



HIGH COURT OF AUSTRALIA

12 June 2019

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v LINDSAY KOBELT
[2019] HCA 18

Today the High Court, by majority, dismissed an appeal from the Full Court of the Federal Court of Australia. The majority held that the respondent's provision of "book-up" credit did not contravene the prohibition on unconscionable conduct in s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth).

The respondent operated a general store in Mintabie, South Australia. He sold goods including food, groceries, fuel and second-hand cars. Almost all of the respondent's customers were Anangu persons who resided predominantly in two remote communities. The Anangu customers were vulnerable due to the remoteness of their communities, their impoverishment and the limitations on their education and financial literacy. The respondent supplied credit to his Anangu customers using a system of credit known as "book-up", under which payment for goods was deferred in whole or in part subject to the respondent retaining the customer's debit card and personal identification number ("PIN") linked to the customer's account into which wages or Centrelink payments were credited. The respondent would then use the debit card and PIN to withdraw the whole or nearly the whole of the wages or Centrelink payments shortly after they were credited, so as to prevent the customer having any practical opportunity to access the monies in other ways. At least 50 per cent of the withdrawn funds were applied to reduce the customer's indebtedness to the general store, and the remainder was held in the respondent's account and informally made available to the customer for the provision of future goods and services. The withdrawal of funds was authorised by the customers, who understood the basic elements of the book-up system.

Anthropological evidence suggested that Anangu customers entrusted the respondent with their debit cards to enable them to exercise choice about what was in their own interests. Several customers reported that they were supportive of the book-up system and the respondent's business. For many, book-up was the only means by which they could purchase a vehicle or access credit. Further, the respondent's retention of the whole of the monies credited to the customers' accounts could protect them from a cultural practice of "humbugging" or "demand sharing", which required them to share resources with certain categories of kin. Book-up credit also ameliorated the "boom and bust" cycle of expenditure and allowed the Anangu customers to buy food between pay days. With two exceptions, the Anangu witnesses considered that the respondent had treated them well.

Section 12CB(1) of the Act relevantly provided that a person must not, in trade or commerce and in connection with the supply of financial services, engage in conduct that is, in all the circumstances, unconscionable. It was accepted that, at all relevant times, s 12CB(1) was capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual was identified as having been disadvantaged by the conduct or behaviour. The sole issue was whether the respondent's provision of book-up credit was, in all the circumstances, unconscionable.

The primary judge found that the respondent's conduct was unconscionable as the respondent had chosen to maintain a system that, while it provided some benefits to Anangu customers, took advantage of their vulnerability to "tie" them to his store. On appeal, the Full Court of the Federal Court concluded that the respondent's conduct was not unconscionable.

By grant of special leave, the appellant appealed to the High Court. A majority of the Court held that the respondent's conduct was not unconscionable. The majority held that, although the book-up system rendered the customers more vulnerable to exploitation, no feature of the respondent's conduct exploited or otherwise took advantage of the Anangu customers' vulnerability. The basic elements of the book-up system were also understood and voluntarily accepted by the Anangu customers. The Anangu customers' acceptance of the terms on which book-up credit was supplied was not the product of their lack of financial literacy, but rather reflected aspects of Anangu culture not found in mainstream Australian society.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*