

**ALL IS FAIR IN LOVE AND REMOTE  
INDIGENOUS COMMUNITIES?  
*ASIC V KOBELT* (2019) 368 ALR 1**

I INTRODUCTION

In 2018–19, mainstream discussions about unfair financial services centred on the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (‘Banking Royal Commission’). The Australian Securities and Investments Commission (‘ASIC’) was embroiled in this ‘war’,<sup>1</sup> waged mainly in Melbourne courtrooms,<sup>2</sup> and banks have incurred over \$10 billion in remediation costs.<sup>3</sup>

At roughly the same time as the Banking Royal Commission, ASIC was also involved in a skirmish. It concerned financial services too, but was not nearly as high profile. It arose from events in Mintabie, a remote South Australian town 1,100 km northwest of Adelaide. The case concerned a ‘book-up’<sup>4</sup> system operated by 75-year-old general store owner Lindsay Kobelt, through which he provided credit to Indigenous customers. If the war in Melbourne was a question of big sums, the skirmish with Mr Kobelt was the sum of big questions. Above all, how should protections against

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<sup>1</sup> James Thomson, ‘Banks Hold Back in War of Attrition’, *The Australian Financial Review* (Sydney, 11 August 2018) 8. For ASIC’s involvement, see, eg, Sean Hughes, ‘The Financial Services Royal Commission and Other Emerging Issues Relating to the General Insurance Industry from an ASIC Perspective’ (Speech, Insurance Council of Australia Annual Forum, 27 February 2019); Stephanie Chalmers, ‘Banking Royal Commission Grills ASIC Boss James Shipton, Telling Him to Start Naming Names’, *ABC News* (online, 22 November 2018) <<https://www.abc.net.au/news/2018-11-22/banking-royal-commission-asic-boss-james-shipton-name-names/10546098>>.

<sup>2</sup> See Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, ‘Public Hearings’ (Web Page) <<https://financialservices.royalcommission.gov.au/public-hearings/Pages/default.aspx>>.

<sup>3</sup> Stephen Letts, ‘NAB Takes Another Billion-Dollar Hit as Royal Commission Customer-Remediation Costs Double’, *ABC News* (online, 2 October 2019) <<https://www.abc.net.au/news/2019-10-02/nab-takes-another-billion-dollar-hit-customer-remediation/11566792>>.

<sup>4</sup> Book-up systems allow a customer to obtain credit from a storekeeper. The customer provides their debit card and personal identification number (‘PIN’) and authorises the storekeeper to ‘withdraw funds from the customer’s account in reduction of the customer’s debt and in return for the supply of goods over the interval between the customer’s “pay days”’: *ASIC v Kobelt* (2019) 368 ALR 1, 4 [1] (Kiefel CJ and Bell J) (‘*Kobelt*’).

unconscionable conduct in connection with financial services apply at the ‘intersection’<sup>5</sup> of the colonial legal system and Indigenous culture and practices?

The High Court’s answer was delivered by a 4:3 majority in *Australian Securities and Investments Commission v Kobelt* (*‘Kobelt’*). The majority held that Mr Kobelt’s book-up system did not contravene the prohibition against unconscionable conduct in s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (*‘ASIC Act’*). *Kobelt* provides the most authoritative articulation of the approach to assessing unconscionable conduct under both s 12CB of the *ASIC Act* and, by analogy, its more widely applicable analogue: s 21 of the *Australian Consumer Law*.<sup>6</sup> It confirms that statutory unconscionability does not set a lower bar for relief than unconscionability in equity. While the facts of the case might be a world away from the Banking Royal Commission, the developments heralded by *Kobelt* will likely influence future litigation against Australia’s banks.<sup>7</sup> More broadly, the stark contrast between the Banking Royal Commission and the *Kobelt* litigation underscores the chasm between applying consumer protections to mainstream financial services and applying them within a vastly different cultural and historical context.

This case note analyses the High Court’s reasoning in *Kobelt*. I contend that both the majority and dissenting judgments are liable to criticism for judicial paternalism, but that the dissents ultimately strike a better balance between respect for freedom of choice and protection from exploitation. Further, the majority’s approach to the issue of voluntariness undermines Parliament’s attempt to legislate a protection against unconscionable conduct that is broader than that offered by equity. This case note concludes that it is time to reform s 12CB of the *ASIC Act* (and s 21 of the *Australian Consumer Law*) by replacing the word ‘unconscionable’ with ‘unjust’ or ‘unfair’.

## II BACKGROUND

### A *Mr Kobelt, His Customers and His Book-Up System*

Since the mid-1980s, Mr Kobelt operated ‘Nobbys Mintabie General Store’ (‘Nobbys’). He sold groceries, fuel and second-hand cars. Almost all of his customers were Anangu<sup>8</sup> people from remote communities in the Anangu Pitjantjatjara

<sup>5</sup> *Kobelt v ASIC* (2018) 352 ALR 689, 746 [328] (Wigney J).

<sup>6</sup> *Competition and Consumer Act 2010* (Cth) sch 2 (*‘Australian Consumer Law’*).

<sup>7</sup> See, eg, Australian Securities and Investments Commission, ‘ASIC Sues ANZ for Misrepresentations and Unconscionable Conduct over Account Fees’ (Media Release 19-191MR, 25 July 2019).

<sup>8</sup> Anangu (more correctly styled Anangu) is pronounced ‘arn-ahng-oo’. It is the term for Aboriginal people from the Western Desert region in the Pitjantjatjara and Yankunytjatjara tongues: see Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘Tjukurpa’ (Web Page) <<https://aiatsis.gov.au/exhibitions/tjukurpa>>; Lindsay Kobelt, ‘Respondent’s Submissions’, Submission in *ASIC v Kobelt*, A32/2018, 2 November 2018, 1 [2] n 1 <[http://www.hcourt.gov.au/cases/case\\_a32-2018](http://www.hcourt.gov.au/cases/case_a32-2018)>.

Yankunytjatjara Lands ('APY Lands').<sup>9</sup> They had limited formal education, lacked 'financial literacy', lived far from Nobbys and were generally 'impoverished'.<sup>10</sup> Most could not 'add up' sums of money.<sup>11</sup>



**Figure 1: Nobbys<sup>12</sup>**

Mr Kobelt supplied credit under a rudimentary book-up system to 117 Anangu customers.<sup>13</sup> The few records he kept were generally illegible, but customers understood the system's basic elements.<sup>14</sup> They would give Mr Kobelt the keycard and PIN for the account into which they received wages or Centrelink payments. Mr Kobelt would regularly withdraw most or all available funds through 'trial and error' on the day funds were credited to the account.<sup>15</sup> For example, between 1 July 2010 and 30 November 2012, Mr Kobelt withdrew almost \$1 million from 85 customer accounts for book-up credit to purchase second-hand cars.<sup>16</sup> It was understood that withdrawals would be applied in part to reduce the customer's debt to Nobbys and in part for future purchases.<sup>17</sup> As the customers had no access to funds except through Mr Kobelt, they had to either travel to Nobbys to shop, or ask

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<sup>9</sup> *Kobelt* (n 4) [20] (Kiefel CJ and Bell J).

<sup>10</sup> *Ibid* 9 [20], 22 [79] (Kiefel CJ and Bell J), 42–3 [165]–[167] (Nettle and Gordon JJ).

<sup>11</sup> *Ibid* 42 [166] (Nettle and Gordon JJ).

<sup>12</sup> Rebecca Opie, 'APY Mintabie Store Owner Fined for Taking \$1m from Customers' Accounts through Book-Up Scheme', *ABC News* (online, 13 April 2017) <<https://www.abc.net.au/news/2017-04-13/mintabie-store-owner-fined-over-credit-book-up-scheme/8443410>>.

<sup>13</sup> *Kobelt* (n 4) 7 [9] (Kiefel CJ and Bell J).

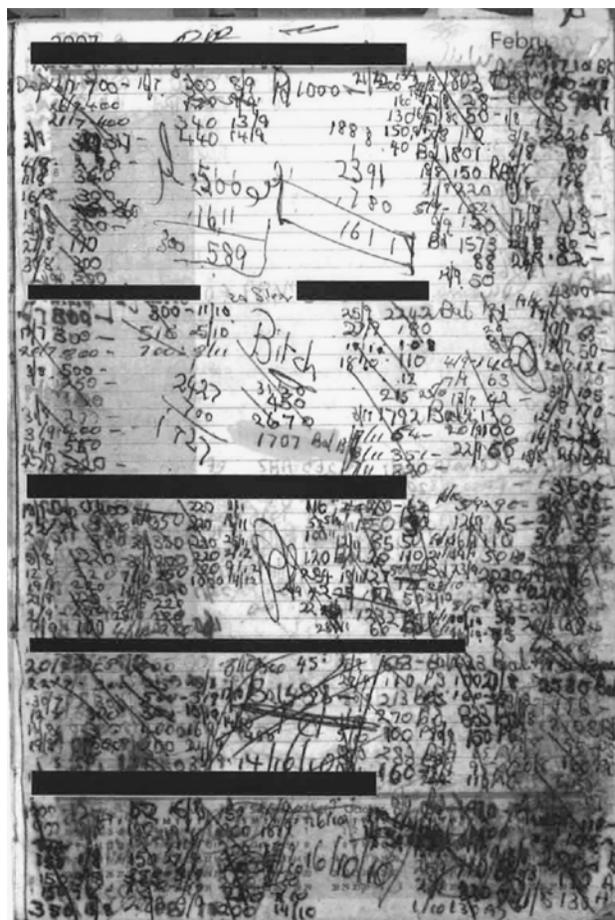
<sup>14</sup> *Ibid* 11 [31] (Kiefel CJ and Bell J).

<sup>15</sup> *Ibid* 10 [22] (Kiefel CJ and Bell J).

<sup>16</sup> *Ibid* 45 [181] (Nettle and Gordon JJ).

<sup>17</sup> *Ibid* 10 [23] (Kiefel CJ and Bell J).

Mr Kobelt to issue ‘purchase orders’ to other stores (for a fee).<sup>18</sup> The majority of book-up credit was supplied so that customers could purchase out-of-warranty second-hand cars from Mr Kobelt, which frequently broke down.<sup>19</sup> Mr Kobelt embedded a credit charge in the car prices, which exceeded commercial rates.<sup>20</sup> However, Mr Kobelt generally did not act dishonestly,<sup>21</sup> and Anangu customers were generally ‘well-disposed’ towards him.<sup>22</sup>



**Figure 2: An example of Mr Kobelt’s book-up records<sup>23</sup>**

<sup>18</sup> Ibid 46–7 [189]–[192] (Nettle and Gordon JJ).

<sup>19</sup> Ibid 44 [175]–[176] (Nettle and Gordon JJ).

<sup>20</sup> Ibid 44–5 [177]–[179], 47–8 [198]–[204] (Nettle and Gordon JJ).

<sup>21</sup> Ibid 11 [31] (Kiefel CJ and Bell J).

<sup>22</sup> Ibid 13 [40] (Kiefel CJ and Bell J).

<sup>23</sup> Australian Securities and Investments Commission, ‘Appellant’s Submissions with Redacted Attachments’, Submission in *ASIC v Kobelt*, A32/2018, 5 October 2018, attachment 4 <[http://www.hcourt.gov.au/cases/case\\_a32-2018](http://www.hcourt.gov.au/cases/case_a32-2018)>.

Although unusual to an outsider, book-up arrangements have existed in remote Indigenous communities for decades.<sup>24</sup> Anthropological evidence collected from Anangu customers gave no sense that book-up was seen as unfair.<sup>25</sup> Rather, it was a simple way to obtain credit that was not otherwise available.<sup>26</sup> It also reflected a cultural preference ‘to conduct financial transactions through the use of brokers, such as storekeepers’.<sup>27</sup> Further, it had two particular advantages in the context of Anangu culture and practices. First, the control on spending imposed by Mr Kobelt ‘had a beneficial effect in ameliorating the boom and bust cycle’, whereby the Anangu customers tended to spend money as it became available ‘without regard to the medium-to-long-term consequences’.<sup>28</sup> Second, a ‘foundational principle of Anangu life’ is a social obligation to share resources with specific categories of kin.<sup>29</sup> This obligation, known as ‘demand sharing’ or ‘humberging’, manifests in demands for resources such as cash from those believed to have it.<sup>30</sup> There was some limited evidence that Mr Kobelt’s customers used book-up to avoid demand sharing.<sup>31</sup>

### B *Applicable Legislation*

Section 12CB of the *ASIC Act* provides:

- (1) A person must not, in trade or commerce, in connection with:
  - (a) the supply or possible supply of financial services to a person (other than a listed public company); or
  - (b) the acquisition or possible acquisition of financial services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.<sup>32</sup>

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<sup>24</sup> *Kobelt* (n 4) 4 [1]–[2], 22 [79] (Kiefel CJ and Bell J). See also Gordon Renouf, *Book Up: Some Consumer Problems* (ASIC Report No 12, March 2002); Australian Securities and Investments Commission, *Book Up in Indigenous Communities in Australia: A National Overview* (Report No 451, October 2015) 5 [10], 10 [18].

<sup>25</sup> *Kobelt* (n 4) 12 [33] (Kiefel CJ and Bell J).

<sup>26</sup> *Ibid* 12 [34] (Kiefel CJ and Bell J); *ASIC v Kobelt* [2016] FCA 1327, [510].

<sup>27</sup> *Kobelt* (n 4) 12 [32] (Kiefel CJ and Bell J).

<sup>28</sup> *Ibid* 12 [35] (Kiefel CJ and Bell J).

<sup>29</sup> *Ibid* 12 [36] (Kiefel CJ and Bell J).

<sup>30</sup> *Ibid* 12–13 [36]–[39] (Kiefel CJ and Bell J).

<sup>31</sup> *Ibid* 13 [38] (Kiefel CJ and Bell J), 51 [218] (Nettle and Gordon JJ).

<sup>32</sup> This is the form of s 12CB(1) from 1 January 2012 to 25 October 2018. Mr Kobelt’s conduct dated back to at least 1 June 2008, but the case proceeded on the basis that differences in the prior legislation were immaterial to the result: *ibid* 6–7 [9] (Kiefel CJ and Bell J), citing *ASIC v National Exchange Pty Ltd* (2005) 148 FCR 132, 140 [33] (Tamberlin, Finn and Conti JJ).

This is supplemented by ss 12CB(2)–(4), particularly ss 12CB(4)(a)–(b):

- (4) It is the intention of the Parliament that:
- (a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and
  - (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; ...

Section 12CC provides a lengthy but non-exhaustive list of factors for courts to consider, including the relative strengths of the parties' bargaining positions, whether conditions are imposed that are not reasonably necessary to protect the supplier's legitimate interests, and the availability of equivalent services elsewhere.<sup>33</sup>

### C Issue

*Kobelt* turned on whether Mr Kobelt's conduct in providing book-up credit was 'unconscionable' under s 12CB.<sup>34</sup>

### D The Lower Court Decisions

At first instance, White J of the Federal Court held that Mr Kobelt's conduct was unconscionable.<sup>35</sup> Mr Kobelt exploited Anangu customers by taking advantage of their vulnerability. This vulnerability 'must have been apparent to Mr Kobelt'.<sup>36</sup> His system resulted in Anangu customers having 'little practical alternative but to continue shopping at Nobbys despite the inconvenience'.<sup>37</sup>

On appeal, the Full Court of the Federal Court unanimously held that Mr Kobelt's conduct was *not* unconscionable.<sup>38</sup> Justices Besanko and Gilmour said the fact that Anangu customers 'voluntarily entered into the book-up arrangements' was a 'powerful consideration against a finding of unconscionable conduct'.<sup>39</sup> Given the

<sup>33</sup> *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CC(1)(a), (b), (e) ('ASIC Act'). These examples are illustrative only and the legislation lists many more factors. Paragraphs (c), (d), (j) and (l) were also relevant in this case: see *Kobelt* (n 4) 6 [6] (Kiefel CJ and Bell J).

<sup>34</sup> *Kobelt* (n 4) 6 [8] (Kiefel CJ and Bell J).

<sup>35</sup> *ASIC v Kobelt* [2016] FCA 1327, [624]. At [3], White J also held that Mr Kobelt contravened s 29 of the *National Consumer Credit Protection Act 2009* (Cth), but that issue did not reach the High Court.

<sup>36</sup> *ASIC v Kobelt* [2016] FCA 1327, [620].

<sup>37</sup> *Ibid.*

<sup>38</sup> *Kobelt v ASIC* (2018) 352 ALR 689, 736 [269] (Besanko and Gilmour JJ), 759 [387] (Wigney J).

<sup>39</sup> *Ibid* 735 [266] (Besanko and Gilmour JJ).

advantages of book-up and the customers' basic understanding of it (amongst other factors),<sup>40</sup> Mr Kobelt's conduct was also not predatory or exploitative.<sup>41</sup> Justice Wigney agreed, adding that White J 'gave insufficient weight to the anthropological and other evidence which explained why the Anangu [customers] freely chose to engage in book-up arrangements with Mr Kobelt'.<sup>42</sup>

### III DECISION

ASIC appealed to the High Court. By a bare majority of Kiefel CJ and Bell J, Gageler J, and Keane J, the High Court dismissed the appeal and held that Mr Kobelt's conduct was *not* unconscionable under s 12CB. Justices Nettle and Gordon, and Edelman J dissented.

#### A *The Majority*

The majority in *Kobelt* was united by a finding that Mr Kobelt's book-up system was used voluntarily in addition to a conservative construction of 'unconscionable' in s 12CB. It followed that book-up did not exploit any special disadvantage of the Anangu customers.<sup>43</sup>

For Kiefel CJ and Bell J, what proved determinative was 'the absence of *unconscientious* advantage obtained by Mr Kobelt from the supply of credit to his Anangu customers under his book-up system'.<sup>44</sup> That conclusion rested on several findings. Most importantly, the circumstances causing Anangu customers to use book-up were 'not the product of [their] special disadvantage'.<sup>45</sup> Rather, Anangu customers voluntarily used book-up because it ameliorated the boom and bust cycle, reduced demand sharing and provided access to credit despite their low incomes and few assets.<sup>46</sup> They understood its 'basic elements' and their perception simply 'reflected aspects of Anangu culture that are not found in mainstream Australian society'.<sup>47</sup> The absence of any undue influence or dishonesty also militated against unconscionability.<sup>48</sup>

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<sup>40</sup> Ibid 735–6 [260]–[267] (Besanko and Gilmour JJ).

<sup>41</sup> Ibid 735–6 [267]–[268] (Besanko and Gilmour JJ).

<sup>42</sup> Ibid 741 [296] (Wigney J).

<sup>43</sup> *Kobelt* (n 4) 15–16 [48]–[50], 18–19 [62]–[63] (Kiefel CJ and Bell J), 24 [88]–[90], 29 [110]–[111] (Gageler J), 30 [115], 31–2 [119] (Keane J). Note, however, that the evaluative approach to unconscionability involves a broad analysis of all the circumstances, not 'a mere balancing of the applicable considerations': at 27 [101] (Gageler J). For brevity, only the most significant considerations have been extracted here.

<sup>44</sup> Ibid 9 [19], 21 [75]–[76] (Kiefel CJ and Bell J) (emphasis in original).

<sup>45</sup> Ibid 18–19 [62]–[63], 20 [69] (Kiefel CJ and Bell J).

<sup>46</sup> Ibid 19–20 [64]–[69] (Kiefel CJ and Bell J).

<sup>47</sup> Ibid 21 [78] (Kiefel CJ and Bell J).

<sup>48</sup> Ibid 17–18 [58]–[59] (Kiefel CJ and Bell J).

Justice Gageler focussed more on the ‘gravity’ imparted by Parliament’s use of the word ‘unconscionable’.<sup>49</sup> As Anangu customers could end their relationship with Mr Kobelt by not returning their keycards, cancelling them or redirecting their income,<sup>50</sup> it followed that the use of book-up was ‘a matter of choice’,<sup>51</sup> and thus it did not exploit any vulnerability.<sup>52</sup> To hold otherwise would ‘dilute’ the gravity of the term ‘unconscionable’.<sup>53</sup>

For Keane J, the key was that tying customers to Nobbys ‘was not itself an exploitation for pecuniary advantage’,<sup>54</sup> nor were Anangu customers worse off because of book-up.<sup>55</sup> Overall, the book-up terms merely reflected the ‘highly unusual market’ in which Mr Kobelt operated.<sup>56</sup>

### B *The Dissents*

The dissenting judges were more sceptical of the ‘choice’ to use book-up. Justices Nettle and Gordon stated that unconscionability developed precisely *because* people at a special disadvantage might voluntarily enter exploitative arrangements.<sup>57</sup> In this case, Mr Kobelt’s customers were at an ‘obvious’<sup>58</sup> special disadvantage due to their remoteness, poverty, limited financial literacy and lack of education.<sup>59</sup> It was therefore unconscionable for Mr Kobelt, who ‘held all the power’,<sup>60</sup> to tie his customers to Nobbys<sup>61</sup> by providing credit to them through a system that

deprived customers of independent means of obtaining the necessities of life. It prevented them from shopping in their own communities. It created a prolonged dependence on Mr Kobelt’s exercise of discretion.<sup>62</sup>

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<sup>49</sup> Ibid 24 [88] (Gageler J).

<sup>50</sup> Ibid 28 [105]–[106] (Gageler J).

<sup>51</sup> Ibid 28 [107] (Gageler J).

<sup>52</sup> Ibid 29 [111] (Gageler J).

<sup>53</sup> Ibid 28 [107] (Gageler J).

<sup>54</sup> Ibid 33 [125] (Keane J).

<sup>55</sup> Ibid 33 [125], 34 [128] (Keane J).

<sup>56</sup> Ibid 33 [127] (Keane J).

<sup>57</sup> Ibid 55 [238] (Nettle and Gordon JJ).

<sup>58</sup> Ibid 49 [208] (Nettle and Gordon JJ).

<sup>59</sup> Ibid 54 [235] (Nettle and Gordon JJ).

<sup>60</sup> Ibid 55 [241] (Nettle and Gordon JJ).

<sup>61</sup> Ibid 58–9 [254]–[256] (Nettle and Gordon JJ).

<sup>62</sup> Ibid 49 [206] (Nettle and Gordon JJ).

Their Honours rejected the use of cultural preferences to excuse Mr Kobelt's conduct:

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.<sup>63</sup>

Justice Edelman agreed with Nettle and Gordon JJ,<sup>64</sup> but added further reasons. His Honour was particularly forthright in declaring that the 'most basic error' in the Full Court's reasoning was 'that the choice of Mr Kobelt's system of credit by the Anangu customers was no real choice at all'.<sup>65</sup>

#### IV COMMENT

##### *A Paternalism or Paternalism: Choose One*

One of the most difficult questions raised by a case like *Kobelt* is the issue of whether distant courts can ever be an effective mechanism for empowering Indigenous people.

To illustrate, the majority's conclusion arguably perpetuates the paternalistic control exercised through book-up systems. That conclusion could impede financial independence for book-up customers. It also risks disregarding the paternalistic context which led to book-up developing at all. This context includes 'colonial exploitation' and government policies and laws that 'deprived members of Indigenous communities of control of their finances'.<sup>66</sup> Or, even worse, the majority's conclusion arguably uses historical and cultural factors which make the Anangu people more vulnerable to *excuse* what is otherwise unconscionable. It thus establishes what Tania and Yates call 'a lower standard of business conscience' in the Anangu community.<sup>67</sup>

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<sup>63</sup> Ibid 60 [260] (Nettle and Gordon JJ). Justice Edelman made a similar point: at 75–6 [313].

<sup>64</sup> Ibid 62 [268] (Edelman J).

<sup>65</sup> Ibid 73 [302] (Edelman J).

<sup>66</sup> Sharmin Tania and Rachel Yates, 'Australian Securities and Investments Commission v *Kobelt*: Evaluating Statutory Unconscionability in the Cultural Context of an Indigenous Community' (2018) 40(4) *Sydney Law Review* 557, 568. See also Australian Securities and Investments Commission, *Book Up in Indigenous Communities in Australia: A National Overview* (n 24) 10 [18]–[20]; Renouf (n 24) 16–18; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (Report, December 2006).

<sup>67</sup> Tania and Yates (n 66) 566. For an approach to unconscionability in a similar factual scenario that does not apply a lower standard of business conscience, see *Driscoll v Tomarchio* [2010] WASC 157.

However, grimly, the dissenting approach is equally liable to criticism. It may be ‘ultimately a worse form of paternalism’,<sup>68</sup> in that it dictates to the Anangu customers what is purportedly in their interests, discounts a cultural approach to money management and could limit their only prospect of affording goods such as cars. As Renouf observes, the prohibition of certain book-up practices could lead to ‘short-term disadvantage’ and would be regarded by some as a ‘significant interference’,<sup>69</sup> particularly in the absence of alternatives.<sup>70</sup>

### B *Balancing Choice and Protection*

Nevertheless, there are consequentialist and conceptual reasons for preferring the dissenting view in *Kobelt* (the latter are considered in Part C). The former rest on how the dissenting judgments balance choice and protection. Crucially, the dissenting approach does not demand the abolition of book-up credit. As Nettle and Gordon JJ emphasise (and Edelman J echoes), ‘[b]ook-up is not itself unconscionable. The problems were with Mr Kobelt’s book-up system and its particular features.’<sup>71</sup> The dissenting approach merely requires that any book-up system be accompanied by full fee disclosure, no retention of a customer’s bank card and PIN, an agreement about how much money can be withdrawn and transparent record-keeping.<sup>72</sup> I respectfully submit that such an approach still respects the choice of Indigenous people to use book-up credit for cultural and historical reasons, but at least sets a baseline standard for how such credit should be offered across Australia. In particular, it would facilitate more informed decision-making and curb exploitative forms of book-up. From a consequentialist perspective, there is therefore much to recommend the dissenting view in *Kobelt*.

### C *Voluntariness Taken a Step Too Far?*

The conceptual reasons for preferring the dissenting approach concern the issue of voluntariness.

In *Commercial Bank of Australia Ltd v Amadio* (‘*Amadio*’),<sup>73</sup> Mason J explained that relief from unconscionable conduct will be granted where an unconscientious advantage ‘is taken of an innocent party who, *though not deprived of an independent*

<sup>68</sup> Lindsay Kobelt, ‘Respondent’s Submissions’, Submission in *ASIC v Kobelt*, A32/2018, 2 November 2018, 10 [36] <[http://www.hcourt.gov.au/cases/case\\_a32-2018](http://www.hcourt.gov.au/cases/case_a32-2018)>.

<sup>69</sup> Renouf (n 24) 51 [15].

<sup>70</sup> Nathan Boyle, ‘Book Up: Current Regulation and Options for Reform’ (2016) 8(22) *Indigenous Law Bulletin* 3, 7.

<sup>71</sup> *Kobelt* (n 4) 61 [264] (Nettle and Gordon JJ), 73 [301] (Edelman J).

<sup>72</sup> *Ibid* 52–3 [227] (Nettle and Gordon JJ), 73 [301] (Edelman J).

<sup>73</sup> (1983) 151 CLR 447 (*Amadio*).

and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest'.<sup>74</sup>

The same point was recently made by Kiefel CJ, Bell, Gageler, Keane and Edelman JJ — all of whom sat on *Kobelt* — in *Thorne v Kennedy* ('*Thorne*').<sup>75</sup> ASIC may therefore have been quietly confident in submitting that voluntarily entering a book-up arrangement was 'no barrier to a finding of unconscionability'.<sup>76</sup> However, four of the judges who endorsed Mason J's view held in *Kobelt* that the choice of Anangu customers to use book-up negated a finding that Mr Kobelt's conduct was unconscionable.<sup>77</sup>

Of course, both *Amadio* and *Thorne* concerned unconscionability in equity. The language of ss 12CB–12CC of the *ASIC Act* justifies some differences in the approach to statutory unconscionability.<sup>78</sup> But, with respect, the majority's approach to voluntariness is not one of them. It raises two issues, one logical and the other doctrinal.

On the logical issue, the dissenting judges in *Kobelt* make a powerful argument that '[i]t does not alleviate the unconscionability of Mr Kobelt's book-up system that his customers were so disadvantaged as to regard Mr Kobelt's offering as acceptable'.<sup>79</sup> Moreover, Mr Kobelt gave the Anangu customers 'Hobson's choice — no matter how badly they need credit, they can either "choose" that system or "choose" no credit at all'.<sup>80</sup>

The doctrinal issue has broader implications. The majority's approach erodes the principle at the root of unconscionability: 'protection of the vulnerable from exploitation by the strong'.<sup>81</sup> It does this by taking the role of voluntariness a step further than *Kakavas v Crown Melbourne Ltd*.<sup>82</sup> In that case, a problem gambler argued that

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<sup>74</sup> Ibid 461 (Mason J) (emphasis added). See also *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

<sup>75</sup> (2017) 263 CLR 85, 104 [40] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) ('*Thorne*').

<sup>76</sup> Australian Securities and Investments Commission, 'Appellant's Submissions with Redacted Attachments', Submission in *ASIC v Kobelt*, A32/2018, 5 October 2018, 10 [32] <[http://www.hcourt.gov.au/cases/case\\_a32-2018](http://www.hcourt.gov.au/cases/case_a32-2018)>.

<sup>77</sup> *Kobelt* (n 4) 17–18 [58], 21 [78] (Kiefel CJ and Bell J), 28 [107] (Gageler J), 30 [115] (Keane J).

<sup>78</sup> *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 180–2 [38]–[47] (Santamaria JA, Neave and Osborn JJA agreeing). See also Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2016) 339–46.

<sup>79</sup> *Kobelt* (n 4) 60 [262] (Nettle and Gordon JJ). Justice Edelman makes the same point: at 76 [313].

<sup>80</sup> Ibid 61 [266] (Edelman J).

<sup>81</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 271 [282] (Allsop CJ).

<sup>82</sup> (2013) 250 CLR 392.

the casino engaged in unconscionable conduct by luring him to its tables and letting him lose \$20.5 million over 14 months. A key reason why Mr Kakavas' claim failed was because 'he was present at the gaming table ... because of decisions *voluntarily made by him when he was not in the grip of his abnormal enthusiasm*'.<sup>83</sup> There is sense in that approach, which denies relief to those who *choose* to make themselves vulnerable. *Kobelt* is not such a case. The Anangu customers did not choose to use book-up before being affected by their poverty, lack of formal education, limited financial literacy and lack of alternatives. Those factors were omnipresent. In such circumstances, as Tania and Yates suggest, 'voluntariness should not be considered in isolation from vulnerability'.<sup>84</sup>

The majority's approach in *Kobelt* opens the door to arguing that a person's vulnerabilities can be dismissed because other factors contributed to their 'choice' to accept unjust or unfair conduct. If this development makes relief harder to obtain under s 12CB than in equity, Parliament's attempt to legislate a protection 'not limited by the unwritten law'<sup>85</sup> may have actually resulted in one that is even *more* limited.

#### D Law Reform: Should We Call Time on 'Unconscionable'?

Finally, *Kobelt* exemplifies the ongoing difficulty with the word 'unconscionable'. All of the majority reasoned that Parliament's use of 'unconscionable' carries a requirement for exploitation or victimisation of the weaker party, and prevents 'lowering the bar' for relief.<sup>86</sup> In stark contrast, Edelman J insisted that the history of s 12CB reveals 'a clear legislative intention that the bar over which conduct will be unconscionable must be lower than that developed in equity'.<sup>87</sup> Curiously, Kiefel CJ and Bell J did not rule this out, but stated that further consideration should only occur if 'the proposition is squarely raised and argued'.<sup>88</sup> The proposition could well be argued. Justice Edelman provides the blueprint.<sup>89</sup>

<sup>83</sup> Ibid 402 [23] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ) (emphasis added).

<sup>84</sup> Tania and Yates (n 66) 562. See also *Kobelt* (n 4) 41 [158]–[159] (Nettle and Gordon JJ); Jeannie Marie Paterson, Elise Bant and Matthew Clare, 'Doctrine, Policy, Culture and Choice in Assessing Unconscionable Conduct under Statute: *ASIC v Kobelt*' (2019) 13(1) *Journal of Equity* 81, 99–101.

<sup>85</sup> *ASIC Act* (n 33) s 12CB(4)(a).

<sup>86</sup> *Kobelt* (n 4) 15–16 [48]–[50] (Kiefel CJ and Bell J), 24 [88]–[90] (Gageler J), 31–2 [119] (Keane J).

<sup>87</sup> Ibid 72 [295] (Edelman J). Justices Nettle and Gordon do not expressly endorse this view, but it is unclear precisely where their Honours fall on the spectrum between Edelman J and the majority on this point: see, eg, *ibid* 37 [144] (Nettle and Gordon JJ).

<sup>88</sup> Ibid 16 [50] (Kiefel CJ and Bell J).

<sup>89</sup> Ibid 65–72 [279]–[295] (Edelman J).

However, post-*Kobelt*, lowering the bar for relief ‘may only be possible if “unconscionable” is replaced with “unjust” or “unfair”’.<sup>90</sup> This option warrants serious consideration for four reasons.

First, s 12CB has produced a 4:3 split decision with three majority judgments. I do not agree with the observations of Lee J and Bromwich J that *Kobelt* merely shows how the legal principles on the meaning of statutory unconscionability are ‘settled’ and that minds just differ when evaluating specific conduct.<sup>91</sup> In contrast, I suggest that important disagreements remain over the role of voluntariness in assessing statutory unconscionability, as well as how to balance Parliament’s choice of a word with an established use in equity against the history of s 12CB and the intentions expressed in s 12CB(4). Justice Robb and Archer J have similarly noted residual uncertainty in post-*Kobelt* judgments.<sup>92</sup> In any event, the existence of uncertainty over whether there is uncertainty emphasises the problem! It follows that Parliament’s plan to ensure the courts receive ‘a clear message about the way in which [P]arliament intends the law to apply’<sup>93</sup> has fizzled.<sup>94</sup> As Paterson, Bant and Clare observe, *Kobelt* ‘is likely to hamper the interpretation and use of the novel provisions offered by the statutory doctrine of unconscionable conduct’.<sup>95</sup> In the long run, retention of the term ‘unconscionable’ may inhibit rather than promote certainty.

Second, Edelman J is not a lone voice. Chris Maxwell has suggested that ‘better understanding’ and ‘higher standards of conduct’ might be achieved by replacing

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<sup>90</sup> Ibid 75 [311] (Edelman J) (citations omitted). This view is arguably vindicated post-*Kobelt* in *Commonwealth Bank of Australia v Dinh [No 2]* [2019] WASC 456, where counsel invited Archer J to assume that the test under s 12CB was the same as the test at equity: at [682].

<sup>91</sup> The quotation is from *Lloyd v Belconnen Lakeview Pty Ltd* [2019] FCA 2177, [212] (Lee J). See also *ACCC v Australian Institute of Professional Education Pty Ltd (in liq) [No 3]* [2019] FCA 1982, [90] (Bromwich J).

<sup>92</sup> *Almona Pty Ltd v Parklea Corporation Pty Ltd* [2019] NSWSC 1868, [781] (Robb J); *Commonwealth Bank of Australia v Dinh [No 2]* [2019] WASC 456, [682] (Archer J). See also *Realtek Holdings Pty Ltd v Wetamast Pty Ltd* [2019] NSWSC 1869, where Robb J observed that ‘the members of the High Court explained the meaning of statutory unconscionable conduct in somewhat different terms’: at [237].

<sup>93</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2010, 4359 (Craig Emerson, Minister for Competition Policy and Consumer Affairs).

<sup>94</sup> Further, even before *Kobelt*, divergent lines of authority were developing: Consumer Action Law Centre, ‘Unfair Trading and Australia’s Consumer Protection Laws’ (Discussion Paper, July 2015) 10 <<https://consumeraction.org.au/wp-content/uploads/2015/07/Unfair-Trading-Consumer-Action-2015-Online.pdf>>; Gerard Brody and Katherine Temple, ‘Unfair but Not Illegal: Are Australia’s Consumer Protection Laws Allowing Predatory Businesses to Flourish?’ (2016) 41(3) *Alternative Law Journal* 169, 171.

<sup>95</sup> Paterson, Bant and Clare (n 84) 83. See also Consumer Action Law Centre, ‘Unconscionable Conduct: Divided High Court Confirms Need for Change to the Law’ (Media Release, 13 June 2019) <[https://consumeraction.org.au/20190613-unconscionable-conduct/#\\_ftn2](https://consumeraction.org.au/20190613-unconscionable-conduct/#_ftn2)>.

‘unconscionable’ with ‘unfair’.<sup>96</sup> Rod Sims has also advocated for replacing statutory unconscionability with a new ‘unfair conduct’ provision.<sup>97</sup> They join a growing chorus.<sup>98</sup> The European Union<sup>99</sup> and the United States<sup>100</sup> have shown how it can be done.

Third, we already have legislation prohibiting some types of ‘unjust’ or ‘unfair’ conduct.<sup>101</sup> Despite early concerns over the ambiguity of such terms, ‘[t]he sky did not fall in’<sup>102</sup> and the analytical process is similar to ss 12CB–12CC.<sup>103</sup> Of course, if such a reform was pursued for s 12CB, it should be crafted so that it does not prohibit commercial parties from ever pursuing their legitimate self-interest, nor should it allow everyone who faces hardship to escape a bargain they have simply come to regret.

Finally, the Banking Royal Commission provides additional impetus to ensure that protections against misconduct by financial service providers are up to the task. Even if the bar for relief should not be lowered, the problem remains that ongoing uncertainty makes the prospects of any statutory unconscionability claim ‘impossible to predict with any confidence’.<sup>104</sup>

<sup>96</sup> Chris Maxwell, ‘Equity and Good Conscience: The Judge as Moral Arbiter and the Regulation of Modern Commerce’ (Speech, Victorian Law Foundation Oration, 14 August 2019) 16.

<sup>97</sup> Ben Butler, ‘Not Fair? Why Judges Have Been Accused of Failing Australian Consumers’, *The Guardian* (online, 8 September 2019) <<https://www.theguardian.com/australia-news/2019/sep/08/not-fair-why-judges-have-been-accused-of-failing-australian-consumers>>.

<sup>98</sup> See, eg, Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (Final Report, March 2017) 50–1; Jeannie Marie Paterson and Gerard Brody, ‘“Safety Net” Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models’ (2015) 38(3) *Journal of Consumer Policy* 331; Brody and Temple (n 94).

<sup>99</sup> *Parliament and Council Directive of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council* [2005] OJ L 149/22, art 5(1).

<sup>100</sup> *Federal Trade Commission Act of 1914*, 15 U.S.C. § 45(a) (2019).

<sup>101</sup> *Contracts Review Act 1980* (NSW) s 7(1) uses ‘unjust’; *Australian Consumer Law* (n 6) s 23(1) and *ASIC Act* (n 33) s 12BF(1) use ‘unfair’; *Corporations Act 2001* (Cth) s 912A(1)(a) uses the combination of ‘efficiently, honestly and fairly’.

<sup>102</sup> James Allsop, ‘The Judicialisation of Values’ [2018] *Federal Judicial Scholarship* 14, [14].

<sup>103</sup> See the similarity between *Contracts Review Act 1980* (NSW) s 9 and *ASIC Act* (n 33) s 12CC.

<sup>104</sup> Boyle (n 70) 5.

## V CONCLUSION

*Kobelt* is the latest development in the jurisprudence on statutory unconscionability. It illustrates how s 12CB of the *ASIC Act* operates and it clarifies the High Court's view that statutory unconscionability does not involve a lower bar for relief than equity. However, despite both the majority and dissenting views being liable to criticism for judicial paternalism, the dissents at least strike a better balance between promoting choice and ensuring consumer protection. The majority's approach to voluntariness may also mean that it will now be harder to establish that conduct was unconscionable if other factors contributed to a consumer's acceptance of that conduct.

The great irony of *Kobelt* is that it represents a role reversal. Whereas once the courts invoked equity 'to mitigate the rigours of strict law',<sup>105</sup> the majority's insistence on not lowering the bar for relief invokes equitable unconscionability to *exacerbate* the rigours of s 12CB of the *ASIC Act*. The goal of more flexible statutory protection against unconscionable conduct has been frustrated. Reform is the best path forward.

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<sup>105</sup> *Crabb v Arun District Council* [1976] 1 Ch 179, 187 (Lord Denning MR), being a modern take on the principle that '[t]he Office of the Chancellor is ... to soften and mollify the Extremity of the Law': *Earl of Oxford's Case* (1615) 1 Ch Rep 1; 21 ER 485, 486.

