

# THE PLACE OF CULTURAL VALUES, NORMS AND PRACTICES: ASSESSING UNCONSCIONABILITY IN COMMERCIAL TRANSACTIONS

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*A shopkeeper develops a “system” of credit. He applies it only to impoverished and often illiterate and innumerate Aboriginal customers. He gives those customers Hobson’s choice — no matter how badly they need credit, they can either “choose” that system or “choose” no credit at all.<sup>1</sup> This was Edelman J’s description of the system of ‘book-up’, a form of credit provision, operating in the Anangu Pitjantjatjara Yankunytjatjara Lands, the conscionability of which came before the High Court of Australia for consideration on appeal in Australian Securities and Investments Commission v Kobelt (‘Kobelt (HCA)’).<sup>2</sup> The High Court, in a closely divided decision, upheld the decision of the Full Court of the Federal Court that the system was not unconscionable in the particular cultural context of the Anangu people.<sup>3</sup> This article examines the relevance of the cultural norms and values of consumers when assessing a breach of the statutory test of unconscionability in financial services transactions. It concludes that Kobelt (HCA) offered a missed opportunity to address broader issues of equality before the law and structural disadvantages confronting Indigenous Australian consumers that have resulted in their marginalisation from the financial sector.*

## I INTRODUCTION

Aboriginal and Torres Strait Islander consumers living in remote communities

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1 *Australian Securities and Investments Commission v Kobelt* (2019) 368 ALR 1, 61 [266] (Edelman J) (‘Kobelt (HCA)’).

2 *Kobelt (HCA)* (n 1).

3 *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689, 747 (Wigney J) (‘Kobelt (FCFCA)’).

face significant obstacles to participation in Australia's financial services sector. This was highlighted in the recent Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('Banking Royal Commission'), which was advised:

Aboriginal and Torres Strait Islander people face unique barriers to participation in the financial sector due to historic economic marginalisation and low intergenerational wealth transfer. Historical policies which restricted Indigenous wealth, home ownership and business ownership continue to burden Aboriginal and Torres Strait Islander people. ...

These barriers are compounded in remote Australia, where access to essential financial infrastructure and fit for purpose banking and financial advice is limited. There are also more fundamental barriers such as language barriers where English is not spoken as a first language, lower levels of financial literacy, and limited exposure to people with high levels of financial literacy.<sup>4</sup>

These unique barriers to participation in the mainstream financial sector have facilitated the normalisation of alternative practices, including 'book-up', which is a type of short-term credit offered by goods and services providers. The High Court of Australia had a rare opportunity to consider the application of the prohibition in s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') on unconscionable conduct in the provision of financial services to the practice of a particular system of book-up in *Australian Securities and Investments Commission v Kobelt* ('Kobelt (HCA)').<sup>5</sup>

This paper will argue that *Kobelt* (HCA) represents a missed opportunity for the highest of the Australian courts to address the unique structural factors affecting the interactions of Indigenous Australian customers from remote communities with a financial services provider, and ensure substantive equality in the application of consumer protection laws. The High Court sought to deliver an outcome that was respectful of the freedom of the particular Anangu community to enter into commercial transactions. However, in doing so, the majority of the High Court used the anthropological evidence before it to justify the Anangu community's acceptance of the system of book-up and transform it into the exercise of a valid choice. In so doing, it found the provision of credit under a book-up system with features 'surprising, if not extraordinary'<sup>6</sup> to most members of modern Australian society to conform to the statutory norm of commercial conscience provided by s 12CB. The outcome of the majority's decision is

4 Department of the Prime Minister and Cabinet, 'Aboriginal and Torres Strait Islander Consumers' Interactions with Financial Services' (Background Paper No 21, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 22 June 2018) 1, 4 ('Aboriginal and Torres Strait Islander Consumers' Interactions with Financial Services Background Paper').

5 *Kobelt* (HCA) (n 1).

6 *Kobelt* (FCFCA) (n 3) 758 [383] (Wigney J), quoted in *ibid* 59 [259] (Nettle and Gordon JJ).

unsatisfactory in their Honours' framing of the barriers to financial participation facing consumers from remote Indigenous communities. Such framing, arguably, disrupts the goal of substantive equality in the minimum standards of conduct required in the Australian financial sector.

This article does not seek to criticise the breadth of credit systems known as 'book-up'. Instead, its focus is on the particular system of credit offered in *Kobelt*<sup>7</sup> and evaluating the role of cultural values and norms in assessing if conduct is unconscionable contrary to s 12CB. It will address this in two ways. First, to consider how the High Court used cultural norms and values in the process of judicial evaluation that the courts have developed for assessing if conduct is unconscionable contrary to statute. Secondly, to demonstrate how the case fits within broader themes of equality in Australian law where there is an intersection between structural and cultural factors affecting Indigenous Australians and the norms of mainstream Australia.

Part II of this article will briefly explain the background to *Kobelt*, including a description of book-up and the particular system under consideration, the issues before the Court at trial and on appeal before the Full Court and then the High Court. It will discuss the key evidence at trial in relation to the alleged conduct and the characteristics of the customers and the findings made by the primary judge. The appeal courts' interpretation of those factual findings in comparison to the primary judge will also be explored. It will show how the majority and dissenting judges differ in *Kobelt* (HCA) in their evaluation of the key factual findings of the primary judge, which led to a split decision.

The article will then set out the applicable law relating to statutory unconscionability in Part III. It will examine the statutory prohibition on unconscionable conduct in the supply of financial services and the development of its interpretation by the courts. The article will focus on the relevance and role of norms and values of the customer in the judicial assessment of the unconscionability of commercial conduct.

Part IV is divided into two sections. In the first section, it will use the legal framework developed in Part III to critique the evaluative approach to unconscionability applied by the High Court. It will consider how the majority applied the anthropological evidence led by the Australian Securities and Investments Commission ('ASIC') at trial to find that the conduct was not unconscionable. This Part will argue that the majority should have focused on an objective evaluation of the totality of the alleged contravener's conduct against the statutory norm, rather than seeking an explanation for the acceptance of that conduct in the norms and values of the customers. In the second section, it will

7 *'Kobelt'* refers to the judgments of the High Court, the Full Court of the Federal Court of Australia, and the Federal Court of Australia.

consider structural and cultural factors affecting remote Indigenous Australians beyond those which were in evidence before the primary judge. It proposes that the chance was missed at trial to lead evidence of cultural and structural factors, which would have permitted the appellate courts to have made a comprehensive assessment of the conscionability of the conduct in all of its circumstances.

Part V will consider the broader ramifications of the appeal courts' interpretation of the use that can be made of cultural norms and social values in assessing whether conduct is unconscionable in a commercial context. It will argue that the consequence of the appeal courts' use of the Anangu community's social and cultural norms sits in discordance with the singular legal system of Australia and the achievement of substantive equality before the law. It will suggest that the apparent development of a different approach to evaluating the conscionability of commercial conduct in remote Indigenous communities such as that in *Kobelt* (HCA) is particularly unsettling when it coincides with the Australian government's expansion of the cashless welfare card scheme. Part V concludes by drawing from the key arguments and findings made in this article.

## II **KOBELT: BACKGROUND AND DECISIONS**

### A **Background**

In 2014, ASIC commenced civil penalty proceedings in the Federal Court of Australia against Mr Lindsay Kobelt ('Kobelt'),<sup>8</sup> the owner and operator of a general store in Mintabie known as 'Nobbys'.<sup>9</sup> Kobelt had operated Nobbys since the 1980s with the assistance of his partner and son.<sup>10</sup> Nobbys sold second-hand motor vehicles and general grocery products, including food and fuel.<sup>11</sup> There were two other general stores in Mintabie.<sup>12</sup>

Mintabie is located in the Anangu Pitjantjatjara Yankunytjatjara Lands ('APY Lands').<sup>13</sup> This is an area of more than 103,000 km<sup>2</sup> of land in the far northwest of South Australia to which title is held by the traditional land owners.<sup>14</sup> The township of Mintabie falls within an opal field that was excised by lease by the

8 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 ('ASIC v Kobelt').

9 *Kobelt* (FCFCA) (n 3) 692 [6], 693 [10] (Besanko and Gilmour JJ).

10 *ASIC v Kobelt* (n 8) [19] (White J).

11 *Ibid.*

12 *Ibid* [22].

13 *Ibid* [1].

14 Anangu Pitjantjatjara Yankunytjatjara, *Annual Report 2016–2017* (Report, 2017) 7.

South Australian government.<sup>15</sup> Many of Nobbys' customers were Indigenous Australian residents of the APY Lands from the Anangu community.<sup>16</sup>

ASIC commenced proceedings against Kobelt for alleged breaches of s 29(1) of the *National Consumer Credit Protection Act 2009* (Cth), which requires credit providers to be licensed, and for unconscionable conduct in connection with the supply of financial services contrary to s 12CB. It sought declarations of contravention against Kobelt, payment of a civil penalty and that he be prevented from continuing his conduct.<sup>17</sup> This article focuses on the allegations and findings made in relation to unconscionable conduct.<sup>18</sup>

Central to ASIC's allegation of unconscionable conduct were the features of the particular book-up arrangement under which Kobelt provided credit to his Anangu customers (and the only basis on which these customers were provided credit).<sup>19</sup>

## 1 Book-Up

Book-up is 'informal credit given by a trader to consumers so that consumers can purchase goods or services from the trader',<sup>20</sup> and 'pay for them later'.<sup>21</sup> It is an umbrella term used to describe a range of transactions between an individual consumer and a provider of goods or services involving the provision of low-level short-term credit.<sup>22</sup> The practice of book-up is associated with regional and remote Australia and the consumers are usually Indigenous Australians.<sup>23</sup>

In 2004, the Parliamentary Joint Committee on Corporations and Financial

15 *ASIC v Kobelt* (n 8) [1] (White J). The township of Mintabie will be closed as soon as practicable after February 2019 following the acceptance by the state government of South Australia of recommendations made by the 2017 Review of the Mintabie Lease and Mintabie Township Lease Agreement conducted by the Mintabie Review Panel for the Government of South Australia. See Mintabie Review Panel, *2017 Review of the Mintabie Lease and Mintabie Township Lease Agreement* (Report, 3 January 2018) <[www.energymining.sa.gov.au/\\_data/assets/pdf\\_file/0017/311174/Review\\_of\\_the\\_Mintabie\\_Lease\\_Township\\_Agreement\\_Report\\_Final.pdf](http://www.energymining.sa.gov.au/_data/assets/pdf_file/0017/311174/Review_of_the_Mintabie_Lease_Township_Agreement_Report_Final.pdf)> ('2017 Mintabie Review'); Government of South Australia, 'Future Closure of Mintabie' (Media Release, 2018) <[www.anangu.com.au/index.php/component/content/article/44-front-page/254-future-closure-of-mintabie.html](http://www.anangu.com.au/index.php/component/content/article/44-front-page/254-future-closure-of-mintabie.html)>.

16 *Kobelt* (FCFCA) (n 3) 693 [12], 695 [30] (Besanko and Gilmour JJ). The primary judge noted that by late 2011, Anangu customers comprised approximately 80% of Nobbys' patrons: *ASIC v Kobelt* (n 8) [21] (White J).

17 *ASIC v Kobelt* (n 8) [7] (White J).

18 Both at first instance and on appeal it was held that Kobelt had been engaging in credit activity without a licence, contrary to s 29 of the *National Consumer Credit Protection Act 2009* (Cth): *ibid* [197]; *Kobelt* (FCFCA) (n 3) 725–6 [202]–[203], 739 [287] (Besanko and Gilmour JJ, Wigney J agreeing at 745 [322]–[323]).

19 *ASIC v Kobelt* (n 8) [34], [211] (White J).

20 See Gordon Renouf, "'Book up': Some Consumer Problems' (Report No 12, Australian Securities and Investments Commission, March 2002).

21 Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Discussion Paper, Project No 94, December 2005) 279 (*Aboriginal Customary Laws Report*).

22 See Renouf (n 20) 5.

23 *Ibid*.

Services ('PJC') identified practices associated with book-up as an example of how Indigenous Australians isolated from mainstream banking services 'are susceptible to exploitation' and that these caused 'particular hardships for consumers'.<sup>24</sup> It recommended that 'ASIC investigate practices associated with book up in an effort to identify and curb unscrupulous conduct'.<sup>25</sup>

In a 2014 report, ASIC identified three major problems associated with some book-up practices. First, when book-up incorporates the provision of keeping customers' debit cards and personal identification numbers ('PINs') to withdraw money at the provider's discretion, customers are vulnerable to price exploitation and the withdrawal of funds without their approval.<sup>26</sup> Second, when there is no agreement underpinning the book-up system and customers are not given any receipts or account statements, customers remain 'unaware of the amount of [their] debt ... and how much they have repaid'.<sup>27</sup> Third, when book-up becomes cyclical in nature, and traps the customers within the book-up cycle,<sup>28</sup> customers consequently remain in debt and lose control of their finances.<sup>29</sup>

In the only case prior to *Kobelt* to consider the unconscionability of a book-up system, the Supreme Court of Western Australia found there was a 'strongly arguable case' of unconscionable conduct, sufficient to justify an interlocutory injunction.<sup>30</sup> This was because of factors that included the onerous terms in providing credit and the exceptional method of securing payment, requiring the provision of debit cards and PINs.<sup>31</sup>

## 2 ASIC's Allegations

ASIC pointed to several aspects of *Kobelt's* particular book-up arrangement as being unconscionable. The most critical of these were the 'Nobbys' Credit

24 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Money Matters in the Bush: Inquiry into the Level of Banking and Financial Services in Rural, Regional and Remote Areas of Australia* (Report, January 2004) 246 [15.48] ('*Money Matters in the Bush Report*'), citing Renouf (n 20) 49.

25 *Money Matters in the Bush Report* (n 24) 248 [15.56].

26 Heron Loban, 'Book Up in Indigenous Communities in Australia: A National Overview' (Report No 451, Australian Securities and Investments Commission, October 2015) 19–20 [52]–[53] ('Book Up in Indigenous Communities in Australia'). The Law Reform Commission of Western Australia had earlier voiced its concern with the risk of exploitation involved with this type of book-up, since it involved traders receiving primary control over the customers' accounts: *Aboriginal Customary Laws Report* (n 21) 279. The Mintabie Review Panel observed that some immoral businesses withdraw more money than required for the satisfaction of the debt and decline to return the keycard even after the debt is settled: *2017 Mintabie Review* (n 15) 10.

27 Loban, 'Book Up in Indigenous Communities in Australia' (n 26) 20 [54]–[55].

28 *Ibid* 21–2 [57]–[59].

29 *Ibid*.

30 *Driscoll v Tomarchio* [2010] WASC 157, [20] (Martin CJ).

31 *Ibid* [15]. There was no final judgment in the matter. ASIC relied on expert evidence concerning the practice of book-up in the Yarrabah community in *Australian Securities and Investments Commission v Channic Pty Ltd (No 4)* [2016] FCA 1174. However, ASIC did not allege that the respondents in that case engaged in book-up. Instead, the evidence was relied on to support that Yarrabah people had limited ability to understand economic transactions, including credit transactions: at [1288]–[1289] (Greenwood J).

Facility’ and the ‘Withdrawal Conduct’.<sup>32</sup>

The ‘Nobbys’ Credit Facility’ referred to the requirement that customers provide their debit card (or key card) and PIN linked to that card to Kobelt as a condition of providing book-up.<sup>33</sup> The debit card was linked to the customer’s bank account into which wages or Centrelink payments were made.<sup>34</sup> Customers were also required to provide detailed information of the amount of, and timing of, periodic payments into their bank account.<sup>35</sup>

The ‘Withdrawal Conduct’ was described as

Mr Kobelt’s conduct in periodically, and usually on the customer’s payday, using the key card and PIN to withdraw the whole or nearly the whole of the credit balance in the customer’s account in reduction of the debt owing to him, thereby leaving no, or only limited, funds available to the customer.<sup>36</sup>

Kobelt engaged in this conduct during the early hours of the day using an EFTPOS machine in Nobbys.<sup>37</sup> This was to prevent customers from having any practical opportunity to access the monies beforehand.<sup>38</sup> The withdrawals and retention of the card and PIN continued until the customer’s debt was satisfied.<sup>39</sup> Kobelt’s record keeping system was ‘rudimentary’ and it was ‘difficult to understand the state of a customer’s account at any one time’.<sup>40</sup>

Kobelt permitted customers to access approximately half of the money withdrawn from their account, although the amount was at his discretion.<sup>41</sup> Typically he

32 *Kobelt* (FCFCA) (n 3) 701 [62], 702 [64] (Besanko and Gilmour JJ). This division of the conduct into two categories broadly mirrors the distinction between ‘procedural unconscionability’ and ‘substantive unconscionability’. This distinction was important under the general law, where only procedural unconscionability was actionable under the equitable doctrine: see generally Senate Standing Committee on Economics, Parliament of Australia, *The Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974* (Report, December 2008) 3, 9 (‘*Senate Standing Committee Report*’). Section 12CB(4) of the *Australian Securities and Investments Commission Act 2001* (Cth) (‘*ASIC Act*’) was amended with effect from 2012 to make it plain that the section is not limited to procedural unconscionability: *Competition and Consumer Legislation Amendment Act 2011* (Cth) s 2(1), sch 2 item 1 (‘*Competition and Consumer Amendment Act*’).

33 *Kobelt* (FCFCA) (n 3) 693 [13]–[14], 701 [62] (Besanko and Gilmour JJ).

34 *Ibid.*

35 *Ibid* 701 [62].

36 *ASIC v Kobelt* (n 8) [231] (White J).

37 *Kobelt* (FCFCA) (n 3) 694 [21] (Besanko and Gilmour JJ).

38 *Ibid* 694 [21], 701 [62]. The primary judge noted that since about mid-2014 it was common for Kobelt’s son to be the person engaging in the Withdrawal Conduct, but that this was as Kobelt’s agent: *ASIC v Kobelt* (n 8) [45]–[46] (White J).

39 *Kobelt* (FCFCA) (n 3) 693 [15], 701 [62] (Besanko and Gilmour JJ).

40 *ASIC v Kobelt* (n 8) [69] (White J). Transaction records were retained in diaries and ledgers and in a series of plastic bags, together with the customer’s key card. However, when the plastic bag became full, he discarded the printed records, leaving no means of showing evidence of withdrawals to his customers: at [41]–[42], [49], [70], [74].

41 *Ibid* [55].

would not allow customers access to all of the amount at one time.<sup>42</sup> To access the withdrawn monies, customers were required to travel from their place of residence (typically at least a 140 km round trip on a rough back road) to return to Nobbys to purchase groceries or receive cash.<sup>43</sup> Alternatively, customers relied on Kobelt's discretion in granting them a 'purchase order' for a fee to make purchases elsewhere.<sup>44</sup>

ASIC alleged that the combined effect of Kobelt's conduct, resulted in customers being 'tied' to Nobbys, dependent on Kobelt's discretion to provide them with credit to obtain the everyday necessities of life. This, together with the disadvantages of the customers, resulted in a 'relationship of dependency' between customers and Kobelt and made his conduct unconscionable.<sup>45</sup>

ASIC particularised that Kobelt's book-up system had operated between June 2008 and July 2015 in relation to 117 customers.<sup>46</sup> The case was primarily pleaded as 'a system of conduct or pattern of behaviour' which breaches the provision of statutory unconscionable conduct within the meaning of s 12CB(1)(a) of the *ASIC Act*.<sup>47</sup> As a result, ASIC's case did not depend on proving unconscionable conduct in relation to any individual customer.

In support of its claim, ASIC tendered statistics published by the Australian Bureau of Statistics.<sup>48</sup> These statistics revealed that the Anangu had low levels of employment, income, education and literacy compared to Australian averages.<sup>49</sup> ASIC also relied on the expert evidence of Dr David Martin, a social anthropologist, who expressed opinions about the characteristics of the Anangu. His evidence was that most Anangu residents in the APY Lands 'would not have an informed understanding of the nature and terms, and consequently of the advantages and disadvantages, of credit provision options available in the general Australian society' and so did not understand 'the financial aspects of Nobby's Credit Facility' or that charges would be levied by Nobbys for the provision of credit.<sup>50</sup> However, he was of the view that 'at a generalised level Nobby's Anangu [sic] customers do have a limited understanding of certain financial aspects of the nature and terms of Nobbys' Credit Facility'.<sup>51</sup>

42 *Kobelt* (FCFCA) (n 3) 693–4 [15] (Besanko and Gilmour JJ); *ibid* [56].

43 *ASIC v Kobelt* (n 8) [72] (White J).

44 *Ibid* [232].

45 *Kobelt* (FCFCA) (n 3) 748 [338] (Wigney J).

46 *ASIC v Kobelt* (n 8) [9], [228] (White J); *ibid* 702 [66] (Besanko and Gilmour JJ).

47 *ASIC v Kobelt* (n 8) [5] (White J). ASIC's secondary case was that Kobelt's conduct in providing credit under the book-up arrangement to four particular customers was unconscionable contrary to s 12CB of the *ASIC Act* (n 32). Ultimately ASIC did not press for findings at trial in relation to its secondary case: *ASIC v Kobelt* (n 8) [6].

48 *ASIC v Kobelt* (n 8) [378], [380], [382] (White J).

49 *Ibid* [379], [381], [383], [387].

50 *Ibid* [404].

51 *Ibid*.



### 3 Defence

Kobelt contended for the high relevance of the social norms and cultural values of the Anangu customers in his defence. He argued that he developed Nobbys' book-up system 'to meet the needs of his Anangu [sic] customers'.<sup>52</sup> First, he claimed that the system assisted his Anangu customers in managing their money in response to 'boom and bust ... expenditure' tendencies.<sup>53</sup> This was described by Dr Martin as a characteristic of Aboriginal residents of remote communities that led to significant expenditures without regard to long term consequences.<sup>54</sup> Secondly, Kobelt submitted that his book-up system alleviated 'demand sharing' or 'humbugging' for his customers. This was described as a cultural practice under which community members with available money have a right and responsibility to share, which can lead to a share being demanded, even to the point of bullying.<sup>55</sup> Dr Martin's evidence was that this was a "plausible" contributing reason for Nobbys' customers to leave their key cards at Nobbys when asked to do so, but he had "no firm evidence to come to that view".<sup>56</sup>

### B Decision of the Primary Judge

The primary judge, White J, held that Kobelt's conduct in providing the book-up system was unconscionable contrary to s 12CB of the *ASIC Act*.<sup>57</sup> His Honour agreed with ASIC's allegations that the combined effect of the Nobbys' Credit Facility and Withdrawal Conduct constituted a form of exploitation of the Anangu customers, to Kobelt's advantage and to the customers' detriment.<sup>58</sup> In coming to this conclusion, his Honour evaluated the factors in s 12CC(1) of the *ASIC Act*.<sup>59</sup>

White J found that his Honour was required to have regard to 'the cultural practices of the Anangu [sic] and of their circumstances more generally which differentiate them from customers in the rest of Australia'.<sup>60</sup> His Honour considered these cultural practices when determining whether Kobelt's conduct went beyond what was reasonably necessary to protect his own legitimate interests and whether the customers benefitted from the arrangements. However, his Honour found that the vulnerability of the customers, related to their social demographic characteristics, needed to be taken into account. His Honour found that Nobbys' book-up system

52 Ibid [75].

53 Ibid [565].

54 Ibid [566].

55 Ibid [574]–[575].

56 Ibid [578].

57 Ibid [9].

58 Ibid [606], [612], [620].

59 Ibid [506]–[560].

60 Ibid [611].

took advantage of this vulnerability.<sup>61</sup> In reaching his Honour's conclusion, White J said:

I am conscious that the Court should not impose a view of what is appropriate for the Anangu [sic] 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 [sic] as citizens of Australia and their entitlement to make decisions in their own interests is to be respected.<sup>62</sup>

### **C Appeal to the Full Court**

Kobelt appealed against the decision of the primary judge on a number of grounds, including his Honour's findings relevant to the contravention of s 12CB of the *ASIC Act*. A 'common theme' of his appeal in relation to s 12CB was that 'the primary judge gave insufficient consideration and weight to the history and complex indigenous cultural context' in which the impugned conduct occurred.<sup>63</sup>

The Full Court, composed of Besanko, Gilmour and Wigney JJ, found that the primary judge's evaluation of Kobelt's conduct as unconscionable was erroneous.<sup>64</sup> Their Honours' reasons, as set out in the joint judgment of Besanko and Gilmour JJ, included the common features of Nobbys' book-up system with other book-up systems,<sup>65</sup> the advantages of Nobbys' book-up system in mitigating the disadvantages from demand sharing and boom-and-bust expenditure in Indigenous Australian communities,<sup>66</sup> the absence of undue influence and dishonesty on the part of Kobelt in handling the key cards and PINs,<sup>67</sup> the absence of predation and exploitation,<sup>68</sup> Nobbys' customers' general understanding of the book-up system, despite their shortcomings in financial literacy,<sup>69</sup> and that they entered into the book-up system voluntarily.<sup>70</sup>

Wigney J provided additional reasoning for the finding that Kobelt did not engage in unconscionable conduct. This emanated from his Honour's viewpoint that the primary judge gave insufficient weight to the 'history and complex indigenous cultural context in which Mr Kobelt's conduct occurred', and 'the anthropological and other evidence which explained why the Anangu [sic] freely chose to engage

61 Ibid [620].

62 Ibid [619].

63 *Kobelt* (FCFCA) (n 3) 741 [296] (Wigney J).

64 Ibid 735 [260] (Besanko and Gilmour JJ, Wigney J agreeing at 741 [296]).

65 Ibid 735 [261].

66 Ibid 735 [262].

67 Ibid 735 [263]–[264].

68 Ibid 735–6 [267]–[268].

69 Ibid 735 [265].

70 Ibid 735 [266].

in book-up arrangements with Mr Kobelt'.<sup>71</sup>

His Honour emphasised three conclusions that he drew from the evidence before the primary judge: first, that book-up was a normative practice for the Anangu communities flowing from 'aspects of indigenous culture that differ substantially from the norms, values and practices of mainstream Australian society';<sup>72</sup> secondly, that Nobbys' book-up system offered particular advantages to these customers in terms of alleviating the cultural pressures of 'demand sharing' and "'boom and bust" expenditure [cycles]';<sup>73</sup> thirdly, the personalisation of financial transactions under book-up was desirable to the customers, finding that while the undocumented nature of the transaction might be seen as a disadvantage in the mainstream Australian society, this might be considered as an advantage for Nobbys' Anangu customers since they would not have to deal with documents.<sup>74</sup>

Highlighting this perceived gap in the primary judge's reasons, Wigney J held that Nobbys' book-up system needed to be assessed in the context of Indigenous culture, which explained the normative practice of the book-up system for the Anangu customers.<sup>75</sup> His Honour opined that

[w]hat the wider Australian society and its culture and institutions might regard as disadvantageous and unfair might be regarded by an Anangu [sic] person as in fact advantageous and reasonable.<sup>76</sup>

The reasoning of Wigney J of the Full Court raised the question of whether his Honour accepted a single statutory norm or multiple statutory norms encompassed within s 12CB and whether his Honour had assessed Kobelt's conduct against a lower statutory standard because of the cultural values and practices of the Anangu customers. The role of cultural values and norms in evaluating conduct against a statutory norm of conduct in s 12CB is the aspect of the case that is central to this paper and to one of the three grounds of appeal raised by ASIC to the High Court of Australia.

## **D Appeal to the High Court of Australia**

The High Court of Australia granted ASIC special leave to appeal from the decision of the Full Court on the unconscionability of the impugned conduct.<sup>77</sup>

71 Ibid 741 [296].

72 Ibid 740 [292]. See also at 749–50 [345].

73 Ibid 747 [331], 751 [349].

74 Ibid 747 [330]–[331].

75 Ibid 755 [368], 758 [383].

76 Ibid 747 [329].

77 On 17 August 2018, Gageler, Nettle and Edelman JJ granted special leave to ASIC: Transcript of Proceedings, *Australian Securities and Investments Commission v Kobelt* [2018] HCATrans 153.

Each of ASIC's three grounds of appeal challenged the evaluative judgment of the Full Court.<sup>78</sup> The first two grounds of appeal argued that the Full Court gave 'undue or disproportionate weight' to the voluntary entry of the Anangu customers into the book-up arrangement and the absence of subjective bad faith, dishonesty or fraud on the part of Kobelt while giving less weight to the vulnerability of the customers and the evidence of Kobelt's irregular conduct respectively.<sup>79</sup> The third ground on which the appeal was brought is that the Full Court 'erroneously rel[ie]d upon historical and cultural norms and practices' of the Anangu community '(demand sharing and boom and bust expenditure) so as to excuse what would otherwise be unconscionable conduct'.<sup>80</sup>

This third ground will be analysed in full in Part IV below. However, to elucidate the distinction between the majority and dissenting judgments on this third ground, this Part will present the sharp distinction in their findings on first two grounds. In a split decision of four to three the majority, composed of Kiefel CJ and Bell J (in a joint judgment), Gageler J, and Keane J, decided that Kobelt's conduct in operating the book-up system was not unconscionable under s 12CB of the *ASIC Act*.<sup>81</sup> The dissenting judges, comprising Nettle and Gordon JJ (in a joint judgment), and Edelman J found the same conduct unconscionable.<sup>82</sup>

On the first ground of weighing voluntariness versus vulnerability, the majority considered that the Anangu customers with their basic understanding of the book-up system<sup>83</sup> voluntarily entered into and remained in the book-up contract with Kobelt in the exercise of their free 'choice',<sup>84</sup> despite having the legal capacity to end the contract.<sup>85</sup> Their Honours found benefits to Anangu customers in the book-up arrangement arising both from cultural and historic factors and socioeconomic factors. The perception of book-up among Anangu customers as 'appropriate', Kiefel CJ and Bell J observed, emanates from 'aspects of Anangu [sic] culture that are not found in mainstream Australian society'.<sup>86</sup> Their Honours also pointed to the benefit of book-up to the Anangu customers, in providing them with 'the ability to purchase goods, including motor vehicles, notwithstanding their low incomes and lack of assets with which to secure a loan'.<sup>87</sup> Keane J noted

78 *Kobelt* (HCA) (n 1) 8 [13] (Kiefel CJ and Bell J).

79 Australian Securities and Investments Commission, 'Appellant's Submissions with Redacted Attachments', Submission in *Australian Securities and Investments Commission v Kobelt*, A32/2018, 5 October 2018, 9 [28] ('*ASIC Submissions*').

80 *Ibid* 1 [2].

81 *Kobelt* (HCA) (n 1) 9 [19], 22 [79] (Kiefel CJ and Bell J), 30 [112] (Gageler J), 30 [113] (Keane J).

82 *Ibid* 55 [238] (Nettle and Gordon JJ), 62 [268] (Edelman J).

83 *Ibid* 21 [77] (Kiefel CJ and Bell J).

84 *Ibid* 28 [107] (Gageler J).

85 *Ibid* 11 [30] (Kiefel CJ and Bell J). The Anangu customers could frustrate the book-up contract by cancelling the keycard or by setting up a different account to receive their social security payment.

86 *Ibid* 21 [78].

87 *Ibid* 19 [65]. See also *ibid* 29 [109] (Gageler J).

the ‘peculiarities’ of the ‘highly unusual market’<sup>88</sup> in which the book-up system operated and the ‘social solidarity’ of the Anangu customers, which ‘meant that they were able collectively to “punish” Kobelt if he were to offer terms that were unacceptable to them.’<sup>89</sup>

The dissenting judgments were in sharp contrast. Edelman J launched a vehement attack against the ‘free choice’ argument by saying that in the absence of Kobelt offering an alternative credit service to the Anangu customers, he gave them ‘no real choice at all’.<sup>90</sup>

Nettle and Gordon JJ opined that voluntariness and the exercise of free choice needed to be assessed in the context of relevant factors such as the imbalance in the bargaining power between Kobelt and his Anangu customers,<sup>91</sup> Kobelt’s knowledge of their vulnerability,<sup>92</sup> the non-transparent and discriminatory terms and conditions of the book-up system,<sup>93</sup> and above all, Kobelt’s exploitative conduct.<sup>94</sup> It is this vulnerability that diminished their ability to take charge of their own interests and Kobelt’s taking advantage of the vulnerability with knowledge, which triggered the unconscionability of Kobelt’s conduct.<sup>95</sup>

On the second ground of appeal, the majority considered ‘[t]he absence of the exertion of undue influence, pressure or unfair tactics’ as material to the assessment of unconscientious taking of advantage and therefore, unconscionability.<sup>96</sup> In contrast, the dissent maintained that dishonesty and undue influence were not pre-requisites to a finding of unconscionability under s 12CB.<sup>97</sup> The majority and dissent were again opposed in their evaluation of the factual findings. For instance, Kiefel CJ and Bell J described Kobelt’s record-keeping as ‘rudimentary’, ‘cramped and chaotic’, but devoid of dishonesty,<sup>98</sup> whereas Nettle and Gordon JJ found the record-keeping as demonstrating ‘a complete lack of transparency and

88 Ibid 33 [127].

89 Ibid 34 [129].

90 Ibid 73 [302].

91 Ibid 41 [159], 42–4 [165]–[167]. Nettle and Gordon JJ explain the power imbalance between Anangu customers and Kobelt at 55–6 [241]–[244]. Both the primary judge and the Full Court held that the vulnerability arises from, among other factors, poverty, lack of education and literacy, and remoteness: *ASIC v Kobelt* (n 8) [620] (White J); *Kobelt* (FCFCA) (n 3) 702 [67], 736 [268] (Besanko and Gilmour J), 755–6 [371]–[372] (Wigney J). According to Nettle and Gordon JJ, Anangu customers’ different perception about the key card and the trust reposed on Kobelt in handing over their key card without any precaution also demonstrate their vulnerability: *Kobelt* (HCA) (n 1) 54–5 [236].

92 *Kobelt* (HCA) (n 1) 54 [235] (Nettle and Gordon JJ), 64 [273] (Edelman J).

93 Ibid 41 [159], 42 [164] (Nettle and Gordon JJ). Edelman J also regarded Kobelt’s book-up as discriminatory against the Anangu customers since the strict conditions of the book-up did not apply to non-Aboriginal customers: at 74 [305], [307].

94 Ibid 41 [159] (Nettle and Gordon JJ).

95 Ibid 55 [238] (Nettle and Gordon JJ).

96 Ibid 18 [58] (Kiefel CJ and Bell J).

97 Ibid 59 [257] (Nettle and Gordon JJ), 74 [310] (Edelman J).

98 Ibid 11 [31].

accountability'.<sup>99</sup> Edelman J found that the exorbitant credit charged by Kobelt on the sale of several dilapidated second-hand cars to the same customer without disclosing the full cost of the car with interest and tying the Anangu customers to Kobelt's book-up for daily necessities made his conduct unconscionable.<sup>100</sup> In contrast, Keane J found it significant that it was not shown that the customers could have obtained a better deal on the purchase of a car from another supplier, but was prevented from doing so because of being 'tied' to Nobbys and found the tying conduct to consist only of 'modest leverage'.<sup>101</sup>

To evaluate the High Court's use of historical and cultural values and norms in evaluating Kobelt's conduct and its response to ASIC's third ground of appeal, it is necessary to explore the statutory test of unconscionable conduct and how it had developed prior to the decision in *Kobelt* (HCA).

### III STATUTORY PROHIBITION ON UNCONSCIONABLE CONDUCT

Section 12CB of the *ASIC Act* prohibits unconscionable conduct in trade or commerce in connection with the supply of financial services.<sup>102</sup> The provision was inserted into the *Australian Securities and Investments Commission Act 1989* (Cth) in 1998 following the recommendations of the Financial System Inquiry.<sup>103</sup> It was intended that the administration of financial consumer protection be removed from the Australian Competition and Consumer Commission and bestowed on the financial system regulator for Australia.<sup>104</sup> As a result, when interpreting s 12CB of the *ASIC Act* it is also relevant to consider the interpretation of its

99 Ibid 57 [248].

100 Ibid 72 [297]–[298].

101 Ibid 34 [128].

102 Section 12CB of the *ASIC Act* (n 32) commenced in its present form on 1 January 2012 when it was amended by the *Competition and Consumer Amendment Act* (n 32). The parties in *Kobelt* (FCFCA) (n 3) appeared not to raise any argument that the earlier provision would have impacted on the application of the relevant principles by the Court. Prior to the 2012 amendment, s 12CB of the *ASIC Act* (n 32) did not expressly state that the provision applied to a system of conduct. However, the Full Court of the Federal Court of Australia had previously expressed the view in *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 ('*National Exchange*') that the unamended provision was capable of applying to a system case: at 140–1 [30], [33].

103 Stan Wallis et al, *Financial System Inquiry* (Final Report, 18 March 1997) ('*The Wallis Report*'). Division 2 of pt 2, including s 12CB, was inserted into the *Australian Securities and Investments Commission Act 1989* (Cth) ('*ASIC Act 1989*') by the *Financial Sector Reform (Consequential Amendments) Act 1998* (Cth) sch 2 item 7. See also Commonwealth, *Parliamentary Debates*, Senate, 14 May 1998, 2796 (Ian Campbell). The *ASIC Act 1989* (n 103) was superseded by the *ASIC Act* (n 32) following the states and territories' referral of powers to the Commonwealth and the operation of s 12CB was continued in that latter Act: Commonwealth, *Parliamentary Debates*, House of Representatives, 4 April 2001, 26435 (Joe Hockey, Minister for Financial Services and Regulation).

104 Phil Hanratty, 'The Wallis Report on the Australian Financial System: Summary and Critique' (Research Paper No 16, Parliamentary Library, Parliament of Australia, 23 June 1997) i.

counterpart provisions in consumer protection legislation.<sup>105</sup>

There is no definition of what constitutes ‘unconscionable conduct’ in s 12CB of the *ASIC Act* and its counterparts.<sup>106</sup> Section 12CB(4) of the *ASIC Act* expresses the legislative intention that the section ‘is not limited’ by the common law principles concerning unconscionable conduct; that the ‘section is capable of applying to a system of conduct’, regardless of whether an ‘individual is identified as having been disadvantaged by the conduct’; and, when deciding if a contract is unconscionable, the court may consider the ‘terms of the contract’, ‘the manner in which and the extent to which the contract is carried out’ and ‘is not limited to consideration of the circumstances relating to formation of the contract’. The concept of unconscionability under statute has been described as ‘substantially broader and more flexible’ than the general law concept of unconscionable conduct.<sup>107</sup>

Some factors that the court may consider when determining if conduct is unconscionable are set out in s 12CC(1) of the *ASIC Act*, including: the ‘relative strengths of the bargaining positions of the supplier and the service recipient’; whether ‘any unfair tactics were used against, the service recipient’; and ‘the extent to which the supplier’s conduct towards the service recipient was consistent with the supplier’s conduct in similar transactions between the supplier and other like service recipients’.<sup>108</sup> Section 12CC of the *ASIC Act* ‘does not purport to be an exhaustive list’ of the relevant factors to be considered.<sup>109</sup>

The key and overall element to be established to contravene s 12CB of the *ASIC Act* is whether the conduct in question was ‘in all the circumstances, unconscionable’. Prior to *Kobelt* (HCA), this was characterised as an objective test and it was said that the assessment must be made ‘according to the ordinary meaning’ of the term ‘unconscionable’.<sup>110</sup> Some Australian courts framed unconscionable conduct

105 *Competition and Consumer Act 2010* (Cth) sch 2 s 21(1) (*ACL*). Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (*Competition and Consumer Act*) contains the *Australian Consumer Law*. The first Australian legislation to prohibit unconscionable conduct in consumer transactions was s 52A of the *Trade Practices Act 1974* (Cth) (*TPA*), the history and development of which were elucidated by Edelman J in *Kobelt* (HCA) (n 1) 65–72 [279]–[295]. The amendments of the provisions have been simultaneously effected through the same amending legislation, most recently sch 2 of the *Competition and Consumer Amendment Act* (n 32). In the second reading speeches for the Competition and Consumer Legislation Amendment Bill 2011 (Cth), ss 12BC and 12CC of the *ASIC Act* (n 32) were described as ‘mirrored provisions’ to ss 21 and 22 of the *ACL* (n 105): Commonwealth, *Parliamentary Debates*, House of Representatives, 17 August 2011, 8445 (Andrew Leigh).

106 The Senate Standing Committee on Economics considered whether a definition of ‘unconscionable conduct’ should be inserted into the *TPA* (n 105): *Senate Stating Committee Report* (n 32) 13–16 [3.13]–[3.24], 33–5 [5.9]–[5.18], 45–7. It determined that such a recommendation should not be adopted: Commonwealth, *Parliamentary Debates*, Senate, 25 November 2011, 9653 (Nick Sherry).

107 *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 357 ALR 240, 322 [2176] (Beach J) (*Westpac*).

108 *ASIC Act* (n 32) s 12CC(1). Equivalent provisions are incorporated in s 22 of the *ACL* (n 105).

109 *National Exchange* (n 102) 139–40 [28] (Tamberlin, Finn and Conti JJ).

110 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525, 587 [188] (Gageler J) (*Paciocco* (HCA)).

as conduct requiring a ‘high level of moral obloquy’.<sup>111</sup> However, more recently, the predominant view was that the words of the statute should not be replaced with a new formulation.<sup>112</sup> In one of his last decisions before being appointed to the High Court of Australia, Edelman J described statutory prohibitions on unconscionable conduct as ‘examples of open-textured provisions about which it is likely that no precise or universal test for application will ever be stated’.<sup>113</sup>

This is not to say that statutory concept of ‘unconscionable’ was given no principled meaning to guide its application by the courts. Three particular aspects of the statutory concept of unconscionability relevant to the role of values and norms in the evaluation of conduct alleged to be contrary to s 12CB had emerged in the cases prior to *Kobelt* and will be explored in this part. First, this part will consider the development of the use of a ‘statutory norm’ of conduct in recent decisions of appellate level Australian courts. Secondly, this part will assert that the statute reflects an intention to provide greater certainty in application than the concept of unconscionability under the general law. Finally, it will show how decisions of the Australian courts prior to *Kobelt* emphasised the conduct of the stronger party, rather than the victims of the alleged conduct.

## A A Statutory Norm

Recently, Australian courts have favoured the notion that s 12CB of the *ASIC Act* sets out a ‘statutory norm’, which operates as a touchstone of commercial behaviour.<sup>114</sup> This is to be assessed by reference to the ‘judicial conscience’.<sup>115</sup> The concept of statutory unconscionability being tested against a ‘normative standard of conscience’, was developed by the Federal Court of Australia, in a series of judgments led by Allsop CJ. In *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* (*‘Lux’*), the Full Court of the Federal Court of Australia elaborated:

111 See, eg, *A-G (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121] (Spigelman CJ) (*‘World Best Holdings’*), which was approved by Gageler J in *Paciocco* (HCA) (n 110) 587 [188].

112 See, eg, *Paciocco v Australia & New Zealand Banking Group Ltd* (2015) 236 FCR 199, 266 [262] (Allsop CJ) (*‘Paciocco* (FCFCA’)). See also *Westpac* (n 107) 323 [2178] (Beach J); *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* (2018) 329 FLR 149, 187 [195] (Bathurst CJ), 205 [278] (Leeming JA) (although stating that the term ‘moral obloquy’ ‘may be of assistance’ in understanding what the statute required: at 187 [195] (Bathurst CJ)). Nevertheless, there is some suggestion that the Supreme Court of Victoria continues to view ‘moral obloquy’ as required for conduct to be unconscionable within the terms of the statute: see *Violet Home Loans Pty Ltd v Schmidt* (2013) 44 VR 202, 219 [58] (Warren CJ, Cavanough and Ferguson AJJA) which referred to ‘moral obloquy’ as a ‘necessary element’, citing *Director of Consumer Affairs Victoria v Scully (No 3)* [2012] VSC 444, [30]–[32] (Hargrave J) (*‘Scully’*). Cf *Scully* (n 112) 181–2 [45] (Santamaria JA, Neave JA agreeing at 169 [1], Osborn JA agreeing at 170 [2]).

113 *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 442 [85] (*‘CBA’*).

114 *Paciocco* (HCA) (n 110) 558 [74], 584 [178]–[180] (Gageler J), 618 [290] (Keane J); *CBA* (n 113) 434 [56], 437 [61] (Allsop CJ). See also Frank Zumbo, ‘Unconscionable Conduct: Private Members’ Bill Introduced in South Australia to Prohibit Unconscionable, Harsh or Oppressive Conduct’ (1997) 5(1) *Trade Practices Law Journal* 70, 70, describing the insertion of an equivalent prohibition to s 12CB of the *ASIC Act* (n 32) into the *Fair Trading Act 1987* (SA).

115 *CBA* (n 113) 442 [86] (Edelman J).



That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers. The content of those values is not solely governed by the legislature, but the legislature may illuminate, elaborate and develop those norms and values by the act of legislating, and thus standard setting. ... Values, norms and community expectations can develop and change over time. Customary morality develops ‘silently and unconsciously from one age to another’, shaping law and legal values ... *the operative provisions of the ACL reinforce the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure.* These considerations are central to the evaluation of the facts by reference to the operative norm of required conscionable conduct.<sup>116</sup>

The Full Court in *Lux* acknowledged that there was a role for the court to take into account context in assessing whether conduct was unconscionable. In that case, the circumstances giving rise to the claim under consumer protection legislation were the direct sale of vacuum cleaners to elderly women in their own homes. The Full Court said:

it is conduct against conscience by reference to the norms of society that is in question. The statutory norm is one which must be understood and applied in the context in which the circumstances arise. *The context here is consumer protection directed at the requirements of honest and fair conduct free of deception.* Notions of justice and fairness are central, as are vulnerability, advantage and honesty.<sup>117</sup>

When considering an alleged contravention of s 12CB of the *ASIC Act* in *Paciocco v Australia & New Zealand Banking Group Ltd* (*Paciocco* (FCFCA)), Allsop CJ identified the values that Parliament intended to be relevant to the statutory prohibition on unconscionable conduct.<sup>118</sup> These were, first, the ‘enduring historical (and contemporary)’ norms and values ‘in the law, especially, but not limited to, Equity, that bear upon the notion of conscience, in this context the conception of a business conscience — one attending conduct in trade or commerce’.<sup>119</sup> Within these values he identified certainty, ‘the demands of honest commerce’ and the ‘protection of the vulnerable from exploitation by the strong’.<sup>120</sup> Secondly, his Honour considered that Parliament could be taken to have incorporated the

116 [2013] FCAFC 90, [23] (Allsop CJ, Jacobson and Gordon JJ) (emphasis added) (*Lux*), quoting Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 104–5. The decision was subject to an application for special leave to appeal to the High Court of Australia, but this application was dismissed: *Lux Distributors Pty Ltd v Australian Competition and Consumer Commission* [2014] HCASL 55.

117 *Lux* (n 116) [41] (Allsop CJ, Jacobson and Gordon JJ) (emphasis added).

118 *Paciocco* (FCFCA) (n 112).

119 *Ibid* 266–7 [263].

120 *Ibid* 268 [270], 271 [282].

standards of unconscionability as an underlying notion in the law of equity as developed in the Australian law.<sup>121</sup> Additionally, s 12CC of the *ASIC Act* provided a ‘framework for the values’ underlying the relevant conscience, being ‘fairness and equality: see paras (a), (b), (d) to (k); a lack of understanding or ignorance of a party: para (c); the risk and worth of the bargain: paras (e) and (i); and good faith and fair dealing: para (l)’.<sup>122</sup>

Allsop CJ emphasised that it was only these values and norms that were relevant and not any values or norms ‘disembodied from, or unconnected with, the choice made by Parliament’.<sup>123</sup> His Honour described the process that a court must undertake for an evaluation of the impugned conduct. Such an evaluation must be made against the norms and values that he identified and assessed considering all connected circumstances, without the involvement of ‘personal intuitive assertion’.<sup>124</sup>

Allsop CJ confirmed again his Honour’s construction of the statutory norm against which the judicial evaluation of the conduct must occur in *Commonwealth Bank of Australia v Kojic* (‘CBA’).<sup>125</sup> In this case, a bank succeeded in appealing a finding that it had acted unconscionably in facilitating a transaction between an experienced businesswoman and her husband in which they invested in a property owned by a company that had granted a substantial security to the bank.<sup>126</sup> Allsop CJ said, in responding to the concern of indeterminacy in the law arising from the statutory test of unconscionability, that:

Some contrast may be seen with a standard or norm that carries within its textual expression a reference or framework for logical analysis. For instance, a provision that proscribes misleading or deceptive conduct has within its terms a framework of meaning that is, to a degree, self-referential. It is a norm or standard, but one that carries within its expression, meaningful criteria for application. A provision that proscribes unconscionable conduct is directed to a standard or norm of right behaviour that is less precise. Its assessment requires a body of values against which to make the evaluative judgment of what is right or conscionable in the circumstances, and how far the departure from such should be to warrant the characterisation of unconscionable. The formation of that judgment requires guidance from considerations not part of the direct reference

121 Ibid 271 [284].

122 Ibid 272 [285].

123 Ibid 266 [262].

124 Ibid 274 [296], discussing the judicial technique referred to by Dixon CJ, McTiernan and Kitto JJ in *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 118–19 (‘*Jenyns*’).

125 *CBA* (n 113) 434–5 [56].

126 Ibid 437 [60] (Allsop CJ, Besanko J agreeing at 438 [69], Edelman J agreeing at 441 [84]). Allsop CJ noted that the primary judge did not consider it necessary to decide whether the relevant statutory provision was found in the *TPA* (n 105) or the *ASIC Act* (n 32) and that the ‘provisions are substantially identical’: ibid 437 [61].

of the immediate language that expresses the standard — but which are the relevant values to bring to bear on the evaluative judgment. Thus, the standard or norm of unconscionability is more diffuse than the standard or norm embodied in a phrase such as misleading or deceptive, but the former takes its stability from the informing values of the statute and the law, Equity in particular.<sup>127</sup>

This construction of the normative values and standards relevant to the statutory test was applied by Beach J in *Australian Securities and Investments Commission v Westpac Banking Corporation [No 2]* (*Westpac*).<sup>128</sup> These were civil penalty proceedings in which ASIC alleged that a bank engaged in unconscionable conduct in influencing the setting of the bank bill swap reference rate.<sup>129</sup> His Honour found that the bank had engaged in unconscionable conduct and stated that:

[I]n making this finding I have avoided descending into the ‘formless void of individual moral opinion’ ... It is sufficient for me to say that applying Allsop CJ’s analysis [in *Paciocco* (FCFCA)] ... and without dwelling in the paradigm of moral obloquy, Westpac’s conduct was against commercial conscience as informed by the normative standards and their implicit values enshrined in the text, context and purpose of the *ASIC Act* specifically and the *Corporations Act* generally.<sup>130</sup>

In summary, the circumstances in which the impugned conduct occurred will be relevant to an assessment of whether the statutory construct of unconscionable conduct has been breached. However, the crux of the above reasoning is that the community standards and values encompassed within the statutory notion of unconscionability are a set of core norms and values. These norms and values are to be found in the text, context and purpose of the relevant statute and in the general law. It is these norms that provide the touchstone against which the technique of judicial evaluation of the conduct in its circumstances must occur, not an individualised or subjective notion of moral conduct judged by the values of the parties involved.

## B Commercial Certainty

Section 12CB of the *ASIC Act* applies only in the context of the supply of financial services. The courts have acknowledged the need to ensure certainty between contracting parties in commercial relationships when assessing unconscionability

127 *CBA* (n 113) 436–7 [59].

128 *Westpac* (n 107).

129 The section that was found to have been breached was s 12CC of the *ASIC Act* (n 32) as it existed prior to amendments that took effect on 1 January 2012. Section 12CC was then a mirror provision to s 12CB.

130 *Westpac* (n 107) 248 [26] (Beach J) (citations omitted).

of transactions.<sup>131</sup> A consistent minimum standard of fair conduct or ‘commercial morality’ in business transactions was emphasised in the final report of the 2015 *Competition Policy Review*. It stated that:

Both the business and the wider community expect business to be conducted according to a minimum standard of fair dealing. There are sound economic and social reasons for enshrining minimum standards of fair dealing within the law.<sup>132</sup>

Equity has long been subject to the criticism that it does not provide the certainty of doctrine required by the commercial community.<sup>133</sup> It is important that there be consistency and clarity in the application of the statutory norm of unconscionable conduct.<sup>134</sup>

Concerns of a lack of certainty in applying the equitable doctrine of unconscionability in commercial transactions influenced the development of statutory prohibitions on unconscionable conduct.<sup>135</sup> John Goldring suggests that the introduction in legislation of the factors that a court would take into account in assessing unconscionability was seen to alleviate some of this concern.<sup>136</sup> He stated that ‘the real virtue of such legislation is that, while it does not and could not entirely eliminate indeterminacy in the law, it does reduce it substantially’.<sup>137</sup>

131 See, eg, *World Best Holdings* (n 111) 583 [121] (Spigelman CJ).

132 Ian Harper et al, *Competition Policy Review* (Final Report, March 2015) 62.

133 This criticism is of longstanding: see, eg, Roscoe Pound, ‘The Decadence of Equity’ (1905) 5(1) *Columbia Law Review* 20, who said in his critique of equity that ‘[t]he commercial world demands rules. No man makes large investments trusting to uniform exercise of discretion’: at 24. See also *Muschinski v Dodds* (1985) 160 CLR 583, 616 (Deane J).

134 Robert Chambers opines ‘[u]ncertainty in the law favours the rich over the poor and the strong over the weak’, noting the ‘ruinous’ monetary and emotional costs of litigation: Robert Chambers, ‘The Importance of Specific Performance’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 431, 434.

135 See John Goldring, ‘Certainty in Contracts, Unconscionability and the Trade Practices Act: The Effect of Section 52A’ (1988) 11(3) *Sydney Law Review* 514, 522. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 1997, 11885 (Peter Reith) (‘The prescription of industry codes and the prohibition on unconscionable conduct aim to provide a framework for commercial dealings that provides a greater degree of certainty for small business when entering into commercial transactions with big business.’). The exposure draft of the Trade Practices Amendment Bill 1984 (Cth) (‘TPA Amendment Bill 1984’), which proposed the introduction of a prohibition on unconscionable conduct in a new s 52A in the TPA (n 105), included in the proposed sub-s (2) that the court shall have regard to, inter alia ‘the principle of the need for certainty in commercial transactions’: Gareth Evans, Barry Cohen and Ralph Willis, *The Trade Practices Act Proposals for Change* (Discussion Paper, February 1984) 50. This was criticised by eminent legal scholars and removed: see IJ Hardingham, ‘Unconscionable Dealing’ in PD Finn (ed), *Essays in Equity* (Law Book, 1985) 1, 25 n 15 (describing the inclusion of commercial certainty as a relevant factor as amounting ‘to little more than a political gesture’, stating that the introduction of the provision would clearly result in uncertainty); Sir Anthony Mason, ‘Themes and Prospects’ in PD Finn (ed), *Essays in Equity* (Law Book, 1985) 242, 243 (stating ‘[o]ne can scarcely describe the “need for certainty in commercial transactions” as a principle, legal or otherwise’ but noting that the legislative draftsman in drafting the proposed s 52A of the TPA (n 105) would be ‘[s]triving for that degree of certainty which commercial men constantly demand from others’). See also Commonwealth, *Parliamentary Debates*, Senate, 29 April 1986, 1982 (Gareth Evans).

136 Goldring (n 135) 522.

137 *Ibid* 534.

It is relevant that s 12CB of the *ASIC Act* is a civil penalty provision.<sup>138</sup> A breach of its terms can result in a declaration of contravention, monetary penalties and other remedies. This should bolster the importance of reducing the variability of the touchstone of normative conduct against which the alleged misconduct is judged.<sup>139</sup>

It appears to be a combination of these factors which led Beach J to pronounce in *Westpac* that:

[Sections] 12CB and 12CC provide no occasion to dwell upon any meta-themes or top-down social theories that either in their expression or in their application merely magnify uncertainty. I must apply ss 12CB and 12CC in the hard-edged commercial context of conduct engaged in and transactions entered into in the finance industry between sophisticated players, albeit where information asymmetry may be used by one participant at the expense of another to conceal, inject or shift risk to its advantage.<sup>140</sup>

This conclusion was reached in the context of a claim brought in relation to conduct alleged to have been engaged in by a large financial institution in relation to sophisticated counterparties. Nevertheless, it emphasises the importance of certainty in the commercial context in which s 12CB of the *ASIC Act* is intended to operate and the potential for the use of individualised notions of conscience to deplete this goal.

### **C *Emphasis on the Supplier's Conduct***

When assessing a breach of statutory unconscionability, the 'focus is substantially on the conduct of the alleged contravener'.<sup>141</sup> The conduct must be judged in all the circumstances, but it is the circumstances of the supplier's conduct that should be central to the analysis as to whether unconscionable conduct has occurred.<sup>142</sup>

In *Australian Securities and Investments Commission v National Exchange Pty Ltd* ('*National Exchange*'), the Full Court of the Federal Court of Australia rejected an argument that the circumstances of the recipients of the impugned

138 Pursuant to s 12GBA of the *ASIC Act* (n 32), which came into force on 15 April 2010: *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth) s 2(1) item 9, sch 3 item 9. It is pertinent to compare the original drafting of the TPA Amendment Bill 1984 (n 135) and that it was 'not envisaged that a breach of s 52A will attract a penalty or give rise to a right to sue for damages', only injunctive relief would be available: Hardingham (n 135) 28 n 17.

139 The nature of civil penalty provisions was described in *Australian Securities and Investments Commission v Ingelby* (2013) 39 VR 554, 556 [4]–[6] (Weinberg JA). His Honour noted that they represent an 'exercise of state power' and have a punitive element, in some cases, the punishment for a civil penalty may be more severe than punishable under the criminal law for equivalent conduct: at 556 [4]–[5].

140 *Westpac* (n 107) 323 [2178].

141 *Ibid* (Beach J).

142 See *Scully* (n 112) 182–3 [47] (Santamaria JA).

conduct must be examined to find a breach of s 12CB of the *ASIC Act*.<sup>143</sup> This case concerned unsolicited offers for the purchase of shares. The Full Court overturned the finding of the trial judge that unconscionable conduct could not be found without the identification of individuals that received the offers.<sup>144</sup> It stated that the ‘primary emphasis is on the conduct of the offeror towards the offeree in deciding whether conduct is unconscionable’.<sup>145</sup> The Full Court’s interpretation of the statutory unconscionability provisions was reinforced in the second reading speech for the 2011 amendments to s 12BC of the *ASIC Act*, where the Minister introducing the Competition and Consumer Legislation Amendment Bill 2011 (Cth) said that ‘the focus is on the conduct rather than the victim’.<sup>146</sup>

The centrality of the conduct of the supplier to the assessment of statutory unconscionability coincides with the operation of the provision as a civil penalty provision. This elevates the provision into a form of public wrong enforceable by a public regulator for breaching a norm of conduct in the absence of a private action for loss.<sup>147</sup>

The focus on the courts’ assessment of the conduct of the contravener also reflects equity’s scrutiny of the conduct of the stronger party. The statutory test of ‘unconscionable’ conduct is not constrained by equitable principles.<sup>148</sup> Nevertheless, the equitable doctrine of unconscionable conduct may shed light on what may be regarded as unconscionable in the statutory formulation.

In equity, a transaction will be prima facie unconscionable where: first, that ‘a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them’ and secondly, ‘that disability was sufficiently evident to the stronger party to make it prima facie unfair or “unconscientious” that he procure, or accept, the weaker party’s assent to the impugned transaction in the circumstances in which he procured or accepted it’.<sup>149</sup>

The doctrine of unconscionable conduct can be distinguished from that of undue influence by the identity of the party to the impugned transaction on which the focus of inquiry is placed. In his authoritative judgment in *The Commercial Bank of Australia Ltd v Amadio* (*‘Amadio’*), Deane J stated that:

143 *National Exchange* (n 102).

144 *Ibid* 143 [45] (Tamberlin, Finn and Conti JJ).

145 *Ibid* 142 [43]. See also *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) 15 BPR 29699, 29765 [291] (Allsop P).

146 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 June 2011, 6055 (David Bradbury).

147 See generally the discussion in *Australian Securities and Investments Commission v Cassimatis* [No 8] (2016) 336 ALR 209, 295–7 [449]–[459] (Edelman J) as to whether breach of the duties of company directors under the *Corporations Act 2001* (Cth) are public or private wrongs.

148 *National Exchange* (n 102) 140 [30] (Tamberlin, Finn and Conti JJ).

149 (1983) 151 CLR 447, 474 (Deane J) (*‘Amadio’*).

The equitable principles relating to relief against unconscionable dealing and the principles relating to undue influence are closely related. The two doctrines are, however, distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party ... *Unconscionable dealing looks to the conduct of the stronger party* in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.<sup>150</sup>

This articulation has been followed by other members of the High Court. In *Thorne v Kennedy* ('*Thorne*'), Gordon J stated:

Unconscionable conduct '*looks to the conduct of the stronger party* in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so'.<sup>151</sup>

Gordon J in *Thorne*, confirmed that the distinction between the person's conduct that was the focus of inquiry in the doctrines of undue influence and unconscionable conduct 'though not always clearly drawn, may now be taken to be accepted in Australia'.<sup>152</sup> Because of the focus on the conduct of the stronger party, the assessment of whether unconscionable conduct occurred, 'does not require asking whether the weaker party lacked the capacity to exercise independent judgment'.<sup>153</sup> Further, the reason for the focus of the inquiry on the stronger party is to assess the 'circumstances affecting the conscience' of the stronger party that justify equity's jurisdiction to intervene.<sup>154</sup> The doctrine looks to the identification of an 'unconscientious' or 'exploitative' element in the conduct of the stronger party and, in relation to the weaker party, the relevant circumstance is whether they were under a 'special disadvantage' of which the stronger party was aware.<sup>155</sup> This suggests that under the general law, the focus of inquiry is not on the normative conduct of the weaker party, but the evaluation of the conduct of the stronger party against social norms and values.

In summary, prior to *Kobelt* (HCA), the emerging approach of most Australian courts was to interpret s 12CB as setting out a statutory norm of conduct against which the impugned conduct was to be assessed. The circumstances in which that conduct occurred were relevant to the evaluation of the conduct, but the operative norm of conscience against which the conduct is judged was considered to be constant. Further, the focus on the evaluation was on the conduct of the party

150 Ibid (emphasis added) (citations omitted).

151 (2017) 350 ALR 1, 30 [109] ('*Thorne*'), quoting *Amadio* (n 149) 474 (Deane J) (emphasis added).

152 *Thorne* (n 151) 25 [86].

153 Ibid 27 [94] (Gordon J), citing *Amadio* (n 149) 461 (Mason J).

154 *Jenyns* (n 124) 118 (Dixon CJ, McTiernan and Kitto JJ).

155 *Thorne* (n 151) 30 [110], 31 [114] (Gordon J).

providing the financial service to customers. The characteristics of the customers were a relevant part of the circumstantial matrix, but the focus of the evaluation was on the supplier's conduct against the statutory norm. It is relevant to consider whether the judgments in *Kobelt* (HCA) reinforced or altered this process of judicial evaluation against a statutory norm of conduct.

#### **IV APPLICATION OF CULTURAL CONTEXT IN *KOBELT***

This part is divided in two sections: Section A will consider the approach of the majority and dissent of the High Court in *Kobelt* (HCA) to evaluating statutory unconscionability. In particular, this Part will consider the use made in the judgments of the cultural values of the Anangu customers that were presented in evidence before the primary judge and how this conformed with or changed the previous approach as described in Part III.

It will argue that the majority of the High Court took an approach that anatomised the supplier's conduct. Their Honours used the values and norms of the customers to, in part or whole, explain the customers' acceptance of each aspect of the conduct and thereby normalised the conduct. This appears to be different to the previously developed approach to s 12CB of considering the totality of the circumstances of the conduct, including the factors in s 12CC against a standard of conscionable conduct, being a standard that has at its heart the values of modern Australian society. It is the latter approach that was taken by the dissent, in particular, Nettle and Gordon JJ and should be the preferred one.

Section B will argue that the majority's analysis of cultural context overlooked nuances in the evidence before it. Moreover, the opportunity was missed for more extensive evidence to be placed before the lower courts to consider as part of the circumstantial matrix in which the conduct occurred. If that evidence had been led, a different conclusion may have been drawn on the advantages of the impugned conduct to *Kobelt*'s customers from the Anangu community.

##### **A *The High Court's Approach***

The High Court's use of cultural values in the evaluation of whether Nobbys' book-up system was unconscionable will be discussed in terms of the matters relevant to the application of the statutory norm identified in Part III, being: the existence of a statutory norm and the values that inform it; the fulfilment of the object of commercial certainty in the use of a statutory norm; and the relevance of the customers' social and cultural values to an assessment of the conscionability of the supplier's conduct.



## 1 A Statutory Norm

At the heart of ASIC's third ground of appeal was a challenge to the Full Court's apparent use of an individualised norm of conduct against which to assess Kobelt's conduct.<sup>156</sup> In oral submissions before the High Court, ASIC submitted that in the application of s 12CB 'one tests the question of whether there was a departure from the normative values incorporated in the standard of unconscionability by reference to modern Australian values'.<sup>157</sup> This third ground of appeal assumed that the approach to the assessment of statutory unconscionability that was developed in the Full Court and implicitly accepted by the High Court in *Paciocco* (HCA) should be adopted.

In *Kobelt* (HCA), all members of the High Court accepted that s 12CB encompassed a statutory norm of conduct and that the evaluation of whether conduct was conscionable required the assessment of all of the circumstances of the conduct in question against that statutory norm.<sup>158</sup> This approach is in line with that developed in the Federal Court and described above in Part III. The use of 'moral obloquy' as an alternative expression of the statutory test was dismissed or downplayed.<sup>159</sup> It was stated or implicit in each judgment that there should be only one statutory norm of conscionable conduct. Gageler J described this norm as applicable to 'all conduct occurring anywhere in Australia in connection with the supply or possible supply of financial services'.<sup>160</sup> However, the identification of the values encompassed within that statutory norm and how cultural values or differences may be incorporated within the court's evaluation of the conduct differed between judgments.

Before considering the different approaches, it is relevant to note that all judges accepted that the Nobbys' book-up system had positive aspects for the Anangu customers in safeguarding their finances from the boom-and-bust cycle of expenditure and the undesired burden from the social obligation of demand sharing, both being aspects of their social and cultural norms.<sup>161</sup> However, the majority and the minority judges differed in building connections between these cultural practices on the one hand and assessing if the statutory norm was contravened.

156 *Australian Securities and Investments Commission v Kobelt* [2018] HCA Trans 252, 251–62, 2136–46.

157 *Ibid* 260–2 (SP Donoghue QC).

158 See *Kobelt* (HCA) (n 1) 15 [47] (Kiefel and Bell J), 32 [122] (Keane J), 39 [150], 39 [153] (Nettle and Gordon JJ), 62 [267] (Edelman J), 23 [84], 24 [87] (Gageler J). Gageler J considered whether s 12CB prescribed a normative standard of conduct or conferred statutory authority on a court to further develop the equitable conception of unconscionable conduct. Ultimately, his Honour determined that the former was the correct perspective: at 23 [84].

159 Gageler J, Keane J, Nettle and Gordon JJ all referred to the use of the term 'moral obloquy', but to different extents refuted or did not pursue a line of reasoning that this was the test of whether the conduct was conscionable: *ibid* 25 [91] (Gageler J), 31 [118] (Keane J), 39 [152] (Nettle and Gordon JJ).

160 *Ibid* 26 [97]. See also 21 [77] (Kiefel CJ and Bell J), 32 [122] (Keane J).

161 *Ibid* 20 [68]–[69] (Kiefel CJ and Bell J), 29 [109] (Gageler J), 33 [126]–[127] (Keane J), 50 [216], 51 [218] (Nettle and Gordon JJ), 73 [301] (Edelman J).

Kiefel CJ and Bell J saw the appeal as capable of determination within the equitable concept of unconscionable conduct. Their Honours were reluctant to consider any movement in the statutory norm beyond the equitable standard where this issue had not been raised clearly on the submissions.<sup>162</sup> As a result, they focused on the value of protecting innocent parties subject to a special disadvantage from ‘those who would victimise, predate or take advantage’.<sup>163</sup> Their Honours interpreted ASIC’s argument that the Full Court had lowered the statutory norm as requiring ASIC to establish that the system of book-up supplied at Nobbys was objectively contrary to the interests of its Anangu customers.<sup>164</sup> They found that this objective test was not met as a result of their application of ‘the evidence of the cultural norms and practices of the Anangu [sic] residents of the APY Lands’.<sup>165</sup> Their Honours used this evidence to find: first, Kobelt gained no advantage from the supply of book-up credit;<sup>166</sup> second, the customers were not exploited;<sup>167</sup> and third, the Anangu customers’ perceived the book-up system as appropriate.<sup>168</sup> Their Honours found that this perception ‘reflected aspects of Anangu [sic] culture that are not found in mainstream Australian society’ and was not generated by a lack of financial literacy.<sup>169</sup> However, their Honours were clear that they did not consider that in finding the conduct to be conscionable that they were setting ‘a different, lower standard of conscionable conduct in the supply of credit to Anangu [sic] consumers than applies to the supply of credit to consumers in mainstream Australian society’.<sup>170</sup>

Keane J took a similar approach. His Honour focused on equity’s requirement of exploitation or victimisation to establish unconscionability in equity and found this was also required to contravene s 12CB.<sup>171</sup> Cultural values were also used in his Honour’s assessment to provide an explanation for the customers’ acceptance of the book-up system and the lack of exploitation or advantage to Kobelt in conducting the system. His Honour considered the ‘absence of ready funds’ in the book-up system, as not detrimental, but beneficial to customers in avoiding demand sharing or ‘humberging’.<sup>172</sup> His Honour opined that these customers were not ‘disposed to turn their unused funds to their pecuniary advantage’, unlike other customers elsewhere in Australia.<sup>173</sup> Nevertheless, his Honour found that

162 Ibid 15–16 [48]–[50].

163 Ibid 8 [14], quoting *Paciocco* (FCFCA) (n 112) 274 [296] (Allsop CJ).

164 *Kobelt* (HCA) (n 1) 21 [77].

165 Ibid.

166 Ibid 22 [79].

167 Ibid.

168 Ibid 21 [78].

169 Ibid 21 [78].

170 Ibid 21 [77].

171 Ibid 31–2 [119].

172 Ibid 33 [126]–[127].

173 Ibid 33 [126].

he was unable to find the conduct ‘so offensive to the norms of wider Australian society as to warrant its condemnation as unconscionable’.<sup>174</sup>

Unlike the other members of the majority, Gageler J seemed unconvinced by the notion that the normative standard of conduct should be limited by equitable concepts.<sup>175</sup> Of all the members of the Court, his Honour provided the greatest analysis of what norms were encompassed by s 12CB. His Honour described the normative test as what was ‘offensive to a conscience informed by a sense of what is right and proper according to values which can be recognised by the court to prevail within contemporary Australian society’.<sup>176</sup> His Honour included within those values ‘respect for the dignity and autonomy and equality of individuals ... [and] the cultural diversity of communities’.<sup>177</sup>

It was clear from the judgment of Gageler J that the task of applying the statutory norm to the particular circumstances of the case weighed heavily with him.<sup>178</sup> However, ultimately, his Honour determined that ASIC’s argument that the book-up system was unconscionable ‘dilutes the gravity of the equitable conception of unconscionable conduct carried over into the normative standard of conduct prescribed by section 12CB’.<sup>179</sup> His Honour called this a ‘form of equity-lite’.<sup>180</sup>

It was crucial to his Honour’s decision that the application of the normative standard of conduct in s 12CB must ‘accommodate societal norms of acceptable commercial behaviour to the peculiar circumstances of the case’.<sup>181</sup> The peculiar circumstances of the case to which he referred was the choice of the Anangu customers to commence and continue their participation in Nobbys’ book-up system. His Honour identified the explanation for this participation in the anthropological evidence of Dr Martin in terms of the apparent advantages of book-up in ameliorating demand sharing and boom-and-bust cycle of expenditure.<sup>182</sup> Gageler J viewed the existence of this choice as being consistent with the norms of wider Australian society and the need to respect the autonomy of the Anangu community. Therefore, his Honour found that the book-up system at Nobbys was not ‘so offensive to the norms of wider Australian society as to warrant its condemnation as unconscionable’.<sup>183</sup>

The minority judgment of Nettle and Gordon JJ most closely followed the

174 Ibid 29 [111].

175 Ibid 24 [89].

176 Ibid 25 [93].

177 Ibid.

178 Ibid 25–6 [95], 26 [97].

179 Ibid 28 [107].

180 Ibid 24 [90].

181 Ibid 28 [107].

182 Ibid 29 [109].

183 Ibid 29 [111].

reasoning used in *Paciocco* (FCFCA) and *Lux*. Their Honours noted that the values and norms to be encompassed within s 12CB were derived from the statute, including the express guidance in s 12CC, and the unwritten law.<sup>184</sup> They clarified that it was ‘by reference to those generally accepted standards and community values’ that permeate the normative standard of conscience found in s 12CB that the conduct in question must be judged.<sup>185</sup> Further, the conduct must be judged objectively.<sup>186</sup>

Nettle and Gordon JJ adopted a process of reasoning using the factors in s 12CC, as well as the equitable values of special disadvantage and unconscientious taking of advantage to assess the conduct. In addition, their Honours considered the cultural values, norms and practices as another factor to be evaluated against the statutory norm.<sup>187</sup> They were highly critical of the book-up conduct when judged objectively against this normative standard. In a scathing passage, their Honours squarely rejected the reasoning of the Full Court that the values, norms and practices of the Anangu customers could justify the Nobbys’ book-up system as conscionable. They stated:

Putting to one side that the majority of Mr Kobelt’s customers were financially illiterate Anangu [sic] living in a remote, harsh and impoverished part of northern South Australia, in what other circumstances would a small-scale consumer credit provider require, let alone expect, a borrower’s assent to terms that, as security for relatively modest advances, the borrower hand over the right to receive the whole of the borrower’s meagre monthly income, with not less than half of it to be applied in reduction of the loan; the borrower confer on the credit provider an untrammelled discretion as to how much, if any, of the other half should be made available to the borrower for the purchase of life’s necessities; and the borrower be tied to purchasing all such necessities from the credit provider at the credit provider’s prices, or else pay the credit provider for the privilege of a ‘purchase order’?

Where else and with what other customer would it be regarded as acceptable that the terms of the arrangement go entirely undocumented ... It is no answer to say that the customers were Anangu [sic] people. It is no answer to say that the customers agreed.<sup>188</sup>

It was apparent in the reasoning of Nettle and Gordon JJ that the customers’ ability to exercise choice was central to the norms and values within s 12CB. The acceptance by Anangu customers of Nobbys’ book-up system and the existence of

184 Ibid 39–41 [153]–[154].

185 Ibid 54 [234].

186 Ibid 41 [160].

187 Ibid 59–60 [259].

188 Ibid 59–60 [259]–[260].

similar systems of book-up in APY Lands did not answer the question of whether customers were able to exercise this freedom of choice.<sup>189</sup> Judged objectively, against modern community standards, Nobbys' book up system offered no true choice to customers and was unconscionable.

Edelman J also focused on choice as a key value encompassed in s 12CB.<sup>190</sup> His Honour's analysis of s 12CB commenced with his expression of preference for the incremental development of 'the moral baseline required by the courts' as 'analogies and comparisons emerged by application of the principles and values underlying the statute'.<sup>191</sup> In this description, his Honour appeared to suggest that the baseline was not found in the expression of a statutory norm, but in the court's pronouncement of the conscionability of the conduct in a particular case. Nevertheless, his Honour cited with approval the reference in *Paciocco* (FCFCA)<sup>192</sup> to a statutory standard underlain with principles and values.<sup>193</sup>

Edelman J did not seek to identify the principles and values underlying the statute, but found that they extended beyond those principles required to breach the bar of conscience set in equity.<sup>194</sup> Nonetheless, his Honour found that the book-up system in this case breached the bar of conscience both in equity and under statute. Crucial to this was his Honour's finding that Parliament could not have intended that s 12CB would operate so as to enable a 'Hobson's choice' unacceptable to mainstream Australian society to be conscionable.<sup>195</sup> The potential for cultural values of the customers to have influenced their acceptance of the book-up system could not avoid the conclusion that the conduct was unconscionable contrary to s 12CB.<sup>196</sup>

## 2 Commercial Certainty

The value of commercial certainty was used to different effect by the majority judgments and Edelman J. The majority used this value to justify a narrow approach to the Court's interpretation of s 12CB. In contrast, Edelman J used the same value to argue the need for the conduct as a whole to be judged against that which would be acceptable to Australian society, devoid of cultural context.

Commercial certainty was singled out by Kiefel CJ and Bell J as a value that Parliament took into account when enacting s 12CB. Their Honours used the

189 See *ibid* 41 [157], 60–1 [262]–[263].

190 This is apparent in his Honour's opening paragraph in which he referred to the Nobbys book-up system as a 'Hobson's choice': *ibid* 61 [266].

191 *Ibid* 62 [267].

192 *Paciocco* (FCFCA) (n 112) 276 [304].

193 *Kobelt* (HCA) (n 1) 62 [267].

194 *Ibid* 72 [295].

195 *Ibid* 75–6 [313].

196 *Ibid* 75–6 [312]–[313].

identification of this value as a reason why the Court should not deviate from the equitable principles of unconscionable conduct that they said had informed the court's interpretation of s 12CB previously.<sup>197</sup>

Keane J concurred with this view and posited that Parliament did not intend for s 12CB to 'provide an avenue of relief for victims of individual transactions'.<sup>198</sup> His Honour supported his conclusion by referring to s 12CB as a pecuniary penalty provision, and the role bestowed on ASIC as a public enforcer to take civil action where there is a breach.<sup>199</sup>

Edelman J, in dissent, concurred that the term 'unconscionable' was selected by Parliament for use in s 12CB and its predecessor provisions for "greater certainty", but referred to Parliament's intention that the provision not be constrained by equitable principle.<sup>200</sup> Further, it is apparent that both the dissenting judgments in the High Court were keen to ensure that there was consistency or certainty in the standard of conduct when viewed in its totality that the court would sanction as unconscionable contrary to s 12CB.

It is interesting that the value of certainty was used by the majority to justify its approach to the process by which it would assess unconscionable conduct, whereas the dissenting judgments appeared to be concerned with consistency in outcome. That is, the dissent was concerned to ensure that an overall evaluation of the conduct would lead to a consistent finding of conscience across different contexts. The majority wished to ensure a clear (and narrow) delineation of the process and principles to be applied in each factual circumstance, but did not require consistency in outcome.

### **3 Relevance of Victims' Social and Cultural Values**

The Full Court, in particular Wigney J, framed the assessment of the conduct of alleged contravener by the cultural norms of the recipient of the impugned conduct, rather than focusing on the conduct of the credit provider. This arguably accords with the equitable doctrine of undue influence, rather than that of unconscionable dealing and was challenged in ASIC's submissions.

On appeal, Kiefel CJ and Bell J justified the Full Court's focus on the characteristics and circumstances of the customers as being relevant to the question of whether there was undue influence, being a factor that the court can take into consideration under s 12CC(1)(d).<sup>201</sup> The majority also saw a need to

197 Ibid 16 [50], 31–2 [119].

198 Ibid 32 [122].

199 Ibid.

200 Ibid 69 [288], quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1997, 8800–1 (Peter Reith).

201 *Kobelt* (HCA) (n 1) 17–18 [58].

qualify the objective standard that it had set for the conduct as being against the interests of their customers by the subjective perception of the conduct by the customers. This subjective perception took into account the cultural values of the customers.<sup>202</sup>

In contrast, in dissent, Nettle and Gordon JJ were of the view that the cultural values of the customers could not justify conduct that was otherwise unconscionable. Their Honours emphasised the focus on the conduct of Kobelt:

Because the focus of s 12CB(1) is on the conduct of the supplier of financial services, those cultural benefits, even if they were being addressed by Mr Kobelt's system, do not relieve a finding of unconscionability with respect to his particular system.<sup>203</sup>

Their Honours also reinforced their view that the focus of their assessment should be on the conduct of the supplier, not the customer, by referring to the choice of Parliament to allow for a system of conduct to be pleaded as unconscionable without reference to an individual customer.<sup>204</sup> They confirmed that the section reflected the distinction between the equitable doctrines of undue influence and unconscionable conduct.<sup>205</sup>

It can be concluded from the High Court's judgments in *Kobelt* (HCA) that a court should consider s 12CB to be setting out a statutory norm of conduct, informed, at a minimum, by the values within the equitable doctrine of unconscionable conduct. Further, there is a singular standard of conscience set by statute, which should not be raised or lowered by the social or cultural values of the recipients of the conduct. However, the use of unique societal and cultural values in determining whether conduct contravenes that norm are left open on the reasoning of the High Court.

This article does not suggest that the cultural values of the customer are irrelevant in determining unconscionable conduct. The cultural context in which the alleged conduct occurred would, of course, be an appropriate consideration in engaging in the judicial evaluation of that conduct. Section 12CB of the *ASIC Act* expressly requires that 'all the circumstances' of the conduct must be taken into account and s 12CC(1) of the *ASIC Act* does not limit the circumstances that may be considered.<sup>206</sup> It is submitted that the preferred approach is demonstrated by the process of reasoning applied by Nettle and Gordon JJ to use the cultural values and norms of the Anangu customers as a circumstantial consideration, but to

202 Ibid 21 [78] (Kiefel CJ and Bell J), 29 [108] (Gageler J), 33 [126] (Keane J).

203 Ibid 42 [161].

204 Ibid 53–4 [232].

205 Ibid.

206 *Paciocco* (HCA) (n 110) 620 [294] (Keane J).

then assess the overall conduct using the singular norm of conduct encompassed within s 12CB.

## **B Relevance of Structural and Cultural Context**

This section considers key factors that have been highlighted in academic literature, policy documents and relevant cases that impact on the financial norms and practices of Indigenous Australian communities in remote Australia. It is recognised that the High Court was limited in its consideration of these issues by the anthropological evidence tendered by ASIC at trial. However, these issues are relevant to a consideration of the broader implications of the High Court's judgment, outside of legal precedent.

It is acknowledged that the circumstances and culture of remote Indigenous Australian communities differ, 'all of whom have different histories, political dynamics, social situations, cultural characteristics, economic resources and administrative capacities'.<sup>207</sup> However, the purpose of this section is to identify the broader historical, structural or cultural considerations affecting remote Indigenous Australian communities that are identified in law and anthropological literature, national reports and inquiries in which the particular system of book-up at Nobbys could have been placed.<sup>208</sup>

These considerations include some of the factors identified by Heron Loban in her 2014 report for ASIC on the prevalence and impact of the book-up system and the key legal concerns associated with the system.<sup>209</sup> Her report was based on survey evidence of financial counsellors and other stakeholders working with Indigenous Australian consumers. It identified a number of inter-related cultural and social factors, which provided the foundation of the book-up system and allowed it to flourish.<sup>210</sup> These factors include:

- 'lack of access to appropriate alternative financial products and services in remote and regional communities (eg banking services, cash and credit)';<sup>211</sup>
- 'low financial literacy and awareness of consumers' rights and providers'

207 Judy Atkinson, *Trauma Trails Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia* (Spinifex Press, 2002) viii. Irene Watson stated that '[t]he prevailing myth has been that we are one homogenous Aboriginal people ... we are not. We are hundreds of independent Aboriginal peoples with distinct and different cultures': Irene Watson, 'Law and Indigenous Peoples: The Impact of Colonialism on Indigenous Cultures' (1996) 14(1) *Law in Context: A Socio-Legal Journal* 107, 108 ('Law and Indigenous Peoples').

208 The expert evidence before White J was that 'the characteristics of the Aboriginal people in remote communities generally also applied to the Anangu [sic] residents ... in the APY Lands': *ASIC v Kobelt* (n 8) [400].

209 Loban, 'Book Up in Indigenous Communities in Australia' (n 26).

210 *Ibid* 7.

211 *Ibid* 7, 23–4 [63].



obligations<sup>212</sup> and

- ‘reluctance to complain about poor book up service for fear of losing access to the service, as well as feelings of shame about using the service and seeking assistance’.<sup>213</sup>

The relevance of these factors to a breach of s 12CB of the *ASIC Act* would be to shape and contextualise the occurrence of the impugned conduct, not to alter the normative standard against which the conduct is assessed.

## 1 *Historical Factors*

The present context of the Indigenous people’s lack of freedom in managing their own finances should be traced to the colonisation of Australia from the late 1770s. Traumas of colonialism resulting in socio-economic dependency of many Indigenous Australian communities are well-illustrated in the writings of Indigenous authors.<sup>214</sup> Judy Atkinson encapsulated the interaction between the Indigenous worldview and colonisation:

The collective and diverse Aboriginal world was one of relating, where social organisation ... was the foundation of all thinking, feeling and behaving. Colonisation brought violence ... It involved actions designed to diminish the power of, and subordinate, the colonised, which re-formed and reshaped the constructions of individual and communal selves. Such activities created complex and compounding experiences of individual and communal traumatisation for Aboriginal peoples across generations.<sup>215</sup>

Government ‘protectionist’ policies were one of the factors which inflicted further trauma on the Indigenous Australian people by enforcing ‘dependency while denying essential services’ and the abusive exercise of power over Indigenous communities.<sup>216</sup> In the late 19<sup>th</sup> and early 20<sup>th</sup> centuries governments of mainland states and territories introduced ‘protection Acts’ under the camouflage of protecting Indigenous workers from the abuses of employers.<sup>217</sup> These laws established systematic control over property, employment and wages

212 Ibid 7, 24 [64].

213 Ibid 7, 24–5 [65], [67].

214 Atkinson (n 207). See generally Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015); Watson, ‘Law and Indigenous Peoples’ (n 207).

215 Atkinson (n 207) 91.

216 Ibid 67.

217 Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press, 2006) 54–7 (*‘Trustees on Trial’*).

of Indigenous Australian people.<sup>218</sup>

Laws and policies were routinely framed ‘to facilitate the colonial exploitation of Indigenous labour’.<sup>219</sup> Anyone of Indigenous descent could be declared wards of the state and put into work placements by the protectors.<sup>220</sup> They could direct employers to pay them the whole or part of a worker’s wages, which they deposited, as trustees, in the government savings banks in the Indigenous worker’s name.<sup>221</sup> This compulsory banking system operated despite resentment from Indigenous Australian workers and, in some cases, without their permission or knowledge.<sup>222</sup>

The protectionist laws subjected the Indigenous Australian workers to a ‘demoralising dependence’ by denying them access to their own wages.<sup>223</sup> Only small portions of the wages were given to Indigenous Australian workers as ‘pocket money’ and they needed authorisation from a protector to withdraw their money from the account held in their name.<sup>224</sup>

Wages were sometimes substituted with the provision of goods or rations.<sup>225</sup> The justification of this practice is evident in the judgment of Kelly J in *Australian Workers Union v Abbey*:

218 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (Report, December 2006) 7–8 [2.1]–[2.7] (*Unfinished Business: Indigenous Stolen Wages Report*). These protection Acts include: *Aboriginals Ordinance 1918* (Cth); *Aboriginals Ordinance 1933* (Cth); *Aborigines Welfare Ordinance 1954* (Cth); *Apprentices Act 1901* (NSW); *Aborigines Protection Act 1909* (NSW); *Aborigines Protection (Amendment) Act 1936* (NSW); *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld); *The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld); *The Aboriginals Preservation and Protection Act 1939* (Qld); *The Aborigines’ and Torres Strait Islanders’ Affairs Act 1965* (Qld); *Aborigines Act 1911* (SA); *An Act to Provide for the Protection and Management of the Aboriginal Natives of Victoria 1869* (Vic); *The Aborigines Protection Act 1886* (WA).

219 Shelley Bielefeld, ‘Compulsory Income Management and Indigenous Australians: Delivering Social Justice or Furthering Colonial Domination?’ (2012) 35(2) *University of New South Wales Law Journal* 522, 529 (‘Compulsory Income Management and Indigenous Australians’). Exploitation took the form of ‘indentured labour, non-payment and underpayment of wages, under-award payments, withholding and mismanagement of wages’, which cumulatively became known as ‘stolen wages’ from the Indigenous people: Margaret Thornton and Trish Luker, ‘The Wages of Sin: Compensation for Indigenous Workers’ (2009) 32(3) *University of New South Wales Law Journal* 647, 647.

220 *Unfinished Business: Indigenous Stolen Wages Report* (n 218) 7 [2.1]–[2.3]. See also Catherine Demosthenous et al, ‘Cultural Identity and Financial Literacy: Australian Aboriginal Experiences of Money and Money Management’ (Conference Paper, Financial Literacy, Banking and Identity Conference, RMIT University, 25–26 October 2006) 4–5; Kidd, *Trustees on Trial* (n 217) 55.

221 Kidd, *Trustees on Trial* (n 217) 60; Rosalind Kidd, *The Way We Civilise* (University of Queensland Press, 1997) 69 (‘*The Way We Civilise*’).

222 Kidd, *Trustees on Trial* (n 217) 60.

223 Bielefeld, ‘Compulsory Income Management and Indigenous Australians’ (n 219) 529–30, citing Garth Nettheim, *Out Lawed: Queensland’s Aborigines and Islanders and the Rule of Law* (Australia and New Zealand Book, 1973) 62, 101 and Kidd, *The Way We Civilise* (n 221) 234–5.

224 *Unfinished Business: Indigenous Stolen Wages Report* (n 218) 11–12 [2.19]–[2.24], 16 [2.43], 18 [2.52], 20 [2.65]–[2.68], 26 [2.95]. ‘Some protectors arbitrarily rejected requests by workers to spend their own money’: Kidd, *The Way We Civilise* (n 221) 69.

225 *Unfinished Business: Indigenous Stolen Wages Report* (n 218) 23 [2.79], quoting Graham Family, Submission No 113 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages Inquiry* 6; Bielefeld, ‘Compulsory Income Management and Indigenous Australians’ (n 219) 530.

Their values are different. ... [T]he payment of money wages for their labour would prove a cause of embarrassment both to the native and to his employer. ... [T]he natives should be encouraged to work in return for the goods and services with which they are provided by the authorities charged with their protection or by those who give them work.<sup>226</sup>

Shelley Bielefeld considered this statement a reflection of '[n]egative stereotypes about the incapacity of Indigenous Australian people to adequately manage finances'.<sup>227</sup> This stereotype dominated government policy in the protectionist era marked by depriving the Indigenous Australian workers of cash.<sup>228</sup> This ultimately affected their capacity to participate in a cash economy and exercise their independence in financial management.<sup>229</sup> The colonial history of deprivation from financial management is an important contextual consideration when assessing the nature of conduct directed to customers from a remote Indigenous community.

The same protectionist policies have been linked to the development of book-up systems.<sup>230</sup> When governments paid part of their wages through cheque, Aboriginal people increasingly relied on their local stores to cash their wages cheque or to obtain groceries from the store on credit until the cheque arrived.<sup>231</sup> Nathan Boyle suggests that the provision of store credit or rations translated into the provision of book-up.<sup>232</sup> The link between the evolution of book-up and these protectionist policies sits uncomfortably with the evidence in *Kobelt* (FCAFC) that book-up '[had] become a deeply embedded and normative practice for Anangu [sic] in the APY Lands communities',<sup>233</sup> or the observation of Kiefel CJ and Bell J in the opening of their Honours' judgment that the Aboriginal people 'have been accustomed' to book-up arrangements.<sup>234</sup>

226 (1944) 53 CAR 212, 214–15.

227 Bielefeld, 'Compulsory Income Management and Indigenous Australians' (n 219) 531.

228 Ibid.

229 Ibid.

230 Nathan Boyle, 'Book Up: Current Regulation and Options for Reform' (2016) 8(22) *Indigenous Law Bulletin* 3, 3.

231 Ibid; Loban, 'Book Up in Indigenous Communities in Australia' (n 26) 10 [18]–[20], 38 [92]–[97]. Indigenous workers were often the victims of fraud committed by the cattle station owners who took the thumbprint of the workers on a wage sheet or book against grossly inflated amounts by claiming that the wage had been used for the sales from the store. Workers were vulnerable not only to the fraud of their employers but also to some protectors who on several occasions made fictitious withdrawals to steal money from the trust fund. There were incidences of missing money, lack of receipts and falsification of accounts as well as collusion between protectors and local storekeepers to charge 'exorbitant prices' for goods: Kidd, *The Way We Civilise* (n 221) 177–9; Kidd, *Trustees on Trial* (n 217) 75–6, 82–3.

232 Boyle (n 230) 3.

233 *Kobelt* (FCFCA) (n 3) 742 [301], 749–50 [345] (Wigney J).

234 *Kobelt* (HCA) (n 1) 4 [1]. Their Honours linked the evolution of book-up to the extension of social security entitlements to Aboriginal Australians in the 1950s and suggested that the holding of key cards and PINs resulted from a change in the way social security payments have been made since: at 4–5 [2].

## 2 Demand Sharing

Individualised financial management does not appear to have a place in the cultural norms historically held by remote Indigenous communities. This was described in evidence to the PJC as being that ‘their stories, traditions and pattern of behaviour do not have a “money dreaming”’.<sup>235</sup> Rather, the ‘domestic moral economy’ of the Indigenous community is based on a concept of ‘kin-based sharing’ or ‘demand sharing’.<sup>236</sup>

Peterson introduced the term ‘demand sharing’ into the anthropological lexicon as a form of distribution of resources that occurs in response to direct verbal and non-verbal demands practised generally within the Indigenous Australian community.<sup>237</sup> Later, other anthropologists described it as a cultural practice to distribute resources, such as money, food, and clothes, which are regarded not only as personal possessions, but also as social capital and so lead to social consequences.<sup>238</sup> This practice of demand sharing remains a reason for ‘unresolved tension between autonomy and relatedness’.<sup>239</sup>

In tracing the genealogy of demand sharing, Jon Altman considered it as a complex phenomenon and one often associated with a moral dimension.<sup>240</sup> One form of demand sharing can be termed as ‘unsolicited giving’ involving a “‘feeling [of] compassion for each other’”.<sup>241</sup> In this sense, demand sharing has a positive moral appeal of generosity and is a mechanism to redistribute scarce resources.<sup>242</sup> Another form of demand sharing is commonly referred to as ‘humbugging’.<sup>243</sup> This incorporates an aggressive form of demanding and relies on the perception of social embarrassment if the demand is refused.<sup>244</sup> This form of demand sharing

235 *Money Matters in the Bush Report* (n 24) 255 [16.1].

236 Nicolas Peterson, ‘What Can the Pre-Colonial and Frontier Economies Tell Us About Engagement with the Real Economy? Indigenous Life Projects and the Conditions for Development’ in Diane Austin-Broos and Gaynor Macdonald (eds), *Culture, Economy and Governance in Aboriginal Australia* (Sydney University Press, 2005) 7, 11–12.

237 Niolas Peterson, ‘Demand Sharing: Reciprocity and the Pressure for Generosity among Foragers’ (1993) 95(4) *American Anthropologist* 860, 860–1 (‘Demand Sharing’).

238 Yasmine Musharbash, ‘The Yuendumu Community Case Study’ in DE Smith (ed), *Indigenous Families and the Welfare System: Two Community Case Studies* (Centre for Aboriginal Economic Policy Research, The Australian National University, 2000) 53, 59; Julie Finlayson, Anne Daly and Diane Smith, ‘The Kuranda Community Case Study’ in DE Smith (ed), *Indigenous Families and the Welfare System: Two Community Case Studies* (Centre for Aboriginal Economic Policy Research, The Australian National University, 2000) 25.

239 DF Martin, ‘Money, Business and Culture: Issues for Aboriginal Economic Policy’ (Discussion Paper No 101, Centre for Aboriginal Economic Policy Research, Australian National University, 1995) 9.

240 Jon Altman, ‘A Genealogy of “Demand Sharing”: From Pure Anthropology to Public Policy’ in Yasmine Musharbash and Marcus Barber (eds), *Ethnography and the Production of Anthropological Knowledge: Essays in Honour of Nicolas Peterson* (Australian National University Press, 2011) 187, 190, 193.

241 *Ibid* 190.

242 *Ibid* 191, 193.

243 *Ibid* 191.

244 *Ibid*.

can generate hardship.<sup>245</sup> Altman suggests humbugging is practised only between socially and genealogically close kin, family or ceremonial allies or partners.<sup>246</sup>

From this genealogical understanding, it is incorrect to equate demand sharing with humbugging. Altman has criticised other academics, including Dr Martin, who use demand sharing and humbugging in an undifferentiated way.<sup>247</sup>

Although demand sharing has both positive and negative forms, the negative form has been accepted in broader policy discourse, including government policies, as the only type of demand sharing.<sup>248</sup> Altman argues that calls for the elimination or prevention of demand sharing equates to a call for a fundamental change to Indigenous societal values.<sup>249</sup> It appears that the majority in the High Court and the Full Court applied the unified concept of demand sharing that Altman has criticised to justify their characterisation of Kobelt's book-up system as being advantageous to Nobbys' customers.<sup>250</sup> This approach ignores the ethnographic complexity of Indigenous values.<sup>251</sup>

### 3 *Gratuitous Concurrence*

Loban identified some common cultural factors indicative of the vulnerability of Aboriginal people and which place them at a disadvantage in dealing with experienced goods and service providers.<sup>252</sup> These include the tendency for 'gratuitous concurrence' with providers and not posing direct questions to them to extract information, despite a lack of a full understanding of their rights and obligations.<sup>253</sup>

These cultural factors were raised in *Australian Competition and Consumer Commission v Keshow* ('*Keshow*'), where the Federal Court held that the respondent engaged in unconscionable conduct towards eight Aboriginal women in the Northern Territory by entering into agreements with them to sell educational materials at an excessive price.<sup>254</sup> Mansfield J accepted the expert evidence of Dr

245 Ibid 191, 193.

246 Ibid 189–90.

247 Ibid 193, discussing S McDonnell and DF Martin, 'Indigenous Community Stores in the "Frontier Economy": Some Competition and Consumer Issues' (Discussion Paper No 234, Centre for Aboriginal Economic Policy Research, Australian National University, June 2002) 10.

248 Altman (n 240) 195–7.

249 Ibid 196.

250 *Kobelt* (FCFCA) (n 3) 736 [268] (Besanko and Gilmour JJ), 756 [372] (Wigney J); *Kobelt* (HCA) (n 1) 20 [68]–[69], 21 [78] (Kiefel CJ and Bell J), 29 [109]–[110] (Gageler J), 33 [126]–[127] (Keane J).

251 Virginia Watson, 'From the "Quiet Revolution" to "Crisis" in Australian Indigenous Affairs' (2009) 15(1) *Cultural Studies Review* 88, 104.

252 Heron Loban, 'Unconscionable Conduct and Aboriginal and Torres Strait Islander Consumers' (Research Report, Indigenous Consumer Assistance Network, 21 May 2010) 7–14.

253 Ibid 9.

254 [2005] FCA 558 ('*Keshow*').

Martin that young Aboriginal women in remote communities are diffident and not likely to ask questions to a non-Aboriginal male to elicit more information from him in a commercial transaction.<sup>255</sup>

Similar patterns of gratuitous concurrence appear to be present in *Kobelt* from the evidence at trial of three of the Anangu witnesses. These witnesses did not seem to ask any questions of Kobelt before giving him their bankcard and PIN.<sup>256</sup> White J identified the lack of questioning of Kobelt by Anangu customers as ‘a marker by itself of their lack of financial literacy’ that ‘is not to be explained away solely by reference to “cultural differences”’.<sup>257</sup> When asked about the reason for handing over the key card and PIN to Kobelt, one of the witnesses presented by ASIC answered ‘I don’t know but because of food. Because I didn’t have no food [sic]’.<sup>258</sup> Edelman J cited this witness’ evidence in his judgment and described the evidence of another five customers as ‘no better’.<sup>259</sup>

#### 4 Financial Literacy

Researchers have reported that saving money is viewed by some Aboriginal communities as selfish or stingy and contrary to the culture of demand sharing that was the subject of evidence in *Kobelt*.<sup>260</sup> The lack of a drive for individual saving, low financial literacy levels and limited access to mainstream banking services all compound a lack of understanding of the rules and procedures under which financial services are provided by private financial institutions.<sup>261</sup>

The PJC noted that this ‘lack of understanding and awareness of how the banking system works puts Indigenous people at risk of engaging in unwise banking activity or entering arrangements that are highly unsuitable for their particular circumstances’.<sup>262</sup>

In *Keshow*, the Federal Court observed that the cultural norms and lack of financial sophistication led the Aboriginal women to sign an open-ended periodical payment form or to conclude a transaction without any written record.<sup>263</sup> Dr Martin highlighted in *Keshow* the difference between Aboriginal consumers on the one hand and consumers in wider Australian society on the other hand:

255 Ibid [86].

256 *ASIC v Kobelt* (n 8) [311]. See also *ASIC v Kobelt* (n 8) [315]–[316], [324] (White J).

257 Ibid [422].

258 Ibid [311].

259 *Kobelt* (HCA) (n 1) 72 [298].

260 Demosthenous et al (n 220) 8–9.

261 See Kate Senior, David Perkins and John Bern, ‘Variation in Material Wellbeing in a Welfare Based Economy’ (Working Paper No 6, South East Arnhem Land Collaborative Research Project, University of Wollongong, 2002) 45–6.

262 *Money Matters in the Bush Report* (n 24) 241 [15.35].

263 *Keshow* (n 254) [87] (Mansfield J).

There is a consequent lack not only of skills such as financial literacy, but also of knowledge of the values, mores, expectations and assumptions implicit in interactions between culturally competent and informed persons within the general Australian society.<sup>264</sup>

In *Australian Securities and Investments Commission v Kobelt*,<sup>265</sup> Dr Martin opined that an informed understanding of Nobbys' credit facility can only be built upon 'a comparative knowledge of other credit facilities including those offered by general Australian credit providers'.<sup>266</sup> It has been highlighted by the Department of Premier and Cabinet's background paper to the Banking Royal Commission that Aboriginal and Torres Strait Islander people face difficulties when interacting with the financial services sector, which is contributed to by the lack of access to information on all forms of consumer credit including book-up. In some circumstances this remains as the only source of credit in remote communities.<sup>267</sup>

Nettle and Gordon JJ appear to identify the Nobbys customers' lack of comparative knowledge of other forms of credit provision as significant in their Honours' reasoning in *Kobelt* (HCA). Their Honours rejected the customers' acceptance of the book-up system as exculpatory, stating 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>268</sup>

## 5 Financial Exclusion

Financial exclusion has been described as a situation of 'lack of access to appropriate and affordable financial services and products from mainstream institutions'.<sup>269</sup> Government inquiries and academics have emphasised the financial exclusion of Aboriginal persons living in remote communities over the past two decades. In hearings leading to the *Money Matters in the Bush Report*, the Committee heard that this sector of the Australian population:

264 Ibid [86].

265 *ASIC v Kobelt* (n 8).

266 Ibid [404].

267 'Aboriginal and Torres Strait Islander Consumers' Interactions with Financial Services Background Paper' (n 4) 4, citing Australian Securities and Investments Commission, *Dealing with Book Up: Key Facts* (Booklet, October 2012) 2.

268 *Kobelt* (HCA) (n 1) 60 [262].

269 Kristy Muir, Axelle Marjolin and Sarah Adams, *Eight Years on the Fringe: What Has It Meant to Be Severely or Fully Financially Excluded in Australia?* (Report for National Australia Bank, Centre for Social Impact, March 2015) 6 ('*CSI March 2015 Report*'), quoted in 'Some Features of Financial Services in Regional and Remote Communities' (Background Paper No 18, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 15 June 2018) 12. Financial exclusion is measured on the basis of ownership of three financial services and products: a transaction account, general insurance and a credit card. A person holding one is considered as severely financially excluded, while a person holding none of them is considered as fully financially excluded: *CSI March 2015 Report* (n 269) 6.

[A]most invariably live in very small communities where there are often no consumer banking services and where individuals lack access to electronic and phone banking options that most Australians take for granted. Inevitably, absence of such basic services further marginalises people who are already among Australia's most economically vulnerable.<sup>270</sup>

It was foreshadowed that this situation would only worsen with 'a massive and continued withdrawal of banking and financial services in rural and remote areas' in Australia.<sup>271</sup> This was due to a number of factors, including disrupting technologies that did not require in person communication and increases in the payment of account keeping fees. These factors act in combination to have the greatest impact on low-income earning Aboriginal communities living in remote communities.<sup>272</sup>

Neil Westbury and others called for the government to act in response to this situation through conducting financial literacy programs and for banking institutions to partner with the government in engaging with remote communities to encourage the provision of mainstream banking services, as has been the case overseas.<sup>273</sup>

Despite these calls for change, research conducted in 2012 found that 'Aboriginal and Torres Strait Islander people are much more likely to be either severely or fully financially excluded (43.1%) compared to the national average (17.2%)'.<sup>274</sup> Michael D'Rosario has asserted that 'the indigenous population of Australia is amongst the most excluded from banking services and home ownership of any indigenous population within the developed world'.<sup>275</sup>

The Full Court and the majority of the High Court gave limited weight to financial exclusion operating as a disadvantage to Kobelt's Anangu customers. Mainstream banking services were not available on the APY Lands.<sup>276</sup> The primary judge noted that this was reflected in the evidence of an Anangu customer at trial, who

270 *Money Matters in the Bush Report* (n 24) 234 [15.6], quoting Professor Altman.

271 Neil Westbury, 'Myth-Making and the Delivery of Banking and Financial Services to Indigenous Australians in Regional and Remote Australia' in F Morphy and WG Sanders (eds), *The Indigenous Welfare Economy and the CDEP Scheme* (Australian National University E Press, 2001) 81, 83. See also *Money Matters in the Bush Report* (n 24) 235 [15.10]–[15.11], which noted that many remote communities have never had banking, so the situation is not only a withdrawal of services, but a continued absence.

272 See Westbury (n 271) 82–3.

273 Ibid 91. See also *Money Matters in the Bush Report* (n 24) xxix, 252–3. Some banks have responded, but the barriers due to diseconomies of scale and regulatory costs appear to have resulted in limited service delivery: see, eg, Michael D'Rosario, 'Promoting Indigenous Financial Inclusion: Improving ICT Access within Rural Australia' (2018) 9(2) *International Journal of Information Systems and Social Change* 1, 3.

274 'Aboriginal and Torres Strait Islander Consumers of Financial Products' (Background Paper No 19, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 21 June 2018) 10, citing Chris Connolly, Meiko Georgouras and Les Hems, *Measuring Financial Exclusion in Australia* (Report for National Australia Bank, Centre for Social Impact, May 2012) 8.

275 D'Rosario (n 273) 2.

276 *Kobelt* (FCFCA) (n 3) 703 [71] (Besanko and Gilmour JJ).



said she had never heard of a bank loan and that book-up was the only way she knew how to buy a car.<sup>277</sup>

Rather than finding that this evidence demonstrated vulnerability, Wigney J of the Full Court upheld Kobelt's submission that, in providing his book-up system, he was fulfilling a demand for credit services that were not otherwise accessible to his Anangu customers.<sup>278</sup> Kiefel CJ and Bell J referred to the Renouf report that in the absence of mainstream credit facility book-up remains the only means for Aboriginal people to get access to credit.<sup>279</sup> However, their Honours expanded this as being an advantage of Kobelt's book-up, enabling the Anangu customers to purchase daily necessities, including second-hand cars despite 'their low incomes and lack of assets with which to secure a loan'.<sup>280</sup> This focus on the advantage of book-up does not seem to take account of the full social and structural context, as described above, in which the system of book-up developed as an alternative commercial practice in remote communities.

The dissenting judgments considered and described the characteristics of other forms of book-up which could be provided and which would be lawful.<sup>281</sup> Nettle and Gordon JJ also recognised and endorsed alternative arrangements to book-up, as found by the primary judge, that may have been available to Nobbys' customers, including the Centrelink payment being on a weekly cycle or Kobelt arranging deductions from customers' wages or entering into direct debit arrangements.<sup>282</sup> Through the consideration of these alternatives to the system in operation, the dissenting judgments reflect a more holistic approach to the circumstances in which the impugned conduct arose.

In summary, the values and practices of remote Indigenous Australian communities are a relevant contextual consideration. However, they should be considered within the broader historical and social factors that have resulted in the development of the financial practices accepted by those communities. Those social factors, when considered in the broader context, point to the vulnerability of remote Indigenous Australian communities when dealing with financial services providers that operate within the broader Australian commercial environment. This observation can only be expressed as a generalisation, as each community will have its own situational factors. Nevertheless, it raises the question whether different conclusions may have been drawn by the High Court if these broader contextual considerations were a greater focus of the evidence before it.

277 *ASIC v Kobelt* (n 8) [247] (White J).

278 *Kobelt* (FCFCA) (n 3) 733–4 [257].

279 *Kobelt* (HCA) (n 1) 5 [3], citing Renouf (n 20).

280 *Kobelt* (HCA) (n 1)19 [65].

281 *Ibid* 52–3 [227] (Nettle and Gordon JJ), 73 [301] (Edelman J).

282 *Ibid* 52 [226]; *ASIC v Kobelt* (n 8) [570]–[572] (White J).

## V POLICY CONSIDERATIONS

On one interpretation, the effect of the majority decision in *Kobelt* (HCA) could lead to an outcome that where the culture, values and practices of a particular community intersect with mainstream commercial practice, conduct that would otherwise be unlawful could be exculpated by the community's subjective acceptance of the conduct. This result appears disharmonious with two core themes underlying the Australian legal system. These are the existence of a singular legal system and the achievement of substantive equality before the law.

Australia has a singular, not pluralist system of law, with some limited exceptions.<sup>283</sup> That is, as a general principle, the law of Australia applies to all persons, regardless of their customs or values. This has been the case since the colonisation of Australia, at which time no formal recognition was given to Indigenous Australian legal systems.<sup>284</sup>

The existence of a singular legal system intersects with the principle of equality before the law.<sup>285</sup> The principle of equality is enacted into Australian law in the context of prohibiting racial discrimination through the *Racial Discrimination Act 1975* (Cth) ('*Racial Discrimination Act* (Cth)') and its state counterparts.<sup>286</sup> Equality before the law is not satisfied by the same laws applying to all persons. It is recognised internationally and domestically that formal equality before the law, or the equal application of the law, may itself result in discriminatory outcomes.<sup>287</sup> As Brennan J noted in *Gerhardy v Brown*, '[f]ormal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities "in the political, economic, social, cultural or any other

283 See Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 12 June 1986) [58], [62] ('*Recognition of Aboriginal Customary Laws Report*'); Kayleen M Hazlehurst, 'Introduction: Unyielding Domains in the Post-Colonial Relationship' in Kayleen M Hazlehurst (ed), *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Avebury, 1995) ix, xxi. The most notable recognition of customary laws was the High Court of Australia's recognition of the land ownership rights of Torres Strait Islanders in *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

284 See *Recognition of Aboriginal Customary Laws Report* (n 283) [167].

285 See generally *ibid* [128]; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* (Final Report, Project No 94, September 2006) 8 ('*The Interaction of Western Australian Law with Aboriginal Law and Culture*'). In both inquiries, the principle of 'equality before the law' was raised in counter-argument to any proposal to recognise Aboriginal customary laws.

286 *Racial Discrimination Act 1975* (Cth) s 10 ('*Racial Discrimination Act* (Cth)'). See also *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

287 See Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712, 713. As Chief Justice Robert French notes, in some circumstances formal equality is the outcome that the law favours, because the public interest in certainty of outcome outweighs the injustice that may result. For example, the imposition of mandatory minimum sentences fall into this category: Chief Justice Robert French, 'Equal Justice and Cultural Diversity: The General Meets the Particular' (2015) 89(10) *Australian Law Journal* 706, 706.

field of public life”<sup>288</sup>.

The aim of the *Racial Discrimination Act* (Cth) and its state and territory counterparts is to achieve substantive equality.<sup>289</sup> Substantive equality requires that the effect of a law applies equally. This may require a differential application of the law based on individual circumstances. The objective of substantive equality in the application of s 12CB is implicit in many of the judgments to consider the conduct in *Kobelt*, albeit, resulting in different outcomes.<sup>290</sup>

The meaning of the right to substantive equality has been described as ‘elusive’.<sup>291</sup> Sandra Fredman has proposed a multi-dimensional approach to understanding substantive equality, which she describes as the ‘four-dimensional framework’. Under this framework, four aims or objectives and their interactions must be considered to understand whether an inequality exists in a particular law, policy or structure.<sup>292</sup> These four factors are: first, ‘to redress disadvantage’; second, to ‘counter prejudice, stigma, stereotyping, humiliation and violence based on a protected characteristic’; third, to ‘enhance voice and participation, countering both political and social exclusion’; and fourth, to ‘accommodate difference and achieve structural change’.<sup>293</sup> Looking at the reasoning applied in the *Kobelt* (HCA) judgment through this model, it would seem that emphasis was placed by the majority on disadvantage (or the existence of an advantage) in the book-up system and insufficient consideration was given to enhancing voice and participation and the interaction of those objectives with achieving structural change.

The need to effect structural change to achieve equality has been a key part of recommendations made by domestic public inquiries into the interactions of Australian law with Indigenous Australian law and culture. Significant inquiries were the 1986 inquiry conducted by the Australian Law Reform Commission and the six-year inquiry conducted by the Western Australia Law Reform Commission, which concluded in 2006.<sup>294</sup> Both of these inquiries adopted the underlying principle of achieving substantive equality in the law. The reports acknowledged the need to provide special treatment to Indigenous Australian persons because of their status as the customary land holders of Australia and the

288 (1985) 159 CLR 70, 129.

289 See *Western Australia v Ward* (2002) 213 CLR 1, 103 [115] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Maloney v The Queen* (2013) 252 CLR 168, 247 [212] (Bell J).

290 *ASIC v Kobelt* (n 8) [611] (White J); *Kobelt* (FCFCA) (n 3) 747 [329]–[332]; *Kobelt* (HCA) (n 1) 21 [77] (Kiefel CJ and Bell J), 29 [110] (Gageler J), 60 [262] (Nettle and Gordon JJ), 75 [313] (Edelman J).

291 Fredman (n 287) 713.

292 *Ibid* 727.

293 *Ibid* 713, 727.

294 *Recognition of Aboriginal Customary Laws Report* (n 283); *The Interaction of Western Australian Law with Aboriginal Law and Culture* (n 285).

situational disadvantage that had been perpetuated since colonisation.<sup>295</sup> Common themes drawn in these inquiries were that Indigenous Australian persons should retain the rights afforded under Australian law, to the extent that this was possible and that legal protections provided by the Australian law should not be withdrawn unreasonably from Aboriginal persons in order to recognise their customs and law.<sup>296</sup> In neither of these inquiries, were situations found where the application of Australian law to an Indigenous Australian person required that the standard of conduct otherwise expected by Australian law should be lowered.<sup>297</sup>

It is difficult to reconcile the outcome of *Kobelt* (HCA) with an ultimate goal of empowering Indigenous Australian persons and achieving structural change.<sup>298</sup> The three dissenting justices made it clear that the commercial conduct under consideration would not be acceptable in mainstream Australian society and could not be justified by reference to cultural norms and values.<sup>299</sup> Overall, it appears that the majority's decision in *Kobelt* (HCA) is not aligned with the achievement of substantive equality in Australia's singular legal system, despite best intentions.

The historical and other structural factors referred to in Part IV that have impacted on remote Aboriginal communities arguably continue to be embedded in compulsory income management schemes legislated by the Commonwealth

295 *Recognition of Aboriginal Customary Laws Report* (n 283) [1]–[2]; *The Interaction of Western Australian Law with Aboriginal Law and Culture* (n 285) 10, 37.

296 *Recognition of Aboriginal Customary Laws Report* (n 283) [165]; *The Interaction of Western Australian Law with Aboriginal Law and Culture* (n 285) 11–12.

297 This is consistent with s 8 of the *Racial Discrimination Act* (Cth) (n 286) and exclusion from the application of the Act of 'special measures' as set out in art 1(4) of the United Nations' *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*United Nations' International Convention on Racial Discrimination*'), which is set out in the schedule to the Act. A 'special measure' is one that is 'taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms': *United Nations' International Convention on Racial Discrimination* (n 297) art 1(4).

298 See *The Interaction of Western Australian Law with Aboriginal Law and Culture* (n 285) 38 for a discussion of empowerment as an ultimate goal of the inquiry and its recommendations. See also Chris Holland, *A Ten-Year Review: The Closing the Gap Strategy and Recommendations for Reset* (Report, February 2018), which was a 10-year review of the Australian government's Closing the Gap Statement of Intent made on 20 March 2008. The report identified the need for structural factors to be addressed in order to achieve a narrowing of the gap in health care outcomes, to treat the cause, not only the end measure of poor health and mortality outcomes: at 3.

299 *Kobelt* (HCA) (n 1) 59–60 [259]–[262] (Nettle and Gordon JJ), 75–6 [313] (Edelman J).

Parliament.<sup>300</sup> These schemes have been implemented in different Australian regions for a decade with a focus on those characterised as ‘vulnerable’.<sup>301</sup> Indigenous Australians have been disproportionately affected by the schemes.<sup>302</sup>

The most recent scheme is the ‘Cashless Welfare Card/Cashless Debit Card’ (‘CDC’),<sup>303</sup> which commenced in 2016 in Ceduna and the East Kimberley pursuant to amendments to the *Social Security (Administration) Act 1999* (Cth). The scheme was expanded to the Goldfields region of Western Australia in 2018 and, most recently, to the Bundaberg and Hervey Bay region in 2019.<sup>304</sup>

Under the initiative, 80% of affected welfare recipients’ payments are placed onto a cashless debit card that can be used for the purchase of items other than

300 In the Australian context, the term ‘income management’ refers to ‘arrangements whereby a percentage of the income support and family payments of certain people is set aside to be spent only on “priority goods and services”’. Luke Buckmaster, Diane Spooner and Kirsty Magarey, ‘Income Management and the Racial Discrimination Act’ (Background Note, Parliamentary Library, Parliament of Australia, 28 May 2012) 3. For a history of the (three) income management schemes in Australia, see Shelley Bielefeld, ‘Cashless Welfare Transfers for “Vulnerable” Welfare Recipients: Law, Ethics and Vulnerability’ (2018) 26(1) *Feminist Legal Studies* 1, 6–11 (‘Cashless Welfare Transfers’). There are also voluntary income management schemes in operation for welfare recipients that do not fall within compulsory income management criteria. For example, voluntary income management was introduced in the APY Lands in October 2012: see Ilan Katz and Shona Bates, *Voluntary Income Management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands* (Report No 23/2014, Social Policy Research Centre, University of New South Wales, September 2014). See also *Social Security (Administration) Act 1999* (Cth) s 124PH (‘*Social Security Act* (Cth)’).

301 See Bielefeld, ‘Cashless Welfare Transfers’ (n 300). See also Bielefeld, ‘Compulsory Income Management and Indigenous Australians’ (n 221) 523; Shelley Bielefeld, ‘Compulsory Income Management and Indigenous Peoples: Exploring Counter Narratives amidst Colonial Constructions of “Vulnerability”’ (2014) 36(4) *Sydney Law Review* 695; Buckmaster, Spooner and Magarey (n 300) 1.

302 In 2017 the Department of Social Services reported that 79% of the 25,009 Australian welfare recipients subject to income management regimes were identified as Indigenous: Department of Social Services (Cth), *Income Management and Cashless Debit Card Summary* (Income Management Summary Dataset, 25 August 2017) 5 <[www.data.gov.au/dataset/income-management-summary-data/resource/b898777c-8a2b-4094-b378-cdb48346a110](http://www.data.gov.au/dataset/income-management-summary-data/resource/b898777c-8a2b-4094-b378-cdb48346a110)>. The original schemes were prescribed as ‘special measures’ for the purposes of the *Racial Discrimination Act* (Cth) (n 286) and so were excluded from its operation and the operation of any laws of Queensland and the Northern Territory that dealt with discrimination: *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) sch 1 items 4–7. In 2010, the Commonwealth Parliament amended the legislation pursuant to the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) to remove these exclusions on the basis that it considered that the new (and second) income management scheme would not operate in a discriminatory manner: Buckmaster, Spooner and Magarey (n 300) 2.

303 The initiative arose from a recommendation of the Review of Indigenous Training and Employment Programmes conducted by Andrew Forrest in 2014: see Andrew Forrest, *Creating Parity* (Report, 1 August 2014) 107. The terms of the recommendation included that the card be introduced ‘in conjunction with major financial institutions and retailers to support welfare recipients manage their income and expenses’.

304 *Social Security Act* (Cth) (n 300) s 124PD(1) (definition of ‘trial area’). The trial was extended to a further (and fourth) trial site, the Bundaberg and Hervey Bay area in January 2019 pursuant to the *Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Act 2018* (Cth). This will expand the total number of trial participants from 10,000 to 15,000: at sch 1 item 8. The passage of the amending Act followed an inquiry and favourable report from the Senate Community Affairs Legislation Committee: see Senate Community Affairs Legislation Committee, Parliament of Australia, *Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018* (Report, August 2018) 29–30 (‘*Senate Community Affairs Committee Report*’).

gambling products or alcohol, or for ‘cash-like products’.<sup>305</sup> The objectives include ‘reducing immediate hardship and deprivation’, ‘encouraging socially responsible behaviour’, and ‘reducing the likelihood that welfare payment recipients will remain on welfare and out of the workforce for extended periods of time’.<sup>306</sup>

The CDC has to date had a greater impact on welfare recipients of Aboriginal descent.<sup>307</sup> Approximately 83% of the income support population within the first two trial sites were Aboriginal or Torres Strait Islander people.<sup>308</sup> This initiative has been criticised by parliamentarians, advocacy organisations, affected community members and academics for its authoritarian and disempowering nature, akin to the return of ‘ration days’<sup>309</sup> and the detrimental impact that it will

305 *Social Security Act* (Cth) (n 300) ss 124PJ, 124PM, 124PQA. However, a community body appointed for a trial region may give a direction for the portion of the money to be paid in cash to be altered in respect of a particular individual under s 124PK. See further Department of Social Services (Cth), *Cashless Debit Card* (Web Page, 26 March 2019) <[www.dss.gov.au/families-and-children/programmes-services/welfare-conditionality/cashless-debit-card-overview](http://www.dss.gov.au/families-and-children/programmes-services/welfare-conditionality/cashless-debit-card-overview)>.

306 Statement of Compatibility with Human Rights, Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018 (Cth) 2 (‘Compatibility Statement’). These reflect pt 3D of the *Social Security Act* (Cth) (n 300).

307 Shelley Bielefeld, ‘Indigenous Peoples, Neoliberalism and the State: A Retreat from Rights to “Responsibilisation” via the Cashless Welfare Card’ in Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez (eds), *The Neoliberal State, Recognition and Indigenous Rights: New Paternalism to New Imaginings* (Australian National University Press, 2018) 147, 149 (‘Indigenous Peoples, Neoliberalism and the State’). The Australian government has opined that any indirect discrimination on the ground of race arising from the CDC is ‘reasonable and proportionate’ and so in accordance with international human rights treaties to which Australia is a party: Compatibility Statement (n 306) 9. The Australian government’s view is contested: see Shelley Bielefeld, ‘Human Rights and the Cashless Debit Card: Examining the Limitation Requirement of Proportionality’, *The Power to Persuade* (Blog Post, 23 March 2018) <[www.powertopersuade.org.au/blog/human-rights-and-the-cashless-debit-card-examining-the-limitation-requirement-of-proportionality/22/3/2018](http://www.powertopersuade.org.au/blog/human-rights-and-the-cashless-debit-card-examining-the-limitation-requirement-of-proportionality/22/3/2018)>.

308 Compatibility Statement (n 306) 9. It was estimated that the proportion of Indigenous Australians participating in the CDC scheme across all four of the trial areas will be approximately 33%: *Senate Community Affairs Committee Report* (n 304) 24 [2.75], citing Compatibility Statement (n 306) and Department of Social Services (Cth), Submission No 69 to Senate Community Affairs Legislation Committee, Parliament of Australia, *Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018* (12 July 2018) 4.

309 Commonwealth, *Parliamentary Debates*, Senate, 12 February 2018, 722 (Susan Lines), quoting Linden Brownley (Councillor for Kalgoorlie). The first and second income management schemes were also analogised to the ‘ration days’ of colonial Australian governments: see, eg, Paddy Gibson, ‘Return to the Ration Days: The Northern Territory Intervention: Grass-Roots Experience and Resistance’ (2012) 3 *Ngiya: Talk the Law* 58, 63.

have on financial management skills.<sup>310</sup>

It is arguable that the CDC will perpetuate the structural factors facilitating the practice of book-up systems in which debit cards and PINs are provided to storeowners. The implemented scheme undermines the autonomy of the participants<sup>311</sup> and continues the perception of a link between financial management and the authority of store owners.<sup>312</sup> Further, it does not of itself address the structural barriers to financial exclusion.<sup>313</sup> Instead, it may be

- 310 See, eg, Commonwealth, *Parliamentary Debates*, Senate, 12 February 2018, 722 (Susan Lines); Shelley Bielefeld, 'Cashless Welfare Cards: Controlling Spending Patterns to What End?' (2017) 8(29) *Indigenous Law Bulletin* 28, 29–30; Shelley Bielefeld, 'Income Management and Indigenous Women: A New Chapter of Patriarchal Colonial Governance?' (2016) 39(2) *University of New South Wales Law Journal* 843, 877; E Klein and S Razi, 'The Cashless Debit Card Trial in the East Kimberley' (Working Paper No 121/2017, Centre for Aboriginal Economic Policy Research, Australian National University, November 2017) 12; Australian Council of Social Service, *Cashless Debit Card* (Briefing Note, February 2018) <[www.acoss.org.au/wp-content/uploads/2018/02/010218-Cashless-Debit-Card-Briefing-Note\\_ACOSS.pdf](http://www.acoss.org.au/wp-content/uploads/2018/02/010218-Cashless-Debit-Card-Briefing-Note_ACOSS.pdf)>; *Senate Community Affairs Committee Report* (n 304). In the most recent review of the Goldfields CDC trial region commissioned by the Commonwealth Department of Social Security, it was reported that opinions of respondents were mixed as to whether the CDC was having a positive impact or not on the ability of participants to better manage their money, although the overall tendency of respondents was to say it was 'leading to improvements in financial literacy and management': K Mavromaras et al, 'Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings' (Future of Employment and Skills Research Centre, February 2019) 97 <[www.dss.gov.au/sites/default/files/documents/02\\_2019/cdc\\_baseline\\_qualitative\\_data\\_collection\\_-\\_goldfields\\_region.pdf](http://www.dss.gov.au/sites/default/files/documents/02_2019/cdc_baseline_qualitative_data_collection_-_goldfields_region.pdf)>. Cf Compatibility Statement (n 306) 4 where it is stated that the use of the card in the first two trial locations resulted in 45% of the affected population reported being able to save more money.
- 311 Bielefeld, 'Indigenous Peoples, Neoliberalism and the State' (n 307) 153. The longitudinal study of the new income management regime implemented in the Northern Territory in 2010 found that the scheme does not promote financial independence and capability. Rather the scheme 'appears to have encouraged increasing dependence upon the welfare system, and the tools which were envisaged as providing them with the skills to manage have rather become instruments which relieve them of the burden of management': J Rob Bray et al, *Evaluating New Income Management in the Northern Territory* (Final Evaluation Report No 25/2014, Social Policy Research Centre, University of New South Wales, September 2014) xxii ('*Evaluating New Income Management: Final Report*').
- 312 Where store owners sell a mix of both goods banned under the cashless debit card and permitted goods, the store owner has to manually prevent the sale of banned goods: Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 58 of 2017–18, 12 December 2017) 4–5. Express authorisation for merchants to decline services on this basis is provided under s 124PQ(2A) of the *Social Security Act* (Cth) (n 300), as an exception to pt IV of the *Competition and Consumer Act* (n 105). This would arguably give merchants the appearance of authority in the implementation of the program from the perspective of customers. This measure was criticised by the Australian Greens: see *Senate Community Affairs Committee Report* (n 304) 37. See also, the anecdotal evidence of the assertions of authority of store owners in the evaluation reports of the second income management scheme: J Rob Bray et al, *Evaluating New Income Management in the Northern Territory* (First Evaluation Report, Social Policy Research Centre, University of New South Wales, July 2012) 94 (a Centrelink officer described sales assistants telling customers subject to income management that they should buy cheaper products). Further, Bray et al, *Evaluating New Income Management: Final Report* (n 311) 30, 37, 123, 243–4, reported that where the customer had misplaced their access card, it could take up to six weeks for it to be replaced, in some cases this was dealt with by the provision of a store account for customers to draw upon. There was anecdotal evidence that in some cases, the customer would leave their access card at the shop. However, stores licensed to provide income managed funds were required to stop providing book-up (of a type where customers could be indebted to the store) as a condition of licensing.
- 313 Bielefeld, 'Indigenous Peoples, Neoliberalism and the State' (n 307) 157. See generally, Tyrone Garstone, 'Cashless Debit Card Opening Statement', *Kimberley Land Council* (Web Page, 16 November 2017) <[www.klc.org.au/cashless-debit-card-opening-statement](http://www.klc.org.au/cashless-debit-card-opening-statement)>. A longitudinal study of the new income management scheme applied to welfare recipients in the Northern Territory found 'no evidence of any overall improvement in financial wellbeing, including reductions in financial harassment or improved financial management skills': see Bray et al, *Evaluating New Income Management: Final Report* (n 311) xxi. Improving financial management skills is not referred to in the statutory objects of the cashless welfare card scheme: see *Social Security Act* (Cth) (n 300) s 124PC.

normalising income management within communities<sup>314</sup> and creating ‘a new banking underclass’ who are not free to elect the financial institutions into which their income should be received.<sup>315</sup> Nevertheless, the Commonwealth government has recently affirmed its commitment to the continuation of the CDC trials, with one of its Ministers describing them as ‘one of the most positive developments in welfare for decades’.<sup>316</sup>

There are some indications that financial literacy and management is becoming a greater focus in the CDC trials. A recent government-funded study revealed anecdotal evidence of an improvement in the resourcing and awareness of financial counselling and management supports during the implementation of the CDC in the Goldfields region, although difficulties in accessing those resources remained.<sup>317</sup> Further, opposition-led amendments made to the legislative scheme earlier this year allowed for a participant to apply to exit the scheme where they can ‘demonstrate reasonable and responsible management of their financial affairs’.<sup>318</sup>

However, more recent amendments passed by Parliament are aimed at restoring the focus of the CDC to social objectives.<sup>319</sup> These amendments widen the criteria for exiting the CDC from an applicant’s ability to manage their ‘financial affairs’ to their ‘affairs’ generally,<sup>320</sup> with the decision maker on exit applications being

314 Bray et al, *Evaluating New Income Management: Final Report* (n 311) 252. See also Mavromaras et al (n 310) 60, where respondents (participants and stakeholders) reported that Indigenous participants were ‘generally found to be more accepting’ of being in the CDC trial and that ‘some respondents felt that this general divide in perceptions between Indigenous and non-Indigenous participants about the CDC was linked to non-Indigenous people being unused to having their welfare payments controlled’. One respondent described Indigenous people as ‘used to be[ing] oppressed, are used to being told what to do and how to do it’.

315 A single private company, Indue Ltd, has been engaged by the Commonwealth government to provide the accounts into which the restricted welfare payments are made under the CDC scheme: Bielefeld, ‘Indigenous Peoples, Neoliberalism and the State’ (n 307) 151–2, citing David Tennant, ‘Is the Cashless Welfare Card the Forerunner to a Banking Underclass?’, *Pro Bono Australia* (Opinion Piece, 29 October 2015) <[www.researchgate.net/publication/285590411\\_Is\\_the\\_Cashless\\_Welfare\\_Card\\_the\\_forerunner\\_to\\_a\\_Banking\\_Underclass](http://www.researchgate.net/publication/285590411_Is_the_Cashless_Welfare_Card_the_forerunner_to_a_Banking_Underclass)>.

316 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 July 2019, 990 (Paul Fletcher). The CDC trials for three trial regions were extended from 30 June 2019 until 30 June 2020 to coincide with the review dates for the newest trial region, Bundaberg and Hervey Bay, pursuant to the *Social Security (Administration) Amendment (Income Management and Cashless Welfare) Act 2019* (Cth), which passed through both Houses of Parliament on 4 April 2019.

317 See Mavromaras et al (n 310). Several stakeholders in the review considered that difficulties that participants in the trial experienced with budgeting money were ‘compounded by a lack of adequate levels of, or timely access to, community services to assist with the development and support of financial literacy skills’: at 99. Some stakeholders spoke of the benefit of the establishment and funding of financial capability and management services in conjunction with the implementation of the CDC trial: at 107, 112. However, stakeholders and participants identified the need to ensure the availability of financial management and counselling services and saw the provision of services by local people (including Indigenous workers), as an area for future improvement: at 8, 55, 111.

318 *Social Security Act* (Cth) (n 300) s 124PHA(2)(a), as at 6 April 2019. This section was inserted as a result of opposition-led amendments to the Social Security (Administration) Amendment (Income Management and Cashless Welfare) Bill 2019 in the Senate: see Commonwealth, *Parliamentary Debates*, House of Representatives, 4 April 2019, 14845–47 (Scott Buchholz); Commonwealth, *Parliamentary Debates*, House of Representatives, 4 April 2019, 14847 (Linda Burney).

319 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 July 2019, 990 (Paul Fletcher).

320 *Social Security Act* (Cth) (n 300) s 124PHB(3)(a).



the Secretary of the Department of Social Services.<sup>321</sup> The amendments followed stakeholder consultation that applicants should meet ‘social norms’ to exit the scheme.<sup>322</sup> This leaves open the question as to by whose values and social norms the open ended criteria now contained in the legislation will be evaluated.<sup>323</sup>

This continuing and subtle exclusion of Indigenous Australians from full participation in the financial economy contextualises and supports the arguments raised by the dissent in *Kobelt* (HCA) against the apparent weakening of the statutory norm of conduct in the provision of financial services to Indigenous consumers in the APY Lands.

## VI CONCLUSION

The High Court has confirmed in *Kobelt* (HCA) that s 12CB prescribes a normative standard of conscience against which the commercial conduct in question must be evaluated. If this accepted approach is to fulfil the objective of certainty within commercial practice, the touchstone of values and norms against which suppliers’ conduct is to be judged must be constant. Contextual circumstances, including norms and values of customers are relevant to the process of judicial evaluation, but not to alter the statutory norm.

*Kobelt* presented an opportunity for the Australian courts to clarify the application of this normative approach in a context where the values and norms of the customers differed from mainstream society. However, the stark difference in the characterisation of the conduct under consideration by the majority and dissenting judgments in the High Court suggests that the opportunity was missed.

Further, the implication of the analysis undertaken by the majority in *Kobelt* (HCA) is that Australia’s most financially excluded persons may need to confront and satisfy additional subjective considerations in accessing consumer protection laws. As a result, the decision in *Kobelt* (HCA) has arguably reinforced, rather than bridged, the divide between the mainstream financial sector operating in Australia and the systems that operate in remote Aboriginal communities. Together with the continuing evolution and expansion of the CDC, it appears unique barriers to financial participation faced by Aboriginal and Torres Strait Islander people in remote communities will continue as a part of Australia’s future.

321 Ibid s 124PHB.

322 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 July 2019, 991–2 (Paul Fletcher).

323 The criteria that must be fulfilled by an applicant range from the objective (‘whether the person was convicted of an offence ... in the last 12 months’) to the highly subjective (‘the responsibilities and circumstances of the person’ and ‘the person’s engagement in the community’): *Social Security Act* (Cth) (n 300) s 124PHB(3)(a).