bus tickets to travel beyond the APY Lands.

35 The primary judge found that customers could, and in fact in some cases did, cancel their key cards or instructed their employer or Centrelink to pay their periodic payment into a different account.

36 The primary judge found that there was an incident involving the Commonwealth Bank of Australia (CBA) on 14 December 2010. A number of Nobbys' customers who used book-up had key cards which had been issued by the CBA. There was a "glitch" in CBA's system on 14 December 2010 and the appellant was able to withdraw "much more than normal" from the customers' accounts. The primary judge found that he must have been aware of this at the time. This ultimately had the consequence that the customer's account could be in debit for a period of time. The primary judge found that the extra withdrawals had not been authorised by the customers and that the appellant's conduct revealed that "his attitude was to transfer to himself whatever funds were available in a customer's account at any one time" (at [97]).

37 It is appropriate to record that this Court was told that the State Government has revoked Mr Kobelt's licence to occupy Nobbys and that he is in the process of removing his possessions. As it happens, and subject to hearing from the parties, we do not think that this has a bearing on the relief to be granted.

38 We turn now to summarise the primary judge's further findings of fact (or elaboration of his earlier findings) and his analysis in connection with the particular causes of action advanced by ASIC.

THE CONTRAVENTION OF S 29(1) OF THE NATIONAL CREDIT ACT

39 ASIC's pleaded case was that, in connection with the sale and purchase of second-hand motor vehicles under the book-up system, the appellant had contravened s 29(1) of the National Credit Act. Section 29(1) provides as follows:

> 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.

40 It is common ground that the appellant did not hold a licence authorising him to engage in credit activity as defined in the National Credit Act.

41 Section 6(1) of the National Credit Act sets out the circumstances in which a person engages in a credit activity in relation to particular types of contract. The relevant contracts in this case are "credit contracts". The section relevantly provides that a person engages in a credit activity in relation to credit contracts if:

> (a) the person is a credit provider under a credit contract; or
>
> (b) the person carries on business of providing credit, being credit the provision of which the National Credit Code applies to; or
>
> (c) ...

42 The National Credit Code which is Schedule 1 of the National Credit Act (s 3 of the National Credit Act) contains definitions of terms used in s 6 and a statement of the circumstances involving the provision of credit to which the National Credit Code applies. Section 5 of the National Credit Code is in the following terms:

> (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.
>
> (2) If this Code applies to the provision of credit (and to the credit contract and related matters):
>
> (a) this Code applies in relation to all transactions or acts under the contract whether or not they take place in this jurisdiction; and
>
> (b) this Code continues to apply even though the credit provider ceases

to carry on a business in this jurisdiction.

(3) For the purposes of this section, investment by the debtor is not a personal, domestic or household purpose

(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.

43 The appellant admitted that the 92 customers identified by ASIC in its Amended Statement of Claim had purchased motor vehicles from him after 1 July 2011 and on the respective dates alleged by ASIC. He admitted that he had provided credit to these customers (s 3 of the National Credit Code; *Geeveekay Pty Ltd v Director of Consumer Affairs Victoria* (2008) 19 VR 512 at [34]). The appellant did not dispute that the requirements in paragraphs (a), (b) and (c) of s 5(1) of the National Credit Code were satisfied. The appellant did dispute the allegation that there was a charge for providing the credit and that was one of the critical issues before the primary judge.

44 The appellant gave evidence that prior to 1 July 2011, there had been a difference between the cash price at which he sold the second-hand motor vehicles and the book-up price (the former was less), but that that practice had ceased on or about that date and that thereafter the prices were the same. The primary judge reviewed the evidence about that matter and firmly rejected the appellant's case.

45 His Honour said (at [155] and [169]):

> 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.
>
> ...
>
> 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.

46 These conclusions of the primary judge are not challenged on the appeal, and, other than noting the strength of the credibility finding, it is not necessary to say anything further about them.

47 The primary judge found that it was the appellant's practice, and remained so until at least April 2014, when selling motor 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.

48 The primary judge made findings and observations about how the appellant determined the purchase price of vehicles. They are important to the appellant's submissions on the appeal.

49 The appellant acquires second-hand motor vehicles from a wholesaler in Adelaide. On occasions, it is necessary for the appellant to do work on a vehicle.

50 The appellant attaches to vehicles he offers for sale a form containing the details required by s 16(1) of the *Second-Hand Vehicle Dealers Act 1995* (SA) and the details include the price at which the vehicle may be purchased (the list price). The primary judge said the following about how the appellant determined the list price for a vehicle (at [135]-[136]):

> 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.
>
> 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.

51 Having made these observations, the primary judge addressed the application of s 11 of the National Credit Code. That section is in the following terms:

> (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.

The section refers to the cash price of goods and "cash price" is defined in s 204 of the National Credit Code as follows:

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.

52 The primary judge said that it was the first limb of the definition of "cash price" which was relevant in the circumstances of this case. He held that because of the difference between the price at which the motor vehicles could be purchased for cash and the book-up price, s 11(1)(b) of the National Credit Code was satisfied in the case of the 92 customers and that the difference between these two amounts was the charge for providing the credit by reason of the operation of s 11(3)(d) of the National Credit Code.

53 The primary judge addressed the issue of whether the amount payable for the purchase of the motor vehicles by the 92 customers was payable by instalments within s 11(1)(a) of the National Credit Code. The primary judge found that the amounts withdrawn by the appellant varied from fortnight to fortnight and by reason of the appellant's provision of further credit until the next payday, were not equal in effect.

54 The rival contentions as to whether the purchase price was payable by "instalments" were, on one hand, that of ASIC that it was sufficient that there were periodic withdrawals from a customer's account and, on the other, that of the appellant that the periodic withdrawals needed to be (and were not) part payments determined in advance and payable at pre-determined times.

55 The primary judge carefully analysed the meaning of the word "instalments" in s 11(1) of the National Credit Code and reached the conclusion that the word was capable of meaning of successive part-payments, even where the amount of those part-payments may vary. He said that having regard to the obvious beneficial purpose of the National Credit Act and National Credit Code, it would be inappropriate to adopt a narrow construction of the word "instalments". That conclusion meant that ss 5(1)(c) and 11(3)(d) were satisfied and the National Credit Code applied.

56 His Honour's reasons may be summarised briefly. First, as to the meaning of the word "instalments", his Honour, after referring to a number of authorities and former Credit Acts in some States, concluded that the word did not have a fixed and immutable meaning and that construing it to include payments of varying amounts at unspecified intervals is not necessarily "to impute a strained and unnatural meaning to the legislation" (at [180]). Secondly, and in terms of context, his Honour held that other provisions in the National Credit Code were not inconsistent with a broader construction of the word, "instalments". Finally, in terms of the purposes of the legislation, his Honour considered, as we have said, that the obvious beneficial purpose supported a broad construction of the word. He said that there is no apparent reason for the National Credit Code to apply only to contracts involving instalments of some kinds and not to others.

57 The primary judge went on to consider the position if s 11 of the National Credit Code did not apply. In those circumstances, it was necessary to consider whether there was a charge for the provision of credit in circumstances in which the word, "charge" is not defined. The primary judge said that the phrase "charge … for providing … credit" was not restricted to an interest charge or even to a charge in the nature of interest and that included amounts paid on account of the provision of credit. The primary judge rejected an argument that there was a material distinction between electing to take less than the "market" price for vehicles "for his own commercial reasons", namely to obviate the risk of default and loading a "market" price with a credit charge. The primary judge accepted the appellant's contention that ASIC had made no attempt to establish that the appellant was making a charge for the provision of his credit by inflating the sale price of the vehicles beyond their "market value", but that, the primary judge said, was not decisive. The matter which was decisive, as far as the primary judge was concerned, was that those to whom the appellant 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.

UNCONSCIONABLE CONDUCT

ASIC's Amended Statement of Claim

58 There is a serious challenge by the appellant to the primary judge's conclusions on the basis that he relied on matters which had not been pleaded. In those circumstances, we start with an examination of ASIC's case as pleaded in its Amended Statement of Claim (Statement of Claim).

59 The Statement of Claim can be divided into two sections. The first section consists of paragraphs 4 to 24 inclusive and the second section consists of paragraphs 24A to 72 inclusive. Paragraphs 1 to 3 are introductory and paragraphs 73 to 75 set out the relief claimed by ASIC.

60 In Section 1, ASIC alleges a system of conduct or pattern of behaviour which s 12CB(4)(b) of the ASIC Act (effective from 1 January 2012) expressly states is within the terms of s 12CB(1) of the ASIC Act. For the period prior to 1 January 2012, ASIC relies on the section as interpreted in the authorities as capable of applying to a system of conduct or pattern of behaviour. For ease of reference, we will refer to this aspect of ASIC's case as the system case. ASIC's system case involves the provision of credit by the appellant to 117 customers under the book-up system. The credit was provided in relation to the purchase of second-hand motor vehicles, food, fuel, general groceries and some services. As we have previously said, ASIC identifies 92 customers involved in the purchase of second-hand motor vehicles between July 2011 and October 2012.

61 In Section 2, ASIC alleges unconscionable conduct with respect to each of five customers who, to preserve their anonymity, were identified by a letter, being A (a husband (AH) and wife (AW)), B, C and D. The primary judge described this as ASIC's secondary case. The appellant's conduct with respect to the five customers was alleged in the Statement of Claim to involve instances of ASIC's system case of unconscionable conduct or, in the alternative, a series of separate contraventions of s 12CB(1) of the ASIC Act. We mention at this point that the primary judge heard evidence from four of the five customers (AH, AW, B and D) and he found that they were honest witnesses, subject to a qualification in the case of one of them (D) which does not need to be examined in detail (at [294]). However, the primary judge noted that ASIC did not press for findings in relation to its secondary case that the appellant's conduct in relation to book-up in the case of the five customers was

unconscionable (at [625]). In the circumstances, he did not consider it necessary to address ASIC's secondary case (at [626]).

62 With respect to ASIC's system case, there were two major aspects of the appellant's conduct identified in the Statement of Claim. The first was given the description of "Nobbys' Credit Facility" and involved the deferral of payment for the purchase of goods on provision by the customer of a debit card linked to a bank account in the name of the customer and the provision of the PIN for the card and details of the amount of the periodic payment into the account and the time at which it is made. The second was given the description of the "Withdrawal Conduct" and involved the appellant, as a means of satisfying the debt due to him, using the relevant debit card and the PIN to withdraw funds from the customer's bank account and the transfer of funds to accounts owned and operated by him, until there were no, or very limited, funds remaining in the customer's account. It is alleged that the Withdrawal Conduct usually occurred at or about the day the periodic payment was due to be made and was repeated until the appellant was satisfied that the customer's debt was extinguished.

63 Other important aspects of ASIC's case as pleaded in the Statement of Claim included the disadvantages of the indigenous residents of the APY Lands (paragraphs 13 and 13A) and the consequences of the appellant's conduct for his customers (paragraph 17), including the fact that the customers were required to ask the appellant for additional credit thereby prolonging the Withdrawal Conduct and its consequences and creating and continuing (it is alleged) "a relationship of dependency between the customer and Mr Kobelt" (paragraphs 18 and 19). There are then pleas by ASIC of the appellant's knowledge or reckless indifference to the elements of ASIC's case (paragraph 20). Finally, there is a plea in paragraph 21 of the conclusion for which ASIC contends. It is as follows:

> 21. By:
>
> 21.1. issuing Nobby's [sic] Credit Facilities to Nobbys Customers, and/or
>
> 21.2. extending additional credit to Nobbys Customers under their Nobbys' Credit Facility in the manner and circumstances pleaded in paragraphs 17, 18 and 19 above; and/or
>
> 21.3. engaging in the Withdrawal Conduct in respect of Nobbys' Customers, as pleaded in paragraphs 14 and 15 above;
>
> Mr Kobelt engaged in conduct that was, in all the circumstances (including Mr Kobelt's State of Mind pleaded in paragraph 20 above, the Consequences of the Conduct pleaded in paragraph 16 above, and the Circumstances of Nobbys' Customers pleaded in paragraph 13 above and the matter pleaded in paragraph 13A above) unconscionable within the meaning of s 12CB(1)(a) of

the ASIC Act.

64 Counsel for ASIC make it clear in his oral submissions on the appeal that the critical aspects of ASIC's unconscionable conduct case against the appellant were the Nobbys' Credit Facility and the Withdrawal Conduct as described above.

65 With that introduction, it is necessary to turn to some further findings of fact made by the primary judge, this time specifically in the context of ASIC's unconscionable conduct case.

The Characteristics of the Nobbys' Customers

66 ASIC pleaded that since at least 1 June 2008, the appellant has provided credit to at least 117 customers. The names of those customers are set out in Schedule A to ASIC's Amended Statement of Claim. As we have said, customers AH, AW, B and D gave evidence. In addition, Mr Ronny Brumby and Ms Rhoda Pearson, who were also customers of Nobbys, gave evidence.

67 ASIC's case was that the Nobbys' customers were indigenous residents of the APY Lands and, in the overwhelming majority of cases, had very limited or no net assets, had very limited net income and had low levels of financial literacy. In addition, ASIC pleaded that the APY Lands was comprised of remote and impoverished communities.

68 There was considerable evidence at trial about the characteristics of Nobbys' customers. The main dispute related to whether the overwhelming majority of Nobbys' customers had low levels of financial literacy. By the end of the case, the appellant did not dispute that a majority of the Nobbys' customers were impoverished in the sense of having no, or only limited assets, and only limited incomes. Nor was it disputed that the APY Lands were comprised of remote communities.

69 The primary judge considered the evidence with respect to the characteristics of the Nobbys' customers at some length. Before doing so, he indicated that he accepted that proof of ASIC's system case did not require proof of the individual circumstances of each customer to whom the system applied. We do not think that that observation had any effect on his conclusions, but we would note that the observation is true, but only to a point. Section 12CB(4) of the ASIC Act provides that s 12CB 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. However, where an applicant's case is that

the unconscionable conduct relates to a group which is disadvantaged, then it must prove that disadvantage. In any event, that was the case pleaded and conducted by ASIC.

70 The majority of the Nobbys' customers come from Mimili and Indulkana. To travel from Mimili to Mintabie on the main road is a journey of 165 km and to travel from Indulkana to Mintabie on the main road is a journey of 116 km. The distances on the back roads are 70 km and 86 km respectively. The primary judge said that it was plain that these were remote communities. Journeys from one place to another is an occasion of some expense and road conditions are such that wear and tear on vehicles is significant. The primary judge noted, however, the evidence of Dr David Martin, an anthropologist, to the effect that it is 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.

71 The primary judge found that mainstream banking services are not available on the APY Lands. An Anangu wishing to do business with a bank is required to travel to Coober Pedy, Port Augusta or Alice Springs each of which would involve a journey of considerable distance.

72 The primary judge conducted a view at Mimili, Indulkana and Mintabie. The Court visited the public and community buildings in Mimili. The Court walked past, but did not view the school. One building the Court viewed was a MoneyMob Talkabout (MoneyMob) office. MoneyMob provides advice and information to community members in connection with matters of finance, including the payment of fines, banking, debt recovery, referrals to financial counsellors, budgeting and making the money last until payday. The primary judge said that MoneyMob may see between 25 and 50 people each day.

73 The primary judge noted that in Mimili most of the employment is directly or indirectly publicly or community funded. He noted that there were no industries and, with the exception of the Arts Centre, no other forms of productive enterprises. He noted that economic opportunities were limited.

74 The Court viewed the store at Indulkana.

75 The Court then travelled to Mintabie and viewed the three stores in Mintabie. As we have said, they are Nobbys, Sam's and Scrooge's.

76 The Court did not observe any signs of material wealth in the communities at Mimili and Indulkana. The Court's observations were to similar effect to the observations of Dr Martin, namely, that the overriding characteristic of the Aboriginal population in the APY Lands is their poverty.

77 The Court heard evidence from a Mr Bernhard Stauner. Mr Stauner was employed by MoneyMob as a financial counsellor between 13 May 2013 and 14 December 2014. Mr Stauner was based at Amata and he provided education and assistance to the Anangu on the same range of money matters as did MoneyMob in Mimili. The primary judge considered Mr Stauner's evidence and opinions to be reliable and he accepted them.

78 Mr Stauner gave evidence of assisting approximately 30 indigenous persons to cancel their key cards and to obtain replacement key cards and PINs. He described low levels of financial literacy among those whom he assisted which was more than 150. He described the characteristics of MoneyMob's clientele. He said that most of his clientele had difficulty in understanding concepts of budgeting and planning for the future. He gave evidence relating to the understanding generally amongst the Anangu of credit facilities and of the possible financial consequences of book-up arrangements such as those that applied at Nobbys.

79 The primary judge said that, in considering Mr Stauner's evidence, he bore in mind that Mr Stauner's experiences related to people who had particular trouble in controlling their own finances and their characteristics may not necessarily reflect the characteristics of the Nobbys' customers. He also said that he bore in mind that being based in Amata, Mr Stauner's contact with customers using book-up at Nobbys may not have been extensive.

80 The Court heard evidence from Mr Andrew James Kilpatrick. Mr Kilpatrick was an employee of Outback Stores Pty Ltd which had a contract with Mimili Corporation to provide management services at the store in Mimili. Mr Kilpatrick worked as the manager of the store between April 2009 and April 2012. The primary judge considered Mr Kilpatrick to be an honest witness and he accepted his evidence as reliable. Mr Kilpatrick described the range of goods which were sold at the store in Mimili and he described the methods of payment. The Mimili store did not provide book-up or other forms of credit. Mr Kilpatrick described some of the characteristics of the customers at the Mimili Store. Mr Kilpatrick said that the store had purchase order arrangements with some stores, but not with Nobbys.

81 The appellant gave evidence about the characteristics of his customers. The primary judge accepted his evidence to the effect that half of the customers to whom he sold motor vehicles on credit could not read and that more than half of his customers could not add up.

82 The primary judge discussed the evidence concerning whether the Nobbys' customers were in employment or were in receipt of Centrelink benefits. He concluded that, at best, about 50% of those to whom the appellant gave credit on book-up, had employment of some kind at some time. He concluded that at least one half of the appellant's customers were dependent on Centrelink benefits as their primary source of income.

83 As we have said, the Court heard evidence from AH, AW, B, D, Mr Brumby and Ms Pearson. The primary judge said that the evidence of these witnesses, who were all Anangu, indicated the characteristics of at least some of the Nobbys' customers. As we have said, the primary judge said that he considered AH, AW, B and D to be honest witnesses. As to D, the primary judge said that some extra care was necessary in evaluating his evidence.

84 The primary judge described the evidence given by AH and AW. Both witnesses lived in Mimili. AH has been in receipt of a Centrelink pension from at least 2010 and probably longer. The most expensive of his assets is a television. AW last worked in 1995 and she receives a Newstart Allowance. Each of AW and AH has their own bank account with a debit card and AH's Centrelink pension and AW's Newstart Allowance are paid into their respective accounts. AH and AW were involved in book-up for the purchase of motor vehicles and food from the appellant from at least May 2009. The primary judge summarises their motor vehicle purchases and the appellant's withdrawal of monies from their accounts.

85 AH said in cross-examination that the appellant had always been good to him and that when he went to the appellant's store, the appellant was happy to see him. AH said that he 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. AH acknowledged that he was aware that the appellant would use his key card to take money from his account and was happy for that to occur, even when the appellant took the whole of the available balance. He acknowledged in cross-examination that he had agreed with the appellant when buying a motor vehicle on book-up that the appellant would use about half of

the amount taken from his account to pay for the motor vehicle and the other half should be available for further book-up.

86 AW said that that appellant was good to her and was happy when he saw her in Nobbys. She said that she still does book-up at Nobbys, but owes the appellant only a small amount. She agreed that she used book-up because it is a means of getting "tucker" and because the appellant is "okay". She agreed that she knew that the appellant would take money from her bank account on the pension payment days to pay for the book-up. She said that in the past she had from time to time telephoned the appellant to tell him how much of the money to take out of her account on pension day, that the appellant had complied with her requests, and that sometimes he had left money in her account as she had requested. She said that she was happy to go to Nobbys at any time because she loves the shop and would be willing to use book-up again at Nobbys once she has paid off her current debt.

87 B is married to C and he and his family reside in Mimili. He is in receipt of a Newstart Allowance. The primary judge described the respective motor vehicle purchases of B and C.

88 B acknowledged that he had known from others in Mimili that he would have to give his key card to the appellant in order to use book-up at Nobbys. He said that the appellant told him that he could have "a little bit" of food on book-up. He also agreed that the appellant 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 the appellant permission to do so. 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 the appellant had told him that he could not have food on book-up.

89 D lives in Mimili. He gave evidence that he had been a petrol sniffer for a long period in the past and had suffered some brain damage. The primary judge said that his presentation when giving evidence seemed consistent with that condition. D receives a Disability Support Pension and it is his only source of income. D had purchased one motor vehicle on book-up from the appellant, 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.

90 D continued 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 used book-up at Sam's store in Mintabie. D acknowledged that without the ability to use book-up, there would be times when he would

go hungry between pension days. D has obtained cash from the appellant to give to the family with whom he resides. He said that the appellant told him how much cash he was allowed to take on each occasion.

91 Mr Brumby had sources of income other than from Centrelink or wages. The primary judge identified those sources of income.

92 The primary judge identified Mr Brumby's motor vehicle purchases from the appellant and noted that on some occasions the purchases were by way of cash and on other occasions they were by way of book-up. The primary judge noted the circumstances surrounding Mr Brumby's use of book-up. He noted the fact that Mr Brumby had developed firmly adverse views of the appellant and was now critical of many aspects of the conduct in which he perceives the appellant to have engaged. It is not necessary for us to set out the details. The primary judge said that given the antipathy between Mr Brumby and the appellant, he considered it appropriate to be circumspect before accepting all of Mr Brumby's evidence.

93 Ms Pearson was employed by Centrelink in Indulkana. The primary judge summarised Ms Pearson's motor vehicle purchases. He summarised her purchases of food and groceries. Ms Pearson has not done any further book-up at Nobbys since cancelling her key card in mid-2013. The primary judge considered her evidence generally reliable and, save for those matters on which the objective evidence indicated that she was mistaken, accepted her evidence.

94 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 Nobbys' customers. It tendered information from the 2011 Census showing characteristics of residents of the APY Lands, Mimili, South Australia, and Australia. The primary judge referred to data published by the ABS in 2012 indicating relatively low levels of attainment in education of residents in the APY Lands. The information suggested that a little less than 40% of the Anangu had 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.

95 The primary judge referred to the ABS Census of Population and Housing for Aboriginal and Torres Strait Islander Australians published in 2012 which permitted a breakdown of the income of the Anangu aged 15 or more who resided on the APY Lands. He said that this

information showed that only 14.8% of Anangu had incomes of over $400 per week, and 61.5% had incomes between $200 and $399 per week. He said that this was consistent with a number of Anangu being unemployed and/or in receipt of social security benefits.

96 The primary judge also referred to data published on the "My School" website by the Australia Curriculum Assessment and Reporting Authority (ACAR) derived from the National Assessment Program – Literacy and Numeracy (NAPLAN). The primary judge said that this information showed that 78% of year 7 students at Mimili School in 2009 were below the NAPLAN Minimal Standards (NMS) in reading compared with 5% for year 7 students in all Australian schools. The 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.

97 The primary judge noted that the 2011 Census reported that some 14.2% of APY Lands residents spoke only English at home. The other languages spoken at home included Pitjantjatjara (72.1%) and Yankunytjatjara (5.6%).

98 As we have said, the Court heard evidence from Dr Martin whom the judge described as a well-qualified social anthropologist and very experienced. He was called as a witness by ASIC.

99 In April 2014, ASIC retained Dr Martin to provide an opinion concerning A to D who are the subject of its secondary allegation. In July 2014, ASIC expanded its instructions to Dr Martin asking him to consider matters relating to Aboriginal residents of the APY Lands. The primary judge noted that Dr Martin was not asked on either occasion to express an opinion with respect to the 117 customers who were the subject of ASIC's system case. Instead, he was asked to provide an opinion of the APY Lands residents. ASIC did not provide information to Dr Martin as to the identity and contact details of the 117 Nobbys' customers.

100 ASIC instructed Dr Martin to assume certain matters for the purposes of his opinion in relation to the majority of the Anangu customers who entered into book-up arrangements at Nobbys.

101 Dr Martin conducted three field trips to the APY Lands in April and May 2014 and, in the course of these trips, he spoke to a total of 23 indigenous residents in Indulkana and Mimili.

102 Dr Martin addressed the existence of social and 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 a complaint about such terms. He then expressed a number of opinions about the characteristics of Aborigines generally, that is, not just the Anangu. He then expressed a number of opinions about the Anangu.

103 Dr Martin then said that he believed it to be a reasonable inference that the characteristics of the Aboriginal people in remote communities generally applied to the Anangu residents in Mimili and Indulkana and in the APY Lands more generally. After expressing a number of other opinions, Dr Martin expressed his opinions as to the understanding by the Anangu of the book-up arrangements at Nobbys.

104 The Court heard evidence from Associate Professor Golnek of the University of Adelaide. He was called as a witness by the appellant. He had undoubted and unchallenged expertise in mathematical statistics and he gave evidence to expose errors he perceived in ASIC's, and to an extent in 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. Putting the matter very generally, Professor Golnek's opinion was that one could not draw inferences concerning the Nobbys' customers unless they were randomly selected. They were not randomly selected and were the subject of a form of "sample selection bias". Professor Golnek gave his opinions as to why the Nobbys' customers could not uncritically be regarded as a random and, therefore, representative sample of all Anangu.

105 Professor Golnek also gave evidence to the effect that no valid inferences as to the characteristics of Nobbys' customers generally could be drawn from the circumstances of AH, AW, B, C and D.

106 The primary judge noted that Professor Golnek's opinions were not contested by ASIC. The primary judge accepted that his criticisms of ASIC's case, and to an extent, of Dr Martin's approach were well made. The primary judge said that care must be taken before accepting ASIC's submissions concerning the characteristics of the 117 customers insofar as they are dependent on inferences being drawn from the characteristics of the Anangu population

generally. However, the primary judge said that this did not mean that the profile of the Anangu or of residents of Mimili derived from the ABS statistics and the NAPLAN results were of no utility. His Honour said (at [415]):

> ... 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.

107 In the circumstances, his Honour considered that, subject to the exercise of care which he had mentioned arising from Professor Golnek's evidence, he considered Dr Martin's evidence to be generally helpful and reliable.

108 The primary judge then made his findings as to the characteristics of the 117 customers. His Honour said (at [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.

109 His Honour said that he was satisfied that most of the 117 Nobbys' customers had the characteristics alleged by ASIC and that included low levels of financial literacy.

110 The primary judge nevertheless accepted the appellant's submissions that the Nobbys' customers did understand that they could purchase a vehicle or other goods from Nobbys on credit. They understood that the credit arrangement involved them paying later for the vehicle or goods by their providing the appellant with their key card and PIN and authorising him to use it to withdraw money from their bank account as it became available. They understood that the disadvantage arising from the arrangement of them not having access to money for the necessities of life could be addressed by the appellant advancing further credit from time to time. The primary judge accepted that the Nobbys' customers had an awareness of these aspects of the arrangement at the time they entered into book-up with Nobbys and

chose voluntarily to do so. He accepted that it was 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 whom, nevertheless, found the appellant's book-up arrangements, at least for a time, to be convenient. The primary judge said that, on his assessment, the number of customers satisfying this description was limited.

The Appellant's Evidence

111 The primary judge described the appellant's background and working history. He noted that the appellant had had a limited education and that he himself had lived in a remote community for significant parts of his working life. He had an unsophisticated approach to many matters and this was manifest, among other things, in his book-up arrangements. The primary judge said that, nevertheless, he had the firm impression during the appellant's evidence that he had a keen appreciation of where his interests lay in the litigation.

112 The primary judge said that he accepted much of the appellant's evidence, but there were several aspects of it which caused him to have doubts about his overall reliability.

113 He referred to his earlier findings whereby he rejected the appellant's evidence that he had ceased charging a reduced price for motor vehicles sold for cash (and not on book-up) in about mid-2011. He reiterated that he did not consider this was a matter about which he could be honestly mistaken. He also rejected the appellant's 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.

114 The primary judge said that there were other matters causing him to doubt the reliability of aspects of the appellant's evidence.

115 First, the primary judge did not accept the appellant's evidence about whether he charged for a cash advance. He did not regard this part of the appellant's evidence as truthful and he made a finding that the appellant did charge at least some of his customers at least 10% of the amount he advanced in cash, or which he had outlaid on their behalf.

116 Secondly, the primary judge referred to cases involving Ms Pearson, Mr Pearson, Mr Doolan and Mr Clothier where the appellant made withdrawals, either more frequently than authorised, or in larger amounts than were authorised.

Use of Book-Up by Others

117 Book-up is not unique to Nobbys.

118 The primary judge referred to a report prepared in 2002 by Mr Gordon Renouf for ASIC entitled: "Book up: Some consumer problems".

119 Mr Renouf reported that "some form of book up 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". The primary judge noted that 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 customers providing key cards and PINs. The primary judge noted 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 primary judge noted that the progression to the provision of key cards and PINs seemed to be the consequence of the change in the way in which financial payments are now paid, and financial services provided.

120 Mr Renouf reported as follows:

> 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.

121 The primary judge accepted that regard should be had to the features which differentiate Nobbys' Anangu customers on the one hand, and customers in general, on the other. He

noted that these features included 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. The primary judge said that account should be taken of those differences in applying the norms which underpin the assessment of the conscionability of the appellant's conduct.

122 The primary judge accepted the advantages book-up offers to customers in remote communities and in some regional areas as identified by Mr Renouf. They were that 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 cycle to those who lack financial management skills, and it is a means by which demand sharing (humbugging) can be addressed. The primary judge noted that there were no banks, credit unions or like institutions in or immediately adjacent to the APY Lands. Credit is not readily available to the Anangu.

123 The primary judge set out the problems or disadvantages which Mr Renouf identified in terms of the way in which many traders operate book-up. Those problems or disadvantages included the following:

(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; and

(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.

124 The primary judge said that there was no evidence of (e) and (f) in the case before him and that ASIC did not rely on (l). The primary judge said that some of the other disadvantages identified by Mr Renouf were apparent in the book-up arrangements at Nobbys.

Practice at Nobbys

125 The primary judge accepted that the appellant never refused food to a customer from whose account he had withdrawn all the money. However, he did 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. The primary judge said that, whilst the appellant may have been motivated by kind heartedness, he would, in addition, be well aware that it was not in his commercial or reputational interest to have refused a customer food altogether. The primary judge noted that the appellant also acted with an appreciation of his own commercial interest in deciding whether to release key cards to customers who wished to travel away from the APY Lands temporarily.

126 The primary judge found that the appellant did not exercise any oversight of the amount which customers could book up in connection with the original purchase of a motor vehicle and that the appellant was indifferent as to whether customers could afford the commitment which they were undertaking, having regard to their financial position more generally.

The Appellant's Record Keeping

127 The primary judge accepted a submission that the appellant conducted his business with little or no insight into the importance of providing a true and proper account to his customers. The primary judge found that the appellant's records of the book-up transactions were inadequate and illegible (at [544]), that a customer had he or she wished could not have checked the reliability of the appellant's record keeping (at [546]) and that any audit of what had occurred was not feasible "(at least without considerable difficulty)" (at [623]).

The Primary Judge's Reasons for holding that the Appellant engaged in Unconscionable Conduct

128 The primary judge began his evaluation of whether the appellant's conduct was unconscionable by a consideration of the matters which are set out in s 12CC(1) of the ASIC Act.

Section 12CC(1)(a): The relative strengths of the bargaining positions of the appellant and his customers

129 The primary judge found that the appellant's bargaining position was relatively stronger than that of his book-up customers. He said that the customers' lack of assets to offer as security for a loan meant that it was difficult for them to obtain loans from commercial lenders. He said that the vulnerability of the book-up customers added to the disparity in bargaining positions. That vulnerability arose from low levels of literacy and numeracy and difficulty in accessing alternative forms of credit.

130 With respect to the appellant's argument that there was no significant disparity in bargaining positions because of a customer's ability to cancel his or her key card or have their income paid into a different account, the primary judge said that the Court should be slow to conclude that the ability to engage in wrongful conduct had the effect of correcting or ameliorating what was otherwise an imbalance of bargaining power.

Section 12CC(1)(b): Whether, as a result of the appellant's conduct, the customers were required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the appellant

131 The primary judge rejected an argument by the appellant that his book-up arrangements were in accordance with "industry standards" and said that no "industry standards" had been proven.

132 His Honour said that it was not readily to be supposed that a requirement that customers hand over debit cards and confidential PINs to a retailer was reasonably necessary to protect a legitimate interest of the retailer. Nor was it reasonably necessary to protect a legitimate interest of the appellant that, absent a contrary instruction from the customer, the appellant be permitted to withdraw all or nearly all of the money in a customer's account and transfer it to his own account. On the appellant's account, 50% of the money was available to the customer and he could have left that amount in the customer's account. Withdrawing that amount and placing it in his own account was not reasonably necessary to protect a legitimate interest of the appellant.

133 The primary judge said that, furthermore, there were other repayment arrangements that the appellant could have adopted which were appropriate and which did not involve the customers handing over their key cards and PINs. His Honour referred to a Centrepay facility, a direct debit arrangement, payday payment arrangements and employer deductions. Direct debit and employer deductions are self-explanatory. Payday arrangements involve the handing over of the debit card, but not the PIN, and then attendance by the customer at Nobbys when monies would be withdrawn by the customer and the appellant repaid. Centrepay involved a scheme where, upon certain conditions being met, nominated traders and suppliers would be paid direct by Centrelink. The primary judge accepted that these alternative repayment arrangements may not be available or satisfactory in all cases, but, his Honour said, they served to indicate that the Nobbys' Credit Facility and Withdrawal Conduct went "well beyond" what was reasonably necessary to protect the appellant's legitimate interests (at [538]).

Section 12CC(1)(c): Whether the customers were able to understand any documents relating to the book-up arrangements

134 The primary judge accepted that the appellant's customers had an understanding of the basic elements of the book-up arrangements. However, because of the deficiencies in the appellant's records, the customers, had they asked to see the records (and there is no evidence any of them did), would have had considerable difficulty understanding the records, let alone checking their accuracy.

Section 12CC(1)(d): Whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the appellant's customers by the appellant in relation to the book-up arrangements

135 The primary judge noted that ASIC did not allege that the appellant exerted any undue influence or pressure on his customers in relation to the book-up arrangements. ASIC did point to certain tactics by the appellant in operating the book-up system.

136 The primary judge found first, that the appellant worked actively to ensure monies were withdrawn from customers' accounts before the customers themselves could access the monies which might otherwise be available to them, secondly, that in some cases the appellant withdrew more monies than he was authorised to or he withdrew monies more frequently than he was authorised to, and thirdly, that he took advantage of the CBA "glitch" on 14 December 2010 to withdraw more monies than he was authorised to withdraw.

137 The primary judge took these matters into account. Whether he did so because he considered them "unfair tactics" within s 12CC(1)(d) is not entirely clear from his reasons.

Section 12CC(1)(e): The amount for which, and the circumstances under which, the appellant's customers could have acquired equivalent financial services from a person other than the appellant

138 The primary judge found that the credit provided to the customers by the appellant in connection with the purchase of second-hand motor vehicles was expensive and that this was not made explicit to book-up customers. Later in his reasons, his Honour said that the credit provided by the appellant was of a "particularly expensive kind" (at [618] and see [493] set out below at [209]). The appellant submitted that the primary judge's finding related not only to the second-hand vehicles, but also to food, fuel, general groceries and other services. It seems to us, reading the reasons as a whole, that the finding relates only to second-hand motor vehicles. His analysis of the cost of the credit is restricted to the second-hand motor vehicles and it is that analysis which formed the basis of his conclusion that the credit provided was expensive. Furthermore, the following facts were admitted in relation to charges, if any, for credit and interest on book-up credit extended by the appellant:

(1) At all relevant times prior to mid-March 2015, upon issuing a purchase order, the [appellant] or his employees would enter the amount of the purchase order in the book up records maintained by the [appellant], together with a fee of $5 or $10 for the service of providing purchase orders to the benefit of the relevant customer;

(2) At all material times, the [appellant] did not (and does not) charge any interest on balances outstanding in respect of the book up credit extended by him; and

(3) At all material times with respect to book credit for items other than motor vehicles, the [appellant] did not and does not levy a charge for the provision of book up credit.

(see exhibit R57 at Tab 134).

139 In the context of the appellant's sale of second-hand motor vehicles, the primary judge said (at [488]-[489]):

> 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.
>
> 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.

Section 12CC(1)(f): The extent to which the appellant's conduct towards his book-up customers was consistent with his conduct in similar transactions between the appellant and other like customers

140 The primary judge found that the appellant did not treat his customers equally in the sense that he provided goods and services to non-indigenous customers on credit without requiring them to provide a key card and PIN or other security and that some customers were allowed more book-up than others.

Section 12CC(1)(j): The extent to which the appellant was willing to negotiate the terms and conditions of his contracts/arrangements with his customers and other matters identified in the section

141 The primary judge noted some flexible aspects of the appellant's book-up system, but then noted what he referred to as the rigid features of its establishment and implementation. As to the establishment of the book-up system, the appellant was not flexible in his requirement that a book-up customer provide his or her key card and PIN and this represented a "significant intrusion into the matters which customers generally are entitled to, and should, keep confidential" (at [555]). As to the implementation of the book-up system, the appellant engaged in the Withdrawal Conduct, including ensuring he withdrew the monies before the customers had the opportunity to do so.

Section 12CC(1)(l): The extent to which the appellant and the customers acted in good faith

142 The primary judge accepted that there were occasions when the appellant, by mistake, withdrew more than he should have from a customer's account and then remedied the situation, but he also found that on more than one occasion the appellant did not comply with his customers' instructions concerning the amount or frequency of the withdrawals from their accounts. The primary judge appears to have accepted submissions by the appellant that first, there was a good deal of trust in the arrangements the appellant had with his customers and there was no suggestion that he had acted fraudulently or dishonestly by misusing the key cards and PINs, and secondly, that conduct by some customers of cancelling their key card or diverting their income to another account could be seen, at least in some instances, as conduct carried out by them, other than in good faith.

143 The primary judge said that the appellant pursued his own interests even to the detriment of his customers and he referred, by way of example, to the implementation of the Withdrawal Conduct and the appellant's conduct at the time of the CBA "glitch".

Other factors listed in s 12CC(1)

144 The primary judge did not need to address the matters in s 12CC(g)-(i) and (k) of the Act.

Other matters relevant to whether the appellant engaged in unconscionable conduct

145 The primary judge said that there were a number of other matters which were relevant (or said by one of the parties to be relevant) to whether the appellant engaged in unconscionable conduct. These matters are as follows: non-compliance with the National Credit Act and National Credit Code; improvident spending; demand sharing; customers' voluntary conduct; absence of complaints; Centrelink loans; the appellant's discretionary control; and the "tying" effect of the conduct.

Non-compliance with the National Credit Act and National Credit Code

146 The primary judge said that the appellant was obliged to comply with the provisions of the National Credit Act and the National Credit Code (in relation to the sale of second-hand motor vehicles), but he failed to do so. This meant that his customers did not have the protections for which the National Credit Code provided. The primary judge said that this was relevant to whether the appellant's conduct was unconscionable, as was his earlier finding that the appellant was indifferent to his customers' ability to afford the transactions into which they were entering.

147 The primary judge gave as examples of non-compliance with the National Credit Act and National Credit Code, non-compliance with s 17(8) of the National Credit Code which requires the credit contract to be in writing and to contain a statement of the credit fees and charges payable under the contract and s 131 of the National Credit Act which requires a licensee under the National Credit Act (the appellant should have been but was not licensed) to assess the suitability of a consumer, including the consumer's ability to meet his or her obligations under the contract.

Improvident spending

148 The primary judge accepted that many indigenous people in remote communities spend improvidently and that this is known, colloquially, as "boom and bust" expenditure. The

primary judge accepted that the appellant's book-up arrangements whereby he controls in his own account 50% of the periodic payment available to the customer ameliorates boom and bust expenditure. However, his Honour said that this advantage comes with the disadvantages that the appellant retains control over a significant aspect of his customers' lives and the time and inconvenience of travelling to Nobbys. Furthermore, there are other means of ameliorating boom and bust expenditure, including payments of the pension each week rather than each fortnight, a Centrelink BasicsCard for the purchase of some goods and not others, and advice and counselling from MoneyMob.

149 The primary judge said that he did not regard the avoidance of improvident spending as a justification for the appellant's conduct. He was prepared to accept that it might be an incidental benefit resulting from the appellant's conduct.

Demand sharing

150 The primary judge's findings on this topic are important because of the significance the appellant places on this matter.

151 The primary judge said that 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 primary judge found that the cultural practice of demand sharing or humbugging can give rise to the importuning of those perceived to have available money, to the extent on occasions, of the bullying of those persons, and of the exploitation of community members.

152 However, the primary judge noted that there was very little evidence from the Anangu witnesses themselves that they gave their key cards and PINs to the appellant in order that their money would be beyond the reach of members of their community who sought to share in it or so that they could shop at Nobbys free of the demands of humbugging. Furthermore, the primary judge noted that the book-up system did not prevent humbugging in relation to the goods which had been purchased by the Nobbys' customers themselves, whether they be the second-hand motor vehicles or food and groceries and, furthermore, the arrangements gave rise to the possibility that Nobbys' customers might themselves engage in humbugging.

153 The primary judge's conclusion was that the book-up system may have some advantages in addressing demand sharing, but that those advantages were not to be overstated and there were other strategies which could be adopted to avoid demand sharing.

Customers' voluntary conduct

154 The primary judge found that the appellant did not apply pressure to customers to enter into the book-up arrangements with him and that it was a matter for their choice. He found that the Anangu witnesses understood that they had a choice and made their arrangements with knowledge of the way in which the book-up system worked. He found that those witnesses each understood the basic elements of their book-up system with Nobbys and had consented to him making withdrawals from their account using their key card and PIN. With the exception of two customers, the Anangu witnesses considered that the appellant had treated them well and were well disposed towards him. They appreciated, in particular, the ability to buy food in between their respective paydays or pension days.

155 The primary judge said that these matters were to be taken into account in assessing whether the appellant's conduct was unconscionable. However, the primary judge went on to say the following (at [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

156 The primary judge said that many of the customers involved in the book-up system were satisfied with the arrangements and that there was undoubtedly features of the book-up system which several of the book-up customers found attractive.

157 However, there were also indications that some customers were dissatisfied and these indications included the following: two of the Anangu witnesses were dissatisfied; several customers cancelled their key cards or diverted their periodic payments into another account; the feature of the Withdrawal Conduct involving the withdrawal of monies at the earliest opportunity; and the appellant's acknowledgement that he had received up to six complaints from customers about book-up arrangements in the last five to six years.

Centrelink loans

158 The appellant contended that those customers who were left without monies in their accounts could obtain money from relatives or short term interest free loans from Centrelink. The primary judge rejected this contention saying that, as far as obtaining money from relatives was concerned, it involved an implicit recognition that the book-up system could result in an increase in demand sharing and, as far as short term interest free loans from Centrelink were concerned, there was limited evidence of the availability of such loans and the fact that they might be needed was an indicator that the appellant's conduct was unconscionable.

The appellant's discretionary control

159 The primary judge said that the appellant's book-up system meant that his customers were dependent on his goodwill and placed them in a position of "some vulnerability" (at [598]). The appellant controlled how much they could spend and the type of goods or services they could purchase, even when they had not used the whole of the notional 50% available to them. If they wanted to access the notional 50% available to them, they had to come to Nobbys to purchase goods or obtain a purchase order which involved a relatively expensive charge and could not be used at many of the community stores in the APY Lands or cash which could involve a 10% charge of the amount of cash provided.

160 The primary judge said that some aspects of the appellant's system might be regarded as benevolent, but he too was a significant beneficiary of the system. The primary judge said that, objectively speaking, the appellant's conduct involved "a form of paternalism by which he exercised considerable control over his customers" (at [602]).

The "tying" effect of the conduct

161 The primary judge said that a "significant feature" bearing upon the unconscionability of the appellant's conduct was that it tied his customers involved in the book-up system to Nobbys and thereby secured significant advantages for the appellant and a corresponding reduction in the freedom of action of his customers (at [603]). He described the reduction of the freedom of action of his customers as involving the following: the customers were deprived of independent means of obtaining the necessities of life; even when the customers imposed a limit on the amount the appellant could withdraw from their accounts, it was difficult for them to access the monies in their account because the appellant had their key card; if customers wished to acquire food and groceries they had to travel to Nobbys in Mintabie to

obtain those commodities on their card or a purchase order or cash before being able to shop elsewhere.

162 The primary judge found that the book-up arrangements involved a significant tie by the appellant of the customers to Nobbys.

163 The primary judge appeared to accept that the tie was one of a customer's own making because they voluntarily entered into the book-up arrangement, but his Honour said that this was to be considered in the context of two important matters. First, the tying effect of the appellant's conduct was to his commercial advantage, constituted a form of exploitation of the Anangu customers and may account for the profitability of Nobbys. Secondly, the appellant's conduct resulted in "the prolonged maintenance of his customers in a situation of dependence and consequent vulnerability" (at [607]).

The Primary Judge's Conclusions as to whether the Appellant's Conduct was Unconscionable

164 Having addressed those matters in s 12CC(1) of the ASIC Act which were relevant in the circumstances of this case and other matters which arose on the facts, the primary judge expressed his conclusions on ASIC's system case. He did not repeat all of the matters which he had discussed earlier. As we will explain, it is fair to say that he emphasised the matters which he regarded as particularly important to his conclusion that the appellant's conduct was unconscionable.

165 First, the primary judge considered it important that the book-up system operated by the appellant involved a customer handing over not only their key card, but also their confidential PINs. This, his Honour said, "runs counter" to one of the very purposes of the issue of PINs in connection with the use of key cards (at [612]). A "stark feature" of the system is that in most cases the appellant withdrew all or nearly all of the funds in a customer's account. The primary judge said that the appellant did not establish an objective justification for such conduct. Matters that might ameliorate the effect of that conduct were subject to the appellant's discretion which gave him control of their everyday lives in a number of ways. The ability to obtain a purchase order or cash was a limited alternative because some customers are charged for these facilities and purchase orders cannot be used at various stores.

166 Secondly, the primary judge said that the appellant's arrangements went well beyond what can be regarded as reasonably necessary to protect his own legitimate interests.

167 Thirdly, his Honour considered whether the book-up arrangements reduced improvident spending (i.e., the boom and bust expenditure) and demand sharing. As to the former, he seemed to accept that it might, but that there were other ways in which the customers could address that circumstance. As to the latter, his Honour accepted that it might reduce some opportunities for humbugging of customers, but was likely to increase it in other ways.

168 Fourthly, the primary judge said that the credit provided by the appellant was of a particularly expensive kind.

169 Fifthly, the primary judge found that the appellant's conduct constituted a form of exploitation of his customers, to his advantage, and to their detriment. He expressed himself in the following way (at [619]-[620]):

> 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.
>
> 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.

170 Sixthly, the primary judge said that the appellant was indifferent as to whether his customers could, having regard to their financial position generally, afford their commitment to him.

171 Seventhly, the primary judge said that the bargaining positions of the appellant and his book-up customers were not evenly balanced.

172 Finally, the primary judge said that the way in which the appellant implemented the book-up system added to the strong impression of unconscionability. His Honour referred to the deficiencies in the appellant's record keeping. In this context, he also observed that the appellant did not provide his customers with the protection contemplated by the National Credit Act and National Credit Code.

173 Although not an exact match, these conclusions are reflected in large part in the declaration of unconscionable conduct which the primary judge made. It is as follows:

> 2. The Respondent contravened s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) in that, since at least 1 June 2008 and continuing until at least July 2015, in connection with the supply of financial services to customers of Nobbys Mintabie General Store the Respondent engaged, in trade or commerce, 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 in that the Respondent:
>
> 2.1 obtained, as a condition of providing a credit facility, possession of debit cards and personal identification numbers from the customers and thereby obtained control over the withdrawal of monies from the customers' bank accounts;
>
> 2.2 on the day on which payments were made into the account or shortly afterwards withdrew the whole, or nearly the whole, of the available funds in the customers' bank accounts;
>
> 2.3 withdrew, in some instances, amounts which exceeded those which the customer had authorised and withdrew funds more frequently than some customers had authorised;
>
> 2.4 was indifferent as to whether the customers could, having regard to their financial position generally, afford their commitment to him;
>
> 2.5 did not provide to his customers periodically true and proper account statements of the transactions he had effected using their debit cards;
>
> 2.6 placed the customers in a position in which they were subject to the exercise of the Respondent's goodwill and his control in their everyday lives, including having to ask the Respondent for additional credit to obtain cash from their bank accounts and to purchase goods including general groceries which the Respondent at his discretion, agreed from time to time to provide;
>
> 2.7 in relation to debts that had been incurred initially for the purchase of motor vehicles, provided credit of a particularly expensive kind in circumstances in which in most cases customers were not aware that they were being charged for the provision of credit; and
>
> 2.8 operated a Book-up system which involved taking advantage 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.

174 It is worth noting at this point some other matters which bear on the significance of each of these matters. In his submissions to the Court, senior counsel for ASIC said the important matters were the Nobbys' Credit Facility (paragraph 2.1) and the Withdrawal Conduct (paragraph 2.2). In further elaboration of his submissions, he contended that the finding of unconscionable conduct could be sustained by reference to the matters in paragraphs 2.1, 2.2, 2.4, 2.6 and 2.8. We address the primary judge's reasons in relation to final relief (other than as to penalty and costs) when we consider Grounds 10 and 11. It is worth noting at this point that the primary judge's reasons in that context support the approach taken by ASIC before this Court and support the critical nature of the matter in paragraph 2.8 to his Honour's finding of unconscionable conduct.

LEGAL PRINCIPLES

175 The period covered by the declaration of unconscionable conduct is from at least 1 June 2008 to at least July 2015. Section 12CB of the ASIC Act was amended with effect from 1 January 2012, but as the primary judge noted (at [213]), neither party suggested that the amendments were material to the outcome of the case. Nevertheless, it is necessary to mention one of the amendments.

176 Section 12CB of the ASIC Act was amended by the *Competition and Consumer Legislation Amendment Act 2011* (No 184 of 2011) to add (among other amendments) s 12CB(4)(b) which is in the following terms:

> (4) It is the intention of the Parliament that:
>
> (a) ...
>
> (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;
>
> ...

177 This amendment commenced in operation on 1 January 2012. The Explanatory Memorandum for the Bill, when dealing with an identical amendment to the *Australian Consumer Law* (Schedule 2 to the *Australian Competition and Consumer Act 2010* (Cth)), stated that the unconscionable conduct provisions of the Australian Consumer Law are not limited to individual transactions. After referring to the decision of the Full Court of this Court in *Australian Securities and Investments Commission v National Exchange Pty Ltd*

(2005) 148 FCR 132 (*National Exchange*) (a case we will consider shortly), the Explanatory Memorandum stated:

> 2.23 … However, it follows from the principle that a specific person need not be identified that a special disadvantage is not a necessary component of the prohibition.
>
> 2.24 To emphasise this point, paragraph 21(4)(b) of the ACL indicates Parliament's intention that the provision may apply whether or not there is an identified person disadvantaged by the conduct or behaviour. This ensures that the focus is on the conduct in question, as opposed to the characteristics of a particular person, or the effect of the impugned conduct on that person.

178 In his Second Reading Speech, the Parliamentary Secretary to the Treasurer said:

> The final interpretative principle to be introduced by the bill is that the prohibition on unconscionable conduct applies to systemic conduct or patterns of behaviour and that there is no need to identify a person at a disadvantage in order to attract the prohibition.
>
> Unconscionable conduct is not limited to individual transactions or events …
>
> This interpretative principle ensures that conduct, rather than individual transactions or events, is the focus of the provisions.

179 The *National Exchange* case was decided before the amendment. In that case a company called National Exchange sent unsolicited off-market offers to members of a company called Aevum Ltd to buy their shares at a price of $0.35 per share. Aevum was a demutualised company. National Exchange was controlled by a Mr Tweed. Mr Tweed, or interests associated with him, sent offers to members of demutualised companies because the members had not paid for the shares and were less likely to want to hold on to them. In addition, they would be less likely to know the value of their shares. National Exchange did not claim that its offer was fair, but rather, it was simply an offer to buy at a particular price. There was a statement in the offer document that National Exchange considered that a fair estimate of the value of each share was in the range of $0.90-$1.29. Over 250 members of Aevum accepted National Exchange's offer to buy their shares at a price of $0.35 per share.

180 ASIC claimed (among other claims) that National Exchange's conduct was unconscionable within the then s 12CC of the ASIC Act.

181 The Full Court made it clear that s 12CC of the ASIC Act was not constrained by limitations under the general law. Importantly, the Court said that under the section there was no need to identify a specific or particular person (at [30]). Later in the Court's reasons, the Court referred to the respondent's conduct as involving the systematic implementation of a strategy,

the need to focus primarily on the unconscionable conduct of the offeror and to the offeror's "carefully formulated and systematic approach" (at [43]-[44]).

182 The Full Court held that National Exchange's conduct was unconscionable because it had targeted a group to take advantage of the fact that there would be members of the group who would be inexperienced and ignorant as to their commercial interests and likely to act irrationally in that respect. The Court said that the offerees, or at least a number of them, were vulnerable targets who were ripe for exploitation and National Exchange's conduct could be properly described as predatory (at [43]).

183 The upshot of the National Exchange case is that a system of conduct or pattern of behaviour may constitute unconscionable conduct even in relation to conduct prior to 1 January 2012. We note that even if the primary judge's conclusion of unconscionable conduct is upheld, there would need to be a minor amendment to the declaration to make it clear that s 12CB(4)(b) applies on and after 1 January 2012.

184 Recently, in *Australian Competition and Consumer Commission v Unique International College* [2017] FCA 727, Perram J addressed a similar case to the present in that the regulator brought both an unconscionable conduct case in relation to certain individuals and a system case involving unconscionable conduct. The respondent provided vocational education services in the form of online courses in management, salon management and marketing. The system case related to the respondent's system for enrolling students. The case concerned ss 21 and 22 of the Australian Consumer Law.

185 The features of the system of conduct or pattern of behaviour which were said to be unconscionable were as follows:

(1) the strategy of targeting disadvantaged people by reference to indigeneity, remoteness and social disadvantage (whether deliberate in its original conception or not);

(2) the use of gifts of laptops or iPads to students signing (or loan computers after a certain date);

(3) the use of incentives to staff to encourage them to sign up students; and

(4) the holding of sign-up meetings.

186 Justice Perram was satisfied that there was a system and pattern of behaviour consisting of the four features referred to above. His Honour then said (at [778]):

> The next question is whether this system was unconscionable. I do not think that (b) to (d) by themselves would necessarily be unconscionable. With the correct student cohort and management practices this style of operation may well have been permissible. However, when the practices in (b) to (d) are deployed against a targeted group of disadvantaged persons very different issues arise. In terms of s 22(1), it seems to me relevant to note in an assessment of the system that the targeted cohort consisted of people who were unlikely to understand the documentation involved (s 22(1)(c)) and that the use of the gift of a free (or 'lent') computer was apt to confuse this particular cohort into thinking a very bad deal was a good one – in my opinion an unfair tactic within the meaning of s 22(1)(d). The effect of the system in (b) to (d) was to supercharge the exploitation of the disadvantaged group which was being targeted (and also Unique's remarkable profits). The system was unconscionable within the meaning of s 21.

187 We turn to authorities which address the circumstances in which it is appropriate to characterise conduct as unconscionable. It is clear enough that it is not simply conduct which might be considered unfair.

188 In *Paciocco and Another v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 (*Paciocco Full Court*), the Full Court of this Court considered, among other statutory causes of action, whether the charging of various categories of bank fees constituted unconscionable conduct within ss 12CB and 12CC of the ASIC Act. Allsop CJ (with whom Besanko and Middleton JJ agreed) held (at [347]) that the bank's conduct was not unconscionable in all the circumstances of the case and, in particular, 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 the accounts which were the subject of the fees, the clarity of disclosure, the lack of secrecy, trickery or dishonesty, and the ability of people to avoid or terminate the accounts. Allsop CJ referred to the various matters and circumstances which inform the evaluation of conduct for the purposes of determining whether it is unconscionable (at [296]):

> … 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.

(see also *Commonwealth Bank of Australia v Kojic and Others* (2016) 249 FCR 421 at [57]-[61] per Allsop CJ; at [71]-[72] per Besanko J; at [85]-[88] per Edelman J.)

189 There was an appeal to the High Court in *Paciocco Full Court* (*Paciocco and Another v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525 (*Paciocco High Court*)). The appeal was dismissed. Keane J gave reasons for dismissing the appeal with respect to the unconscionability claims with which French CJ (at [2]) and Kiefel J (as her Honour then was) (at [70]) agreed. Gageler J wrote separate reasons for dismissing the claims and Nettle J did not need to address the claims in view of his conclusions on the other issues (at [375]).

190 Justice Keane said that the appellant's claims took on an air of unreality given that it was not suggested that the bank treated him less favourably than he would be treated by other credit card suppliers, there was no allegation of unlawful manipulation of the market and no allegation that the appellant was driven to agree the bank's terms by financial pressures of which the bank was aware. His Honour said that a mere disparity in bargaining power did not take the matter very far. Section 12CB(1) of the ASIC Act did not proscribe the existence of a disparity of bargaining power as opposed to the manner of its exercise (at [293]) (see also *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd and Others* (2003) 214 CLR 51 at [11] per Gleeson CJ). Keane J also made the point (at [294]) that the appellant's arguments focused unduly on only the first two matters in the statutory list.

191 Justice Gageler said that the word "may" in s 12CB(2) of the ASIC Act was not permissive, but conditional (at [189]). His Honour made a further point. Section 12CC(2)(b) is or may be engaged when the recipient of the services is required to comply with conditions that were not reasonably necessary for the protection of the interests of the supplier *as a result of conduct engaged in by the supplier*. Gageler J put the matter as follows (at [184]-[185]):

> The value-laden terminology in which the customers couch the characteristics of the late payment fee on which they rely for the conclusion that its imposition on Mr Paciocco was unconscionable implicitly incorporates conclusions about the legal operation and commercial context of the late payment fee which have already been rejected in the context of rejecting the customers' argument that the late payment fee was to be characterised as a penalty. It would be open to reject their argument concerning statutory unconscionability on the basis that they have failed to establish each of the argument's premises. The argument, however, has deeper problems.

> To the extent that the customers' argument relies on s 12CB(2)(b) of the ASIC Act, it is based on a misconstruction of that provision. The concern of s 12CB(2)(b) was not, in its primary operation, with the substantive content of a condition with which a consumer was required to comply but rather with conduct on the part of the supplier as a result of which the consumer was required to comply with that condition. Section 12CB(2)(b) was not enlivened, and therefore raised no question about whether or not a condition with which a consumer was required to comply was reasonably necessary for the protection of the legitimate interests of the supplier, unless a requirement on the part of the consumer to comply with a condition was brought about by conduct on the part of the supplier.

192 We have not overlooked the fact that unconscionable conduct under s 12CB of the ASIC Act is not restricted by the constraints that may exist under the unwritten law. It is something more than conduct which may be considered unfair and all the relevant circumstances must be considered. That includes the matters listed in the statute. Some of those matters may not be relevant in a particular case and not all of the matters may point to the same conclusions. Features such as dishonestly, trickery, predatory or overbearing behaviour, choice or the absence of choice, disadvantage, vulnerability and exploitation all remain relevant matters. The Court is required to evaluate the conduct by reference to the relevant principles. The judgment does not involve a discretionary judgment to which the principles in *House v The King* (1936) 55 CLR 499 are applied on appeal.

193 Before leaving this section of our reasons, it is convenient to address two submissions of the appellant. Although it is not entirely clear, the appellant seemed to submit that the absence of a predatory state of mind was decisive against a finding of unconscionable conduct. He relied on the decision in *Kakavas v Crown Melbourne Limited and Others* (2013) 250 CLR 392 (*Kakavas*). *Kakavas* was a case under the general law and we do not think it dictates the conclusion for which the appellant contends. Again, although it is not entirely clear, the appellant seemed to submit that a high level of moral obloquy was an essential element in a finding of unconscionable conduct. He relied on *Paciocco High Court* at [188] per Gageler J. We reject that submission. Moral obloquy has a role to play, but it is not to be used as a substitute for the statutory words. That is the effect of authority binding on this Court (*Paciocco Full Court* at [262] per Allsop CJ).

THE GROUNDS OF APPEAL

194 There are 14 grounds of appeal. Grounds 12-14 raise a challenge to the primary judge's conclusion that the appellant had contravened s 29(1) of the National Credit Act and we will deal with those grounds first.

195 Grounds 10-11 raise a challenge to the scope of the injunction granted by the primary judge, assuming his conclusion that the appellant had engaged in unconscionable conduct stands. We will deal with that last.

196 Grounds 1-9 raise a challenge to the primary judge's conclusion that the appellant had engaged in unconscionable conduct. The grounds raise a number of specific errors and then in Grounds 4 and 9, there is a general challenge to the primary judge's evaluation of the conduct as unconscionable. With respect to Grounds 4 and 9, the appellant submits that, although there are both advantages and disadvantages in his book-up system, the conduct does not rise to the level of unconscionable conduct. In many respects these grounds lie at the heart of the appeal. We will deal with the grounds raising specific errors first and then Grounds 4 and 9.

Grounds 12–14

197 In Grounds 12, 13 and 14 of the appellant's Notice of Appeal, he raises two matters. First, he contends that the purchase of second-hand motor vehicles under the book-up system did not involve the payment of the purchase price by instalments within s 11(1)(b) of the National Credit Code because the payments were not of pre-determined amounts payable at pre-determined times (Ground 12). Secondly, he contends that such transactions did not involve a charge for the provision of credit within s 5(1)(c) of the National Credit Code.

198 The appellant submits that the relevant contracts did not involve a purchase price payable by instalments because book-up was inconsistent with the "very rationale of defining 'instalments'". An instalment required a pre-definition of the amount which must be paid by the creditor. Identifying the amount of the instalments and the time at which they are to be paid meant that circumstances in which a failure to pay amounted to a breach of contract were identified. By contrast, book-up is controlled by the creditor (i.e., the appellant) who uses the key card to repay himself. Those repayments are not instalments.

199 In response, ASIC in essence relied on the reasoning of the primary judge.

200 The appellant submits that the relevant contracts did not involve a charge for the provision of credit within s 5(1)(c) of the National Credit Code. The sale of the second-hand vehicles under the book-up system were at or below market price and the case is a very different one from *Walker v Consumer, Trader and Tenancy Tribunal of New South Wales* [2013] NSWSC 1432 (*Walker*). The substance of the transaction in this case (so it was submitted) was that

the appellant was paying an implicit fee to cash paying customers (an economic equivalent to a credit default premium to an insurer of another's credit risk) in order to avoid the risk of default. The consideration moved from the appellant, not to him. Another way of putting the submission is that the appropriate characterisation of the transaction was the conferral of a benefit on the customer by the sale of a vehicle at less than its market value for a cash sale, rather than the loading of a charge for credit in the price of a vehicle as a hidden extra cost by selling it for more than market value.

201 In response, ASIC submitted that the primary judge did not make a finding that the appellant sold the vehicles at or below market value. The primary judge did no more than summarise the appellant's evidence and said that the appellant *may* adjust his figure so that it is little less than the prices of his competitors (emphasis added). In any event, reference to market value is not the critical consideration. The critical consideration is whether there is a charge for the provision of credit and the fact that there is such a charge is established by the circumstance that a purchaser on book-up paid more for a vehicle than would be paid by a purchaser of the same vehicle who paid cash. *Walker*, which involved a "concealed amount" in the sale price of a vehicle in that that price exceeded the retail market value of the vehicle, is no more than one example of a charge for providing credit (see *Walker* at [81], [82], [104] and [201]).

202 In our opinion, the purchase of second-hand motor vehicles under the book-up system fell within the terms of s 11 of the National Credit Code. In large measure, we agree with the reasons given by the primary judge for reaching that conclusion. It was not easy to come to grips with the appellant's submission to the contrary. It seemed to focus on breach and be to the effect that if a court could not identify a breach involving a non-payment of a particular amount at a particular time, then the purchase price was not payable by instalments. The parties in this case contemplated payment of the purchase price in parts over a period of time and neither party suggested that these contracts were void for uncertainty. The beneficial purpose of the legislation supports the broader construction as there is every reason to think the National Credit Act and National Credit Code were to apply to a contract where the obligations to pay are less precisely defined as much as they apply to a contract where they are precisely defined.

203 This is sufficient to dispose of the appellant's challenge to the declaration that he had contravened s 29(1) of the National Credit Act. In case we are wrong about s 11 of the National Credit Code, we will consider the submission that, aside from s 11, the primary

judge erred in concluding that there was a charge for the provision of credit within s 5(1)(c) of the National Credit Code.

204 Two matters should be noted at the outset. First, by reason of s 13 of the National Credit Code, the onus as to matters of fact concerning whether the National Credit Code applies is and was on the appellant. Secondly, although market value is not relevant to the application of s 11 because the case fell within paragraph (a) of the definition of cash price, the appellant contends that it is relevant in considering the application of s 5(1)(c) aside from s 11. A question at the outset is whether the appellant has proved that he sold at or below market value. The appellant points to the primary judge's statements in paragraphs 135 and 136 of his reasons (set out above at [50]). They are not expressed as findings and, in any event, it is said that he *may* adjust the figure. We are disposed to think that the primary judge accepted this evidence because he did accept some of the appellant's evidence and in those cases where he did not, he made that very clear.

205 The problem for the appellant's argument is that he undoubtedly provided credit to the customers involved in the book-up system because the payment of a debt was deferred and, if the matter is viewed objectively, it is difficult to avoid the conclusion that the difference between the amount paid in cash and the amount paid under the book-up system where the payment of the debt is deferred, is a charge for deferring the payment of the debt. It is difficult to accept that the result would be any different depending on the thought processes of the seller. We would dismiss the challenge in Grounds 12-14 of the Notice of Appeal.

Ground 2

206 In Ground 2 of the Notice of Appeal, the appellant contends that the primary judge erred in concluding that the appellant's conduct was unconscionable because, in addition to relying on matters which had been pleaded, he relied on matters which had not been pleaded. In his submissions, the appellant contended this case involved pecuniary penalties and ASIC was required to particularise and prove its case, having regard to the gravity of the allegations it made (s 140 *Evidence Act 1995* (Cth); *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-363 per Dixon J (as his Honour then was) at [13]). The appellant pointed to various steps and stages of the trial where he sought particulars of ASIC's case and made it clear that he sought to hold ASIC to the particulars which it had provided. He also suggested that counsel for ASIC made it clear that ASIC did not seek to go beyond its pleadings. We have read the passage to which the appellant referred. Counsel for ASIC seems to make that point,

but subject to the further point that ASIC is not bound to accept the correctness or accuracy of an issue introduced by the appellant.

207 The first matter which the appellant contended was not pleaded was that the credit provided by the appellant was expensive. As we have already explained, this finding relates only to the sale of the second-hand motor vehicles.

208 ASIC did not plead as a particular of unconscionable conduct that the credit provided by the appellant was expensive. However, the appellant pleaded in his Defence that the store credit which he provided was without any requirement to pay interest or any other charge (paragraphs 20.3 and 21.2).

209 Furthermore, Mr Paul Jorgensen, a forensic accountant, called by the appellant was asked to reconstruct the appellant's records and (among other tasks) to provide an opinion on the interest and other charges which a commercial credit provider would charge four of the five customers identified in ASIC's secondary case. It was in the context of discussing Mr Jorgensen's evidence that the primary judge made the findings that formed the basis of his conclusion that the appellant was providing credit of an expensive kind. That can be seen from the following passage in the primary judge's reasons (at [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.

210 The primary judge relied on his finding that the credit provided by the appellant was expensive in his consideration of s 12CC(1)(e) of the ASIC Act, in his final conclusions and it is paragraph 2.7 in the declaration. It seems to us that it was an issue at trial (*Leotta v Public Transport Commission (NSW)* (1976) 9 ALR 437 at 446; *Dare v Pulham* (1982) 148 CLR 658 at 664) and that it would be artificial to say the nature of the credit if found to be inexpensive was an issue at the trial, but not so if the credit was found to be expensive.

211 The second matter which the appellant contended was not pleaded was that the credit provided by the appellant was provided on a discriminatory basis. This matter was not pleaded by ASIC. It was referred to by the primary judge in his consideration of s 12CC(1)(f) of the ASIC Act, but not in his conclusion and it is not in the declaration. We

are disposed to think that it needed to be pleaded before it could be relied upon, but that, in fact, it was a relatively insignificant consideration.

212 The third matter which the appellant contended was not pleaded was that there was a lack of documentation recording book-up arrangements, that the recording of book-up transactions was often illegibly recorded and the auditing of books was not feasible.

213 ASIC did not plead this matter as a particular of unconscionable conduct.

214 The primary judge referred to this matter in his consideration of s 12CC(1)(c) of the ASIC Act and in his conclusion when he said that the way in which the appellant implemented his book-up system added "to the strong impression of unconscionability" (at [623]). A related topic of providing proper accounts to customers is referred to in the declaration in paragraph 2.5.

215 We have already described the manner in which the appellant recorded transactions involving the purchase of second-hand motor vehicles, first by the use of 365 day diaries and secondly, in 2014, by the use of ledger cards. ASIC adduced evidence from a senior investigator employed by it, Mr Michael McCabe. Mr McCabe is a certified practising accountant and he analysed transactions between the appellant and eight of his customers, including the five customers who formed the basis of ASIC's secondary case. Mr McCabe had the following records:

(1) the appellant's book-up diaries;

(2) the customers' bank statements; and

(3) the merchant reports prepared by the appellant's bank regarding his use of the EFTPOS terminals at Nobbys to access the customers' accounts.

216 Mr McCabe found that he could not decipher a number of entries in the book-up diaries and that there were a number of cases where he could not match entries in the bank statements and entries in the book-up diaries.

217 As we have said, the appellant adduced evidence from Mr Jorgensen and one of the tasks he was asked to perform was to detail the transactions concerning four of the five customers identified as part of ASIC's secondary case. Unlike Mr McCabe, Mr Jorgensen and his staff had the cooperation of the appellant.

218 Mr Jorgensen was asked whether, on the assumption that schedules prepared by Mr McCabe recorded accurately information from the bank statements of the four customers, the book-up diaries permitted an accurate record to be kept of amounts advanced to the customers. Mr Jorgensen said that, subject to some minor errors, the answer to this question was in the affirmative. The primary judge rejected this evidence for reasons we do not need to set out. He said that Mr Jorgensen should have recognised that the appellant's record keeping was inadequate (at [476]). The primary judge identified other aspects of inadequate record keeping in relation to the book-up system which we will identify, but do not need to discuss in detail: no itemised receipts in relation to the purchase of goods between 1 July 2010 to 31 October 2012; no or inadequate recording of cases where a customer had taken cash; no records in relation to D who used book-up but had never purchased a second-hand motor vehicle from the appellant; and unexplained questions in relation to the sale of second-hand motor vehicles to B.

219 In our opinion, the adequacy of the appellant's record keeping was an issue well and truly canvassed at trial and the primary judge was entitled to take his conclusions on that topic into account in considering ASIC's case of unconscionable conduct.

220 The fourth matter which the appellant contended was not pleaded was that the appellant had not complied with the National Credit Code. It was certainly alleged by ASIC that the appellant had contravened s 29(1) of the National Credit Act. However, the appellant contends that the primary judge went further and, in assessing whether the appellant's conduct was unconscionable, he took into account the fact that the appellant's non-compliance with the National Credit Code meant that the customers did not have "the protections which the Code seeks to achieve". Putting to one side the alleged contravention of s 29(1) of the National Credit Act, non-compliance with other provisions of the National Credit Act and National Credit Code was not pleaded by ASIC as a particular of unconscionable conduct.

221 The primary judge referred to the matter as one of the other relevant matters and it was the subject of an observation he made in his conclusions. It is not referred to in the declaration. We are disposed to think that the allegation should have been pleaded, although, at the same time, it was not central to the primary judge's conclusion that unconscionable conduct was made out.

222 The fifth matter which the appellant contended had not been pleaded was that there had been withdrawals from customers' accounts which in some instances were in excess of those withdrawals which were authorised. The matter was not pleaded by ASIC as a particular of unconscionable conduct. The primary judge found that there were unauthorised withdrawals on several occasions (at [48]), on occasion by mistake the appellant took more than he was entitled to and he reimbursed the customer when he realised that (at [63]), the appellant took advantage of a "glitch" in CBA's cash transfer system on 14 December 2010 (at [92]-[97]) and that he took money out more frequently or in greater amounts than he was authorised in the case of Ms Pearson, Mr Pearson, Mr Doolan and Mr Clothier. The primary judge took the unauthorised withdrawals into account when addressing whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customers (s 12CC(1)(d)) (at [549]-[550]) and whether the appellant acted in good faith (s 12CC(1)(b)) (at [557]-[559]). It is in the declaration in paragraph 2.3 where there is a reference to "some instances" and "some customers". We are disposed to think that this matter should have been pleaded. More fundamentally, it is difficult to see how it was part of a system of conduct or pattern of behaviour. Periodic conduct could meet that description, but we do not think that the primary judge's findings establish that in this case.

223 The sixth matter which the appellant contended had not been pleaded were other repayment arrangements the appellant and his customers could have used, including Centrepay, direct debit, payday payments, employer deductions which rendered the key card security not reasonably necessary to protect the appellant's legitimate interest.

224 Other repayment arrangements were not pleaded by ASIC as a particular of unconscionable conduct. The primary judge relied on these matters when addressing s 12CC(1)(b) and in his conclusions. We do not think that these matters needed to be pleaded. Most of them are obvious (e.g., payday arrangements) or well-known (e.g., direct debit or employer deductions). Anyone advising the appellant would have been aware of s 12CC(1)(b) and the question it posed. It was the appellant himself who relied on the related matter of the availability of loans by Centrelink (see paragraph 16.6.5 of the Defence).

225 The final matter which the appellant contended was not pleaded was that the appellant imposed a charge for the provision of purchase orders. To even describe this complaint as technical would be to endow it with a respectability it does not deserve. ASIC pleaded the tying effect of the appellant's conduct and one of the appellant's responses was to refer to the

availability of purchase orders (see paragraph 16.6.3 of the Defence). Whether there was a charge associated with the purchase orders was plainly within the issues for trial.

Ground 1

226 This ground is directed at the primary judge's finding that the credit provided by the appellant was expensive. We have already explained the reasons we consider the primary judge was entitled to consider this matter and the reasons we consider his finding was restricted to transactions involving second-hand motor vehicles. In addition, we have already explained the reasons we consider there is a charge for credit under the National Credit Act and National Credit Code. We are not able to detect any error in the primary judge's method of calculating the amount of credit.

227 In all the circumstances, Ground 1 of the Notice of Appeal is rejected.

Ground 8

228 In Ground 8 of the Notice of Appeal, the appellant challenges the primary judge's conclusion that the Nobbys' customers were vulnerable because of a low level of financial literacy. The appellant points out that only six Anangu gave evidence and a finding of special disadvantage because of a low level of financial literacy was not open with respect to the 117 Nobbys' customers. Such a finding requires an inference to be drawn from the evidence of the witnesses and such general evidence as may be relevant.

229 The appellant submitted that the primary judge was correct to conclude as follows:

(1) That the Court could not draw inferences as to the net income, asset position and financial literacy of the 117 Nobbys' customers from the characteristics of Anangu generally, or even from the characteristics of those Anangu who reside in Mimili and Indulkana, unless the Court is able to be confident that the subgroup comprising the 117 customers was truly representative and, in this case, one could not be confident that that was the case; and

(2) Among other reasons, the smallness of the numbers and sample selection bias meant that no valid inferences as to the characteristics of Nobbys' customers generally could be drawn from the circumstances of A to D.

230 The appellant submitted that despite the conclusion in paragraph 1, which the appellant submitted was correct, the primary judge had proceeded to make that very error (at [415]).

231 We do not think that the primary judge made the error alleged when regard is had to his reasoning in paragraphs 415 and 417. These paragraphs are set out above (at [106] and [108]).

232 We reject the appellant's argument. The primary judge had evidence which supported his conclusion that most of the Nobbys' customers had low levels of financial literacy. The appellant's own evidence was that half of his customers could not read and more than half could not add up (at [283]). Furthermore, it was reasonable for the primary judge to conclude that even in the case of those who could read, their ability to do so was likely to be compromised. The primary judge also referred to the evidence of remoteness, his observations on the view, the evidence of Messrs Stauner and Kilpatrick and the evidence of the appellant himself. Of course, each item of evidence might be limited in effect. For example, it could be said that by virtue of his position, Mr Stauner was most likely dealing with the most vulnerable. Nevertheless, the primary judge was entitled to consider the accumulated force of the evidence and when that is done, we do not think that there is any error in the finding which he made. Ground 8 of the Notice of Appeal is rejected.

Ground 5 and 6

233 The challenge in Grounds 5 and 6 is that the primary judge erred in not giving sufficient weight to the mitigating effect of the appellant's practice of issuing purchase orders. The appellant submitted that this was directly relevant to key aspects of the reasons the primary judge held that the appellant's conduct was unconscionable.

234 The essence of the primary judge's reasoning is as follows: the Nobbys' customers are a vulnerable group in the community and the extent of their vulnerability or disadvantage is shown by their willingness to hand over their debit cards and PINs; there are some benefits to customers in the book-up system, but they are not to be overstated. For example, the benefits are qualified or to be seen in light of the fact that the appellant retains discretionary control in terms of the goods and services provided to customers. The detriment in the end is the tying effect of the conduct. The customers are tied to Nobbys despite the inconvenience in some cases of having to continue shopping there.

235 The primary judge did refer to the ameliorating effect of purchase orders, but said that these effects were limited by the fact that there is a $10 charge for each purchase order issued and, in any event, they are not available at "several community stores in the APY Lands" (at [614]).

236 This conclusion is said by the appellant to involve error in that the primary judge overlooked the fact that two of the stores which will not accept purchase orders from the appellant – the Kaltjiti Anangu Store and Amata Anangu Store – will not do so pending the resolution of this dispute between the appellant and ASIC (see the letter comprising exhibit A1). The primary judge's erroneous finding (according to the appellant) is at [85]. The primary judge referred to the appellant's evidence that, with the exception of the store at Mimili, he is willing to send purchase orders to all community stores in the APY Lands.

237 The appellant submitted that the purchase orders are significant, not only because they are reasonably substantial in number – the appellant issued 425 purchase orders between 6 April 2011 and 31 October 2012 – but also because they negate or tend to negate a "predatory state of mind" (*Kakavas* at [161]).

238 The primary judge did not refer to the reasons the two stores identified above ceased accepting purchase orders from Nobbys. ASIC's response to the appellant's submission was largely to "confess and avoid". ASIC submitted that even if right, "a factual finding to this effect would not have influenced the ultimate multifactorial outcome". We think that submission is correct in light of the fact the primary judge's conclusion was that purchase orders were not available in any event "at several of the community stores in the APY Lands" (at [614]).

Ground 3

239 There seems to be only one issue raised in Ground 3 in the Notice of Appeal, but the way the submission was developed raised further issues.

240 There were three key aspects to the book-up system conducted by the appellant. They were first, the provision of the debit card by the customer to the appellant. Secondly, the provision of the PIN by the customer to the appellant and finally, the withdrawal of all or nearly all of the money in the account on the day the periodic payment was made into the account. The issue raised in Ground 3 is whether the primary judge erred in not finding that the Withdrawal Conduct was authorised, or, in the alternative, ASIC had not proved that it was not authorised.

241 The primary judge did not, as far as we can see, make an express finding that the Withdrawal Conduct was authorised. He had evidence from some of the Anangu witnesses that they had authorised the appellant to take the whole of the monies in their accounts or what they were

owed (at [316] and [366]). On the other hand, he did not make a finding that an express feature of the book-up system was that the Withdrawal Conduct was unauthorised. In our opinion, the fact that he found that on more than one occasion the appellant had exceeded his authority in terms of the amount or timing of withdrawals (at [557]) supports the conclusion that he did not find that it was part of the system of conduct or pattern of behaviour that the Withdrawal Conduct was not authorised.

242 The way in which the submissions were developed, the gravamen of the challenge in Ground 3 is that the primary judge erred in not finding that the book-up system, including the Withdrawal Conduct, was adopted at least in part to avoid the consequences of the practice of demand sharing or humbugging. If that was established, then it would reduce the significance of the primary judge's criticism of the Withdrawal Conduct. As we have previously said, the primary judge found no objective justification for the Withdrawal Conduct had been established on the evidence (at [613]).

243 We should identify the difference between a finding that individuals entered into book-up to avoid demand sharing and a finding that book-up has the effect of eliminating, to some degree at least, the practice of demand sharing. We take the primary judge to be addressing the latter matter. That is understandable as he did not hear evidence from the 117 Nobbys' customers as to each individual's reasons for entering into the book-up system.

244 The appellant referred this Court to various passages in Dr Martin's evidence in support of his submission. As will become clear, we have concluded that the appellant's conduct was not unconscionable and we would give the effect of book-up in avoiding some of the effects of demand sharing a more prominent place in the relevant matters than the primary judge. However, at present, all we are addressing is whether the primary judge overlooked evidence or failed to take a relevant matter into account. In that respect, we do not think that the primary judge erred.

245 First, the appellant referred to the fact that a number of Anangu did not want to speak to Dr Martin because they wished to continue using book-up and witness AH's evidence that he thought book-up was a good idea. The primary judge took these matters into account when he said that the Nobbys' customers "must have considered it appropriate to their needs".

246 Secondly, the appellant referred to evidence that the Anangu tend to dissipate money as soon as it comes into their possession. The primary judge took boom and bust expenditure into account in his discussion of improvident spending.

247 Thirdly, the appellant referred to evidence that demand sharing is part of a foundational principle of reciprocity, exchange and sharing within a hunter gatherer society and extended beyond money and the nuclear family. The primary judge was aware of these matters (at [575], [576] and [584]).

248 Fourthly, the appellant referred to evidence that demanding, as part of demand sharing, is pervasive on the APY Lands. We do not propose to summarise that evidence because we think that the primary judge found that the practice of demand sharing was common. The primary judge referred to the evidence of Mr Stauner (at [576]) and Mr Kilpatrick (at [577]). He also referred to the evidence of the Anangu witnesses (at [582]-[583]).

249 Fifthly, the appellant pointed to the fact that in a demand sharing environment, people will adopt strategies to avoid the obligation implicit in demand sharing. There are advantages in shopping at Mintabie. Again, we think that the primary judge took these matters into account (at [582]-[583]).

250 Sixthly, the appellant referred to evidence that Dr Martin thought that it was reasonable to come to the view that Nobbys' customers may regard leaving their key cards at Nobbys as part of a strategy to avoid the consequence of demand sharing. The primary judge was aware of this evidence and referred to it in his reasons (at [578]).

251 Seventhly, the appellant submitted that the primary judge should have accepted the appellant's evidence about the customers' reasons for participating in the book-up system. The primary judge was aware of the evidence and gave his reasons for rejecting it (at [579]-[580]). We do not think that the primary judge erred in refusing to accept the appellant's evidence as to the reasons the Nobbys' customers gave for their involvement in the book-up system as including a desire to avoid the consequences of demand sharing. The primary judge accepted parts of the appellant's evidence. He rejected other important parts of his evidence. He was entitled to do that and no basis to interfere with his findings as to the appellant's credibility and reliability has been established (*Robinson Helicopter Company Incorporated v McDermott* [2016] HCA 22; (2016) 331 ALR 550 at [43]).

252 Before leaving this section of our reasons, we note that it is not entirely clear how much weight the primary judge put on the benefits of book-up in terms of avoiding the consequences of demand sharing. At one point, he said that the advantages should not be overstated (at [585]). Later in his final conclusions, he said (at [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.

In fairness, a little later he referred to "some benefits to customers" (at [620]) and that may have been a reference to, inter alia, benefits in terms of demand sharing.

Ground 7

253 The essence of Ground 7 of the Notice of Appeal is a contention by the appellant that the primary judge erred in finding that the appellant was indifferent to whether his customers could afford the commitment which they were undertaking, having regard to their financial position generally (at [456]). This matter formed part of the declaration (paragraph 2.4), but was not one of the critical matters identified by counsel for ASIC.

254 As we understood the appellant's submission, it was not that he made inquiries of a customer relevant to affordability or turned his mind to that matter. It was that affordability really was not an issue because of the way he conducted his book-up system. There were no on-going fees or charges and the book-up debt would be paid off when the customer was in a position to do so and the customer would be provided with staple products in the meantime. In our opinion, the matters identified by the appellant mean that this matter is of far less significance than the other matters raised by the evidence.

Grounds 4 and 9

255 The essence of these grounds was as follows.

256 First, as found by the primary judge (at [425] and [588]), the Nobbys' customers understood the basic terms of the book-up system operated by the appellant and voluntarily participated in it.

257 Secondly, there were many advantages associated with the book-up system and the primary judge never stood back and considered the mitigating or ameliorating factors as a whole. The advantages included the following:

(1) It was a service in demand (at [588]) in circumstances where mainstream banking services were not in practical terms available;

(2) A book-up system was provided "fee free and interest free". It is convenient to note at this point that we do not accept this contention as being completely accurate. For reasons we will give, a charge was made to the provision of credit in relation to the sale and purchase of motor vehicles. In addition, there was a fee for the provision of purchase orders (at [78]-[85]). Furthermore, on occasions, there was a fee for the provision of cash. As to this matter, the primary judge made findings and nothing has been said to suggest that he erred (at [433]-[439]);

(3) The book-up system assisted Anangu to avoid demand sharing and the boom and bust cycle (at [565]-[585]);

(4) The book-up system was sufficiently simple for both the appellant (who was not himself a sophisticated person) and Anangu to understand it;

(5) The Anangu never ran out of the essentials of life (at [453]);

(6) There were few complaints about the book-up system (at [586]-[593]);

(7) The Anangu could always shop down the road at the two competitor stores;

(8) The Anangu regard travelling to Nobbys not as a burden, but as a culturally fulfilling experience and a break from the pressures of life on the APY Lands. There was some evidence to this effect (exhibit R59) and the primary judge noted (without making a finding) evidence from Dr Martin also broadly to this effect (at [245]);

(9) The Anangu could obtain an increase in their standard of living by being able to purchase substantial items such as motor vehicles or white goods they would otherwise have significant difficulty in saving for;

(10) Even if (contrary to the appellant's submission) the sale and purchase of cars involved a credit charge, there is no evidence that the cars were sold at above market value and such evidence as there is suggests that they were not. ASIC did not attempt to prove that the cars were sold at a price above market value. It cannot be said that, in the circumstances, the transactions involving the sale and purchase of cars were unfair;

(11) The appellant would on occasions return a debit card to a customer who wished to travel to, for example, Alice Springs, Port Augusta or Adelaide even where the customer's account with the appellant was in debit at the time (at [67], [454] and [554]);

(12) It was open to a customer not to return his or her card after travelling and some customers did not return their cards (at [67] and [454]). In addition, customers could cancel their debit cards or redirect their periodic payments to another account and some customers did one or other of these things (at [36], [89], [268], [371], [511] and [530]); and

(13) Market forces were a check on the possibility of the appellant acting in a predatory or exploitative way. Book-up on similar terms was available in at least one other store in Mintabie (at [508]).

258 In developing these grounds, the appellant referred to Mr Renouf's report and Dr Martin's evidence about book-up and the effects on demand sharing and boom and bust expenditure. He submitted that the primary judge placed insufficient weight on the cultural practices of Anangu and the circumstances in which they lived. The appellant accepted that there were disadvantages as well as advantages to the book-up system, but submitted that a fair weighing of the advantages and disadvantages should not lead to the conclusion that the conduct was unconscionable.

259 There can be no doubt that all of the circumstances of the appellant's book-up system must be considered and there are advantages and disadvantages in the system from the perspective of the Nobbys' customers. However, counsel for ASIC was correct to identify as essential to the conduct which is alleged to be unconscionable, the vulnerability of the Nobbys' customers, the provision of the debit card and PIN, the Withdrawal Conduct and the consequences to the Nobbys' customers of the book-up system. There are other matters which, while no doubt relevant, do not lie at the heart of whether the conduct was or was not unconscionable. For example, it does not go to the heart of the evaluation process that monies were withdrawn at 1.00 am as distinct from during business hours. The same might be said about the fact that on occasions (and not part of a system of conduct or pattern of behaviour) there were unauthorised withdrawals by the appellant.

260 The primary judge's careful evaluation of the relevant considerations is to be given due weight. However, even giving due weight to his evaluation, we consider, with respect, that it was erroneous. Our reasons, in no particular order, for reaching that conclusion are as follows.

261 First, it seems to us that it is relevant that the book-up system of the appellant is neither a recent nor unique system. Book-up in its various forms has been practised for some time in

regional and remote areas in Australia. The appellant's book-up system is not unique in its features or "out of the ordinary". For example, the primary judge found the other two stores in Mintabie had a similar book-up system to that of the appellant (at [508]).

262 Secondly, the appellant's book-up system had advantages to the Nobbys' customers in terms of alleviating the disadvantages associated with demand sharing and boom and bust expenditure. These advantages are difficult to quantify and weigh, but on the evidence, they are undoubtedly present.

263 Thirdly, ASIC did not contend and the primary judge did not find that the appellant had adopted forms of "undue influence or exerted undue influence" (at [547]).

264 Fourthly, as the primary judge found, the appellant did not make dishonest use of the debit cards or PINs and, although he was critical of the appellant's record keeping, he noted that there was no suggestion that the appellant maintained his records dishonestly.

265 Fifthly, and significantly, despite the disadvantages of the Nobbys' customers, including low levels of financial literacy, they understood the basic elements of the appellant's book-up system, including the Withdrawal Conduct.

266 Sixthly, and related to the previous matter, the primary judge found that the Nobbys' customers voluntarily entered into the book-up arrangements. In our opinion, the fact that the Nobbys' customers understood the basic elements of the book-up arrangements and voluntarily entered into them is a powerful consideration against a finding of unconscionable conduct, particularly (as we will explain in the next point) in the absence of predatory conduct or exploitation.

267 Finally, we are not satisfied that the appellant's conduct was predatory in the relevant sense. The primary judge made reference to predation at one point in his reasons when he said that the appellant's submission that there was no predation was "contestable" and that certain conduct is a form of predation (at [609]). The conduct he identified and our comments with respect to it are as follows:

(1) The appellant's requirement that he have access to the whole of the customers' income. There is no clear indication of how, in practical terms, this disadvantages the customers over and above holding their debit cards and PINs;

(2) The appellant's conduct on the occasion of the CBA "glitch" on 14 December 2010. This conduct does not reflect well on the appellant, but we do not see it as part of the system of conduct or pattern of behaviour;

(3) There was a lack of disclosure of the high credit charges. This was not the gravamen of ASIC's unconscionable conduct case. There may be an argument here that it is also relevant that they were receiving the motor vehicles at or below market value; and

(4) The tying of customers to Nobbys and the charge for purchase orders and, on occasions, for cash was a form of predation. We deal with this in the context of the next point which relates to exploitation.

268 As to exploitation, in what in many respects is a critical passage in terms of his Honour's conclusions (at [620]), he said the advantages to the appellant of the tying effect of the conduct constituted a "form of exploitation" of his customers. With respect, we think that is an error and the conduct is neither predatory nor does it involve exploitation in the relevant sense. As we have said, we accept that the Nobbys' customers were vulnerable in the sense pleaded by ASIC (at [67] above), but they understood the book-up arrangements and voluntarily entered into them. They knew they could bring those arrangements to an end and some did. We accept that the tying effect of the conduct was advantageous to the appellant, but there were also advantages to the Nobbys' customers.

269 The matters that can be put on the other side must be acknowledged, but in view of the matters we have identified, we do not think that the appellant's conduct can be characterised as unconscionable.

Ground 10 and 11

270 We turn now to deal with Grounds 10 and 11 of the Notice of Appeal. In view of our earlier conclusions, they do not strictly arise. However, we will deal with them in case we are wrong in concluding that the appellant did not engage in unconscionable conduct. We do so on the assumption that the primary judge's findings and conclusions are correct.

271 The primary judge delivered his substantial reasons and invited the parties to make submissions about the final orders (other than as to penalty and costs) which should be made. The primary judge made the following declarations:

1. In the period between 1 July 2011 and 31 October 2012 in respect of 92

customers, and continuing until at least April 2014, the Respondent contravened s 29(1) of the National Consumer Credit Protection Act 2009 (Cth) (**National Credit Act**) by engaging in credit activity within the meaning of s 6(1) of the National Credit Act when selling vehicles by way of Book-up without holding a licence to engage in that credit activity.

2. (set out above at [173]).

272 The terms of the first declaration were agreed and there was a relatively minor dispute about the terms of the second declaration. It is not necessary to identify the terms of that dispute about the second declaration because it was resolved by the primary judge and his resolution of the dispute is not challenged on the appeal.

273 There was a dispute between the appellant and ASIC about the terms of the injunction to be granted under s 12GD(1) of the ASIC Act. The primary judge resolved that dispute in favour of ASIC and his decision in that respect is challenged by the appellant (*Australian Securities and Investments Commission v Kobelt* [2016] FCA 1561).

274 The injunction sought by ASIC was substantially in the terms of the injunction actually granted by the Court which was as follows:

3. Pursuant to s 12GD(1) of the ASIC Act:

3.1 the Respondent (whether by himself or his agents) be permanently restrained, and an injunction is hereby granted restraining him, whether personally or by his employees or agents from receiving and retaining:

3.1.1 any customer's debit card, or

3.1.2 any customer's debit card personal identification number.

3.2 the Respondent is:

3.2.1 to cease forthwith (whether by himself, his employees or his agents) using customers' debit cards, which as at the date of this order are in his possession, to withdraw funds from the customers' accounts;

3.2.2 by no later than 10 am on Thursday 15 December 2016, to deliver any customers' debit cards which remain in his possession to the Australian Securities and Investments Commission (**ASIC**) employees who attend Nobby's Mintabie General Store at that time and to destroy any records in his (or his employees' or agents') possession of customers' personal identification numbers.

3.2.3 during the period of 60 days commencing on 15 December 2016, to use his best endeavours to inform any customer whose debit card has been returned to ASIC and who either attends at Nobbys Mintabie General Store or telephones the Nobbys Mintabie General Store that the customer's card has

> been returned to ASIC and that they should contact Money Mob in their community or ASIC's Indigenous Helpline for advice about their debit card.

275 The appellant suggested an injunction which reflected the system of conduct declared to be unconscionable by the Court's earlier order (i.e., the second declaration).

276 The primary judge considered that there was force in ASIC's criticisms of an injunction that identified a system that had all of the features to which the Court's second declaration refers. Such an injunction would lack the precision and certainty of an injunction which made clear to those bound by it precisely what they were permitted to do and were restrained from doing. It lacks certainty because of its reference to the declaration by which a number of aspects of the appellant's conduct were found to warrant the characterisation that this conduct was unconscionable and it would create difficulties of enforcement. The primary judge said that it would be inappropriate to frame an injunction by reference to all aspects of the appellant's conduct which were found to contribute to the unconscionability of the conduct. His Honour said (at [10]):

> … To do so would mean that all of those aspects were essential to that finding, in the sense that without those aspects, the finding would not have been made. Plainly, some aspects were at the heart of the conduct found to be unconscionable and others were more peripheral. …

277 We take his Honour to mean that, although all eight matters were part of his conclusion of unconscionable conduct, a conclusion of unconscionable conduct would have been made in the absence of peripheral matters.

278 The primary judge accepted that an injunction should be as specific as possible, but noted that the appellant had not advanced an alternative formulation of an injunction with the desired degree of specificity. Significantly, he noted that it would have been difficult for the appellant to do so in the manner contemplated by him. His Honour later identified the matters in paragraphs 2.1 and 2.2 as going to the heart of the matter and we think it can be inferred from the matter discussed next that the matter in paragraph 2.8, and possibly the matter in paragraph 2.6, were also considered by his Honour as going to the heart of the matter.

279 ASIC submitted, and the primary judge accepted, that the injunction it proposed went beyond "the precise limits of the conduct found by the Court to be unlawful" (at [12]). This was because it would apply to all of the debit cards held by the appellant "irrespective of the literacy, education and general awareness of the customers who provided the debit cards and

PINs, and whether or not they provided the debit cards to Mr Kobelt in circumstances in which they were fully informed and fully aware of the implications in doing so" (at [12]).

280 The primary judge said that it was appropriate to make the injunction sought by ASIC despite the fact that it went beyond the precise limits of the conduct found by the Court to be unlawful for five reasons, four of which went to the general appropriateness of the injunction and one to the particular problem.

281 First, the appellant admitted at the time of the hearing dealing with the final orders that he had continued to withdraw money from some or all of the debit cards which remain in his possession. Secondly, there are relatively few, if any, customers in respect of whom the appellant's conduct would not be characterised as unconscionable. Thirdly, the proposed injunction went to the heart of the unconscionable conduct which was the appellant's conduct in taking the customers' debit cards and PINs and using them in the absence of the customer to withdraw money (paragraphs 2.1 and 2.2). Fourthly, the injunction is expressed in a way which is effective and enforceable, so as to achieve the protection of the customers for which it is designed. Finally, the injunction will not prevent conventional retail activity, namely, customers attending Nobbys and using their debit cards and PINs in a conventional way.

282 The two grounds of appeal which challenge the injunction (Grounds 10 and 11) are put forward as an "alternative challenge" to the final orders made by the Court. As we understand it, that means that they are put forward on the basis that the primary judge's conclusions otherwise stand.

283 Grounds 10 and 11 in the Notice of Appeal are as follows:

> *Alternative Challenge to Orders on 13 December 2016*
>
> 10. Alternatively, the Primary Judge erred in granting an injunction pursuant to section 12GD(1) of the ASIC Act, that restrained the Appellant from engaging in a scope of conduct that included conduct that was not:
>
> 10.1 Unconscionable within the meaning of section 12CB of the ASIC Act; and /or
>
> 10.2 In contravention of section 29 of the *National Consumer Credit Protection Act 2009* (Cth);
>
> (see J[12], of additional reasons of 13 December 2016)
>
> In particular the injunction extended to restraining the Appellant from retaining and using customer's debit cards and personal identification numbers, irrespective of:

10.3 The personal circumstances (including financial literacy) of the customer;

10.4 Whether or not the customer remained indebted to the Appellant;

10.5 Whether or not the customer had voluntarily authorised the Appellant to retain the debit card and personal identification number and withdraw amounts from their account, and the extent of such authorisation;

10.6 The wishes of the customer;

10.7 Whether the retention and use of the debit card and personal identification number to withdraw monies from the customer's account would in all the circumstances be unconscionable or otherwise unlawful.

11. Further and/or alternatively, the Primary Judge erred in granting an injunction pursuant to section 12GD(1) of the ASIC Act, in the terms that he did, by placing in substance an obligation upon the Appellant to draft an alternative form of order that did not restrain otherwise lawful conduct (T26 of 13 December 2016), in default of which he imposed the broader scope of order.

284 The formulation of an appropriate injunction in this matter was no easy matter. An injunction formulated in terms of the eight particulars in the second declaration would not make clear to the appellant the matters he could and could not do and would be almost impossible to enforce effectively. One only has to consider the matter in paragraph 2.8 to reach that conclusion. The problem remains even if the injunction was restricted to the essential matters or matters which went to the heart of the matter according to the primary judge (paragraphs 2.1, 2.2 and 2.8 and possibly paragraph 2.6). The matter in paragraph 2.8 remains an essential matter.

285 We do not think that the primary judge impermissibly reversed the onus of proof in terms of the form of the injunction. He rejected the primary submission, noted that there was no alternative submission and noted significantly (and in our view correctly) that in view of the position the appellant took it would be difficult for him to formulate an alternative form which embodied the required degree of specificity.

286 It was open to the primary judge to grant the injunction that he did and there was no error in his approach. The five reasons he gave supported the order he made. In particular, we think (proceeding on the assumption we identified at the outset of this section) he was entitled to proceed on the basis that there were relatively few, if any, customers falling within the category of customers with respect to which the appellant's conduct would not be unconscionable.

CONCLUSIONS

287 We reject the appellant's challenge to the primary judge's conclusion that he contravened s 29(1) of the National Credit Act.

288 We uphold the appellant's challenge to the primary judge's conclusion that he engaged in unconscionable conduct contrary to s 12CB(1) of the ASIC Act.

289 The appeal must be allowed in part. Provisionally, and subject to hearing from the parties, we think the following orders may be appropriate. With respect to the orders made on 13 December 2016, the orders made in paragraphs 2, 3 and 4 be set aside. The order in paragraph 1 will stand. With respect to the orders made on 13 April 2017, the orders in paragraphs 1, 3 and 4 be set aside. The order in paragraph 2 will stand. The applicant in the proceeding and the respondent on the appeal pay 85% of the costs of the respondent to the proceeding and appellant on the appeal of the proceeding and of the appeal. We will hear from the parties and will adjourn the appeal to a date and time during the week commencing 19 February 2018 for that purpose.

I certify that the preceding two hundred and eighty-nine (289) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Besanko and Gilmour.

Associate: 

Dated: 15 February 2018

REASONS FOR JUDGMENT

WIGNEY J:

290 Mr Lindsay **Kobelt** operated a general store called "Nobby's" in the remote South Australian town of Mintabie. Mintabie is situated within the Anangu Pitjantjatjara Yankunytjatjara (**APY**) Lands, about 1,100 kilometres northwest of Adelaide. Many of Mr Kobelt's customers were Indigenous Australian residents of the APY Lands – the Anangu people. A significant part of Mr Kobelt's business was selling used cars to Anangu customers by means of a rudimentary form of credit known as "book-up". The main issue in this appeal is whether Mr Kobelt's book-up system was unconscionable.

291 The essential elements of the book-up system were largely not in dispute. After paying a small deposit, book-up customers would give Mr Kobelt the debit card for their bank account, together with the personal identification number (**PIN**) which allowed the holder of the debit card to access the bank account. The customer would also tell Mr Kobelt when he or she periodically received money in their bank account, mostly from some form of social security payment. When funds were periodically paid into the customer's bank account, Mr Kobelt would then use the customer's debit card and PIN to withdraw or transfer all, or almost all, of those funds to his bank account. Mr Kobelt applied the withdrawn funds to reduce the customer's indebtedness to him. Because the withdrawal of all the funds in the customer's bank account effectively left him or her with no money for food and the other necessities of life, Mr Kobelt's book-up system also permitted the customer to purchase a certain amount of other goods from the store on credit. Mr Kobelt did not permit the cost of the goods purchased by the customer to exceed 50% of the amount deposited into the account and then withdrawn by Mr Kobelt. The cost of the goods was added to the customer's indebtedness to Mr Kobelt. Thus, the customer had a crude form of running account with Mr Kobelt, secured by their debit card and PIN.

292 While this and similar forms of credit might be considered to be surprising, if not extraordinary, in the suburbs of Adelaide and other towns and cities in mainstream Australia, it was and apparently still is common in remote indigenous communities. Book-up forms of credit have a long history in those communities, and indeed could be said to be deeply embedded in and to flow from aspects of indigenous culture that differ substantially from the norms, values and practices of mainstream Australian society.

293 The Australian Securities and Investments Commission (**ASIC**) commenced proceedings in this Court alleging that, in providing book-up credit, Mr Kobelt contravened s 29(1) of the *National Consumer Credit Protection Act 2009* (Cth) (**National Credit Act**) because he engaged in a credit activity to which that Act applied without a licence authorising him to do so. ASIC also alleged that Mr Kobelt contravened s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) because the book-up system was unconscionable. ASIC initially also alleged that Mr Kobelt's conduct in respect of five specific Anangu book-up customers was unconscionable, however those allegations were ultimately not pressed. The primary judge found that ASIC made out its case and, in a separate and subsequent judgment, made declarations that Mr Kobelt had contravened s 29(1) of the National Credit Act and s 12CB(1) of the ASIC Act, and ordered that Mr Kobelt be restrained from receiving and retaining any customer's debit card or PIN.

294 Mr Kobelt appealed the primary judge's liability judgment (**Judgment**). He challenged the primary judge's findings that he had contravened both s 29(1) of the National Credit Act and s 12CB(1) of the ASIC Act. Mr Kobelt also challenged the terms of the injunction granted by the primary judge. After Mr Kobelt filed his appeal, there was a further hearing before his Honour in relation to the imposition of penalties for the contraventions. His Honour subsequently made penalty orders, however those orders were not the subject of this appeal.

295 While Mr Kobelt's notice of appeal is complex and prolix, in broad terms the appeal raises two critical issues. The first issue is whether, in finding that Mr Kobelt contravened s 29(1) of the National Credit Act, the primary judge erred in finding that Mr Kobelt imposed a charge for providing credit pursuant to the book-up system, either generally or because the total amount payable by a book-up purchaser of a car was payable by instalments and exceeded the cash price of the cars. The second issue was whether the primary judge erred in finding that Mr Kobelt's book-up system was, in all the circumstances, unconscionable. Mr Kobelt contended that the primary judge's evaluation of the circumstances was infected by various incorrect or contradictory factual findings, and that the considerations taken into account by the primary judge went outside ASIC's pleaded systems case.

296 I have had the considerable advantage of reading the reasons to be published by Besanko and Gilmour JJ. I agree with the orders proposed by their Honours. Subject to what follows, by way of elaboration and further elucidation, I also agree with their Honours' reasons. My additional reasoning relates primarily to what could be seen to be a common theme of many

of Mr Kobelt's arguments concerning the primary judge's finding of unconscionability. That common theme was that the primary judge gave insufficient consideration and weight to the history and complex indigenous cultural context in which Mr Kobelt's conduct occurred. In short, while the primary judge accepted that it was necessary to have regard to the cultural practices of the Anangu which differentiate them from persons in mainstream Australia, his Honour ultimately gave insufficient weight to the anthropological and other evidence which explained why the Anangu freely chose to engage in book-up arrangements with Mr Kobelt.

EVIDENCE AND FACTUAL FINDINGS

297 The evidence and the factual findings made by the trial judge are set out and analysed in considerable detail in Besanko and Gilmour JJ's judgment. It is unnecessary to rehearse what has been said there. There is, however, one aspect of the evidence that I would wish to expand on. There are also some factual findings that I would wish to emphasise.

298 The evidence that I would expand on is the expert anthropological evidence of Dr David **Martin** and some associated or related evidence, including a report concerning book-up by an ASIC officer, Mr Gordon **Renouf**. Dr Martin was a witness called by ASIC. Mr Renouf's report was tendered by Mr Kobelt. Following is a summary of the main points that emerge from that evidence.

299 Mr Kobelt's book-up facility was hardly unique. The expression "book-up" refers to a form of store credit which is, and has been for many years, prevalent in many rural and regional communities, particularly remote communities where there is an absence of appropriate alternative financial services. While there are different forms and systems of book-up, one common form (and in recent times perhaps the most common form) involves customers handing over their debit cards and PINs to the store owner or trader to secure credit for the acquisition of goods or services. The store owner than uses Electronic Funds Transfer Point of Sale (EFTPOS) or similar facilities to debit the customer's account on their payday, often their social security payday. The customers who utilise book-up are primarily Indigenous Australians.

300 It is to be noted, in this context, that the primary judge found that book-up, on materially similar terms to those employed by Mr Kobelt, was available in at least one of the two other stores in Mintabie used by the Anangu people.

301 In his report, Mr Renouf stated that "for many Indigenous consumers, "book-up" is perceived as offering an essential service given the lack of alternative financial services available to them". It is often the only way that such consumers can have access to credit. Dr Martin's evidence was that the "institution" of book-up "has become a deeply embedded and normative practice for Anangu in the APY Lands communities" and that there is widespread use and support for book-up amongst many Anangu.

302 Book-up offers some particular benefits to Indigenous Australians. Those benefits arise from or relate to certain specific and unique cultural practices and attitudes of those people. Those practices and attitudes include a "boom and bust" cycle of expenditure, the concept of demand sharing or, in more pejorative terms, "humbugging", and the desire to personalise financial and other transactions.

303 Dr Martin's evidence was that in his experience it was common for indigenous 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". The result is that there is often a chronic shortage of money towards the end of each fortnightly pay cycle. Needless to say, such a situation is also not conducive to saving. In that context, Mr Renouf stated in his report that book-up is "a convenient way of managing money over a fortnightly or weekly payment cycle for consumers who lack financial management skills" and that one of the motivations for entering book-up arrangements was "a belief that book up can help with budgeting". Dr Martin also referred to Anangu often passing responsibility for things like cash flow to third parties, such as storekeepers.

304 Demand sharing is a complex cultural phenomenon. It is part of a foundational principle of reciprocity, exchange and sharing within a hunter gatherer society. In the context of contemporary indigenous culture, it involves the obligation to share resources with specific categories of kin. The existence of demand sharing obligations means that there is generally less utility for Anangu to retain money in their bank accounts. Leaving a debit card with a storekeeper is seen as one strategy for avoiding the pressures of demand sharing. In a discussion paper co-authored by Dr Martin, it was noted that:

> By leaving their keycards with the storekeeper, Aboriginal people can avoid the all-pervasive 'humbugging' for cash from relations, particularly on those days when wages or pensions are known to be deposited electronically into accounts, and they may also accumulate savings.

305 In cross-examination, Dr Martin gave the following evidence:

> Q: Yes, but in your experience, it's not uncommon for Aboriginal consumers in an Aboriginal community to seek to, as it were, quarantine their bank account from ready access by giving their cards to a storekeeper, for example?
>
> A: These are strategies that people use in remote communities, indeed.

306 In his report, Mr Renouf stated that one of the motivations for dealing with a store offering book-up was a belief that book-up was "a way to protect resources from demands from kin".

307 Other witnesses gave evidence in relation to the problem of demand sharing or humbugging. Mr Bernhard Stauner, a financial counsellor who provided education and assistance to Anangu in respect of "money matters", gave evidence that he had seen residents withdraw cash from an automatic teller machine and be almost immediately subjected to demands that the cash be shared (see Judgment at [576]). Mr Andrew Kilpatrick, an employee of a community store, gave similar evidence (see Judgment at [577]).

308 Dr Martin's evidence was that there was also a tendency for indigenous APY Lands residents to personalise financial transactions by conducting financial transactions through "brokers", such as storekeepers, in order to better access goods and services. He expressed the opinion that the dealings between Mr Kobelt and his Anangu customers were an example of the personalisation of financial transactions through a broker with whom they had established a particular form of mutuality. At paragraphs 89 and 90 of his report, Dr Martin stated as follows:

> Firstly, the facts and circumstances concerning 'Nobby's Credit Facility' and the 'Provision of Additional Credit' at points 5 and 6 of my instructions entail that there is direct and ongoing interpersonal engagement by its Anangu customers with Nobby's personnel, including through the cycles of obtaining, extending, and negotiating debts and repayments, which appear to be intrinsic to that system. As described, they are of a different and more personal character than the processes involved in obtaining and repaying credit from a normal Australian financial institution, as I have observed and experienced them.
>
> Anangu interviewees referred to this personalised character of the provision of credit by Nobby's. 'Face to face' contact and talking rather than relying on paperwork were perceived as 'Anangu ways' (customs). As a consequence of my interviews, it is my view that Anangu perceive that Lindsay Kobelt 'helps' them and that he has become almost 'part of the family'. In my opinion, such statements can be understood as recasting a commercial transaction into a personalised Anangu framework in which such transactions are seen as demonstrating care and nurturance.
>
> (Footnote omitted.)

309 In cross-examination, Dr Martin gave the following evidence:

> Q: And by ensuring the card is in the possession of a third party – in this case, Mr Kobelt – it does serve as a form of insulation from the potential pressures of

demand sharing?

A: There is a literature on the roles of such brokers. It's a term I use in my report again. It's a widely-observed fact. It's not just in financial transactions and, yes, it is a distinctive feature, again, of Aboriginal agency that it can sometimes mean people pass responsibility for certain aspects of managing things like cash flow to outsiders. It happens, yes.

Q: And by exercising that choice, the consumer is vesting the person in Mr Kobelt's position with the authority and agency circumstance?

A: I – Mr Trim, I myself wouldn't use the word "agency" there. He may be operating a financial agency but it's a different meaning. They are entrusting him, I think, with their cards to enable them to exercise their agency, I think is probably a better way to put it. That's how I would see it would be more accurately phrased …

310 The anthropological concept of "agency" referred to by Dr Martin in this evidence was explained in his report. It refers to the "capacity and willingness of individuals to take action or to exercise instrumental or strategic choices in accordance with what they perceive to be in their own interests". Dr Martin's opinion was that many Anangu saw shopping at the various establishments in Mintabie, including Nobby's, as exercising agency in this sense. He stated that his interviews with Anangu residents "made it clear that customers saw using the various book-up facilities offered by those establishments, including Nobby's, as exercising choice".

311 There are three final aspects of Dr Martin's evidence that should briefly be touched on.

312 First, he expressed the opinion, from an anthropological perspective, that while many Anangu residents of the APY Lands would not have the financial literacy to have an informed understanding of the nature and terms of credit arrangements generally, and would not be in a position to have an informed understanding of the advantages and disadvantages of credit arrangements offered by general Australian financial institutions, Anangu customers do nonetheless have a limited understanding of the nature and terms of the book-up arrangements offered by Mr Kobelt. In particular, they understood that they had to leave their debit card and provide their PIN to Mr Kobelt, and that Mr Kobelt would withdraw money from their accounts using the card and PIN to repay the debt incurred.

313 Second, Dr Martin's view was that "interpersonal negotiation and contestation are among the intrinsic characteristics of Aboriginal social process". That characteristic, coupled with "direct and ongoing interpersonal engagement" between the Anangu and Mr Kobelt, would allow them to negotiate with and question Mr Kobelt and Nobby's personnel within the basic parameters of Mr Kobelt's book-up practices. They were, however, unlikely to question or

challenge those basic parameters because they were "normative practices" that were seen by most Anangu as being "normal" or "usual" practices that were "taken for granted".

314 Finally, the interviews that Dr Martin conducted with several Anangu suggested to him that "they supported book-up in general and were positively disposed to Nobby's Credit Facility in particular". Dr Martin got no sense at all in his interviews that any of those individuals "felt that the terms on which Nobby's provided credit to them were unjust, unfair or unreasonable".

315 The other factual findings made by the primary judge that I would wish to emphasise are as follows.

316 First, Mr Kobelt did not apply any pressure to customers to enter into book-up arrangements with him: it was a matter for their choice (Judgment at [586]). ASIC did not contend that Mr Kobelt had adopted forms of undue influence or exerted undue pressure in respect of any of his book-up customers (Judgment at [547]).

317 Second, the Anangu witnesses who gave evidence at the trial each understood the basic elements of the book-up system and must have considered it appropriate to their needs (Judgment at [588]). There was no evidence to suggest that any of the 117 customers encompassed by ASIC's systems case were not in the same position.

318 Third, for the most part, Mr Kobelt's customers considered that Mr Kobelt had treated them well and were well-disposed towards him (Judgment at [588]). Two witnesses had grievances with Mr Kobelt, however their antipathy appeared to be the result of specific adverse incidents involving Mr Kobelt, not the book-up system generally.

319 Fourth, many book-up customers were satisfied with the arrangements. There were undoubtedly features of the system that customers found attractive (Judgment at [591]). Two of the Anangu witnesses were dissatisfied customers and Mr Kobelt acknowledged that he had received up to six complaints over the previous five to six years (Judgment at [593]). Given that there were 117 customers encompassed by ASIC's systems case, however, that was a very low level of dissatisfaction in all the circumstances. As noted earlier, ASIC did not press any allegation of unconscionability in respect of any specific customer.

THE NATIONAL CREDIT ACT CONTRAVENTION

320 Mr Kobelt challenged the primary judge's finding that he contravened s 29(1) of the National Credit Act on two bases. Both concerned whether a "charge" was made for providing credit under the book-up system.

321 First, he contended that the primary judge erred in finding that Mr Kobelt's contracts for the sale of second hand cars involving book-up were contracts in respect of which the amount payable was payable by instalments for the purposes of s 11(1) of the National Credit **Code**, which is Schedule 1 to the National Credit Act (ground 12 of the notice of appeal). He submitted that a contract would only fall within s 11(1) if it "pre-define[d]" the amounts and times of the instalments payable under the contract. Mr Kobelt's contracts did not specify the precise amount or time of the instalment payments. Rather, they left the amount and timing of the part-payments up to Mr Kobelt.

322 I agree with Besanko and Gilmour JJ that there is no merit in this ground. The text, context and purpose of the National Credit Act and Code, and s 11(1) of the Code in particular, do not support the narrow construction of "instalments" advanced by Mr Kobelt.

323 The book-up contracts fell within s 11(1). They provided, in essence, that the purchase price for the car was to be paid by way of periodic part-payments. The timing and amount of each part-payment was determined by the timing and amount of the periodic payments that the purchaser/borrower received into his or her bank account. In my opinion, whatever may be the precise scope or meaning of "instalments" for the purposes of s 11(1), it is broad enough to encompass the part-payments that were to be made under Mr Kobelt's book-up contracts. It is immaterial that the contracts did not "pre-define" the precise times that the payments were to be made, or the precise amounts that were to be paid at those times. It is equally immaterial that the precise timing and amount of the part-payments were, at least to a certain extent, left up to Mr Kobelt, who made the withdrawals from the bank account of the purchaser/borrower.

324 Second, Mr Kobelt argued that if, as he contended, s 11(1) of the Code did not apply, the primary judge erred in finding that a charge was made for providing credit under the book-up contracts for the purposes of s 5(1)(c) of the Code (ground 13 of the notice of appeal). Mr Kobelt submitted that it was not open to the primary judge to find that there was a charge for the credit having regard to findings that his Honour made about how Mr Kobelt went

about setting the "list price" for the cars, and because his Honour found that the price did not include any component calculated or identified specifically as a credit charge.

325 I again agree with Besanko and Gilmour JJ that there is no merit in this ground. Mr Kobelt's arguments in relation to this ground tended to confuse and conflate the concept of market price or market value with the concept of cash price. It was the concept of cash price, as defined in s 204 of the Code, which was relevant.

326 It was open to the primary judge to find that Mr Kobelt made a charge for providing credit when he sold a car pursuant to a book-up arrangement. There was evidence that it was Mr Kobelt's practice to require a purchaser of a car on credit pursuant to a book-up arrangement to pay a higher price than a customer who was able to pay the purchase price in cash immediately. While Mr Kobelt sought to portray this as a discount for a cash purchaser, it was open to the primary judge on the evidence to find that the difference between the cash price and the book-up price was a credit charge. Mr Kobelt failed to demonstrate any error on the part of the primary judge in arriving at that conclusion.

THE UNCONSCIONABILITY FINDING

327 As already noted, Mr Kobelt's notice of appeal is complex and prolix. That is particularly the case with respect to those grounds that relate to the unconscionability finding. The gist or essence of the grounds of appeal relating to that finding, and the submissions and arguments advanced in support of them, are carefully summarised and analysed in the reasons of Besanko and Gilmour JJ. It is again unnecessary to add significantly to that analysis. I agree with Besanko and Gilmour JJ's resolution of the issues raised by the grounds of appeal. My additional observations relate primarily to ground 9, which is essentially a "catch-all" ground the effect of which is that, upon a proper assessment of the whole of the evidence, the primary judge erred in concluding that Mr Kobelt's book-up system was unconscionable.

328 The question whether Mr Kobelt's book-up system was unconscionable was undoubtedly a difficult question to resolve. That was so for a number of reasons, but in particular because a proper consideration of Mr Kobelt's book-up system involved what Dr Martin referred to as "an intersection between the distinctive Anangu society and culture of the APY Lands, and the wider Australian society and its culture and institutions (including the legal and financial systems)". The intersection between indigenous laws and customs and the Australian legal system, in Dr Martin's opinion, raised the possibility of "incommensurability". Dr Martin explained that concept in the following terms (at [69]-[71]):

> An intersection of systems necessarily raises the possibility of varying degrees of incommensurability of the values, understandings and practices of those systems in that intersection, as well as varying forms of accommodation and adaptation by the Aboriginal people concerned. I say this on the basis of my own anthropological research and publications: incommensurability between systems is a concept considered in my co-authored book on native title referred to immediately above.
>
> Based on that work, and on my experience in remote Aboriginal communities more generally, it is my opinion that as a generalisation there will be varying degrees of incommensurability between Anangu 'economic' and other values and practices on the one hand and those of the general Australian society and financial system on the other, and that these will become most apparent where they intersect (e.g. for my purposes here, in Anangu interactions with the Mintabie establishments, and the market economy and the legal frameworks which regulate it).
>
> Based on my study, experience across remote Aboriginal societies, and observations in Mimili and Indulkana, one particular accommodation and adaptation by Anangu people in the intersection between their values and practices and those of the market economy, which is directly relevant and of significance to this Report, concerns the personalisation of financial transactions whereby Aboriginal people incorporate outsiders as brokers (and sometimes into their systems of kin and 'skin' relationships) in order to better access goods and services which they can provide.

329 The concepts of "intersection" between systems and the resulting "incommensurability" are important in assessing whether Mr Kobelt's conduct was or was not unconscionable. In evaluating whether, in all the circumstances, Mr Kobelt's book-up system was unconscionable, it was and is necessary to have regard to relevant indigenous values, understandings and practices. What the wider Australian society and its culture and institutions might regard as disadvantageous and unfair might be regarded by an Anangu person as in fact advantageous and reasonable. It suffices to give two simple examples, both of which will be discussed in some more detail in considering the reasons of the primary judge.

330 First, one of the criticisms of the system was that it was largely undocumented. That might well be seen as a valid criticism and a disadvantage by many in the wider mainstream Australian society. Yet Dr Martin's analysis would tend to suggest that it might be seen by an Anangu person as an advantage, given the preference for the personalisation of financial transactions. In short, they would rather deal with Mr Kobelt face-to-face than be provided with a sheath of documents.

331 Second, the requirement for a customer to hand over their debit card and PIN required the customer to trust Mr Kobelt (and members of his family) in relation to the operation of their bank account. That might seem anathema to most people in mainstream Australian society. The fact that such conduct would be contrary to banking policy might also be seen as a

problem. Neither of those considerations, however, may trouble an Anangu person. As to the former, the Anangu preference for the personalisation of financial transactions involves incorporating outsiders, such as storekeepers, as "brokers". Handing over a debit card and PIN would be seen as part of that process. Anangu people are also unlikely to view a debit card and PIN in the same way as people in the wider Australian community, particularly given the concept of demand sharing. As Mr Renouf noted in his paper, "a keycard is seen both as a resource to be shared and a pledge to secure a book up arrangement".

332 The notions of the "intersection of systems" and "incommensurability" required and requires the Court to be cautious, when assessing Mr Kobelt's book-up scheme and evaluating whether it was unconscionable, to not paternalistically impose on the Anangu people, who were and were likely to be Mr Kobelt's book-up customers, values, norms and practices that do not sit comfortably with Anangu culture and practices. As noted earlier, the primary judge accepted that 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 (Judgment at [611]). Close consideration of the primary judge's reasons, however, reveals that his Honour did not always have regard to the evidence concerning Anangu culture and practices; or if he did, he did not give those considerations sufficient weight.

333 Before addressing this issue in more detail, one further issue with the primary judge's unconscionability evaluation should be noted. Ground 2 of Mr Kobelt's notice of appeal raised what is essentially a pleading point. He contended that the primary judge erred in deciding the case in relation to unconscionability outside the issues that ASIC had asserted in its pleadings constituted unconscionable conduct. In their reasons, Besanko and Gilmour JJ carefully analyse the facts or circumstances that Mr Kobelt contended were outside the pleadings. I agree that ground 2 has little merit as a separate standalone ground of appeal.

334 That is not to say, however, that some of the arguments advanced by Mr Kobelt in support of ground 2 do not have merit in assessing whether the primary judge erred in finding unconscionability. A close analysis of the Judgment reveals that the primary judge had regard to, and gave weight to, various considerations that lay outside ASIC's pleaded systems case. Perhaps more significantly, the primary judge also appears to have had regard to a number of facts and circumstances that could not in any event be regarded as part of Mr Kobelt's book-up system. They were not systemic features. Rather, they were mistakes or departures from the system which, at most, may have been relevant to allegations of

unconscionability in respect of particular customers. As has already been noted, however, ultimately ASIC did not press the alleged particular instances of unconscionable conduct.

335 Given this latter issue, it is necessary to briefly analyse what ASIC claimed were the essential features of Mr Kobelt's book-up system, before addressing the primary judge's reasons for concluding that the system was unconscionable.

The pleaded book-up system

336 There was, in short summary, six elements to the pleaded book-up system. The first three elements concerned the conduct that was alleged to comprise the system. I will call those elements the **conduct elements**. The other three elements were the circumstances in which that conduct occurred. I will call those elements the **circumstances elements**.

337 The first conduct element involved Mr Kobelt issuing "Nobby's Credit Facilities" to "Nobby's Customers" (ASOC [21.1]). The Nobby's Credit Facility involved Mr Kobelt: deferring all or part of the payment by the customer for the goods if the customer provided his or her debit card and PIN linked to a bank account into which the customer received periodic payments; taking possession of the debit card; recording the PIN; and recording details of the periodic payments (ASOC [4]). Nobby's Customers were the 117 customers listed in Schedule A.

338 The second conduct element involved Mr Kobelt extending additional credit to Nobby's Customers in respect of the purchase of further goods from Mr Kobelt's store, or in respect of goods purchased from other stores by way of purchase order issued by Mr Kobelt, or in respect of cash advances (ASOC [21.2] and [17]). The provision of additional credit was alleged to be at Mr Kobelt's discretion (ASOC [19.1]) and was alleged to create and continue a relationship of dependency between the customers and Mr Kobelt (ASOC [19]).

339 The third conduct element involved Mr Kobelt engaging in the "Withdrawal Conduct" in respect of Nobby's Customers (ASOC [21.3]). The Withdrawal Conduct involved Mr Kobelt using the customer's debit card and PIN to withdraw funds from the customer's bank account and then transferring those funds into accounts owned and operated by him until there were no, or very limited, funds remaining in the customer's account (ASOC [14]). The Withdrawal Conduct usually occurred very shortly after the periodic payment was deposited into the customer's account (often very early in the morning of that day) (ASOC [15.1]).

Mr Kobelt continued to withdraw funds from the customer's account in this manner until Mr Kobelt was satisfied that the customer's debt was extinguished (ASOC [15.2]).

340 The first circumstances element was "Mr Kobelt's State of Mind" (ASOC [20]). Mr Kobelt's State of Mind was his knowledge of the following matters: the features of the Nobby's Credit Facility; the fact that in the overwhelming majority of cases the customers, who were indigenous residents of the APY Lands, had very limited or no assets, had very limited net income and had low levels of financial literacy; and the fact that the APY Lands were comprised of remote and impoverished communities (ASOC [13] and [13A]).

341 The second circumstances element concerned the "Consequences of the Conduct" (ASOC [16]). The Consequences of the Conduct were alleged to be that Nobby's Customers were often left with little or no funds in their accounts into which the periodic payments were made for so long as Mr Kobelt asserted that the debt owed by the customer remained unpaid.

342 The third circumstances element was the "Circumstances of Nobby's Customers" (ASOC [13]). Those circumstances were alleged to be that, at least in the overwhelming majority of cases, the customers had very limited or no assets, had very limited net income, had low levels of financial literacy (ASOC [13]), and were residents of the APY Lands, which were comprised of remote and impoverished communities (ASOC [13A]).

The primary judge's reasons for concluding that Mr Kobelt's book-up system was unconscionable

343 It is possible to distil the primary judge's reasons for concluding that Mr Kobelt's book-up system was unconscionable into 11 main points or propositions. In my view, upon close analysis, a number of those propositions are infected in some way by one or other of the two issues or errors that have already been identified: a failure to give sufficient weight to Anangu culture and practices; and having regard to, or giving excessive weight, to un-pleaded or non-systems considerations. A number of the matters relied on by the primary judge in support of his finding that the system was unconscionable, when closely considered in light of the anthropological and cultural evidence and the pleaded system, provide little or only limited support for the conclusion of unconscionability.

344 The first point relied on by the primary judge was that Mr Kobelt's bargaining position was relatively stronger than that of his book-up customers (Judgment at [507]-[516]; see

s 12CC(1)(a) of the ASIC Act). The primary judge acknowledged, however, that inequality of bargaining power is not alone sufficient to support a conclusion of unconscionability.

345 While there undoubtedly was an inequality of bargaining power, it is difficult to see how that consideration was deserving of much weight in the circumstances of this case. That is so for a number of reasons. In particular, as the primary judge found, the customers understood the basic elements of the book-up system and voluntarily entered into them. There is no indication that they wished to bargain with Mr Kobelt about the basic terms of the book-up. The evidence referred to earlier, including Mr Renouf's report and Dr Martin's evidence, also showed that book-up systems had become a deeply embedded and normative practice for Anangu in the APY Lands communities, and that there was widespread use and support for it amongst many Anangu. That evidence tended to support an inference that, even if they had more bargaining power, the Anangu customers may not have wanted to, or may have had no reason to, bargain with Mr Kobelt about the basic terms of the book-up.

346 Further, Dr Martin's evidence, referred to earlier, was that even if they had little bargaining power, the Anangu customers had some capacity to negotiate with and question Mr Kobelt within the basic parameters of his book-up practices. That was a result of the fact that interpersonal negotiation and contestation were among the intrinsic characteristics of Aboriginal social process, together with the fact that there was a direct and ongoing interpersonal engagement between the Anangu and Mr Kobelt. It should be noted, in this context, that the primary judge accepted that Mr Kobelt applied the book-up system with some flexibility in response to customers' specific requests (Judgment at [554]-[555]).

347 The second proposition relied on by the primary judge was that Mr Kobelt's requirement that he obtain possession of customers' debit cards and PINs, and that he be permitted to withdraw the whole of the available balance in the customers' accounts, went beyond what was reasonably necessary for the protection of his own legitimate interests (Judgment at [519]-[520]; see s 12CC(1)(b) of the ASIC Act). As for the requirement that customers hand over their debit cards and PINs, his Honour found that this ran "counter to one of the very purposes of the issue of PINs" and required the customers to trust Mr Kobelt and his family (Judgment at [612]). It also seemed to "reflect a lack of understanding of the precautions which [the customers] should take in their own self-interest" (Judgment at [620]) and put the customers "in jeopardy of misconduct" (Judgment at [422]). As for the withdrawing of all of the funds in the customers' accounts, his Honour found that this was a "stark" and

"extraordinary" feature of the system for which no objective justification had been established in the evidence (Judgment at [613]). His Honour went so far as to find that this feature of the system amounted to a form of predation (Judgment at [609]).

348 Those findings, however, tended to give insufficient weight to Anangu culture and practices. As for the requirement that customers hand over their debit cards and PINs, the evidence tended to show that this was a basic requirement of most book-up systems, and that this practice had a long history, was widespread, was deeply embedded in Anangu culture and practices, and was accepted to the point that it was essentially taken for granted. The Anangu plainly had a different conception of, and different attitude to, their debit cards. The fact that this practice required the customers to trust Mr Kobelt, and may have reflected a lack of understanding of the precautions which they should take in their own interests, was hardly a weighty consideration given the fact that the primary judge accepted that Mr Kobelt acted in good faith and there was no suggestion of fraud or dishonesty. The evidence showed that, on the whole, the customers did trust Mr Kobelt, and had no reason not to trust him. While the customers may have put themselves in jeopardy of misconduct by handing over their cards and PINs, no such misconduct was alleged. Dr Martin's evidence concerning the Anangu preference for personalising financial transactions also suggested that the fact that the system required the customers to trust Mr Kobelt was not in any relevant sense detrimental.

349 As for the requirement that Mr Kobelt be permitted to withdraw the whole balance in the customer's account, the primary judge's analysis tended to give insufficient weight to the evidence that suggested that this requirement may have been seen as desirable, or at least not undesirable or unreasonable, by some Anangu because it tended to alleviate the pressures of humbugging or demand sharing, and tended to assist in the management of money over the pay period and avoid the "boom and bust" expenditure cycle.

350 The primary judge accepted that the system mitigated the "boom and bust" cycle "to some extent", however he noted that there were other methods by which the customers could address that circumstance. Those other methods included requesting Centrelink to make payments weekly rather than fortnightly, obtaining a Centrelink "BasicsCard" which could not be used for the purchase of certain goods, such as tobacco and alcohol, and seeking the assistance and counselling of organisations such as MoneyMob (Judgment at [570]-[572]). While those may have been other methods by which the customers could in theory have mitigated the issue of the "boom and bust" expenditure cycle, they were not always methods

that the Anangu people chose to take up or adopt. The fact remained that the book-up system was perceived to be one way of managing money over a payment cycle. This was seen to be a benefit of the book-up system.

351 His Honour also accepted that the book-up system "might" reduce some opportunities for humbugging, but noted that this seemed likely to increase the prospect of humbugging in other ways (Judgment at [617]). That appeared to be a reference to his Honour's finding that a customer returning from grocery shopping in Mintabie would be subject to demand sharing with respect to the groceries that had been purchased, and that a customer who purchased a car on book-up would be subject to demand sharing in respect of the use of the car (Judgment at [584]). There is no doubt that demand sharing was not limited to money. Nevertheless, the fact that demand sharing may have occurred in relation to other goods did not significantly reduce the force of the evidence that one of the perceived benefits of the book-up system was the avoidance of the "all-pervasive", and what the evidence suggested was the somewhat more pernicious, humbugging for cash.

352 The primary judge also appears to have given less weight to the evidence of Dr Martin, Mr Stauner and Mr Kilpatrick relating to humbugging for cash because only one of the six Anangu customers called as witnesses by ASIC expressly said that the reason they engaged in book-up was to avoid demand sharing (Judgment at [582]-[583]). The fact that the other witnesses did not say that they entered into book-up arrangements to avoid humbugging does not, however, mean that they did not perceive that to be a benefit of the system. No doubt the main reason they entered into book-up arrangements was because they wanted to purchase a car, and Mr Kobelt's book-up system was seen as the best means of achieving that objective. Dr Martin referred to that as "agency" or exercising choice. Even putting that consideration to one side, the fact that only one of ASIC's Anangu witnesses expressly referred to the avoidance of humbugging as being the reason they entered into book-up arrangements may have been more significant had ASIC pressed its case that the specific book-up arrangements with those witnesses were unconscionable. In circumstances where ASIC's only case was a systems case involving 117 customers, the evidence of Dr Martin and others concerning demand sharing as part of the Anangu system of norms, values and patterns of behaviour should have assumed greater significance.

353 Finally, in relation to demand sharing, it should be noted that Mr Kobelt's evidence was that some customers told him that they wanted him to withdraw all the money in their bank

accounts "before some of the family got their hands on it". The primary judge, however, did not attach much weight to that evidence because he regarded it as having a self-serving quality. Even if that be so, Mr Kobelt's evidence was consistent with the evidence of Dr Martin, and statements in Mr Renouf's report, concerning the motivation of indigenous people for dealing with stores offering book-up.

354 In considering whether the imposition of the requirement for the customer to hand over their debit card and PIN, and the requirement that Mr Kobelt be permitted to withdraw all funds in the customer's bank account, were reasonably necessary, the primary judge had regard to various potential alternatives available to Mr Kobelt. It is perhaps questionable whether some of those supposed alternatives were in fact reasonably available or feasible. The primary judge recognised, for example, that the Centrepay facility was directed to essential services that were unlikely to encompass the purchase of used cars. More significantly, the analysis of those various alternatives tended to ignore the evidence that suggested that Anangu people may have preferred the book-up system to the alternatives because the book-up system involved the personalisation of the relevant financial transaction through the incorporation of Mr Kobelt as a trusted "broker". It did not involve them having to deal with a bureaucracy, or fill out paperwork.

355 It is relevant to emphasise, in this context, that the evidence tended to show, and his Honour found, that Mr Kobelt's Anangu customers knew and understood the basic elements of the book-up system and the way it worked, understood that they had a choice whether or not to enter into book-up arrangements, considered that the system was appropriate to their needs, and were generally well-disposed to Mr Kobelt and considered that he had treated them well. The evidence, and his Honour's findings, that the Anangu customers voluntarily chose to enter book-up arrangements were entirely consistent with Dr Martin's evidence concerning what he called "Aboriginal 'agency'": "the capacity and willingness of individuals to exercise choices in accordance with what they perceive to be in their own interests". His Honour was acutely conscious that the freedom of Anangu to make decisions concerning their own lives must be respected (Judgment at [589]) and that the Court should not impose a view of what is appropriate for the Anangu which could be regarded as paternalistic (Judgment at [619]). With the greatest respect, however, it is difficult to avoid the conclusion that parts of his Honour's reasoning, and the ultimate conclusion of unconscionability, failed to appropriately heed those cautions.

356 The third point relied on by the primary judge related to whether the customers were able to understand any documents relating to the supply of the financial services (Judgment at [541]-[546]; see s 12CC(1)(c) of the ASIC Act). Mr Kobelt submitted, before the primary judge, that this point had little force given the simplicity of the system and the fact that the customers understood the basic elements of the book-up system in any event. The primary judge accepted the correctness of that submission "[in] a sense", but found that the fact that there were so few documents detracted from the conscionability of Mr Kobelt's conduct (Judgment at [542]). It is, however, unclear exactly why that was the case.

357 Dr Martin's evidence concerning the Anangu preference for personalising financial transactions tended to support the inference that the Anangu were content with the book-up system precisely because it did not involve significant documentation, but was instead transacted personally through Mr Kobelt as a so-called "broker". In any event, it is difficult to see how the documentation of the terms and conditions of the system, which the Anangu customers understood in any event, would have advantaged the customers.

358 The primary judge also referred, in this context, to the inadequacy and illegibility of Mr Kobelt's records of the relevant book-up transactions. This was a reference to the handwritten diaries and ledgers that recorded withdrawals, payments and further book-ups by each customer. There could be little doubt that the diaries and ledgers were barely legible and difficult to follow. The problem with this finding, however, is that the adequacy of Mr Kobelt's records of the implementation of each customer's book-up "account" was not part of the pleaded book-up system. The adequacy of Mr Kobelt's record keeping was undoubtedly an issue canvassed at trial, as Besanko and Gilmour JJ have pointed out. In my view, however, it does not follow that it was open to the primary judge to have regard to the inadequate record keeping as part of his evaluation of whether the pleaded book-up system was unconscionable.

359 In any event, the inadequacy of Mr Kobelt's record keeping was hardly a matter deserving of any significant weight in circumstances where there was no evidence that any customer had ever sought an account of the relevant transactions. Perhaps even more significantly, it is difficult to see why this was a weighty consideration in circumstances where the primary judge accepted that Mr Kobelt did not make dishonest use of the debit cards and PINs, and where there was no suggestion, let alone evidence, that Mr Kobelt maintained his records dishonestly.

360 The primary judge concluded that Mr Kobelt's implementation of the system, including the fact that the arrangements were largely undocumented and poorly recorded, "adds to the strong impression of unconscionability" (Judgment at [623]). For the reasons just given, I do not agree.

361 The fourth point relied on by the primary judge concerned Mr Kobelt's "tactics" in administering or implementing the book-up system. The primary judge considered that point in the context of whether any undue influence or pressure was exerted on, or any unfair tactics were used against, Mr Kobelt's customers (Judgment at [547]-[550]; see s 12CC(1)(d) of the ASIC Act). His Honour acknowledged that ASIC did not contend that Mr Kobelt had adopted forms of undue influence or exerted undue pressure (Judgment at [547]). It would appear, however, that his Honour gave at least some weight to three matters that were said to constitute "tactics" in administering the scheme. The first was the fact that Mr Kobelt or his family made the relevant withdrawals at the earliest opportunity. The second was that, at least in some instances, Mr Kobelt made withdrawals that exceeded the customer's authorisation. Those instances related to only two customers. The third was Mr Kobelt's conduct in making withdrawals from accounts in circumstances where a "CBA glitch" enabled withdrawals to be made from Commonwealth Bank accounts which resulted in the customer's accounts going into debit.

362 As for the first of those matters, it is difficult to see how that "tactic" was deserving of any significant weight in circumstances where the book-up customers were generally aware that the system involved Mr Kobelt withdrawing all the money from their accounts. It also ignores Mr Kobelt's evidence that if a customer asked for some funds to be left in his or her account, he would generally abide by that request. It does not appear that any, or any material number of Mr Kobelt's book-up customers were aware that funds were sometimes withdrawn in the early hours of the morning, or if they were aware, that they took exception to this so-called "tactic", or were otherwise frustrated by it. As for the second and third matters, the short point is that they were isolated incidents. They were not systemic. They were not part of the book-up system. Nor were they pleaded as such.

363 The fifth point relied on by the primary judge was that "[t]he credit provided by Mr Kobelt is of a particularly expensive kind" (Judgment at [618]). The primary judge initially considered this point in the context of whether the customers could have acquired identical or equivalent

financial services from other suppliers (Judgment at [551]; see s 12CC(1)(e) of the ASIC Act).

364 There are in my view a number of difficulties with this point. The first is that it is at least somewhat questionable whether the evidence was capable of supporting a conclusion that the credit supplied to each, or even a majority, of the 117 "Nobby's Customers" the subject of ASIC's systems case was "of a particularly expensive kind". The finding appears to be based on Mr Kobelt's evidence that he would usually, but not invariably, offer a discount of at least $1,000 to persons paying for the purchase of a car upfront in cash. Using that figure as the credit charge, the primary judge then calculated the effective interest rate on various assumptions as to the price of the car and the period of time over which the debt was repaid (Judgment at [488]-[490]). There was, however, no evidence concerning the exact price of the cars which were purchased by the 117 customers, or the difference between the book-up price and the cash price for each of those vehicles, or the period of time over which their debts were repaid. There was also no suggestion that the book-up system involved any credit charge, let alone a credit charge of an expensive kind, in respect of credit provided for purchases other than cars.

365 In any event, it was not part of ASIC's pleaded systems case that the credit supplied under the book-up system was of a particularly expensive kind. It may readily be accepted, as Besanko and Gilmour JJ have found, that the expense or otherwise of the credit supplied under the book-up system was an issue at trial. The issue appears to have arisen primarily in the context of the alleged contravention of s 29 of the National Credit Act and in the context of evidence led by Mr Kobelt. It was plainly open to the primary judge to consider and reject Mr Kobelt's contention that the credit was effectively interest free. There is accordingly no merit in this issue as a pure pleading point. It is, however, another thing to say that the expense of the credit was part of the pleaded book-up system. It was not. In my view, if ASIC wished to contend that the expense of the credit provided as part of Mr Kobelt's book-up system was one of the factors that made the system unconscionable, it was required to properly plead that fact as part of the system. It did not.

366 The sixth point relied on by the primary judge was that Mr Kobelt did not treat his customers equally: he provided goods and services to non-indigenous customers on credit without requiring them to provide a key card and PIN or other security (Judgment at [553]; see s 12CC(1)(f) of the ASIC Act). I agree with Besanko and Gilmour JJ that this matter should

have been pleaded if it was to be relied upon. It was not part of ASIC's pleaded system. It is also somewhat unclear whether this issue was fully explored in the evidence at trial. It does not appear, for example, that there was any evidence that any of the 117 indigenous customers the subject of the systems case had ever sought and been refused credit which did not involve handing over their debit cards and PINs. Given the anthropological evidence relating to the perceived benefits of the book-up system for the Anangu, it may have been the case that the customers preferred book-up to obtaining credit on any other terms.

367 The seventh point relied on by the primary judge was that, while Mr Kobelt was flexible in relation to some aspects of the book-up system, he was not flexible in his underlying requirement that customers provide both their debit card and PIN (Judgment at [555]). The primary judge found that Mr Kobelt also implemented the book-up system with some rigidity, including making withdrawals from the customers' accounts very early in the morning of the relevant pay days so the customers could not access the 50% of the funds which was notionally theirs (Judgment at [556]).

368 The primary judge had regard to those matters in considering the extent to which Mr Kobelt was willing to negotiate the terms and conditions of the book-up "contract" (s 12CC(1)(j)(i) of the ASIC Act). The finding that Mr Kobelt was inflexible in relation to the basic terms of the book-up system, however, must again be considered in light of Dr Martin's evidence. As noted earlier, that evidence included that there was direct and ongoing interpersonal engagement between the Anangu and Mr Kobelt which allowed the Anangu to negotiate with and question Mr Kobelt within the basic parameters of the book-up practices. They were, however, unlikely to question or challenge the basic parameters of the book-up system because they were "normative practices" that were seen by most Anangu as being "normal" or "usual" practices that were "taken for granted". The fact that the basic terms of book-up were not subject to negotiation, therefore, may have been as much due to those cultural considerations as any inflexibility on the part of Mr Kobelt.

369 The eighth point relied on by the primary judge was that, while his Honour accepted that Mr Kobelt acted with a "degree" of good faith, and that there was no suggestion that he had acted fraudulently or dishonestly, or exerted undue influence, his Honour did not accept that Mr Kobelt acted in an altruistic or disinterested way. Rather, in his Honour's evaluation, Mr Kobelt was at all times pursuing his own interests, even when that was to the detriment of his customers (Judgment at [557]-[559]; s 12CC(1)(l) of the ASIC Act). His Honour gave the

"CBA glitch" as one example of Mr Kobelt pursuing his own interests to the detriment of his customers.

370 The fact that Mr Kobelt operated the book-up system in good faith and without fraud, dishonesty or undue influence was a powerful consideration. It is difficult to see why individual instances of self-interest, which were not part of the pleaded system, should significantly detract from that consideration. Equally, given that Mr Kobelt was operating a business, it is hardly surprising that he was not acting in an entirely altruistic or disinterested way.

371 The ninth point relied on by the primary judge was that the book-up customers were vulnerable because of the remoteness of their communities, the limitations of their education, their impoverishment and the limitations on their financial literacy. The primary judge reasoned that, in those circumstances, Mr Kobelt's book-up system involved taking advantage of the customers' circumstances (Judgment at [620]).

372 There could be little doubt that the circumstances of the majority of book-up customers were as described by the primary judge. The finding that Mr Kobelt's book-up system involved taking advantage of those circumstances, however, tended to ignore the evidence concerning the history and prevalence of similar book-up systems in remote parts of Australia, and the evidence of Dr Martin and others which went some way towards explaining why the Anangu people freely chose to enter book-up arrangements. In short terms, it would appear that book-up systems the same or similar to Mr Kobelt's system developed precisely because mainstream financial services and credit facilities were either unavailable or unfeasible in many remote indigenous communities. Perhaps more significantly, other forms of credit were not suitable or appropriate to the needs of the indigenous residents of those communities. The book-up system was simple, involved the personalisation of the credit transaction through a broker, and was seen as providing benefits, such as the avoidance of humbugging and assistance in avoiding the "boom and bust" expenditure cycle. In many cases, book-up was really the only realistic way that residents of remote indigenous communities could access credit. As the primary judge found, the majority of book-up customers did not have any assets which could be proffered as security for a loan. It was accordingly unlikely that they could have obtained a loan to purchase a car from a commercial lender.

373 In those circumstances, it is doubtful that it could fairly be said that Mr Kobelt's book-up system involved him taking advantage of his customers' circumstances and vulnerabilities. Rather, he was fulfilling a demand, as was the proprietor of the other store in Mintabie, and the proprietors of many like establishments throughout remote indigenous communities, who provided book-up credit. The finding that Mr Kobelt was taking advantage of his customers' vulnerabilities also does not sit easily with the primary judge's other findings that Mr Kobelt exercised a degree of good faith, did not exert any undue influence and was neither fraudulent nor dishonest. There was no evidence that any of Mr Kobelt's book-up customers considered that they had been taken advantage of. Rather, the evidence tended to suggest that they understood the system and, on the whole, were supportive of book-up and Mr Kobelt's implementation of it.

374 The tenth point relied on by the primary judge was that Mr Kobelt's book-up system maintained a continuing dependence by customers on his store because the customers had little practical alternative but to continue shopping at his store despite the inconvenience of doing so. The system, insofar as it permitted customers to book-up further purchases of food and other necessities, also depended on the favourable exercise of Mr Kobelt's goodwill and therefore gave Mr Kobelt discretionary control over the lives of his customers (Judgment at [598]). That was said to constitute a form of predation (Judgment at [609]) and exploitation of Mr Kobelt's customers (Judgment at [620]).

375 The primary judge's finding of predation and exploitation, however, again sits uneasily with his Honour's finding that Mr Kobelt did not exert any undue influence. It also again tends to ignore the cultural or anthropological evidence.

376 It may generally be accepted that Mr Kobelt's book-up system had the effect of tying the customers to Mr Kobelt's store. Because they had no funds left in their bank accounts, the customers had to buy their groceries and other necessities utilising further book-up at Mr Kobelt's store, subject to their ability to obtain purchase orders for other stores, or get cash advances, from Mr Kobelt. It may also be accepted that this involved some degree of inconvenience for the customers because they were required to travel some considerable distances to Mr Kobelt's store. That said, Dr Martin's evidence was that Anangu residents saw shopping at the various establishments in Mintabie, including Mr Kobelt's store, as exercising "agency" or choice because there was a wider choice and prices were cheaper than at the community stores in the APY Lands (Martin at [77]). Further, while shopping at

Mr Kobelt's store may have involved significant travel, Mr Martin's evidence was that it was not uncommon for indigenous customers to travel long distances to access goods and services, that travel was not seen as a disincentive for most Anangu, and indeed that travel could be seen as an advantage because it entailed visiting "country" and relatives, and constituted a "highly social occasion". Those advantages could outweigh the costs of the travel itself. There was no evidence that any of Mr Kobelt's customers considered that they had been exploited because they had to return to Mr Kobelt's store.

377 The system also included provision for Mr Kobelt's customers to purchase goods at other stores by means of purchase orders. The primary judge noted that Mr Kobelt charged his customers $10 for purchase orders, a cost which his Honour described as relatively expensive. There was evidence, however, that Mr Kobelt's purchase orders cost less than the express money order service provided by Australia Post. Mr Kobelt also permitted cash advances by way of book-up in certain circumstances.

378 As for the primary judge's findings concerning discretionary control, it may be accepted that this was an incident of the system. It may also be accepted that it was potentially disadvantageous and open to abuse. Nevertheless, apart from some very isolated instances of what his Honour described as "arbitrary decision-making" (Judgment at [599]), the evidence did not suggest that Mr Kobelt widely or systematically abused or took advantage of his discretion. The primary judge accepted, for example, Mr Kobelt's evidence that he never refused food to a customer from whose account he had withdrawn money pursuant to the book-up system (Judgment at [453]). The fact that the system gave Mr Kobelt a degree of discretionary control in respect of the financial affairs and spending of his customers must also be considered in light of the evidence concerning the indigenous preference for personalising financial transactions. The Anangu people who engaged in book-up arrangements with Mr Kobelt freely chose to effectively appoint him as a "broker" in respect of their spending and financial affairs.

379 In all the circumstances, having regard to the whole of the evidence, neither the "tying" effect of Mr Kobelt's book-up system, nor the fact that the system gave Mr Kobelt a form of discretionary control over the spending of his customers, could fairly be said to be a form of predation or exploitation.

380 The eleventh point relied on by the primary judge was that Mr Kobelt provided credit to the book-up customers without complying with the requirements of the Code (Judgment at [562]-

[564]). His Honour noted that, amongst other things, to comply with the Code, Mr Kobelt would have been required 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 and other matters. I agree with Besanko and Gilmour JJ, for the reasons given by their Honours, that the fact that Mr Kobelt did not comply with the Code, and the considerations that flowed from that, should have been pleaded if they were to form part of the reason for concluding that Mr Kobelt's book-up system was unconscionable. They were not pleaded as part of the book-up system.

Did the primary judge err in finding that the book-up system was unconscionable?

381 The legal principles in relation to unconscionability are dealt with at length in the reasons of Besanko and Gilmour JJ. It is unnecessary to add to their Honours' analysis. There was no real issue between the parties in relation to the applicable principles. Suffice it to say that, in considering the primary judge's evaluation of whether Mr Kobelt's book-up system was unconscionable, I have had regard to the detailed elucidation of the concept of unconscionability in, amongst other cases, *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 (Full Court) and (2016) 258 CLR 525 (High Court) and *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421.

382 The characterisation of conduct as unconscionable involves a quintessentially evaluative judgment. In an appeal from such a judgment, due regard must be given to the advantages the primary judge may have had in hearing the evidence in its entirety as it unfolded at the hearing: ***Branir*** *Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [24] (Allsop J, with whom Drummond and Mansfield JJ agreed). Such a judgment can also only be overturned on appeal if error is demonstrated: "The views and conclusions of the trial judge ultimately have to be shown to be wrong. They should not be laid to one side and a simple re-argument of the case take place": *Branir* at [30].

383 At first blush, the terms, nature and circumstances of Mr Kobelt's book-up system would appear to bespeak unconscionability. Many, if not most, members of the broader Australian community would probably find some aspects of the system to be surprising, if not extraordinary. It is, however, necessary to consider Mr Kobelt's book-up system in its proper historical and cultural context. In particular, it is necessary to consider the system in the context of the evidence concerning the values, norms and practices of the Anangu people who comprised Mr Kobelt's book-up customers.

384 While that was recognised by the primary judge, to my mind his Honour failed to have sufficient regard to those important contextual matters, failed to give appropriate weight to the actual or perceived benefits of the book-up system to the Anangu customers, and failed to give appropriate weight to the fact that, on the whole, the Anangu people who were Mr Kobelt's book-up customers understood the basic elements of the system, voluntarily entered into the arrangements, and by and large were content with them. Most wanted the book-up system to continue.

385 Like Besanko and Gilmour JJ, I also consider that the primary judge erred in finding that Mr Kobelt's book-up system involved predation and exploitation in the relevant sense. In my opinion, that error came about not only because his Honour failed to have sufficient regard to the evidence concerning the values, norms and practices of the Anangu people, but also because his Honour had regard to elements and incidents that were not part of the pleaded system, such as poor record keeping, the supposedly high credit charges, incidents such as the "CBA glitch" and other isolated incidents relating to individual customers. The findings of exploitation and predation do not sit easily with the primary judge's findings that Mr Kobelt acted with a degree of good faith and did not adopt forms of undue influence or exert undue pressure on his book-up customers.

386 There could be little doubt that there were some actual and potential disadvantages and detriments inherent in Mr Kobelt's book-up system. Equally, however, there were some actual and perceived benefits and advantages for the Anangu customers who voluntarily chose to enter the arrangements armed with an understanding of the basic elements of the system. There was and is undoubtedly considerable scope for book-up systems like Mr Kobelt's system to be abused by unscrupulous proprietors. There was, however, no evidence that Mr Kobelt widely or systematically abused the system, or unfairly or unreasonably took advantage of his customers, or exerted any undue influence or undue pressure, or acted dishonestly or deceitfully. ASIC chose not to press any claim that Mr Kobelt engaged in unconscionable conduct in respect of any specific customer or customers.

387 In all the circumstances, having regard to the whole of the evidence, and taking into account the advantages the primary judge had in hearing the evidence in its entirety as it unfolded at the hearing, in my opinion the primary judge was wrong to conclude that Mr Kobelt's book-up system was unconscionable.

Injunctive relief – appeal grounds 10 and 11

388 Grounds 10 and 11 of Mr Kobelt's notice of appeal relate to the injunctive relief granted by his Honour, being paragraph 3 of the orders made on 13 December 2016. Like Besanko and Gilmour JJ, I am of the view that, given the conclusion that the primary judge erred in concluding that Mr Kobelt's book-up system was unconscionable, it is strictly unnecessary to resolve those grounds.

389 Were it necessary to resolve the issue in relation to the scope of the appropriate injunctive relief, I would incline towards the view that the injunction granted by the primary judge was too wide. In my opinion, the appropriate injunction should have been limited to restraining Mr Kobelt from continuing to engage in the conduct that constituted or comprised the essential elements of the impugned book-up system. That would include, at least, the conduct defined in the pleading as the "Withdrawal Conduct", which involved the withdrawal of all, or almost all, of the available funds in the customers' accounts. The Withdrawal Conduct lay at the very heart of ASIC's case, and the primary judge's conclusion, that the book-up system was unconscionable.

390 The terms of the injunction ordered by the primary judge in paragraph 3.1 of the orders restrained Mr Kobelt from receiving and retaining debit cards and PINs in any circumstances, even if they were not to be used to withdraw all the funds in the customers' accounts in accordance with the impugned book-up system. The terms of the order in paragraph 3.2.1 required Mr Kobelt to cease withdrawing any funds from any customer's account in any circumstances; even if, for example, the withdrawal was with the express consent and authority of the customer (and in his or her presence) to repay a debt, and even if the withdrawal represented only a small portion of the funds in the customer's bank account.

391 In the circumstances I would prefer not to express any concluded view as to the precise form of an appropriate injunction, and in particular whether the terms of the injunction should have included any of the other pleaded elements of the book-up system, including what I have described as the circumstances elements. I incline towards the view, however, that an injunction which included elements relating to Mr Kobelt's knowledge or state of mind, and the circumstances of the customers, would be problematic for a number of reasons. It would also be problematic to include conduct that was not part of the pleaded system. That would include, for example, the failure to provide proper account statements (see paragraph 2.5 of

the declaration) and the provision of credit of a "particularly expensive kind" (see paragraph 2.7 of the declaration).

CONCLUSION AND DISPOSITION

392 Like Besanko and Gilmour JJ, I reject Mr Kobelt's challenge to the primary judge's conclusion that he contravened s 29(1) of the National Credit Act, and uphold Mr Kobelt's challenge to the primary judge's conclusion that he engaged in unconscionable conduct contrary to s 12CB(1) of the ASIC Act. I agree with the order proposed by Besanko and Gilmour JJ. I also share their Honours' provisional views, subject to hearing from the parties, concerning the final orders that may be appropriate to dispose of the appeal.

I certify that the preceding one hundred and three (103) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate:

Dated: 15 February 2018