

Before the High Court

Australian Securities and Investments Commission v Kobelt: Evaluating Statutory Unconscionability in the Cultural Context of an Indigenous Community

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Abstract

The concept of ‘unconscionable dealing’ in statutory consumer protection provisions, such as s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth), has been the subject of extensive consideration in the Federal Court of Australia and the superior courts of the states. The evaluative approach taken by the courts is emerging as a principled approach in its own right, although informed by equity’s jurisdiction. The upcoming appeal in *Australian Securities and Investments Commission v Kobelt* provides the High Court of Australia with the opportunity to further articulate the application of the evaluative approach to be undertaken by Australian courts. The factual matrix provides a unique impetus for the High Court to do so, involving the intersection of national financial services laws with the cultural norms and practices of the residents of the Anangu Pitjantjatjara Yankunytjatjara Lands in South Australia when purchasing daily necessities from a remote general store. This column argues that the Full Court of the Federal Court erred in its use of the cultural norms and practices of the Anangu community to conclude that conduct, which would otherwise be unconscionable dealing, is not so. The High Court is expected to elucidate the correct application of the evaluative process in assessing statutory unconscionability where the cultural norms and practices of the consumer differ from that of the broader Australian community.

I Introduction

The introduction of statutory prohibitions on unconscionability in commercial transactions has seen a rise in unconscionable dealing claims being framed as statutory contraventions, rather than under the general law.¹ In connection with the

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¹ The statutory unconscionable conduct schemes have their origins in s 52A of the *Trade Practices Act 1974* (Cth), introduced by the *Trade Practices Revision Act 1986* (Cth) s 22: *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 565 [18] (Spigelman CJ) (‘*World Best Holdings*’). Similar provisions can now be found in s 21 of the *Australian Consumer Law*

supply of financial services, s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') prohibits a person from engaging in conduct 'that is, in all the circumstances, unconscionable'. The meaning of the term 'unconscionable' is not defined for the purposes of s 12CB(1). The courts have interpreted the section as being informed by the concept of unconscionability in equity.² However, s 12CB(1) is expressly not limited by the 'unwritten law'³ and the statutory provisions are considered to permit a broader concept.⁴ Section 12CC(1) incorporates a non-exhaustive list of factors that the court may consider when assessing if conduct is unconscionable. These factors 'assist in setting a framework for the values that lie behind'⁵ the commercial conscience in s 12CB — values primarily drawn from equity, but including the concept of 'good faith' in contract law.⁶

The principles giving rise to the jurisdiction of equity to relieve against unconscionable dealing are well established and have been articulated by the High Court of Australia most recently in *Thorne v Kennedy* as follows:

A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage 'which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests'. The other party must also unconscientiously take advantage of that special disadvantage. This has been variously described as requiring 'victimisation', 'unconscientious conduct', or 'exploitation'. Before there can be a finding of unconscientious taking of advantage, it is also generally necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage.⁷

The relevant factors that may weigh in evaluating whether conduct under consideration in a particular case is unconscionable in equity 'cannot be comprehensively catalogued'.⁸ The reason is that every case is dependent on its circumstances. In *Thorne*, the High Court highlighted the 'evaluative nature of the judgment involved in determining whether the vitiating factors have been established'.⁹

Previous cases before the High Court have either not given the Court the opportunity to articulate the evaluative approach required for the application of the

(*Competition and Consumer Act 2010* (Cth) sch 2) and in state legislation, such as s 62B of the *Retail Leases Act 1994* (NSW).

² See, eg, *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 271 [283] (Allsop CJ) (Besanko and Middleton JJ agreeing) ('*Paciocco FCAFC*'). The provisions have been interpreted consistently: see, eg, *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* (2018) 329 FLR 149, 184–7 [181]–[199] (Bathurst CJ) ('*Ipstar*').

³ *ASIC Act 2001* (Cth) s 12CB(4)(a).

⁴ *World Best Holdings* (2015) 63 NSWLR 557, 566 [21] (Spigelman CJ); *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132, 140 [30].

⁵ *Paciocco FCAFC* (2015) 236 FCR 199, 272 [285] (Allsop CJ).

⁶ *Ibid.*

⁷ *Thorne v Kennedy* (2017) 91 ALJR 1260, 1272 [38] (citations omitted) (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) ('*Thorne*').

⁸ *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 81 [68] (Kirby J) ('*ACCC v Berbatis*').

⁹ (2017) 91 ALJR 1260, 1273 [43] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

statutory prohibition fully, or the High Court has declined to hear the argument.¹⁰ However, it appears from the High Court of Australia’s decision in *Paciocco HCA* that the High Court agrees with the evaluative approach described by Allsop CJ of the Federal Court of Australia for assessing statutory unconscionability.¹¹

Chief Justice Allsop stated in *Paciocco FCAFC* that the judicial technique to be applied by the court entails a close examination of ‘the complete attendant facts and rational justification’ and assessment and characterisation of the impugned conduct ‘against the standard of business conscience’.¹² Inherent in that standard are the ‘values and norms that Parliament must be taken to have considered relevant to the assessment of unconscionability’.¹³ The relevant factors to be identified and considered against that statutory standard include, but are not limited to, the considerations set out in s 12CC(1) of the *ASIC Act*.¹⁴ Crucially, none of the considerations should be examined in isolation, and the presence or absence of one or more of the relevant factors is not determinative.¹⁵

The application of this evaluative framework is at the heart of the appeal in *Australian Securities and Investments Commission v Kobelt*.¹⁶

II Facts and Litigation History

For approximately 30 years, Mr Lindsay Kobelt operated ‘Nobbys Mintabie General Store’ (‘Nobbys’) in Mintabie, located in the Anangu Pitjantjara Yankunytjatjara Lands (‘APY Lands’) in South Australia.¹⁷ A significant part of Nobbys’ business was the sale of second-hand cars, although it also sold groceries and other items.¹⁸ In 2008, Mr Kobelt commenced providing ‘book-up’ to Nobbys’ Anangu customers and book-up became the only form of credit available to the Anangu customers.¹⁹

Under his book-up system, customers wanting to access credit had to provide Mr Kobelt with the debit card linked to their account into which their wages or Centrelink payments were paid and the personal identification number (‘PIN’) for

¹⁰ See, eg *ACCC v Berbatis* (2003) 214 CLR 51; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 (‘*Kakavas*’) (both concerning s 51AA of the *Trade Practices Act 1974* (Cth), a statutory prohibition on conduct that ‘is unconscionable within the meaning of the unwritten law’). In *Paciocco v Australia and New Zealand Banking Group Ltd*, the parties agreed the content of the statutory norm, so the Court was not called upon to consider it: (2016) 258 CLR 525, 584 [180] (Gageler J) (‘*Paciocco HCA*’). The High Court has previously declined a special leave application from the Full Court of the Federal Court in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 (15 August 2013) (‘*ACCC v Lux*’); *Lux Distributors Pty Ltd v Australian Competition and Consumer Commission* [2014] HCA 55 (12 March 2014).

¹¹ (2016) 258 CLR 525, 584–7 [180]–[189] (Gageler J), 620 [294] (Keane J). See also *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 434 [55] (Allsop CJ).

¹² (2015) FCR 199, 276 [306].

¹³ *Ibid* 266 [262].

¹⁴ See also *Ipstar* (2018) 329 FLR 149, 203 [270] (Leeming JA).

¹⁵ See also *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 357 ALR 240, 322 [2177] (Beach J) (‘*ASIC v Westpac*’).

¹⁶ High Court of Australia, Case No A32/2018 (‘*Kobelt HCA*’).

¹⁷ *Australian Securities and Investment Commission v Kobelt* [2016] FCA 1327 (9 November 2016) (White J) 3 [1], 6 [19], (‘*Kobelt*’).

¹⁸ *Ibid* 7 [24], 17–18 [74].

¹⁹ *Ibid* 3 [2], 9 [34].

their card as a form of security.²⁰ Customers were asked to provide details of the income and Centrelink amounts and when they were paid.²¹ Mr Kobelt agreed informally with customers that he would take all of the money in their account from time to time, but that he would allow them to access some of the amount he had taken, usually around 50%.²² Typically, he retained possession of the card and PIN until the customer paid their debt.²³ Mr Kobelt, or his son, made withdrawals from customers' accounts at times that precluded customers having the practical opportunity to access money in their account before Mr Kobelt did.²⁴ The total amount Mr Kobelt withdrew from customers' accounts was described as 'substantial'.²⁵

Usually, customers were only able to access the amounts of money that Mr Kobelt permitted by returning to Nobbys to purchase goods, access cash, or through a system of 'purchase orders' to other stores.²⁶ Generally, Mr Kobelt did not permit customers to have access to the full amount he had permitted at any one time, but would curtail that amount, saying he wanted 'to ensure that his customers did not spend all their money at once'.²⁷ The recordkeeping for Nobbys' book-up system was 'rudimentary', with it being difficult to identify the state of the customers' account at any given time.²⁸

In 2014, ASIC commenced proceedings against Mr Kobelt in the Federal Court of Australia alleging, inter alia, that since at least 1 June 2008, Mr Kobelt had engaged in unconscionable conduct in contravention of s 12CB of the *ASIC Act* in operating his book-up system.²⁹ ASIC brought its case at trial on the basis that Mr Kobelt's conduct in relation to 117 customers constituted a system of conduct or pattern of behaviour within the meaning of s 12CB(4) of the *ASIC Act*.³⁰

The primary judge found that Mr Kobelt had contravened s 12CB.³¹ The Full Federal Court overturned this decision on appeal.³² The joint judgment of Besanko and Gilmour JJ emphasised the customers' voluntary entry into and understanding of the book-up system and lack of predation by Mr Kobelt to arrive at the conclusion that the conduct was not 'unconscionable' within the meaning of s 12CB(1).³³ Justice Wigney agreed with their Honours' reasons, but delivered his own judgment

²⁰ Ibid 7 [28].

²¹ Ibid 8 [30].

²² Ibid 8 [31], 15 [59]–[60]. The primary judge found that if a customer placed a limit on the amount that Mr Kobelt could take from his or her account, Mr Kobelt would generally, but not always, comply with that limit.

²³ Ibid 7–8 [29].

²⁴ Ibid 12 [46]–[47].

²⁵ The primary judge noted that in a 29-month period, Mr Kobelt withdrew \$984 147.90 from the accounts of 85 customers: *Australian Securities and Investments Commission v Kobelt* [2017] FCA 387 (13 April 2017) 5 [19].

²⁶ *ASIC v Kobelt* [2016] FCA 1327 (9 November 2016) 8 [31] (White J).

²⁷ Ibid 14 [56] (White J).

²⁸ Ibid 16–17 [69]–[70], 17–18 [74].

²⁹ Ibid 4 [4].

³⁰ Ibid 4 [5].

³¹ Ibid 142 [624].

³² *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689, 739 [287] (Besanko and Gilmour JJ), 760 [392] (Wigney J) ('*Kobelt v ASIC*').

³³ Ibid 735–40 [261]–[269].

emphasising the weight to be given to the historical and cultural context in which the book-up system operated when determining the conscionability of Mr Kobelt's conduct.³⁴

ASIC was granted special leave to appeal to the High Court on giving an undertaking not to seek its costs.³⁵

III Questions to be Addressed on Appeal

Three legal questions are likely to be addressed by the High Court on ASIC's submissions:

- (a) Should the voluntary entry of a customer into a transaction exclude or outweigh the relevance of the vulnerability of the customer?
- (b) Can an absence of subjective bad faith or dishonesty on the part of the supplier preclude a finding of unconscionability?
- (c) Can the historical and cultural norms and practices of the customer be used so as to justify conduct as conscionable that would otherwise be unconscionable?³⁶

As our discussion of these three questions below will show, *Kobelt HCA* provides the High Court with an opportunity to illuminate the correct application of the evaluative process by weighing all the interconnected circumstances against a norm of commercial conscience to arrive at a logical conclusion on the unconscionability of the impugned conduct.

IV Relevance and Weight of Customer Characteristics and Supplier State of Mind

In our view, ASIC's submissions in the appeal highlight errors in the Full Federal Court's consideration of factors associated with customers' characteristics and suppliers' conduct. On the first issue in the appeal, the Full Federal Court gave insufficient consideration to the vulnerability of the Anangu customers by giving undue weight to their voluntariness in entering into, and their understanding of, the book-up system.³⁷

A *Vulnerability and Voluntariness*

The plurality in *Thorne* observed that the word 'voluntary' is a variable expression that takes its 'colour from the particular context and purpose in which [it is] used'.³⁸ Although a person may be perfectly competent to understand and intend to do something, there can still be a question as to how their intention to enter into the

³⁴ Ibid 741 [296].

³⁵ *Australian Securities and Investments Commission v Kobelt* [2018] HCA Trans 153 (17 August 2018).

³⁶ ASIC, 'Appellant's Submissions with Redacted Attachments', Submission in *ASIC v Kobelt*, Case No A32/2018, 5 October 2018, 1 [2] ('*ASIC Submissions*').

³⁷ *ASIC Submissions*, above n 36, 6 [22]–[23].

³⁸ *Thorne* (2017) 91 ALJR 1260, 1282 [91] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), quoting *Tofilau v The Queen* (2007) 231 CLR 396, 417 [49].

transaction was produced.³⁹ According to the plurality, ‘[t]he question whether a person’s act is “free” requires consideration of the extent to which the person was constrained in assessing alternatives and deciding between them.’⁴⁰ That is, voluntariness should not be considered in isolation from vulnerability, rather it should be considered in the context of vulnerability.

The interconnectedness of voluntariness and vulnerability is exemplified by the circumstances of *Kobelt*. Most of Nobbys’ Anangu customers were residents of Mimili and Indulkana, two remote aboriginal communities in South Australia.⁴¹ There were no mainstream financial or credit facilities in those communities and, crucially, even if there were, the mainstream credit facilities would have been unsuitable to Anangu customers, since they did not have assets to offer as security for a loan. The voluntary nature of their entry into the book-up arrangement should therefore be considered in the context of the lack of alternative financial services.

Vulnerability is also an important contextual consideration, as it compromises the ability to ‘perceive, judge and protect’ one’s own interest.⁴² An element of unconscionable conduct as illuminated by Mason J in *Commercial Bank of Australia Ltd v Amadio* is that the innocent party’s ability to make a judgement as to his or her own best interest is seriously affected by the special disadvantage.⁴³ Accordingly, the Anangu customers’ voluntary entry into the book-up arrangement with Mr Kobelt needs to be considered in the context of their low level of financial literacy;⁴⁴ limited assets, income, and economic opportunities;⁴⁵ and lack of access to mainstream banking facilities.⁴⁶ The voluntary nature of the transaction should not deprive them of protection against exploitation by those in a stronger position, a principle that goes to the root of the doctrine of unconscionability.⁴⁷

Further, the two equitable doctrines of undue influence and unconscionable dealing must be distinguished with regard to the place of voluntariness of the innocent party. Undue influence relates to situations in which ‘the will of the innocent party is not independent and voluntary because it is overborne’.⁴⁸ Undue influence has been described as arising where a person is not a ‘free agent’ due to the influence over the mind by the ‘deliberate contrivance’ of another.⁴⁹ Justice Gordon opined in *Thorne* that ‘establishing a special disadvantage ... for the

³⁹ *Thorne* (2017) 91 ALJR 1260, 1282 [91] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), citing *Huguenin v Baseley* (1807) 14 Ves June 273, 300; *Bridgewater v Leahy* (1998) 194 CLR 457, 491 [118].

⁴⁰ *Thorne* (2017) 91 ALJR 1260, 1270 [32] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

⁴¹ *Kobelt v ASIC* (2018) 352 ALR 689, 702–3 [70].

⁴² *ASIC Submissions*, above n 36, 11 [33].

⁴³ (1983) 151 CLR 447, 462 (Mason J) (*‘Amadio’*). This point has been cited in *Thorne* (2017) 91 ALJR 1260, 1279 [74]; *ASIC v Westpac* (2018) 357 ALR 240, 330 [2219] (Beach J).

⁴⁴ *Kobelt v ASIC* (2018) 352 ALR 689, 702 [68], 704 [81] (Besanko and Gilmour JJ).

⁴⁵ *Ibid* 702 [68], 703 [73] (Besanko and Gilmour JJ).

⁴⁶ *Ibid* 703 [71] (Besanko and Gilmour JJ).

⁴⁷ *Paciocco FCAFC* (2015) 236 FCR 199, 271 [282] (Allsop CJ), citing *Amadio* (1983) 151 CLR 447, especially 461–2, 474–5; *Blomley v Ryan* (1956) 99 CLR 362, especially 405 (Fullagar J), 415, 428–9 (Kitto J); *Louth v Diprose* (1992) 175 CLR 621, 627 (Brennan J), 637 (Deane J), 650 (Toohey J); *Bridgewater v Leahy* (1998) 194 CLR 457, 485–6 [100]; *Kakavas* (2013) 250 CLR 392, 393–5.

⁴⁸ *Amadio* (1983) 151 CLR 447, 461 (Mason J), quoted in *Thorne* (2017) 91 ALJR 1260, 1272 [40] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), 1285 [115] (Gordon J).

⁴⁹ *Johnson v Buttress* (1936) 56 CLR 113, 134 (Dixon J); *Hall v Hall* (1968) LR 1 P&D 481, 482, cited in *Thorne* (2017) 91 ALJR 1260, 1270 [31].

purposes of unconscionable conduct does not require asking whether the weaker party lacked the capacity to exercise independent judgment'.⁵⁰ Statutory unconscionability is connected with the doctrine of unconscionable dealing, not undue influence. Hence, in unconscionability the exercise of the voluntary will of the innocent party can be the result of the disadvantageous position in which that party is placed and of the other party taking advantage of that position.⁵¹

The relevant factors identified in the *ASIC Act* must also be considered, in particular, the inequality of the bargaining position between the supplier and the consumer (s 12CC(1)(a)) and the customers' understanding of the documents relating to the supply of the financial services (s 12CC(1)(c)). In relation to s 12CC(1)(c), 'understanding' should not be a 'bright line' test. For example, in *Kobelt*, the primary judge considered the understanding of Nobbys' customers as falling short of an informed understanding because of the rudimentary style of recordkeeping.⁵²

B *Predation and Exploitation*

A second issue in the appeal arises from the Full Federal Court overruling the finding of the primary judge that Mr Kobelt engaged in predation and exploitation. This aspect of the appeal raises a significant question of legal principle: whether an absence of subjective bad faith or dishonesty precludes a finding of unconscionability.⁵³ In our view, the Full Federal Court erred in holding that dishonesty, fraudulence and bad faith are essential requirements for a finding of unconscionability.

The primary judge found that Mr Kobelt was engaged in predation and exploitation of his Anangu customers by tying the customers to Nobbys and maintaining a continuing dependence by customers on Nobbys;⁵⁴ and by having access to and withdrawing the whole funds available in customers' accounts.⁵⁵ While the Full Federal Court agreed with these facts, it concluded that Nobby's customers' understanding of the book-up arrangement, their voluntary entry to the system, and overall advantages of the system trumped any finding of predation and exploitation.⁵⁶ This reasoning appears to give too much weight to the factual findings of voluntariness and the advantages to the customers, and does not take into account other factual findings of the primary judge. These other factual findings include the undisturbed finding that the tying of customers to Nobbys was not required for the protection of Mr Kobelt's commercial interests,⁵⁷ and the example of predation given by the primary judge, being an occasion in which Mr Kobelt was able to draw

⁵⁰ *Thorne* (2017) 91 ALJR 1260, 1283 [94] (Gordon J) citing *Amadio* (1983) 151 CLR 447, 461.

⁵¹ *Amadio* (1983) 151 CLR 447, 461; also cited in *Thorne* (2017) 91 ALJR 1260, 1272 [40], *ASIC Submissions*, above n 36, 10–11 [32].

⁵² *ASIC v Kobelt* [2016] FCA 1327 (9 November 2016) 126 [541]–[546] (White J).

⁵³ *ASIC Submissions*, above n 36, 1 [2].

⁵⁴ *ASIC v Kobelt* [2016] FCA 1327 (9 November 2016) 125 [538], 138 [606], [620] 141 (White J).

⁵⁵ *Ibid* 12 [46], 128 [556], 139 [606].

⁵⁶ *Kobelt v ASIC* (2018) 352 ALR 689, 735–6 [267]–[268] (Besanko and Gilmour JJ).

⁵⁷ *ASIC v Kobelt* [2016] FCA 1327 (9 November 2016) 140 [616] (White J).

more money than authorised from customers' accounts held with a particular bank because of a temporary 'glitch' in its systems.⁵⁸

As a result of overruling the primary judge's factual findings, Bensanko and Gilmour JJ found that there was no predatory conduct or exploitation to balance against the customers' voluntary entry into, understanding of, and receipt of advantages from the book-up arrangements. Justice Wigney agreed with this finding and found there was no breach of trust, and therefore no unconscionability, in Mr Kobelt's requirement that customers relinquish their debit card and PIN.⁵⁹ Justice Wigney found Mr Kobelt 'exercised a degree of good faith, did not exert any undue influence and was neither fraudulent nor dishonest'.⁶⁰

We argue that the Full Federal Court erred in holding that dishonesty, fraudulence and bad faith are essential requirements for predation and exploitation. Predation and exploitation, as they refer to the taking advantage of customers' vulnerability, are an essential element of unconscionable dealing in general principles of equity.⁶¹ In *Thorne*, the plurality explained 'victimisation' or 'exploitation' as means of describing the requirement in equity's jurisdiction that the stronger party must unconscientiously take advantage of the special disadvantage of the weaker party.⁶² The only subjective element that their Honours said was generally necessary was that 'the other party knew or ought to have known of the existence and effect of the special disadvantage'.⁶³ In *Bridgewater v Leahy*, Gaudron, Gummow and Kirby JJ accepted that 'victimisation ... can consist either of the active extortion of a benefit or *the passive acceptance of a benefit in unconscionable circumstances*'.⁶⁴ In *Amadio*, Deane J found no suggestion of 'dishonesty or moral obliquity in the dealings between Mr and Mrs Amadio and the bank'.⁶⁵ At general law, unconscionable dealing is a species of equitable fraud, and actual deceit or fraud is unnecessary.⁶⁶

In the statutory context, there are two avenues through which a subjective element has emerged. The first is through s 12CC(1)(l), which provides that one of the factors the court may have regard to is, *inter alia*, 'the extent to which the supplier and service recipient acted in good faith'. 'Good faith' has been described as a 'much mooted' concept.⁶⁷ There have been various judicial attempts to describe the parameters of its meaning.⁶⁸ Carter and Peden maintain that good faith 'is not a fixed

⁵⁸ *Ibid* 21 [97], 139 [609].

⁵⁹ *Kobelt v ASIC* (2018) 352 ALR 689, 750 [348] (Wigney J).

⁶⁰ *Ibid* 756 [373].

⁶¹ *ASIC Submissions*, above n 36, 15 [41].

⁶² *Thorne* (2017) 91 ALJR 1260, 1272 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ). See also at 1285 [114] (Gordon J).

⁶³ *Thorne* (2017) 91 ALJR 1260, 1272 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

⁶⁴ *Bridgewater v Leahy* (1998) 194 CLR 457, 479 [76] (emphasis in original), quoting *Hart v O'Connor* [1985] AC 1000, 1024. See also *Wu v Ling* [2016] NSWCA 322 (24 November 2016) [14] (Leeming JA).

⁶⁵ *Amadio* (1983) 151 CLR 447, 478.

⁶⁶ *Blomley v Ryan* (1956) 99 CLR 362, 385 (McTiernan J); *Kavvas* (2013) 250 CLR 392, 400–01 [17].

⁶⁷ Jenny Buchan and Gehan Gunasekara 'Administrative Law Parallels with Private Law Concepts: Unconscionable Conduct, Good Faith and Fairness in Franchise Relationships' (2015) 36(2) *Adelaide Law Review* 541, 542.

⁶⁸ See eg, *Paciocco FCAFC* (2015) 236 FCR 199, 273 [288] (Allsop CJ).

concept',⁶⁹ and is dependent on the context in which it is employed.⁷⁰ What is apparent is that good faith should not be applied so as to subsume the statutory concept of unconscionability and it is only one of the circumstances to be weighed by the court.⁷¹

Second, the fact that the Australian courts have sought to equate the statutory concept of unconscionability with the test of a 'high level of moral obloquy' also arguably imports a subjective element.⁷² The submissions of Mr Kobelt before the High Court endorse this test to argue for a 'very high bar' to prove statutory unconscionability'.⁷³

The substitution of 'moral obloquy' for the words of the statute has been criticised previously, as it would 'import into unconscionability a necessary conception of dishonesty'.⁷⁴ Such a substitution is inconsistent with the equitable jurisdiction in which the courts have denied the need for 'immoral or dishonest motives' on the part of the party alleged to act unconscionably.⁷⁵

However, predation, exploitation and dishonesty continue to be referred to by the Full Federal Court as alternative descriptors of the meaning of unconscionability, not merely as factors relevant to the circumstantial matrix.⁷⁶ Most recently, the Full Federal Court stated:

To behave unconscionably should be seen, as part of its essential conception, as serious, often involving dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worthy of criticism.⁷⁷

⁶⁹ J W Carter and Elizabeth Peden, 'Good Faith in Australian Contract Law' (2003) 19(2) *Journal of Contract Law* 155, 157. On the meaning, interpretation and implication of good faith in contract, see generally J W Carter and Wayne Courtney, 'Good Faith in Contracts: Is There an Implied Promise to Act Honestly?' (2016) 75(3) *Cambridge Law Journal* 608; J W Carter and Andrew Stewart, 'Interpretation, Good Faith and the "True Meaning" of Contracts: The Royal Botanic Decision' (2002) 18(2) *Journal of Contract Law* 182.

⁷⁰ J W Carter and Elizabeth Peden, 'Good Faith in Australian Contract Law' (March–May 2003) 17(1) *Commercial Law Quarterly* 15, 19–20.

⁷¹ See generally Bryan Horrigan, 'Unconscionability Breaks New Ground — Avoiding and Litigating Unfair Client Conduct after the ACCC Test Cases and Financial Services Reforms' (2002) 7 *Deakin Law Review* 73, 85–6.

⁷² See, eg, *World Best Holdings* (2005) 63 NSWLR 557, 583–4 [119]–[122] (Spigelman CJ).

⁷³ Lindsay Kobelt, 'Respondent's Submission', Submission in *ASIC v Kobelt*, Case No A32/2018, 2 November 2018, 17 [62].

⁷⁴ *Paciocco FCAFC* (2015) 236 FCR 199, 266 [262] (Allsop CJ). See also *Australian Securities and Investment Commission v Wealth & Risk Management Pty Ltd (No 2)* (2018) 124 ACSR 351, 373 [116] (Moshinsky J).

⁷⁵ *Wu v Ling* [2016] NSWCA 322 (24 November 2016) [8] (Leeming JA). See also *Johnson v Smith* [2010] NSWCA 306 (17 November 2010) [5], [98]–[102]; *Paciocco FCAFC* (2015) FCR 199, 276 [305] (Allsop CJ); *Blomley v Ryan* (1956) 99 CLR 362, 385 (McTiernan J); *Kakavas* (2013) 250 CLR 392, 400–401 [17].

⁷⁶ See, eg, *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155 (19 September 2018) 48–9 [155] ('*Unique v ACCC*'); *Kojic v Commonwealth Bank of Australia* (2016) 249 FCR 421, 437 [60] (Allsop CJ); *Paciocco FCAFC* (2015) 236 FCR 199, 283 [347] (Allsop CJ).

⁷⁷ *Unique v ACCC* [2018] FCAFC 155 (19 September 2018) 48 [155].

If such subjective elements are taken as compendious preconditions, this would result in the statutory concept of unconscionability being more restricted in its application than the equitable concept of unconscionable dealing. This seems contrary to the broader statutory concept envisaged by parliament and the courts.⁷⁸

V The Statutory Norm of Unconscionability and Cultural Norms and Practices

The third issue before the High Court is whether the Full Federal Court has made an unprecedented misuse of historical and cultural norms and practices to excuse what would otherwise be unconscionable conduct,⁷⁹ paving the way for formulating ‘multiple Australian consciences’ depending upon the recipient of the conduct.⁸⁰ This question is central to the statutory standard of unconscionability in this case. The cultural and historical factors form an aspect of the legal reasoning of the primary judge and plurality,⁸¹ while being central to the legal reasoning of Wigney J of the Full Federal Court.⁸² Justice Wigney applied the cultural norms and practices of the Anangu to alter the statutory yardstick of commercial conscience. This is exemplified in his Honour’s statement that ‘[w]hat the wider Australian society and its culture and institutions might regard as disadvantageous and unfair might be regarded by an Anangu person as in fact advantageous and reasonable.’⁸³

The Full Federal Court’s approach should be rejected by the High Court because it leads to the potential for inversion of a finding of unconscionable conduct to conscionable conduct due to the presence of particular cultural norms and practices of the customer. The Full Federal Court’s use of the cultural norms and practices of the Anangu community is erroneous and misplaced for two reasons. First, the Full Federal Court created a lower standard of business conscience to assess the unconscionability of a conduct as it applies to the Anangu community and thereby created uncertainty as to the standard of acceptable conduct. Second, the Full Federal Court did not take into account the historical and structural factors in the context of which the cultural norms and practices, and the book-up system itself, evolved.

A Lowering the Standard of Business Conscience

Section 12CB has, at its core, a ‘normative standard of conscience’⁸⁴ against which claims of statutory unconscionability must be tested.⁸⁵ That normative standard is

⁷⁸ See above n 4.

⁷⁹ *ASIC Submissions*, above n 36, 1 [2(c)].

⁸⁰ *Ibid* 20 [52].

⁸¹ *ASIC v Kobelt* [2016] FCA 1327 (9 November 2016) 139 [611], 141[619], [620] (White J); *Kobelt v ASIC* (2018) 352 ALR 689, 732 [244], 733 [257(3)], 735 [262] (Besanko and Gilmour JJ), *Kobelt v ASIC* (2018) 352 ALR 689, 746–7 [328]–[332]; 749–57 [345]–[378] (Wigney J).

⁸² *Ibid* 747 [329] (Wigney J).

⁸⁴ *ACCC v Lux* [2013] FCAFC 90 (15 August 2013) [23] (Allsop CJ).

⁸⁵ *Ibid*. See further, Rachel Yates and Sharmin Tania, ‘The Place of Cultural Values, Norms and Practices: Assessing Unconscionability in Commercial Transactions’ (2019) 45(1) *Monash University Law Review* (forthcoming).

one set by the Australian Parliament and is permeated with the recognised societal and community 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’.⁸⁶

The values and norms incorporated within that statutory standard ‘are those that Parliament has considered, or must be taken to have considered, as relevant’.⁸⁷ The norms and values relevant to the concept of statutory unconscionability include: the norms and values in the law, especially equity; the guidance that can be drawn from the factors in s 12CC; and ‘modern social and commercial legal values identified by Australian Parliaments and courts’.⁸⁸ This notion of a consistent ‘yardstick’⁸⁹ of commercial behaviour or ‘base norm’⁹⁰ is important in ensuring that the statutory prohibitions on unconscionable conduct can be applied in a principled manner, not driven by ‘idiosyncratic’ determinations in each case.⁹¹

The context of the statutory prohibition is consumer protection in the provision of financial services. It is a prohibition that applies and has been applied by the courts, across a range of circumstances, from a remote store supplying basic necessities to its retail customers, to a major bank engaged in bank bill trading.⁹² In each circumstance, Parliament has determined that the same statutory norm of conduct should apply. If Parliament wished to permit ‘multiple Australian consciences’ in the statutory norm, it could and should have prescribed this to be the case.

Both the plurality and Wigney J appeared to be of the view that the alteration of the commercial norm of conscience was required to ensure the equality of Mr Kobelt’s customers. However, it is not consistent with Australia’s singular system of law for s 12CB to be applied in a manner to give rise to multiple norms of conduct dependent on the cultural and societal values of the customers subject to the impugned conduct.⁹³ This is particularly so when the result is not to achieve substantive equality, but to alter conduct that would be ‘extraordinary’ to ‘broader Australian society’ to one that is within commercial conscience.⁹⁴

⁸⁶ *ACCC v Lux* [2013] FCAFC 90 (15 August 2013) [23] (Allsop CJ).

⁸⁷ *Ibid.*

⁸⁸ *Ibid* 274–5 [296].

⁸⁹ *A v BI* (No 2) (2012) 271 FLR 122, 188 [324] (Edelman J).

⁹⁰ *Ibid.*

⁹¹ *Ipstar* (2018) 329 FLR 149, 187 [196]–[197] (Bathurst CJ); *Muschinski v Dodds* (1985) 160 CLR 583, 616 (Deane J).

⁹² See, eg, *ASIC v Westpac* (2018) 357 ALR 240. The breadth of application of s 12CB has been extended recently, pursuant to the *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018* (Cth) s 3 and sch 2 cl 1, which removes the exemption from the application of s 12CB to conduct directed to a ‘listed public company’.

⁹³ See Australian Law Reform Commission, *Recognition of Aboriginal Customary Law*, Report No 31 (1986) [58], [62].

⁹⁴ The proposal of ‘equality before the law’ has been raised in counter-argument to proposals to recognise Aboriginal customary laws: see *ibid* [128]. The *Racial Discrimination Act 1975* (Cth) and its state and territory counterparts aim to achieve ‘substantive equality’: see *Western Australia v Ward* (2002) 213 CLR 1, 103 [115] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

B *Historical and Structural Factors*

The plurality and Wigney J developed an alternative norm of commercial conduct, specific to the Anangu, based on expert evidence of the cultural norms and practices of remote Indigenous communities. In particular, the evidence concerned ‘boom and bust expenditure’,⁹⁵ ‘demand sharing’⁹⁶ and the ‘personalisation of financial transactions’.⁹⁷ The Full Federal Court used this evidence to reason that the Anangu required protection from themselves and Mr Kobelt’s book-up system provided this protection.

This approach to assessment of cultural norms and practices of an Indigenous community is particularly troubling when the historical and structural factors in which the book-up system arose are taken into consideration. The historical factors of colonial exploitation from the late 1770s and the government protectionist policies and laws in the 19th and 20th century gradually deprived members of Indigenous communities of control of their finances.⁹⁸ Structural factors such as lack of financial literacy and lack of access to affordable financial services served to exclude Indigenous communities from participating in financial management.⁹⁹ These historical and structural factors facilitated the evolution of the book-up practice.¹⁰⁰

The full extent of these structural factors may not have been in evidence before the Federal Court. However, there was evidence before the Court that book-up developed and was used in remote communities, where there was an absence of alternative financial services and that there was ‘incommensurability’ to varying degrees between the Anangu’s ‘economic’ values and those of the market economy.¹⁰¹ Rather than considering these factors as giving rise to vulnerability, Wigney J considered these structural factors to conclude that Mr Kobelt’s conduct was not unconscionable because his book-up system provided them with these essential financial services.¹⁰² Further, as identified in ASIC’s submissions, the Full

⁹⁵ *Kobelt v ASIC* (2018) 352 ALR 689, 735 [262] (Besanko and Gilmour JJ), 742 [303], 751 [349]–[350] (Wigney J).

⁹⁶ *Ibid* 732 [244], 735 [262] (Besanko and Gilmour JJ), 742 [304], 751 [349], 751–2 [352] (Wigney J).

⁹⁷ *Ibid* 747 [330], 752 [354], 756 [372] (Wigney J).

⁹⁸ These protection Acts include *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aboriginals Preservation and Protection Act 1939* (Qld); *Aborigines’ and Torres Strait Islanders’ Affairs Act 1965* (Qld); *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld); *Aborigines Protection Act 1909* (NSW); *Apprentices Act 1901* (NSW); *Aborigines Protection (Amendment) Act 1936* (NSW); *The Aborigines Protection Act 1886* (WA); *Aboriginals Ordinance 1918* (Cth); *Aboriginals Ordinance 1933* (Cth); *Aborigines Act 1911* (SA); *Aboriginal Protection Act 1869* (Vic); *Aborigines Welfare Ordinance 1954* (Cth). See generally, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006); Judy Atkinson, *Trauma Trails, Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia* (Spinifex Press, 2002); Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press, 2006).

⁹⁹ See generally 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* (2004).

¹⁰⁰ Nathan Boyle, ‘Book Up: Current Regulation and Options for Reform’ (2016) 8(22) *Indigenous Law Bulletin* 3, 3.

¹⁰¹ *Kobelt v ASIC* (2018) 352 ALR 689, 746–7 [328] (Wigney J).

¹⁰² *Ibid* 756 [372]–[373].

Federal Court appeared to incorrectly apply a historical standard of community expectations as to book-up to justify contemporary conduct.¹⁰³

Contrary to the approach taken by the Full Federal Court, the cultural practices of remote Indigenous communities should be considered alongside the circumstances of lack of education and financial literacy to give context to the vulnerability and voluntariness of Mr Kobelt's customers. These circumstances should then be evaluated against the statutory norm of unconscionability, which has at its root 'the protection of the vulnerable from exploitation by the strong'.¹⁰⁴ As stated by Allsop CJ, the evaluation and assessment of unconscionability includes

the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can ... be used in a way that is contrary to fair dealing or conscience ...¹⁰⁵

VI Conclusion

Kobelt provides the ideal opportunity for the High Court to confront and articulate how the evaluative approach to statutory prohibitions on unconscionable conduct should be applied to remote Indigenous customers. We have argued that the High Court should endorse the evaluative process articulated by Allsop CJ in *Paciocco FCAFC*. In so doing, the Court should confirm that the statutory norm of conscience in s 12CB should be consistent across all commercial conduct. This will ensure that all in the Australian community are subject to the same 'yardstick' of conscience. Of course, whether that normative standard of conscience is crossed should depend on its application to the precise circumstances of the case. However, the cultural norms and practices of Indigenous customers should not be used to excuse what would otherwise be unconscionable conduct.

¹⁰³ *ASIC Submissions*, above n 36, 19 [50].

¹⁰⁴ *Paciocco FCAFC* (2015) 236 FCR 199, 271 (Allsop CJ).

¹⁰⁵ *Ibid* 274 [296], quoted in *Director of Consumer Affairs Victoria v Gibson (No 3)* [2017] FCA 1148 (28 September 2017) 25 [76] (Mortimer J). See also *Paciocco FCAFC* (2015) 236 FCR 199, 266–7 [263], 268 [270], 270 [279], 271 [282] (Allsop CJ).

