ASIC v Kobelt

An Illustration of the Problems in Applying Community Values in Novel Situations

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Unconscionable conduct, particularly as defined within ss 12CB and 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth) (*'ASIC Act'*), has been assumed to be conduct that can be objectively characterised as falling short of standards of commercial practice.[1] Allsop CJ in *Paciocco v Australia and New Zealand Banking Group Ltd* [2] suggested that the evaluation of such conduct 'does not involve personal intuitive assertion'.[3] Instead, it is an examination of 'every connected circumstance that ought to influence its determination upon the real justice of the case'.[4] This is measured against norms and standards of commercial behaviour including:

> [A] rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection … the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.[5]

The implied assumption therefore is that there are objective standards of commercial conduct, which are norms of Australian society, against which conduct can be measured to determine whether it is unconscionable or not.

But what of those situations where standards of commercial conduct are measured against a community outside of the so-called norm? One of the questions that then arises is in those circumstances when judges are asked to apply 'community values' to a situation which is accepted to be outside of mainstream Australian practice: are the values being applied really that of the community, and if so, whose values are they and more importantly whose values should they be?

I *Australian and Securities and Investment Commission v Kobelt* (2019) 267 CLR 1

In remote Aboriginal communities there is limited access to banking and credit facilities.[6] What occurs is a system called 'book-up', where a customer gives a storekeeper some form of security (usually access to wages or welfare payment)

in return for credit.[7] The storekeeper then has the customer's authority to access these payments to pay for debts incurred by the customer or pay for goods bought by the customer. Book-up developed with 'the entitlement of Aboriginal people to social security payments … and the consequent receipt by them of such payments'.[8] There are recognised advantages of the book-up system, including that it was often the only way to access credit, it provided a means of managing money, and addressed cultural expectations such as demand sharing.[9]

On the edge of the Anangu Pitjantjatjara Yankunytjatjara Lands in the far north of South Australia, is a town called Mintabie which is 45km west of Marla located on the Stuart Highway.[10] Mintabie has a general store, called 'Nobbys Mintabie General Store', which is run by Mr Kobelt.[11] Nobbys sells a range of goods including food, groceries, general goods, and second-hand cars.[12]

By late 2011, 80% of the store's patronage were Aboriginal, many of whom relied upon credit extended through the store based on the book-up system.[13] Mr Kobelt required, 'as a condition of the provision of credit, that his Bookup customers provided him with a debit card … linked to the bank account into which their wages or Centrelink payments were made as well as their PIN'.[14]

The arrangement was that Mr Kobelt would take the whole of the money in the account but would allow his customers to use half for their own purposes. The customers could obtain access to their half of the money by coming back to the store and purchasing goods from the store.[15] It is clear that the book-up system was the only means of supplying credit to these customers.[16] Importantly, Mr Kobelt did not maintain records showing the balance available to each customer.[17] Moreover, most of the credit that was extended to his customers was for the use of second-hand vehicles.[18] It was determined that book-up customers ended up paying about $1,000 more for a second-hand vehicle through the book-up system than people who paid by cash.[19]

It was noteworthy that all but one of the customers to whom book-up was provided were Indigenous.[20] Mr Kobelt 'did extend credit to non-Aboriginal persons, but on different arrangements'.[21] Justice White, the judge at first instance, found that Mr Kobelt's Anangu customers considered that he 'had treated them well and were well-disposed towards him',[22] and were satisfied with the book-up arrangement.

During the trial, expert evidence was obtained from anthropologists to explain the culture of the Anangu people within this rural community. Furthermore, during the trial, the court travelled to the Mintabie, and saw the community within which the Anangu people lived.

Nonetheless, the question at issue was this – was the conduct of Mr Kobelt unconscionable (that is, was it taking unfair advantage of his customers) under ss 12CB and 12CC of the *ASIC Act*?

A The Decisions Below

At first instance, his Honour Justice White determined that while the freedom of the Anangu people must be respected, regard must be had to the particular vulnerabilities of the customers.[23] Justice White was conscious that the court should not take a paternalistic view of what is in the best interests of the Anangu people, noting that the 'freedom of action of the Anangu as citizens of Australia and their entitlement to make decisions in their own interests is to be respected'.[24] Nevertheless, Justice White determined that the conduct of Mr Kobelt was unconscionable.[25]

The decision was appealed, and the Full Bench of the Federal Court unanimously overturned the first instance decision. Their Honours Besanko, Gilmour and Wigney JJ found that Nobbys' customers understood the basic elements of the book-up arrangement and voluntarily entered into it.[26] They considered that there were benefits to the customers in that they avoided demand sharing and the boom and bust cycle.[27] They also found that the book-up system is not unique and was practised in some form in many parts of regional and remote areas of Australia.[28] A final consideration was the conduct of Mr Kobelt himself, where it was accepted that he was not predatory in the relevant sense.[29]

The Australian Securities and Investment Commission ('ASIC') then appealed the decision to the High Court and asked it to consider three issues:

1. Whether the vulnerability of the customers was outweighed by their basic understanding of the book-up system and their voluntary entry into it;

2. Whether or not Mr Kobelt was predatory and exploitative and the weight to be attached to findings that Mr Kobelt acted with a 'degree of good faith'; and
3. Whether 'historical and cultural norms and practices' excused behaviour which would otherwise be unconscionable.[30]

1 The High Court Decision

It was not in dispute that the book-up system that was under consideration was 'unacceptable in mainstream Australian society'.[31] At issue was whether such a system was rendered acceptable in circumstances where the Anangu people, who it was accepted lacked the financial knowledge of most people in Australian society, chose to enter the system for the benefits it provided, including for the alleviation of certain cultural practices such as demand sharing.

2 The Majority

Three of the justices whose decisions formed the majority relied on cultural considerations in forming their decision. Importantly they considered that, as the book-up system reflected aspects of a culture that did not form part of mainstream culture, it was inappropriate that a court override the choice that the Anangu people make in agreeing to the conditions of the book-up system.

In their joint judgment Kiefel CJ and Bell J reflected this belief by emphasising the choice that the Anangu people made. Their Honours stated that the 'basic elements' of the book-up system were understood by the Anangu customers and that:

> The terms on which book-up credit was supplied were perceived by the Anangu customers to be appropriate. This perception was not the product of the Anangu customers' lack of financial literacy: it reflected aspects of Anangu culture that are not found in mainstream Australian society. Book-up credit has a long history in rural and remote Indigenous communities. In this context, Mr Kobelt's supply of book-up credit was not out of the ordinary.[32]

His Honour Justice Gageler reflected a similar view. His Honour considered that unconscionable conduct as proscribed in the *ASIC Act* was conduct that 'is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience'.[33] His Honour however found that ASIC's argument failed in the application of the normative standards found in s 12CB of the *ASIC Act* 'to accommodate societal norms of acceptable commercial behaviour to the peculiar circumstances of the case'.[34] While acknowledging the argument that the book-up system would be 'patently unacceptable conduct elsewhere in modern Australian society',[35] his Honour relied on anthropological evidence, and determined that cultural considerations fed into the choice that the Anangu people made to participate in Mr Kobelt's book-up system. His Honour suggested that failing to accept the choice of the Anangu people fails 'to afford to the Anangu people the respect that is due to them within contemporary Australian society'.[36] His Honour did not consider that there was a sufficient basis to 'question the choice made by Mr Kobelt's Anangu customers, much less to question the ability of those customers to make it'.[37]

Justice Keane, whose decisions rounded out the majority, determined that the appeal should be dismissed on other grounds, namely that it had not been established that 'the respondent engaged in conduct which can properly be characterised as unconscionable'.[38]

B The Minority

The minority decisions are not without their own issues. They take an arguably less pragmatic approach emphasising the objective nature of the book-up system rather than the subjective circumstances of the Anangu people. In doing so, they gave greater weight to the suggestion that the book-up system did not accord with the values espoused by broader Australian society but gave less weight to the unique situation of the Anangu people.

For instance, Nettle and Gordon JJ in their joint judgment stated that it may be possible for an innocent party to make an 'independent or rational judgment' about entering a 'bad bargain', but that does not operate to transform an 'exploitative arrangement'.[39] They soundly reject any suggestion that this approach is paternalistic, stating:

> [I]t is not paternalistic to assess the vulnerability of Mr Kobelt's customers and whether that vulnerability was exploited. It is not paternalistic to take into account that the view of a vulnerable party of a transaction will be shaped by context and circumstance. Equally, it is not paternalistic to look at the transaction and the position of the parties objectively.[40]

In determining that they would take an objective view of the transaction, they declined to draw a distinction between mainstream Australian society and the Anangu people. They pointed out that '[s]urely, anywhere else with any other customer, such an arrangement would be regarded as unconscionable. It is no answer to say that the customers were Anangu people. It is no answer to say that the customers agreed'.[41]

Justice Edelman in his judgment rather succinctly stated his issue with the book-up system:

> [T]he system of credit adopted by Mr Kobelt is one that would be unacceptable in mainstream Australian society. It is made less acceptable, not more acceptable, because it was the *only* form of credit offered, and thus accepted, in remote communities of highly vulnerable persons in need of credit.[42]

II Whose Values?

The question that the High Court was asked to consider was a curious one. It was asked to examine a credit system, which was accepted to be 'outside mainstream Australia', and to determine whether it was appropriate for a particular community of rural Indigenous people. The problem, of course, is the assumption that these rural and Indigenous communities which rely on the book-up system are not part of mainstream Australian society. If, as had been previously suggested, ss 12CB and 12CC provided norms of acceptable commercial behaviour, why were the circumstances of the Anangu people treated differently from that of Australian society as a whole?

The acceptance of this assumption as valid resulted in the immediate 'othering' of the Anangu people.[43] This was compounded by the way the hearing was run. The community within which the Anangu people lived was considered so far outside the experience of the judiciary that evidence from anthropologists was utilised to explain the culture of the Anangu people within this rural community. Only the trial judge experienced first-hand the community within which the Anangu people lived as he travelled there, and the overturning of his decision is telling. The High Court was asked to accept that the financial services provided to a vulnerable and disadvantaged population should be considered within a cultural context that in effect compounded these disadvantages. The appeal questioned if norms of acceptable commercial behaviour applicable to broader Australian society were also applicable to this disadvantaged group.

What was lost in not having a bench that reflected a more diverse spectrum of community values, is the questioning of this proposition, and perhaps a more nuanced approach to resolving the issue. For it is difficult to see how such a proposition would have been accepted if even one of the appeal judges had lived experience of the system they were asked to consider or had lived experience of such a community. The result is that the High Court may have provided too little protection to a group of vulnerable people and entrenched the very disadvantages that created the vulnerabilities in the first place.[44]

There are, of course, strong policy reasons to raise issues with the manner in which these questions were considered in *Australian Securities and Investment Commission v Kobelt*.[45] If services that fall short of acceptable in mainstream society are allowed to be provided to vulnerable and disadvantaged populations, we as a society are effectively ensuring that these populations continue to be disadvantaged.[46] One of the effects of this tacit acceptance of continued disadvantage is the current health crisis sweeping through vulnerable and disadvantaged Indigenous populations in Western NSW[47], which in turn has brought to the fore the inequities that continue to be propagated in Australia.

References

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25 Ibid [612].
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