

*Soft law, hard law, case law -
Recent updates in consumer
credit, banking and finance law*

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Outline of session

- Unfair contract terms recap
- Case update on unfair contract terms and small business loans with *ASIC v Bendigo and Adelaide Bank Limited* [2020] FCA 716; *ASIC v Bank of Queensland Ltd* [2021] FCA 957
- Case update on statutory unconscionability with *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200
- Banking Code of Practice

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A short history of unfair contract terms

- The unfair contract term (UCT) regime was introduced into the *Australian Consumer Law* and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) from 1 July 2010
- On 12 November 2016, the UCT regime was extended to small business contracts under the *Australian Consumer Law* and the *ASIC Act*
- In March 2018, ASIC released Report 565: Unfair contract terms and small business loans which identified the types of terms the regulator has concerns with
- On 5 April 2021, contracts subject to the *Insurance Contracts Act 1984* became regulated by the UCT regime
- The Government is currently consulting on proposed enhancements to UCT which impose civil penalties and expand the class of eligible small business contracts

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The legislation

Section 12BF ASIC Act

(1) A term of a ... small business contract is void if:

- (a) the term is unfair; and
- (b) the contract is a standard form contract; and
- (c) the contract is:
 - (i) a financial product; or
 - (ii) a contract for the supply, or possible supply, of services that are financial services.

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The meaning of “unfair”

12BG Meaning of unfair

(1) A term of a contract referred to in subsection 12BF(1) is unfair if:

- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

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ASIC v Bendigo and Adelaide Bank Limited [2020] FCA 716; ASIC v Bank of Queensland Ltd [2021] FCA 957

The four categories of impugned terms were:

- indemnification clauses;
- event of default clauses;
- unilateral variation or termination clauses; and
- conclusive evidence clauses.

For a summary of the case law and legal principals that apply to unfair contract terms, see *ASIC v Bendigo and Adelaide Bank Limited* [2020] FCA 716 at [15]-[36]

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ASIC v Bendigo and Adelaide Bank Limited [2020] FCA 716; ASIC v Bank of Queensland Ltd [2021] FCA 957

The Court considered those terms were unfair because:

- **Indemnification clause:** the bank could rely on that clause to make the customer liable for loss or costs incurred by the bank that the customer had not caused, or had been caused by the bank's mistake, error or negligence, or that could have been avoided or mitigated by the bank. The indemnification extended to the bank's servants and agents.
- **Event of default:** the consequences were disproportionately severe and none of the event of default clauses permitted the customer to remedy a default which could be capable of being remedied.

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ASIC v Bendigo and Adelaide Bank Limited [2020] FCA 716; ASIC v Bank of Queensland Ltd [2021] FCA 957

- **Unilateral variation:** the clause allowed the bank to unilaterally vary the contract (including the upfront price and services to be supplied under the contract) and terminate the contract if the customer failed to accept the new terms, while not giving the customer any corresponding rights.
- **Conclusive evidence clause:** the bank could terminate the contract if the customer did not pay an amount stated in a certificate issued by the bank where the certificate was conclusive evidence of the amount claimed unless the customer could prove it was 'incorrect' (BOQ) or there was a 'manifest error' (Bendigo Bank). This clause imposed an evidential burden on the customer to disprove matters which the bank is best placed to provide primary evidence. The customer had no corresponding right.

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Examples of the impugned terms

Clause 17.6 of the Delphi Conditions

7. Clause 17.6 of the Delphi Conditions reads:

17.6 Conclusive evidence

The Bank's determination of any amount for the purposes of the Finance Agreement or any other Transaction Document (including, without limitation, the determination of amounts owing by the Borrower) is conclusive in the absence of manifest error.

Clause 22.1 of the Delphi Conditions

8. Clause 22.1 of the Delphi Conditions reads:

22. Changes

22.1 We may change these terms and conditions at our absolute discretion at any time. If any law regulates that change, we will only make the change to the extent permitted by and subject to, the requirements of that law.

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Example of impugned term

Clause 14 of the Delphi Conditions

6. Clause 14 of the Delphi Conditions reads:

14. COSTS

The Borrower indemnifies the Bank in respect of, and shall on demand pay to the Bank all costs, fees and losses (including, without limitation, legal expenses on a full indemnity basis) and stamp duty and other taxes and fees in connection with the Finance Agreement and each other Transaction Document including, without limitation, in respect of:

- (a) the negotiation, preparation, review, amendment, execution, stamping and registration of;
- (b) any property valuations required by the Bank and any action taken by the Bank in connection with;
- (c) the monitoring of compliance with the obligations of the Transaction Party under;
- (d) the exercise or attempted exercise of the preservation of any rights of the Bank under;
- (e) any Event of Default or Potential Event of Default in relation to;

the Finance Agreement and each other Transaction Document (including, without limitation, any existing Security or other document which is or is to be a Transaction Document) and any action taken by the Bank in connection with the Finance Agreement or a Transaction Document.

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Example of replacement term

Replacement clause 14 of the Delphi Conditions

14. COSTS

The Borrower indemnifies the Bank in respect of, and shall on demand pay to the Bank all costs, (including legal expenses) and stamp duty and other taxes and fees in connection with:

- (a) the negotiation, preparation, review, amendment, execution, stamping and registration of;
- (b) any property valuations required by the Bank in connection with;
- (c) the exercise or attempted exercise of the preservation of any rights of the Bank under;
- (d) any Event of Default in relation to;

the Finance Agreement and each other Transaction Document (including, without limitation, any existing Security or other document which is or is to be a Transaction Document).

The Borrower is not required to indemnify the Bank in respect of any amount which arises from any mistake, fraud, negligence or willful misconduct by:

- (a) the Bank;
- (b) the Bank's officers, employees, contractors or agents; or
- (c) any receivers appointed by the Bank over any secured property.

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Statutory unconscionability

Section 21 of the *Australian Consumer Law* and section 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth)

12CB Unconscionable conduct in connection with financial services

(1) A person must not, in trade or commerce, in connection with:

- (a) the supply or possible supply of financial services to a person; or
- (b) the acquisition or possible acquisition of financial services from a person;

engage in conduct that is, in all the circumstances, unconscionable.

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Jams 2 Pty Ltd v Stubbings [2020] VSCA 200

- The applicants (Lenders) were three companies who, in 2015, loaned \$1,059,000 to Victorian Boat Clinic Pty Ltd, a shell company with no assets which was owned and controlled by the respondent, Jeffrey Stubbings.
- The purpose of the loan was to enable Mr Stubbings to fund the purchase of a \$900,000 residential property in Fingal. The company borrower could only contribute \$100 towards the purchase of the Fingal property.
- Mr Stubbings was unemployed and had nominal income and was 'unsophisticated, naive' with 'little financial nous'.
- AJ Lawyers employed a system of structuring loans to avoid the *National Credit Code*. Mr Jeruzalski was a partner from that firm.

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Jams 2 Pty Ltd v Stubbings [2020] VSCA 200

- The Court of Appeal adopted the approach taken by Gageler J, Nettle and Gordon JJ and Edelman J in *Australian Securities and Investments Commission v Kobelt* (2019) 368 ALR 1 when assessing statutory unconscionability.

The applicable standard is a normative one involving the evaluation of whether the conduct in question is 'so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience'; in the sense that a court should only take the serious step of denouncing conduct as unconscionable when it is satisfied that the conduct is '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'. [90]

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Jams 2 Pty Ltd v Stubbings [2020] VSCA 200

- Is asset-based lending in and of itself unconscionable? No [122]
- The decision of *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413 does not stand for that principal and, if it does, it is wrong
- Mr Stubbings was not at the same disadvantage as Mrs Elkofairi so the case can be distinguished on its facts
- The trial judge's adverse view of asset-based lending as a concept overwhelmed his determination of the unconscionability issue [126]
- Mr Jeruzalski did not know of matters which should of put him on inquiry and did not wilfully and recklessly fail to make such inquiries [130]
- Other cases considered: *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389; *Violet Home Loans Pty Ltd v Schmidt* (2013) 44 VR 202

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Jams 2 Pty Ltd v Stubbings [2020] VSCA 200

- The High Court has granted Mr Stubbings leave to appeal.
 - Mr Stubbings has raised 3 grounds of appeal:
 - Did the Court below fail to properly take into account primary findings regarding the lenders' knowledge of, and wilful blindness to, the guarantor's vulnerability?
 - Did the court fail to have proper regard to the primary judge's advantage when substituting its own finding as to Mr Jeruzalski's knowledge?
 - Was the lender's system of lending unconscionable?
- https://www.hcourt.gov.au/cases/case_m13-2021

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Banking Code of Practice

- Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) highlighted the shortcomings of industry codes.
- **Recommendation 1.15:** amend the law so that codes which ASIC approves may include 'enforceable code provisions' whereby a contravention will constitute a breach of the law.
- The *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* received Royal Assent on 17 December 2020 and introduced a new framework for ASIC's approval of codes. ASIC may identify a provision of the code as an 'enforceable code provision' if ASIC considers that the provision(s) meet specific criteria.

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Banking Code of Practice

The 2020 and 2021 Banking Code of Practice added the following commitments:

- Implementing the reforms to credit card responsible lending
- Includes a COVID-19 'special note'
- Increased accessibility to services for people who speak limited English or live in remote areas
- Removing overdraft and dishonour fees on basic, low fee or no fee accounts for concession card holders
- The ability not to deal with a representative who is not a financial counsellor and who the bank reasonable considers is not acting in your best interests (i.e. debt management firms)
- Not to charge fees for services to deceased customers

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Banking Code of Practice Review

- The 2021 independent review of the Banking Code of Practice is underway.
- Consumer advocates have made a joint submission making over 100 recommendations to change the Banking Code of Practice. These include commitments to:
 - Expand the definition of small business;
 - Retain all responsible lending commitments to individuals;
 - Not establish or maintain arrangements with third party retailers where the retailer relies on the point-of-sale exemption to enter into credit arrangements;
 - Enhance protections to customers around recording repayment history information and financial hardship information on credit files;
 - Not sell a guarantor's principal place of residence to repay a loan they have guaranteed but instead permit the guarantor to retain a life interest in that property;
 - Not sell debts owed by customers who are experiencing significant vulnerability or that are, or will become, statute-barred.

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A quick update on responsible lending

- Responsible lending laws were phased in from 1 July 2010 and applied to businesses providing consumer credit from 1 January 2011
- Royal Commission recommendation 1.1: The NCCP Act should not be amended to alter the obligation to assess suitability
- ASIC was unsuccessful in its litigation against Westpac in which it alleged that Westpac's home loan system failed to consider the consumer's declared living expenses. *ASIC v Westpac Banking Corporation* [2019] FCA 1244; *ASIC v Westpac Banking Corporation* [2020] FCAFC 111
- On 9 December 2020, the *National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020: A new regulatory framework for the provision of consumer credit (Amending Bill)* was introduced into Parliament
- On 12 March 2021, the Economics Legislation Committee Report is released. The majority report recommends that the Amending Bill be passed

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Any questions?

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