Rachel De Luchi

Welcome, and thank you to all who have joined our webinar today. My name is Rachel De Luchi, and I am joined by my colleagues Mei Barnes and Salwa Marsh.

The subject of today's webinar is 'Moral Obloquy or Commercial Autonomy? Debating Statutory Unconscionability'. We'll be looking at the recent High Court decision *ASIC v Kobelt*, which is an interesting demonstration of just how difficult it can be to apply moral standards, particularly when you throw in some cultural diversity in the way of a vulnerable Indigenous community and a book-up credit system. The judgment revisits the issue of statutory unconscionability. Many of you will have read the decision and know the judges were almost evenly split on the issue, making for an interesting read.

The purpose of today's webinar is to dive into some of the main arguments that were made by the parties to that appeal and discuss the implications of the decision. So, you will see a debate today because Mei and Salwa are going to present the arguments in a submission format, Mei on behalf of ASIC, and Salwa on behalf of Mr. Kobelt.

Firstly though, to give you some background of the facts of the case. Mr. Kobelt runs a general store in South Australia called Nobby's Mintabie General Store. Most of his customers are the Anangu People, residents of remote communities in nearby indigenous lands. Mr. Kobelt operates his store by utilising a book-up system, which is not an uncommon system of credit used by Aboriginal consumers. Essentially under this arrangement, the customer is required to give the storekeeper their debit card which is linked to the bank account into which their Centerlink payments are made. The storekeeper is then authorised to take funds from the customer's account in payment of the customer's debt to the store for the supply of goods. Mr Kobelt's system extended to the sale of second hand cars, cash advances and purchase orders by which customers could purchase goods or obtain cash at other stores and Mr. Kobelt would settle with the store owner for a fee.

At first instance, in the Federal Court ASIC alleged that Mr. Kobelt contravened, amongst other things, section 12CB of the *ASIC Act* due to supplying credit under this book-up system. It was not alleged that Mr. Kobelt's withdrawal of the funds was ever unauthorised, rather ASIC's case focused on the system of credit itself and identified four particular customers who it said were subject to unconscionable conduct.

Justice White acknowledge that an advantage of Mr. Kobelt's book-up system was that it provided a relatively simple means by which the Anangu customers could obtain credit that would not otherwise be available to them. But he ultimately found that Kobelt's supply and credit contravened section 12CB and was unconscionable. His Honour found that Mr. Kobelt

did not need to take the full amount out of his customers' accounts and was doing that for his own benefit, thereby tying customers dependence on his store.

Mr. Kobelt appealed to the full court of the Federal Court. The Justices unanimously allowed the appeal in relation to the unconscionability issue. Whilst their Honours accepted a number of the primary judges' findings, they found that Mr. Kobelt had not acted unconscionably because his customers had a basic understanding of the credit system and they had entered it voluntarily. Kobelt did not act with dishonesty, but rather was fulfilling a demand.

In his separate judgment Justice Wigney added that the primary judge had given insufficient consideration to ASIC's expert evidence from social anthropologist Dr. Martin. Regarding Anangu cultural practices, that evidence explained why the Anangu customers had chosen to use this book-up system. ASIC of course appealed to the High Court.

Mei and Salwa will now take you through some of the important and very persuasive arguments for both ASIC and Mr. Kobelt.

Mei Barnes

May it please the Court, my name is Barnes, initial M and I appear for the applicant, the Australian Securities and Investments Commission.

Mr. Kobelt, knowing that his customers were vulnerable people, designed a system in which they gave him complete access to their bank accounts and they became beholden to him, not only for the repayment of their debt but also in their ability to use their money at all.

The issue before the Court today is whether this conduct was in all of the circumstances unconscionable, within the meaning of Section 12CB of the *ASIC Act*. In my submission, in light of the inequality of bargaining power between the parties and the inherently exploitative nature of the system, the Court must conclude that it was.

I will start by outlining some of the material facts. The litigation centres around a book-up system operated by Mr. Kobelt. Now, book-up is a form of credit, whereby a customer gives the shopkeeper their bank card, and the PIN - that is the personal identification number that is linked to that card. The shopkeeper is then authorised to withdraw funds from the account in reduction of a customer's debt.

Book-up practices are not uncommon, as Rachel said, in rural and remote parts of Australia. In some remote communities, they are in fact the only way that people can access credit, particularly Indigenous Australians. Mr. Kobelt operated a general store called Nobby's Mintabie General Store in Mintabie, South Australia. Mintabie is very remote. It is 1000 kilometres northwest

of Adelaide. Most of Mr. Kobelt's customers were Anangu People from the APY Lands in Central Australia.

Mr. Kobelt sold food, groceries, second hand cars and fuel. If customers wished to buy from Mr. Kobelt and they didn't have cash available, they could enter into a book-up arrangement with him.

In order to do that, the customer was required to give Mr. Kobelt their bank key card, the PIN for the bank account in which that customer received their income, which was primarily Centrelink payments or wages. And they were required to tell Mr. Kobelt how much income they received and exactly when that income would hit their account. On the day that the funds came into the account, Mr. Kobelt would login to the account and he would withdraw the balance of the funds.

Importantly, Mr. Kobelt took more than was necessary to pay the customer's debt. He withdrew all of the funds deposited into the account at that time. Of that amount 50% was withdrawn to pay down a customer's debt and the remaining 50% was applied in a form of book-down store credit, so the customer could use that money as credit in his store. If the customer wished to buy something at another store, or to take the money out as cash, Mr. Kobelt would allow them to raise a purchase order for which they would have to pay a fee.

If your Honours will bear with me, because the factual background is important, I'd like to illustrate by way of an example. Assume there is a customer who wants to buy a second hand car from Mr. Kobelt. Second hand cars, in fact made up a significant portion of Mr. Kobelt's business and due to their relatively high value often required a book-up arrangement with customers. The car costs $4,000 and the customer receives $1,000 per fortnight in Centrelink payments. The income comes in, $1,000. On the day that the money enters into the account, Mr. Kobelt withdraws all $1,000. He then takes $500 for himself as payment for the car. And that payment is applied to the debt to reduce the $4,000 owing. He takes the other $500 as book-down store credit, which the customer can use in his shop.

Now if the customer wants to use that credit, they have to travel to Mr. Kobelt's shop, which may be hundreds of kilometres away from the community in which they actually live. If they want to access their cash and spend the credit at any of the other two general stores in Minabie they need to ask Mr. Koblet and they need to pay the fee for the purchase order.

Mr. Kobelt didn't allow Anangu customers to spend the book-down credit all at once, they could only spend it in transactions of $100, $150 or $200 at a time. And on some occasions Mr. Kobelt would refuse to sell customers certain items that he didn't think were appropriate. For example, he might limit their purchases to milk and bread or meat and not to lollies or chips.

Mr. Kobelt's documentation of the transactions was chaotic. He didn't keep any written record of the amounts withdrawn from the accounts, the amount of book-down credit that had been used by the customer to date, or the amount that was still available for use.

ASIC contends that Mr. Kobelt's book-up system involved unconscionable conduct. Now, the *ASIC Act* prohibits two forms of unconscionable conduct, the first being conduct that's unconscionable within the meaning of the unwritten laws of the state and territories, and secondly, statutory unconscionable conduct. This case falls in with the latter category. The prohibition is contained in Section 12CB of the *ASIC Act*. It provides that a person must not in connection with the supply of financial services engage in conduct that is in all of the circumstances unconscionable. Section 12CC of the *Act* sets out a list of factors the court may have regard to in deciding whether the supplier has contravened section 12CB. These include the strength of the bargaining positions of the supplier and the service recipient; whether the service recipient was required to comply with provisions that were not reasonably necessary for the protection of the legitimate interests of the supplier; whether any undue influence was exerted; and the amount for which the service recipient - that is the customer - could have acquired identical or equivalent financial services from a person other than the supplier.

The phrase 'unconscionable conduct' is not defined in the *ASIC Act*. However, recent High Court decisions confirm that it requires not only that the innocent party be under a special disadvantage, but that the other party must also unconscientiously take advantage of that special disadvantage.

The two primary questions in this matter are therefore, first whether Mr. Kobelt's customers were under a special disadvantage. And second, whether Mr. Kobelt unconscientiously took advantage of that special disadvantage. Pertaining to the first issue, were the customer's under potential disadvantage? That issue is relatively uncontroversial in this case. Cases such as *Blomley v Ryan* make clear that special disadvantage may arise from poverty event or need of any kind, illiteracy or lack of education. In this case, Mr. Kobelt's customers were impoverished. At least half of them were dependent on Centrelink benefits as their primary form of income. Their literacy, financial literacy and numerical abilities were poor. They lived in a very remote part of Australia and had limited access to credit. In fact, it's hard to imagine a more disadvantaged group of Australians. Mr. Kobelt was aware of each of the circumstances that give rise to this special disadvantage.

So moving on to the second element. Did Mr. Kobelt unconsciously take advantage of this special disadvantage? ASIC's case is that he did, for three reasons. First, Mr. Kobelt, was in a clearly superior bargaining position. He had products and credit that the Anangu People needed, he was able to dictate the terms on which he was willing to make those things available. He knew that the Anangu People were severely disadvantaged and would have limited ability to negotiate with him.

Second, Mr. Kobelt imposed conditions that were greater than reasonably necessary to protect his interests. Mr. Kobelt could have protected his interest in being paid the balance of the debt by just withdrawing the proportion of a person's wages and Centrelink payments that would have been necessary to pay down that debt. He didn't need to withdraw the full amount and to compel customers to enter into the book-down store credit arrangement. Centrelink, in fact, has a separate system called Centrepay, which allows participants in that system to be paid part of a person's Centrelink payments directly. Mr. Kobelt was aware of that system and he chose not to participate in it.

Thirdly, Mr. Kobelt's system was inherently exploitative. By cutting off customers from their funds, Mr. Kobelt tied the customers inexorably to his store. The system deprived customers of an independent means of obtaining basic goods and services, and it created prolonged dependence on Mr. Kobelt. Mr. Kobelt didn't simply act as an ATM or the holder of their money, but he made discretionary decisions about what customers could buy, how much of their money they could use, and they therefore became dependent upon a favourable exercise of his goodwill.

Now, ASIC doesn't contend that Mr. Kobelt exercised his discretion dishonestly, or in bad faith. However, by the terms of his book-up arrangement, he plays with vulnerable people in an even more vulnerable position, for his own commercial game. This is highlighted by an incident that occurred in 2010. The Commonwealth Bank of Australia experienced a computer glitch, which meant that customers were for a short time, able to withdraw from their accounts much more than the actual balance. During that time, Mr. Kobelt logged into his customers' accounts and was able to withdraw $56,000 which was well in excess of the usual withdrawal amounts. And it was more than the customers had to authorise him to take in relation to their debts. As a result, those customers became indebted to CBA for the amount of the overdraw and had to pay fines.

The vulnerability of Mr Kobelt's customers to his discretion and goodwill was increased by the lack of transparency and accountability with which he admitted to the system. Mr. Kobelt's record keeping was chaotic. It didn't leave him in a position where he could tell customers how much they owed under the system at any given time. He had no record of this. If the reason he had no records was because customers didn't ask for it, or because they were illiterate and couldn't use the information anyway, this tends to support the view that his customers weren't in a position to protect themselves, and were therefore particularly vulnerable to such a system.

It's hard to believe that consumers who didn't suffer from the same special disadvantage as Mr. Kobelt's customers could have possibly accepted the terms on which he was supplying credit, which indicates that they couldn't be perceived as objectively fair.

Mr. Koblelt raises two matter in his defence. Because I won't have a right of reply today I'm going to look at those now.

The first matter he raises is that his customers entered into the arrangement voluntarily. ASIC doesn't dispute that the customers may have voluntarily entered into the transaction. However, that voluntariness doesn't neutralise the unconscionability of Mr. Kobelt's conduct for two reasons. First, the fact that a transaction was entered into voluntarily allows the Court to conclude more safely the transaction was entered into without undue influence. However, undue influence is just one of a number of statutory factors that have to be taken into account in the calculus of unconscionability. At best, it can be treated as a neutral factor in Mr. Kobelt's case. Second, customer's willingness has to be weighed in light of irrelevant circumstances, in particular, their limited understanding of the transaction, their financial illiteracy, and their lack of alternatives.

People who are suffering under extreme hardship occasionally do enter into transactions that are not in their best interest. This may speak more to their own circumstances of desperation than to the reasonableness of the transaction that they're entering into.

The second matter that Mr. Kobelt raises is that the transaction provided unique benefits to the customers. There is of course the benefit of having credit and ASIC doesn't deny that that is a benefit for which customers may have paid and have been willing to pay. However, the fact that a system is better than nothing doesn't prevent it from being exploitative, particularly where the exploitative features are not necessary to protect a party's interests.

Mr. Kobelt identified a further benefit, which was that the system allowed his customers to avoid the cultural pressure of having to share resources, which is a unique factor of the Anangu People. This benefit was hypothetical only. There is little evidence from Mr. Kobelt's customers that this was a factor that motivated them entering into the transaction or one that was a matter of significance to them.

In conclusion, Mr. Kobelt's book-up system made a vulnerable group of people even more vulnerable by cutting off access to their money, tying them to his store and making them totally dependent on him or his exercise of discretion and goodwill. His conduct was in all of the circumstances unconscionable.

May it please the Court.

Salwa Marsh

May it please the Court. My name is Marsh initial S and I appear for the respondent Mr. Kobelt in these proceedings.

The central issue for consideration is whether Mr. Kobelt engaged in conduct that was in all the circumstances unconscionable in the supply of financial services under Section 12CB of the *ASIC Act*. Now, there are two critical points to make at the outset, which must shape our consideration of that inquiry. The first is that this case has been run by ASIC as a so called systems case under Section 12CB subsection 4(b), meaning that the case has been framed to address the system of conduct or a pattern of behaviour, rather than simply to provide relief to victims of individual transaction. The second point to raise is the framing of the legislation as being targeted as unconscionability in all the circumstances, including by reference to the multiplicity of factors articulated in Section 12 that we'll see in the *ASIC Act*. This requires our inquiry to involve analysis of all evidence before the Court and in context. It is critical then to identify the parameters of the system that was played by ASIC below.

Now, broadly speaking, the system involves the provision of credit by Mr. Kobelt to 117 customers under the book-up system for the purchase of second hand cars, and other goods including fuel, general groceries and some services. In particular, and by reference to the statement of claim, there are two aspects of this system's case. Firstly, the credit facility by which payment for goods obtained is deferred when the customer provides a debit card linked to a bank account and their PIN and further information about when they expect to receive payments into that account to Mr. Kobelt. The second aspect of this system's case is the withdrawal conduct, which is that in order to satisfy the debt Mr. Kobelt gained authorisation to use the relevant debit card and PIN to withdraw funds from the customer's bank account, and did so at a time, which prevented the relevant customer any practical opportunity to access those funds.

It's important at this stage, and at the outset, to identify that the computer glitch was not said to be a part of that system.

Before I proceed, I would like to set out the way forward in my submissions today. So firstly, I will look at unconscionable conduct. I'll then go on to draw your attention to some other aspects of the findings below, which is significant in this case when considering unconscionability in all the circumstances. And I'll conclude by homing in on this idea of unconscious advantage, which as we know, is the key controversy.

Firstly, in regard to unconscionable conduct, you'll recall that unconscionable conduct requires the existence of some special *dis*advantage of which the defendant takes on unconscientious advantage. Now, I accept that Mr. Kobelt's Anangu customers were in a position of a special disadvantage by virtue of their poverty and their lack of financial literacy, and those factors rendered them vulnerable. The more controversial aspect of this case is whether the second aspect is made out, being whether Mr. Kobelt took unconscientious advantage of that disadvantage.

It is common in that in the authorities is the test has been described as requiring victimisation, unconscientiousness, or exploitation. It is conduct which can be described as being so far outside of societal norms of acceptable commercial behaviour as to warrant condemnation as conduct within good conscience.

A central contention made by ASIC is that the decision below doesn't take full account of the existence of the special disadvantage, which seriously affects the ability of the Anangu People to make decisions in their own interest. Given that social disadvantage isn't an issue here, the danger with this approach is to emphasise the extent of the special disadvantage at the expense of establishing unconscientious advantage.

It's convenient I think now to step through some aspects of the evidence which inform our inquiry as to unconscionable conduct in all the circumstances. And I'll cover a few aspects of customer evidence, anthropological evidence, and also the evidence on the practical impact of the book-up system.

Firstly though, to the customer evidence. Now I know that this comes from two sources. Firstly, six customers who gave evidence below and also the anthropological evidence, which was based on interviews conducted in the community. Now this evidence tells us that the customers understood that purchases were made on credit and involved them paying later by way of Mr. Kobelt withdrawing the available funds from the bank account and that involved him effectively controlling their access to those funds. This evidence confirms that they considered that it was an advantage of the system that Anangu customers and their families were able to access the necessities of life by way of this system. Now, this is of no small importance, given the evidence of the boom and bust household expenditure among the Anungu customers, in particular, because of the unique cultural practice of demand sharing or humbugging, by which there is significant cultural pressure to share resources when they're available, and that that cultural pressure is routinely exerted by the young as against the old.

Further, there's evidence that the customers were aware and understood that it may be said that a disadvantage of the system is that they would lose control of their funds, and that the system would require the advancement of further credit from time to time.

Finally, and most importantly, they were aware of this when they were entering into the book-up credit system. And they chose to do so voluntarily because they considered that the system communicated benefits to them they would not otherwise have access to. In particular, one of our six witnesses said she loved the shop and she used the book-up system again, when she had paid down her debt. That same customer had said that in her experience Mr. Kobelt was prepared to negotiate the amount withdrawn during particular weeks when she asked and engaged with him on that, which is important as a willingness to negotiate is one of the factors the Court may have regard to under Section 12CC 1(j), of the *Act*. There was specific

acknowledgement by at least two witnesses that without the system they would go hungry between paydays. Another said that they chose to go into the store because of the book-up system because there were other stores available that did offer that service. And another said that they use book-up credit at different stores, including at Nobby's. So there is a market for that service and there is competition for that service.

It is useful also to draw your attention to some aspects of the anthropologist's evidence. Now, the anthropologist's evidence states that the Anangu residents who shopped at Nobby's considered it an exercise of agency in the sense that they had capacity to act and to exercise choice in what was perceived to be their own interest. Interviews with the community indicated that they supported book-up systems of credit generally, and Nobby's in particular, and that the system was not viewed to be unfair or unjust or unreasonable.

Further, there is evidence that in the very act of trusting Mr. Kobelt to take immediate control of Anangu customers finances those customers were able to experience relief from the cultural practice of demand sharing, or humbugging in order to smooth out that boom and bust aspect of household spending. This is an answer to the allegation put by my learned friend that the book-up system required Anangu customers to comply with conditions that were disproportionate to the protection of Mr. Kobelt's interests. Rather, that very feature of the system was an attractive aspect of the system, and compels at least one of the only six witnesses before the Court to say that that was a reason for going to Nobby's General Store rather than another.

Furthermore, there's relevant evidence about the effect of the practical effect of the book-up system generally. Now, book-up systems are not unique. In fact, it was a widespread practice and there was at least one other store that competed with the store in question. Such businesses provide a means of managing money over weekly and fortnightly cycles to those who lack the financial management skills that underpins ASIC's submissions. There were no banks, credit unions or other institutions or other methods by which the Anangu customers could obtain credit. And the Anangu customers would likely have experienced difficulty securing credit from commercial lenders by virtue of their low income and few material assets. So accordingly, we can see that the system allowed Anangu customers a consistency of access to the necessities of life, such as food and fuel. And there's direct evidence from the customers who gave evidence in this case that that was an attractive feature the system. But there's also an opportunity available for those customers to secure a car which is a significant asset which they would otherwise not be able to obtain in circumstances where there is evidence that having a car provides significant value, because it allows those customers to access country necessary for hunting and gathering, for the visiting of their kin, for attending medical appointments and for participating in initiations and funerals.

Turning now, to drill down further into this conception of unconscientious advantage. The highest ASIC rises is that the withdrawal conduct has a tendency to tie customers to depending on Nobby's being the only advantage enjoyed by Mr. Kobelt, which was identified by the primary judge. To this, I respond by pointing to three factors, which were also found by the primary judge which negate the idea that this advantage was unconscientious. The first is that there is evidence that customers of Mr. Kobelt paid off their debt and brought the relationship to an end, and that some of them became repeat customers. And we have direct evidence from one of those customers. Furthermore, there's evidence that customers were able to obtain purchase orders at other shops, so they were not restricted to Nobby's shop. In fact, both purchase orders were provided in terms more favourable to Australia Post's Express Money purchase order service. And finally, customers were able to sever their relationship with Mr. Kobelt. And they did so by withholding or not returning their key card, they weren't able to access their keypad if they asked for it by changing their bank details. And there's evidence that the customers were aware of it and did so. There is further evidence that Mr. Kobelt didn't enforce those steps after that had taken place, except on one occasion, and that his view was that it wouldn't be in his interest to do so because it would result in reputational damage. This, I submit is a response to the argument stemming from the relative strength of the bargaining power between the parties, which is a matter the Court must have regard to under section 12CC 1(a).

So we can see that the continuation of the relationship between Mr. Kobelt and his Anangu customers was not the involuntary consequences of the book-up system, but rather a consensual choice, which was often made repeatedly. ASIC contends that we can't put much weight on the availability of that choice due to the lack of financial literacy of the Anangu People and to their vulnerability. I say that it prevents their ability to make decisions in their own interests. Now, this approach does a great disservice to those people who understand the benefits and the disadvantages of the book-up system, and who nonetheless, choose to maintain their relationship with Mr. Kobelt and who continue to participate in those arrangements because they suited their interests by reference to their own personal preferences, and by reference to the cultural and socio-economic necessities, the circumstances.

If I'm wrong in this regard to place emphasis on the evidence of the perceptions of those very customers the more objective evidence also favours the finding that there was no unconscionable conduct. The primary judge found that Mr. Kobelt conducted himself with a degree of good faith, without dishonesty, without the presence of undue influence or pressure. There was no allegation that withdrawals were made without authority and the Anangu customers understood the arrangements and were able to extricate themselves from them, if they chose to. These of course are all matters relevant to the assessment of the nature of the conduct and which speak to the multiplicity of requirements that the Court may have regard to under Section 12CC.

So it is my submission that this tie in effect being a key advantage that can be attributed to Mr Kobelt is why the book-up system cannot be said to be unconscious in all the circumstances. I submit that the Anangu customers may have been vulnerable to exploitation but the evidence simply does not support the idea that they were so exploited.

Set against the broader socio-economic context, there is good evidence why Mr. Kobelt would not seek to exploit his customers vulnerability because of the countervailing market power of customers flowing from their numbers and their sense of community, as well as the existence of another shop that serviced those very customers and other shops that were accessible by them.

I'd like to say something further about the construction of unconscionable conduct. The legislature has adopted the word 'unconscionable' in the *ASIC Act* and in other consumer legislation. It didn't select 'unjust' or 'unfair' or 'unreasonable' or other term for it within the within the consumer context. Now I certainly don't seek to describe the conduct in this case by reference to those words and in fact there is evidence in interviews with those consumers held by the anthropologists, they do not consider that be so. But I do include those words to demonstrate that there is a spectrum of conduct, which the legislation might seek to address, and which it does address and that unconscionable must be that conduct which falls at the most serious end of the spectrum, which attracts condemnation as offending conscience.

I submit that in circumstances where there is evidence of the customers in question understood the system felt they benefited from it and chose to engage in it often repeatedly without more, without dishonesty, without undue influence, without pressure or predation, the conduct cannot be said to rise to that level. Further, there is no requirement that when dealing with customers, even in those in positions of special disadvantage, that a business conduct itself in an altruistic or benevolent or disinterested way. A trader is not in a fiduciary relationship with customers, and there is no requirement that interaction they act in the interest of customers with special disadvantage. If that was the case, commercial parties will be reticent to trade with those in such a position and that cannot be the intention of the statute.

To summarise, it cannot be said that Mr. Kobelt took unconscionable advantage of his customers in the operation of the book-up system in this case, and their evidence does not demonstrate that they consider that to be so. Rather, the evidence makes clear that the Anangu customers understood the book-up system, perceived value in it, gained actual benefit from it, and accordingly they chose to continue to engage in that system in an ongoing way. It is a great a great disservice to the Anangu customers to conclude that by virtue of their poverty, their dependence on social security, their lack of financial literacy or their remoteness that they were necessarily rendered unable to make financial decisions in their own interest about the acquisition of important assets and those necessities in their life. And to contend that there are deceptions in this regard, which will make clear in ASIC's evidence which are simply objectively

wrong, is problematic. Accordingly, the conduct without more cannot be said to be unconscionable in all of the circumstances.

Rachel De Luchi

Thank you Mei and Salwa. Unsurprisingly, this debate resulted in a 4:3 split decision by the High Court. Ultimately, the court dismissed ASIC's appeal and found Mr. Kobelt was not guilty of unconscionable conduct. The majority judgment was delivered by Chief Justice Kiefel and Justices Keane, Bell and Gageler. Chief Justice Keane and Justice Bell reiterated that the values that inform the standard of conscience fixed by section 12CB(1) include certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made, and especially in this case, the protection of the vulnerable from those who would victimise or take advantage.

Their Honours' characterisation of the evidence before the primary judge is important. They found at [78] the basic elements of Mr. Kobelt's book-up system were understood by his customers and those who chose to enter into book-up credit contracts with him appear to have done so because it enabled them to purchase goods which they valued and which otherwise they may not have been able to acquire. The terms on which book-up credit was supplied were perceived by the Anangu customers to be appropriate. His perception was not the product of their lack of financial illiteracy. It reflected aspects of the Anangu culture that are not found in mainstream Australian society. There Honours found that the book-up system had advantages for Anangu people unrelated to their lack of education and financial acumen, including the capacity to deal with the bust and boom economy, to avoid paperwork and to avoid that demand sharing or humbugging of economic resources by relatives, which is characteristic of many indigenous societies. Although Mr. Kobelt's system was open to abuse, he did not abuse it and there was no feature of his conduct that exploited or otherwise took advantage of the customer's lack of education and financial acumen.

Justice Gageler was not satisfied that the evidence provided a sufficient basis for the Court to question the choice made by Kobelt's customers or their ability to make it. The result being that he found he could not characterise Kobelt's provision of credit as involving exploitation of his customers vulnerability, or to conclude that the conduct was so offensive to the norms of Australian society that it warranted it condemnation as unconscionable. His Honour also recanted from his earlier use of language in clarifying the meaning of unconscionable conduct. In *Paciocco v ANZ Banking Group Limited* as requiring a high level of moral obloquy His Honour regretted using what he described as "arcane terminology" which did not elucidate the normative standard and he said could be misleading by suggesting a requirement for conscious wrongdoing. At [92] he clarified "What I meant to convey by the reference was that conduct prescribed by the section as unconscionable conduct is conduct that is so far outside societal norms of acceptable commercial behaviour so as to warrant condemnation as conduct that is offensive to conscience. To that view of the statutory standard I adhere."

Justice Keane, the final member of the majority, found that at its highest ASIC had shown that the Anangu customers were more vulnerable to exploitation by the book-up system than might otherwise have been the case. But that is not to say that Mr. Kobelt actually took advantage of that. Implicit in all three majority judgments was this notion that it is overprotective to say that the Anangu customers were not capable of voluntarily entering into this type of arrangement. Inter-judgment emphasises the benefits to the customers because of that particular culture and situation.

Justices Nettle and Gordon, in their dissenting judgment identified the difficulty in defining unconscionability. Their Honours noted that the heart of the dispute concerns voluntariness which needs to be assessed in the context of the system of conduct in issue. The relevant question is how the willingness or intention is produced. They were sceptical of what the other judges had relied on as being advantages to the customers, such as the avoidance of demand sharing by relatives, or that there was no other better, fairer system. There Honours considered that Mr. Kobelt's system was an unconscionable taking advantage of his customers vulnerability because, amongst other things, the implementation of the system was characterised by unconscionable conduct, tying the customers to the store, and Kobelt's conduct was not necessary to protect his legitimate interests but went beyond that.

Their Honours, made a strong statement at [260] where they reasoned "Where else and with what other customer would it be regarded as acceptable, that the terms of the arrangement go entirely undocumented, that the credit provider not be required to, and not render invoices, receipts or reconciliations? And that the credit provider not maintain financial accounts sufficient even for two experienced accountants who gave evidence at trial to determine how much had been advanced and how much had been paid? Surely anywhere else with any other customer, such an arrangement would be regarded as unconscionable. It is no answer to say that the customers were Anangu People. It is no answer to say that the customers agreed."

Justice Edelman agreed with his dissenting colleagues, but for additional reasons. He considered that the customers were essentially offered a Hobson's Choice. No matter how badly they needed credit they could either choose that system, Mr. Kobelt's system, or choose no credit at all. His Honour considered that the statutory history indicated a desire by parliament to liberalise the rigour of moral disapprobation which courts have required for the statutory prohibition of unconscionable conduct. His Honour's judgment notes two additional reasons why Mr. Koblelt's book-up system was unconscionable. The system was mostly applied to Aboriginal customers as their only option for credit. Yet other forms of credit were available for non-Aboriginal customers and the interest rates for second hand cars were high and were concealed in the price differentials for cars purchased on credit rather than with cash.

So what are the implications of the decision? There has already been some varied commentary on the potential implications. The ethical doctrine of unconscionable dealing is well traversed by the cases, but the boundary separating special disabilities from the rest of the population remains difficult to define. As tempting as it is to look for underlying principles, the concept of unconscionability is not closed, and ultimately judgments on this topic will always be subjective. At the very least, this case adds to a growing body of case law on what constitutes statutory unconscionability. The narrow majority and the reasons demonstrate how varied judicial opinion is on the issue and perhaps the risks of running a statutory unconscionability case in the current legal climate.

An apt observation by Justice Gageler is the difficulty in judging an intersection between the cultures of the Anangu People and wider Australian society. The difference in approach between the majority and the minority seems to reflect also the differences of opinion in values which affected the assessment of voluntariness central to this case. This may make the judgment difficult to apply in other cases. It could be said that the case affirms the narrow and orthodox approach to the inquiry, which is decided on a case by case basis.

Does this create an unacceptable gap in conduct that is prohibited in commercial transactions? Conduct that is unfair, and will perhaps previously have been termed as unconscionable, but as a result of recent interpretation by the courts does not quite get over line.

On one view, the case provides grounds to resist a finding of unconscionability on the basis that choices were made voluntarily, by reason of the very circumstances rendering the person vulnerable to making the choice in the first place, or according to Justice Edelman, an Hobson's choice.

The developing law seems to indicate that the equitable principles and statutory provisions now seem to ensure a higher moral standard than was the case in the distant past. Whilst the rules are difficult to define in equity some predictability can be found in awareness of the standards which the courts consistently uphold. Time will tell whether this decision by the High Court is a step in the direction of a narrower approach, or whether the facts of the case are so specific that its application is limited.

The decision has had some application already, including by the Federal Court in *ASIC v One Tech Media Limited* which relied on the High Court statements regarding the width of statutory unconscionability compared to that under equity and the general unwritten law. Also by the Supreme Court of New South Wales in *Realtech Holdings Private Limited v Wettermast Pty Ltd* which made reference to both the majority and minority judgments in finding that unconscionable conduct was not made out. And thirdly by the Federal Court in *Lloyd v Beloonnen Lakeview Pty Ltd* in which Judge Lee said this at [216] "Little is to be gained by

canvassing the cases which, as *Kobelt* reinforces, turn on their on facts and assist only to the extent that they provide an explication of the applicable principles. Relevantly, these principles include a) that a norm such as section 21 is capable of applying to a system of conduct, irrespective as to whether an individual is identified as having been disadvantaged by the conduct; b) that it's not limited to conduct that's been held to be unconscionable under the general law; and c) that nevertheless, the unwritten law still has a significant part to play in ascribing meaning or content to the word 'unconscionable', such that it is conduct which warrants being described as such. And that the statutory concept permits consideration of but does not require a special disadvantage or the taking advantage of that special disadvantage; and d) that more is required than merely reasonableness or unfairness to establish unconscionable conduct."

Because of the subjective nature of decisions in this area the questions addressed by the appellate courts are not so much about resolving conflicting lines of authority, or particularising legal doctrines, but often turn on debates about voluntariness, vulnerability and moral standards and the extent to which courts should intervene in a protective role. As Justice Edelman optimistically put it "Although conscience has no single objective moral voltage, the moral baseline required by the courts might emerge by incremental development in the long run through very slow degrees, and by very short steps, and through the process of methodological reductionism, but also that, unfortunately, in the long run, we are all dead."

Mei, Salwa and I thank you for joining us. We have prepared a short paper to accompany this webinar and that paper will be emailed to everyone who registered and will also be available for download on the Chambers website.