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General Editor's note

Karen Lee *LEGAL KNOW-HOW*

I am excited to present to you this special expanded edition of the *Australian Banking and Finance Law Bulletin*. This issue features insightful commentary and analysis on a range of pressing topics in banking and finance law and practice.

To begin, in "Guarding the Personal Property Securities Register's integrity — the decision in Registrar of Personal Property Securities v Brookfield", **editorial board member Leonard McCarthy** (William James) discusses the recent decision of *Registrar of Personal Property Securities v Brookfield*.[1] This case highlights the importance of maintaining the integrity of the Personal Property Securities Register (PPSR). It involved Mr. Brookfield, who made several registrations on the PPSR without holding the required reasonable belief for the registrations. The court found Mr. Brookfield in contravention of s 151 of the Personal Property Securities Act 2009 (Cth), resulting in a penalty of $30,000. The court emphasised the need for potential registrants to have a reasonable belief for their registration to be valid and warned against frivolous and vexatious registrations.

Moving on to our next piece, we have one written by **Frank Downes** (Juris IT Services). In "Covering the new bases when securing a loan or attempting recovery", the author discusses the rise of digital assets, particularly cryptocurrencies, and their implications for banking and finance lawyers. Among many other things, the author explains the concept of digital assets, their existence in the "metaverse", and the role of cryptocurrencies. This article is packed with astute observations, including the challenges and methods of recovering digital assets used as collateral. Be sure to stay tuned for Frank's future pieces that delve even deeper into this exciting topic.

For a legal analysis discussing the complexities of equitable unconscionability and the difficulty in obtaining relief based on this doctrine, "Yerkey v Jones, Garcia v NAB and general principles of unconscionability in Equity — Wakim v Senworth — must you show 'predatory' conduct or will 'passive acceptance' of a benefit get you home?" is a must-read. In this article by **Lee Aitken** (Australian National University), readers will come across some familiar names and concepts, including "Yerkey v Jones", "Amadio", "Garcia", "Thorn v Kennedy" and "Stubbings". As always, Lee's article offers valuable insights you would not want to miss.

"Understanding syndicated loans and multi-tiered financings" by **Gary A Goodman**, **Gregory Fennell** and **Jon E Linder** (Dentons US LLP) is a 2-part article series that considers the many legal issues surrounding syndicated transactions, which continue to grow in popularity among lenders, both here and abroad. In Part 1 (in the previous edition of the bulletin), the authors examined the driving forces behind loan syndication, participation structures for real estate loans, matters relating to documenting syndication relationships and considerations relevant to assignment and assumption agreements. In Part 2 (this edition of the bulletin), the authors explore information rights of co-lenders and notice provisions, liability and reliance on agent lenders, the decision-making process, intercreditor agreements, default and payment priorities and lender default.

Up next is "Lawful act economic duress in English and Australian law" by **Jeffrey Goldberger** (Norton Rose Fulbright Australia). In this article, the author discusses the concept of economic duress in contract law, a topic that often arises in financial transactions and negotiations. The author highlights the ongoing uncertainty in Australian law regarding the boundaries between duress, undue influence, and unconscionable conduct. He also discusses the recent UK Supreme Court case, *Pakistan International Airline Corp v Times Travel (UK) Ltd*,[2] which characterised economic duress as an equitable doctrine founded on unconscionable conduct. Could this case influence future Australian cases in the banking and finance sector? Jeff's commentary provides expert perspectives to help you form your own opinion. (Jeff also refers to *Commercial Bank of Australia Ltd v Amadio*[3] and *Thorn v Kennedy*,[4] which Lee also refers to in his article on unconscionability in equity (see above).

Rounding out this double edition is a book review. You may have noticed the recent release of the latest edition of the "NCC Bible". Should you add *Annotated National Credit Code 7th edn* (paperback ISBN/

ISSN 9780409357448 released in December 2023, and ebook ISBN/ISSN 9780409357455 released in February 2024), by Andrea Beatty and published by LexisNexis, to your professional library? I invite you to read my book review where I share my thoughts.

I am sure you will agree that this bulletin is packed with great articles on topical issues relating to banking and finance law and practice. I extend a heartfelt thank you to the contributing authors for their invaluable expertise, and I hope you enjoy reading these articles.

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Footnotes

1. *Registrar of Personal Property Securities v Brookfield* [2024] FCA 29; BC202400572.
2. *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40.
3. *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; 57 ALJR 358; [1983] HCA 14; BC8300072.
4. *Thorne v Kennedy* (2017) 263 CLR 85; 350 ALR 1; [2017] HCA 49; BC201709420.

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Guarding the Personal Property Securities Register's integrity — the decision in Registrar of Personal Property Securities v Brookfield

Leonard McCarthy *WILLIAM JAMES*

A change brought about by the Personal Property Securities Act 2009 (Cth) (PPSA) was allowing registrations to be made without the knowledge or consent of the grantor. That marked a departure from, for example, the requirements in the former Ch 2K of the Corporations Act 2001 (Cth), which obligated the security granting company to attend to the registration of the charge on the now defunct Australian Register of Company Charges.[1] Practically, a charge could not be registered without the accompanying form 309 signed by the company giving the security.

The PPSA change was deliberate. One intended to promote the functionality of the register as a real-time online noticeboard.[2] That functionality removed steps and formality in the registration process. It even permitted registrations to be made ahead of the creation of the security interest, so long as reasonable grounds were held by the registrant that they would become a secured party.[3] To combat mischievous use of the register, requirements were implemented to ensure that registration could only be done with reasonable belief of the security interest claimed, and mechanisms enabling the Registrar to keep the register clean and making secured party's wholly responsible for the accuracy of their registrations.[4]

Notwithstanding these provisions, the experience has been one of a cluttered (or polluted) register.[5] There has also been complaints the register is used strategically, without regard to the protections built into the system by the PPSA.[6] There has also been veiled criticism of an inactive Registrar not adequately policing this aspect of the system.[7] The problem was discussed in the Whittaker review but a call to introduce express grantor consent to registrations was rejected.[8] Indeed, the change the Whittaker review did recommend to PPSA that s 151 expands its ambit so that a registration can be done where a person reasonably believes they "may be" a secured party.[9] This liberalising change is adopted in the recently released exposure draft of the proposed amendments to the PPSA and which are the current subject of industry consultation.[10]

It is in this setting the reasons in *Register of Personal Property Securities v Brookfield*[11] were recently published. The decision involved a consideration of PPSA, s 151 on an application by the Registrar for declarations as to contraventions of the PPSA, pecuniary penalty orders and costs. The Registrar alleged the respondent, Mr Brookfield, did not hold the required reasonable belief for several registrations he had made on the register against collateral of a company. It is the first known application by the Registrar in relation to the issue.

Section 151(1) requires that a registrant, at the time of registration, believe on reasonable grounds that they "[are], or will become, a secured party". The provision is a civil penalty provision, carrying 50 penalty units. Similarly, ss 151(2) and (3) mandate the removal or amendment of a registration as soon as practicable, or within 5 business days, if the registrant has never been a secured party in relation to the collateral and there are no reasonable grounds for the belief required by s 151(1). This provision also carries 50 penalty units.

Mr Brookfield was a party to a sale agreement by which a rent roll had been sold to Real Estate Now Pty Ltd. Mr Brookfield's interest was by way of a purported assignment to him by the named vendor on the sale agreement, Blueprop Pty Ltd. Whether the purchase price had ever been paid under the agreement was not a fact put in issue by the Registrar. However, it is evident that Mr Brookfield maintained the price had never been fully paid.

Mr Brookfield registered two registrations on the register claiming a security interest in the rent roll. The registrations were recorded as over commercial property and in the class of all present and after acquired — no exceptions. The basis for the claimed security interest appears to have been an interest in the rent roll by way of a vendor's lien to secure the unpaid purchase price. These two registrations were essentially repeats of other, now removed, registrations Mr Brookfield had made against the rent roll 2 years previous (the Previous Registrations, to distinguish them from the registrations

in issue in the proceedings). The Previous Registrations had been administratively removed from the register by the Registrar but had otherwise never been the subject of any application by the Registrar under PPSA, s 151.

The court examined the agreement relied upon by Mr Brookfield and found no express creation of a security interest or any reservation of title in the rent roll pending payment of the sale price. Instead, the court concluded as uncontroversial that the agreement provided for the conveyance of the rent roll at completion, which had on the terms of the agreement passed.

In doing so, the court accepted a vendor's lien could give rise to an equitable interest in personal property. However, held that:

> . . . the PPSA swept away the prior law relating to securities over personal property . . . [and w]hether or not Mr Brookfield holds a security interest that is registrable under the PPSA can only be determined by reference to the PPSA and the subsequent jurisprudence.[12]

The court further identified that PPSA, ss 8(1)(b) and (c) excluded from its operation liens arising at general law and those created under legislative provisions, citing as an example the Sale of Goods Act 1896 (Qld), s 41, which gives an unpaid seller a lien over goods still in that seller's possession. The court also readily dismissed Mr Brookfield's continued contention that the agreement otherwise created a security interest within the meaning of PPSA, s 12.

To establish the contraventions alleged, two things needed proving. First, that Mr Brookfield did the registrations, a matter about which there was no dispute. Secondly, Mr Brookfield did not believe on reasonable grounds that he was or would become a secured party in relation to the rent roll. That Mr Brookfield honestly believed he was owed a debt by Real Estate Now and that he honestly believed he was a secured party was not disputed. However, these honest beliefs did not resolve the question of whether the belief was reasonable.

Material to the court's determination was the history involving the Previous Registrations. At the time the Registrar removed the Previous Registrations, Mr Brookfield was notified by the Registrar of his reason for removing them, namely, the view that the agreement — being the same agreement in issue in this proceeding — did not create a security interest. Mr Brookfield was also given notice by the Registrar of his right to appeal the decision to the Administrative Appeals Tribunal. Mr Brookfield did not appeal. The court determined that:

> . . . the clear correspondence from the . . . Registrar to Mr Brookfield in respect of the Previous Registrations is objective evidence that Mr Brookfield's belief that he held a security interest that was registrable on the PPSR was not reasonable.[13]

On this basis, the contravention of s 151 as it related to the two latest registrations was held to be made out.

Ultimately, the court determined that out of a possible maximum penalty available of $315,900 it would impose a penalty of $30,000. In doing so, the court took a purposive approach to the penalty provisions, seeing them as "protective of the 'primacy and predictability' of the PPSR by deterring frivolous or vexatious registrations".[14] The contravening conduct was over a short number of days, 9 for one registration and 18 for the other, being the days between when the registrations were made and their removal by the Registrar — like the Previous Registrations, the Registrar had also removed these latter two registrations from the register. This short number of days and that the other conduct of Mr Brookfield relevant to the contravening was similarly over a short period of time was the reason why the penalty was only some 10% of the maximum available.

Expressly material to the court's penalty considerations was a need to promote the proper use of the register where:[15]

- registrations could be made without a grantor's consent or knowledge
- secured parties needed to ensure accuracy and contemporaneousness in their recording of security interests
- those searching the register were entitled to have faith in its accuracy and
- there was "an obvious vice in registering an overreaching financing statement, it being likely to deter other financiers from providing credit to a particular grantor"

As stated already, Mr Brookfield was not held to be dishonest in his beliefs and actions. However, in the face of the removal of the Previous Registrations and the communications to him by the Registrar at that time, the court was satisfied that he was being "deliberately obtuse" and being so in the context of seeking to improve his position in his continuing litigation with Real Estate Now in other courts.[16] The court noted that while no evidence of loss to Real Estate Now from the registrations was led, the conduct undermined the integrity of the register and that was a cost to the public at large which also informed the amount of the penalty.[17]

A factor underlying the reasons was an emergence partway through them that there was a question over the validity of the assignment. Real Estate Now had not consented to the assignment as the agreement required. Further, in the penalty stage of the reasons, it also emerged that earlier there had been a finding by the Queensland Court of Appeal that the agreement Mr Brookfield relied upon was not the effective agreement under which the rent roll had been sold by Real Estate Now to

Blueprop. Instead, it was another agreement. The court here had not been told of this other decision at the time of its hearing. And while the court considered these events were not directly relevant matters to its decision, they did factor in its decision on the costs of the proceeding. These happenings were also deemed relevant to the circumstances in which the contravening took place.[18] This contributed to the court determining that the contravention was serious, and the penalty therefore needed to be significant enough to pose a real deterrent.[19]

The decision serves as a reminder to potential registrants of what they need to reasonably believe for their registration to be valid. Frivolous and vexatious registrations make one liable to civil penalty orders that have the potential to be of significant size given they are dependent on the number of days an improper registration remains on the register. The courts also now have a precedent against which can be assessed future contraventions and a precedent which emphasises the criticality of the protecting the register's integrity as a source of informed fair commercial dealing.

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Footnotes

1. Corporations Act 2001 (Cth), s 263(1), now repealed.
2. Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) (EM) 5.1; *Curo Capital Pty Ltd v Registrar of Personal Property Securities* [2020] FCA 1515.
3. Personal Property Securities Act 2009 (Cth) (PPSA), s 151(1); EM, above, 5.11.
4. Eg, PPSA, above, ss 178, 184 and 271. See also EM, above n 2, 5.29.
5. See, N Mirzai "Pollution on the PPSR — and what to do about it" (2015) 33(1) *Company and Securities Law Journal* 30.
6. D John and R Le Tessier "Invalid Security Interests — An Opportunity Missed" *Herbert Smith Freehills* 11 June 2024.
7. *Registrar of Personal Property Securities v Brookfield* [2024] FCA 29; BC202400572 at [79].
8. Attorney-General's Department *Review of the Personal Property Securities Act 2009* Final Report (2015) 208 and 214–16.
9. Above, at 216–18.
10. The exposure draft of the amended PPSA can be found at: https://consultations.ag.gov.au/legal-system/government-response-to-pps-review/user_uploads/compilation-of-reforms-to-the-pps-act-2009.pdf.
11. Above n 7.
12. Above n 7, at [48].
13. Above n 7, at [75].
14. Above n 7, at [93].
15. Above n 7, at [96].
16. Above n 7, at [108].
17. Above n 7, at [110].
18. Above n 7, at [111].
19. Above n 7, at [117].

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Covering the new bases when securing a loan or attempting recovery

Frank Downes *JURIS IT SERVICES*

All lenders love security and collateral, the more the better. Traditionally loans have been secured against real property and physical assets. With the growth of digital assets, lenders and their advisers must be aware of, and understand, this new asset class. At some point in the not-too-distant future the value of the digital estate will surpass the physical.

A digital asset is anything that exists only in digital form and has some form of value — either financial or sentimental. These assets are created, exchanged, and stored using physical devices like computers and mobile phones that are connected to the internet.

Digital assets do not exist in the physical world, rather they exist in a virtual world, in what is increasingly known as the "metaverse". Briefly, the metaverse is the next iteration of the internet and encompasses virtual currencies, worlds with virtual real estate, digital artworks and collectibles, and avatars — an individual's digital persona. It is rapidly evolving beyond gaming and virtual reality, and you should be aware that many borrowers will hold extensive and valuable assets in the metaverse. The creator of Facebook, Mark Zuckerberg has renamed his company to "Meta" to take advantage of this next wave of value creation.

Whilst many digital assets are valuable in a monetary sense, we will confine ourselves to cryptocurrency in this article.

Cryptocurrency is a form of digital currency that is created using cryptography and blockchain technology. Cryptography has been around since we first started writing and is simply communication between two parties that has been disguised or encoded to make it difficult or impossible for a third party to read or understand.

Think of the blockchain as a ledger, a good analogy is Old System title for land. In Old System a separate deed (block) is prepared every time the land is dealt with, whether that is a sale, a lease, a mortgage or subdivision. In order to establish ownership, you had to have an unbroken chain of deeds going back to when that land was first granted by the Crown.

In the blockchain each block (deed) contains a cryptographic hash (code or mark) of the previous block and an unalterable timestamp (land registry stamp) which proves the legitimacy and validity of that particular block (deed). This forms a chain linking each block to the one that came before it back to the creation of the first block (grant by the Crown).

Rather than residing on one computer (bundled collection of deeds) the blockchain ledger is stored on thousands of computers, hence it is a distributed ledger. Each computer has a copy of the ledger and will update the chain if the new block has the matching cryptographic hash or mark as the previous block that was received. The chain is only updated if a majority of the computers agree that the cryptographic hash or mark on the new block corresponds to the previous block. It is a very secure system, for someone to forge or alter that particular chain they have to have simultaneous access and control of at least half of all the computers storing the ledger.

There are hundreds, if not thousands of cryptocurrencies in existence, some of the most popular are — Bitcoin, Ethereum, Litecoin and Ripple. As part of conducting your due diligence you should include questions on what digital assets borrowers hold. If you are acting for lenders there are opportunities to assist cryptocurrency holders in leveraging their holdings through "staking", where they place their holdings in a type of escrow to underpin the value of a particular cryptocurrency. Staking plays a similar role to that of being a market maker for listed financial instruments.

Even though digital assets do not exist in the physical space there are ways to create physical security over digital assets by having custody of the "seed phrase" which is a series of words that allows for the access or recovery of cryptocurrency stored on the blockchain. There are numerous custodial and regulatory issues that would need to be considered but it is an option you should be aware of.

In the digital sphere physical assets are also known as Real World Assets, these are any assets that have value in the real world, they can be tangible — real property, works of art or intangible — IP, licenses. Real world assets are also referred to as being "off-chain". Moving these real-world assets "on-chain" represents enormous

opportunities for bankers, asset managers, investors and those that advise them. Tokenisation is the pathway to move physical assets into the metaverse. The rights or subset of rights to a particular asset can be represented by tokens governed by a smart contract sitting on the blockchain. This is where I see the real value of the blockchain, cryptocurrencies and the attention they have garnered to date, have clouded the real opportunities for lawyers and advisers where digital assets are concerned.

In the event of a default, you will need to recover the digital assets used as collateral. In one respect digital asset recovery is very simple as all transactions are located on a publicly available register — the blockchain. You only need to review the register data, as compared with searching through a variety of bank accounts and tracing transfer transactions through multiple entities.

The difficulty lies in identifying individuals and tying them to the holdings. The ledgers only record the cryptocurrency address (equivalent to a bank account number), the amount and the date and there is no centralised registry that ties the cryptocurrency address to the individual. However, specialists can analyse the history and flow of transactions over time and locate "off-ramps" where the holder has converted into fiat currency and re-entered the traditional banking system, or "on-ramps" where fiat currency is converted into cryptocurrencies.

There are several regulatory and legislative changes underway in this space, both nationally and internationally. Digital assets are in one respect "stateless" which leads to some interesting jurisdictional issues which we will explore in future articles.

There is one point to consider with respect to blockchain and the banking system. The blockchain provides a trust-less method of recording and proving ownership of an asset. This capability disintermediates banks and financial institutions, removing the need for a trusted intermediary to stand in between parties to a transaction. It is early days, but banking and financial services will undergo a transformation which will be as fundamental as when the Medici family entered banking in the 15th century.

Whilst digital assets are a new asset class many of the principles of physical assets still apply with some interesting twists and nuances, as lawyers focussed on banking and finance this will be an area ripe for opportunities in the years to come.

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Yerkey v Jones, Garcia v NAB and general principles of unconscionability in Equity — Wakim v Senworth — must you show "predatory" conduct or will "passive acceptance" of a benefit get you home?

Lee Aitken *AUSTRALIAN NATIONAL UNIVERSITY COLLEGE OF LAW*

The applicant, Mrs Wakim, a Lebanese woman, sought to set aside a default judgment entered on a guarantee she had signed with her husband. To do so, of course, she needed both to explain why she had failed to defend the matter initially (and why she delayed in seeking to set aside the judgment), and whether she had some reasonably arguable defence to advance ie, at least a reasonably arguable defence to have the default judgment set aside and permit the substantive dispute to go to trial.[1]

As to the first matter, she asserted that she trusted her husband to take care of matters when the claim was initially propounded and only became aware subsequently that he had not done so, when the judgment creditor sought to bankrupt her. As to her grounds of defence, she contended that the conduct of her husband at the time when the guarantee was entered engaged the "protection" for wives in Equity initially laid down in *Yerkey v Jones*[2] and subsequently confirmed by the High Court in *Garcia v National Australia Bank Ltd*[3] (*Garcia v NAB*). Central to any discussion is the Court of Appeal's recent decision in *Nitopi v Nitopi*[4] (*Nitopi*).

Equitable unconscionability?

The trial judge had drawn on the High Court decision in *Kakavas v Crown Melbourne Ltd*[5] (*Kakavas*) to determine whether equitable unconscionability[6] was available to Mrs Wakim. What needs to be shown according to *Kakavas*[7] is evidence that the plaintiff's benefit of the bargain was procured by an "unfair exploitation of the weakness" of the vulnerable defendant which *may require proof of a "predatory state of mind"*, and also for the related proposition that "the principle is not engaged by mere inadvertence, or even indifference, to the circumstances" of the defendant since this "falls short of the victimisation or exploitation with which the principle is concerned" (emphasis added).

However, as Griffiths AJA pointed out,[8] the decision in *Kakavas* turned on its own facts. In particular, *Kakavas* involved just two parties viz the casino, and the problem gambler; here, the arrangement being scrutinised was tripartite — it involved Mr and Mrs Wakim, and the financier whose debt was being guaranteed. Secondly, as Griffiths AJA noted in his judgment[9] that both *Thorne v Kennedy*[10] (*Thorne*) and *Stubbings v Jam 2 Pty Ltd*[11] (*Stubbings*) suggest that the propositions stated in *Kakavas*[12] may require some modification. Thus, in *Thorne*, the plurality said:

> ... 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 [citing *Amadio* at 462] [emphasis added].[13]

In *Stubbings,* the plurality made the point even more directly:

> It may be accepted that his Honour's findings as to Mr Jeruzalski's state of mind did not rise to an unequivocal finding of actual knowledge on the part of Mr Jeruzalski that the appellant would inevitably lose his equity in his properties by taking these loans; but *a finding in such terms was not essential to the appellant's case for relief. For a court of equity, the question is whether Mr Jeruzalski's appreciation of the appellant's special disadvantage was such as to amount to an exploitation of that disadvantage* [emphasis added].[14]

Commercial Bank of Australia v Amadio

In *Commercial Bank of Australia v Amadio*[15] (*Amadio*) both Mason and Deane JJ noted[16] that equitable unconscionability may exist even if the stronger party does not have "actual knowledge" of the weaker party's "special disadvantage" so long as the stronger party should have made "appropriate inquiries" to determine the weaker party's ability to protect his or her own interests.

The tension in the decisions between *Kakavas* and *Thorne* was discussed by Bell CJ in *Nitopi* who concluded that "the only way to reconcile *Kakavas* and *Thorne* in relation to questions of knowledge is that *Kakavas* must be understood as standing as authority only for the negative proposition that constructive notice is insufficient but not as standing for the additional proposition that constructive knowledge of a special disadvantage in the sense I have explained is also insufficient. This reading has recently been proffered by Y K Liew and D Yu in their article, "The Unconscionable Bargains Doctrine in England and Australia: Cousins or Siblings?"[17]

(If that view be correct, then a trinity of Western Australian Court of Appeal decisions[18] on the topic may be in error.)

It would seem that constructive knowledge of both the existence and effect of the special disadvantage would suffice.[19] In *Nitopi*,[20] White JA also noted that the plurality in *Stubbings* did not address the distinction between constructive knowledge and constructive notice but did not support the notion that constructive notice would suffice.[21]

Yerkey v Jones

In *Yerkey v Jones*, Sir Owen Dixon noted first, that there may be a case of actual undue influence by a husband over his wife, and secondly, where there is no undue influence but there is a failure to explain adequately and accurately the suretyship transaction which the husband seeks to have the wife enter for the immediate economic benefit not of the wife but of the husband, or the circumstances in which her liability may arise.[22]

The leading book on Equity makes the same point.[23]

> [15–150] The equitable doctrine extends to cases where the party exerting the undue influence was not the direct recipient of the disponor's property. It extends to set aside transactions involving third parties in the following capacities: . . . where Y under the influence of X enters into obligations to Z which will be to the benefit of X, for example, where Y guarantees the bank overdraft of X . . .; it would appear that Y's rights will persist against all but a bona fide purchaser for value without notice . . .
>
> There has been much litigation concerning the position of financiers who take a guarantee [or] other security from a third party . . . If the financier had actual knowledge of what was happening between the debtor and the surety (in a case of "actual" undue influence) . . . *or ought to have been put upon inquiry that impropriety might occur,* then the creditor is subject to the equitable rights of the surety. [15–155] In Australia, it will be unconscionable for the financier to enforce the security if it has not itself explained the situation to the third party, and does not know that an independent person has done so if the financier knows that there was a relationship of trust and confidence between debtor and third party [emphasis added].[24]

Further inquiry necessary on the facts

Having considered these authorities, Griffiths AJA concluded that the trial judge may have taken too clear a view of an area of law which is still developing.[25] Thus, as a matter of first principle, a decision on whether conduct was "unconscionable" can only be properly made after a full and detailed analysis of the facts at a final hearing. As a matter of procedure, a default judgment is given without the benefit of all the interlocutory processes available to augment the applicant's case, and to demonstrate a relevant state of mind.[26] In a detailed analysis, Griffiths AJA concluded that the trial judge had placed the need to demonstrate "predatory conduct" was an "essential element" of equitable unconscionability.[27]

"Predatory conduct" is not necessarily required

Griffiths AJA then set out the relevant dicta which demonstrates that even the "passive acceptance" of a benefit by a stronger party may justify relief, without the need for overt conduct.[28]

His Honour observed:

> (a) The statement of the plurality in *Thorne* at [38], to the effect that unconscionable conduct involves the unconscientious taking of advantage by a stronger party of a weaker party's special disadvantage, which may be described as requiring "victimisation", "unconscientious conduct" or "exploitation". The cases cited in support of the term "victimisation" include a reference in [fn] 79 to *Bridgewater v Leahy* . . .
>
> (b) The plurality's reference in *Bridgewater* at [76] to the Privy Council's decision in *Hart v O'Connor* . . ., where unconscionable conduct attracting equitable relief was described as "victimisation, which can consist either of the active extortion of a benefit *or the passive acceptance of a benefit in unconscionable circumstances*" . . .
>
> (c) Bell CJ's statement in *Nitopi* at [28], where he described the concept of "victimisation" in this context as not being a narrow concept and as potentially taking the form of the "passive acceptance or retention of a benefit". The Chief Justice said at [32] (to similar effect, see Ward P at [101]) (emphasis added):
>
> It may be that the unqualified observations in *Kakavas* as to the requirements of proof of a predatory state of mind and that the transaction in question be caused or procured by unconscientious conduct are properly to be confined to a circumstance involving apparently arms' length commercial transactions and not gifts. Of course, where a gift is so procured, equity may also intervene, as was the case in Louth. However, the converse does not follow, that is to say, *a gift or transaction may still or also be impeached where unconscionability lies not in the predatory procuring of the gift but in its retention in all the circumstances of the particular case. Bridgewater was a case in point. The majority in that case stated that "[t]he equity to set aside the deed [of forgiveness] may be enlivened not only by the active pursuit of the benefit it conferred but by the passive acceptance of that benefit"*: at [122] [emphasis in original].[29]

The Contracts Review Act

Although there was considerable overlap in relation to the facts to support both the unconscionability claim, and the Contracts Review Act 1980 (NSW) (CRA) claim, the two "defences" were not completely coterminous. In particular, is it possible in advancing a CRA claim to establish the "unjustness" of the contract "by reference to matters of which the counterparty was ignorant when the contract was entered"?[30] It may be that such knowledge is not required, even though it will possibly be relevant when assessing the relief to which the applicant is ultimately entitled.

Conclusion

The basal reasoning suggests that it will be difficult to obtain summary judgment if a defendant raises equitable unconscionability and its sibling, *Yerkey v Jones* in the appropriate circumstances. This is most important tactically in banking litigation involving spouses where one has guaranteed the debts of the jointly conducted enterprise. It means that in most cases, the possible bases for relief will require detailed analysis after interlocutory investigative processes have been exhausted — this in turn may induce the plaintiff financier to resolve the matter before a final hearing.

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Footnotes

1. See *Pham v Gall* (2020) 102 NSWLR 269; [2020] NSWCA 116; BC202005591 at [99]–[102] per Payne JA, Leeming and McCallum JJA agreeing). In the applicant's favour was the fact that the trial judge gave an ex tempore judgment and failed to take into account the course of authority after the High Court's decision in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; 298 ALR 35; [2013] HCA 25; BC201302838 (*Kakavas*).
2. *Yerkey v Jones* (1939) 63 CLR 649; 13 ALJR 84; [1939] HCA 3; BC3900003. For an interesting recent analysis of whether a company may be able to rely upon "unconscionability" due to the extreme age of the controlling director see the detailed discussion by Davies J in *First Mortgage Managed Investments Pty Ltd v Dial-A-Blind* [2024] NSWSC 92; BC202402276.
3. *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; 155 ALR 614; [1998] HCA 48; BC9803588 (*Garcia v NAB*). I have always followed closely the developing law flowing from *Yerkey v Jones* and *Garcia v NAB*. I was junior counsel for the appellant, Mrs JB Garcia, in the High Court, in the latter case, led by Australia's greatest appellate advocate, David Jackson QC, now sadly recently deceased, and instructed by Minter Ellison and a maestro of banking and insolvency litigation, Lindsay Powers. My own role in the case was comparatively minor, but my late mother did drive David and Lindsay to the Grand Hyatt Canberra on a scorching day in March before the hearing when there was a "taxi strike" in Canberra.
4. *Nitopi v Nitopi* (2022) 109 NSWLR 390; 405 ALR 470; [2022] NSWCA 162; BC202208256.
5. *Wakim v Senworth Capital Pty Ltd* [2024] NSWCA 102; BC202405806 at [50] per Griffiths AJA discussing the trial judge's use of the High Court's reasoning in *Kakavas*, above n 1, at [161].
6. Note also the possibility of a claim which seeks relief for unconscionability under the "unwritten law" (Australian Consumer Law (ACL) s 20(1); Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) s 12CA; or the statutes themselves (ACL, s 21(1); ASIC Act, s 12CB).
7. *Kakavas*, above n 1.
8. Above n 5, at [51].
9. Above n 5, at [52]–[53].
10. *Thorne v Kennedy* (2017) 263 CLR 85; 350 ALR 1; [2017] HCA 49; BC201709420.
11. *Stubbings v Jam 2 Pty Ltd* (2022) 276 CLR 1; 96 ALJR 271; [2022] HCA 6; BC202201755.
12. See *Kakavas*, above n 1, at [161].
13. Above n 10, at [38].
14. Above n 11, at [44].
15. *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; 46 ALR 402; [1983] HCA 14; BC8300072.
16. Above, at 467 and 479, respectively.
17. Y K Liew and D Yu "The Unconscionable Bargains Doctrine in England and Australia: Cousins or Siblings?" (2021) 45(1) *Melbourne University Law Review* 223.
18. *Mavaddat v HSBC Bank Australia Ltd (No 2)* [2016] WASCA 94; BC201604473 at [79]; *Serventy v Commonwealth Bank of Australia (No 2)* [2016] WASCA 223; BC201611320 at [18] and *Dewar v Ollier* [2020] WASCA 25; BC202001292 at [178].
19. See for example, Henry J in *Commercial N Pty Ltd v Huang* [2024] NSWSC 23; BC202400665 at [278], holding that a compounding monthly interest rate might attract relief: at [304]. And see further, the detailed discussion and summary by Henry J in *van Camp v Bellhealth Pty Ltd* [2024] NSWSC 7; BC202400361 at [214]–[224] in deciding whether the beneficiary of a binding death beneficiary notice in relation to a large superannuation fund had been guilty of overreaching conduct.
20. Above n 4, at [199].
21. Above n 5, at [58] per Griffiths AJA.
22. See *Garcia v NAB*, above n 3, at [23] cited by Griffiths AJA in above n 5, at [60].
23. J D Heydon, M J Leeming and P G Turner *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* 5th ed, LexisNexis Butterworths Australia, 2015.
24. Above n 5, at [61].

25. Above n 5, at [62]–[63].
26. Above n 5, at [68].
27. Above n 5, at [67].
28. Above n 5, at [68].
29. Above. See also *Bridgewater v Leahy* (1998) 194 CLR 457; 158 ALR 66; [1998] HCA 66; BC9805443 at [76]; *Hart v O'Connor* [1985] AC 1000; *Lopwell Pty Ltd v Clarke* [2009] NSWCA 165; BC200907370 at [52] per Macfarlan JA (Ipp and Campbell JJA agreeing).
30. Above n 5, at [69] per Griffiths AJA.

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Understanding syndicated loans and multi-tiered financings — Part 2

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Syndication continues to grow in popularity among lenders. This article will explain the significant legal issues surrounding such transactions. Due to the rapid growth in volume and the escalating size and complexity of mortgage loans and the projects securing such loans, lenders have been forced to further develop methods to adequately diversify their risk. While most mortgage loans are sold into the commercial mortgage-backed securitization (CMBS) market, mortgage loans held for syndication still represent a significant share of the loans made by many real estate lenders. The syndication market provides mortgage originators with an opportunity to create a customized lending product which extends beyond the standard requirements of the rating agencies. The syndication market has recently gained significant momentum for "value-added" lenders who are willing to:

- *incur above-average risk by placing loans in higher-leveraged loan positions in the capital stack or*
- *provide financing outside a conduit structure for construction projects, land acquisitions, and/or lease-up projects*

Information rights of co-lenders and notice provisions

Generally, the primary loan documents will require third parties and the borrower to give notices with respect to the loan to the agent lender rather than to each of the co-lenders directly. The primary and/or syndication loan documents typically address the types of information that the agent lender is obligated to provide to the co-lenders and the timeframes within which the obligations must be carried out. The co-lenders often negotiate for rights to as much information as possible relating to the loan, such as notices of borrower default, recording information and copies of all loan documents. The agent, however, will prefer to keep the obligation to provide information to a minimum by negotiating to exclude obligations to provide such information altogether or limit the obligation to instances in which a co-lender requests such information.

Liability and reliance on agent lenders

Agent lenders usually limit liability to co-lenders under the primary and syndication loan documents to willful misconduct or gross negligence resulting in actual damages. The agent lender is usually held to the standard that it would use in its own transactions. The courts usually accept these provisions and do not read a fiduciary relationship into the agreements between agent lender and participants. Most primary and/or syndicated loan documents provide that agent lenders have actual knowledge of a borrower's default. Some very large agent lenders with far-flung operations are concerned about being deemed to have knowledge because of employees' actual knowledge. Therefore, they seek to limit their liability to those defaults of which they have received written notice from either the borrower or their co-lenders. Because a borrower will not ordinarily give a lender notice of its own default, it is unlikely that the co-lender will obtain knowledge of a default before the agent lender. While it might be fair to limit imputed knowledge of the borrower's default to employees working on the subject loan transaction, large agent lenders rarely agree to that compromise. Rarely do prospective co-lenders terminate negotiations over this point.

In order to avoid liability to co-lenders, agent lenders require that co-lenders perform their own due diligence and credit analysis with the information provided by the agent lender. To memorialize the lack of co-lender reliance on the agent lender's analysis, the agent lender will typically require representations from each co-lender that such co-lender has not relied on the financial analysis of the agent lender and that the co-lender has done its own credit analysis and made its own decision with respect to joining the syndicate group. Therefore, the agent lender is usually protected when making day-to-day decisions with regard to a real estate loan. Liability issues do arise for an agent lender if a real estate loan requires specific skills, and the agent lender explicitly commits to apply such skills in administering the loan under the primary and/or syndication loan documents.

Decision-making

The agent lender will want the maximum amount of freedom possible with respect to administering the loan and avoiding interference or delay due to co-lender involvement in the decision-making process. For example, the agent is usually granted the right to make protective advances without co-lender consent (ie, taxes, insurance and ground lease payments) to maintain the value of the collateral in case of emergency. Co-lenders, on the other hand, will want some degree of control over key issues such as material amendments to the loan documents (eg, changes in the interest rate applicable to the loan or the maturity date of the facility or increases in the facility amount). Co-lenders also want control over the management of the collateral, decisions regarding acceleration of the loan after an Event of Default, releases of any collateral, actions that affect the value of the collateral and appointments of successor agent lenders. Co-lenders are not likely to request control over non-material issues because they also have an interest in distancing themselves from the burdens of administering the loan. Therefore, negotiations over the granting of authority to the agent to act on behalf of the co-lenders and over the decisions that will require co-lender consent are likely to be limited to material decisions affecting the loan and the collateral.

The borrower will only want to deal with one lender for payments and other day-to-day loan administration. For more material decisions and approvals, however, loan syndication documents might require that all or a certain percentage of the participant lenders approve an action before the borrower may act, which can be a time-consuming process, causing the borrower unwanted delay. To minimize the likelihood of future issues arising within the syndicate group with respect to decision-making, it is imperative to select participant lenders with adequate risk tolerance and expertise for the subject real estate project.

Primary and syndication loan documents may distinguish between decisions requiring unanimous co-lender consent and those only requiring consent from a certain percentage of the syndicate group. Again, the agent lender will generally prefer a lesser percentage of co-lender consent, while the co-lenders will want their votes to count on major decisions. Typically, all decisions regarding the extension of a maturity date, reduction in the interest rate, payment of debt service and the release of collateral require unanimous co-lender consent. Other major decisions, such as approval of changes in the controlling interest in the borrower, a borrower's request for change orders in construction loans above certain thresholds, a borrower's request to enter into all leases with respect to the mortgaged property and any transfers of subordinate loan interests to another lender can be tied to a qualified majority of the syndicate lenders. The calculation of the majority percentage is usually based on the individual distribution of participant lenders in the bank group and their respective money at risk rather than on a headcount of lenders. The percentage of lenders required should be more than 51% of the syndicate group but typically is set at 60% or 66.67% of the aggregated amounts of all lenders.

In loan structures involving both senior lenders and subordinate lenders, the lender relationship may be arranged such that only senior lenders have the right to be involved in decision-making. The documentation for such structures typically limits the subordinate lender's right to cure existing borrower defaults and the right to buy out the senior lender to gain control of the mortgage collateral. The subordinate lender's motivation and incentive to take control in default situations varies to the extent the current market value of the mortgage collateral still supports the subordinate lender's subordinate position. A/B loan structures may allow for a shift in control of decision-making to the subordinate lender once a default with respect to the senior obligation is cured. In such cases, this shift is only valid for a period during which the subordinate lender can pursue foreclosure of the real estate and pay off the senior lender.

When a borrower makes a request which requires the consent of co-lenders, the agent lender must process the request before submitting the issue to the syndicate group for approval. The co-lenders then consider the information provided along with any other documentation and due diligence items that may be involved before informing the agent lender of its decision. To limit the amount of time between a borrower's request and the agent lender's response when co-lender consent is involved, agent lenders will push to limit the amount of time that the co-lenders have to consider the request and related information. Oftentimes, the primary and/or syndication loan documents will include a provision deeming consent given after a certain number of days if no co-lender response is received by the agent lender. Co-lenders will negotiate for as long a time period as possible to consider the issue.

With little existing law in this area and with the agency provisions of the agreements rarely addressing issues in detail, solutions frequently depend on the judgment and consensus of the parties and their lawyers. The courts have typically deferred to the language in agreements among lenders, in particular the decision-making procedures they establish. All parties, therefore, must understand that such agreements will likely form the main, if not the only, foundation for legal judgments in the case of later disputes. The decision-making

processes should be considered and established carefully.[1] Nevertheless, it is incumbent upon the lending group's decision-making party or parties to respect the implied covenant of good faith and fair dealing. The interests of other members of the lending group should be factored in and the decision-making party should keep all members apprised of its actions or potential actions. By keeping the decision-making process transparent and by building consensus where possible, a lending group can head off most potential conflicts. Often, a lending group will enlist a co-agent to review and make objective recommendations on certain substantive decisions. However, in cases where the decision-making authority acts contrary to the co-agent's recommendations, this may be used as damaging evidence in future conflict issues.[2]

Finally, the lending group should bear in mind that once it becomes a property owner, it will have to make all decisions associated with real estate ownership — leasing, management, tenant terms, ownership structure and so forth.[3]

Inter-creditor agreements

Some syndicated real estate loans involve senior and subordinate tranches within a facility that are secured by the same mortgage (A/B loan structures). Because the senior lenders and the subordinate lenders share the same collateral, the respective priorities and rights of each group of lenders must be set forth in an agreement between such parties. When various classes of lenders are involved in the capital stack, multiple inter-creditor agreements may be required. Because the priority and control over the claim against the mortgage collateral are instrumental to each lender's underwriting, the inter-creditor agreement is often heavily negotiated.

Likewise, in a multi-tiered financing with mortgage and mezzanine debt (and sometimes with multiple levels of mezzanine debt), the sole document governing the relationship between the two classes will be the inter-creditor agreement. Given that this document acts to grant, as well as to curb the rights of each class vis-à-vis the borrowers and the collateral, the inter-creditor agreement is a hotly contested document. Real estate professionals should exercise great care when negotiating an inter-creditor agreement.

Generally, the senior lenders will agree to provide notice to the subordinate lenders of a borrower default either:

- contemporaneously with delivery of such notice to borrower or
- at the expiration of borrower's cure period

How much time the senior lenders will afford the subordinate lenders to cure a default remaining uncured by borrower before the senior lenders accelerate the loan or otherwise exercise remedies is heavily negotiated. Subordinate lenders should attempt to bifurcate the cure periods granted by senior lenders into two distinct categories: monetary defaults and non-monetary defaults.

When negotiating the monetary cure period terms, subordinate lenders should seek to be released from the payment of late charges or default interest in connection with their cure of any monetary default. Senior lenders, on the other hand, should limit the number of times a subordinate lender can cure a default by a borrower with respect to the payment of debt service.

When dealing with the duration of non-monetary cure periods, subordinate lenders will want a cure period that is long enough for them to effect a cure. Mezzanine lenders will also want to negotiate additional time with respect to non-monetary defaults that are of a nature that cannot be cured without the ownership of the equity. In such a case, mezzanine lenders should seek enough time under the agreement as is necessary to gain ownership of the equity and to cure such a default. Senior lenders often allow such additional periods provided there is no material impairment to value or use of the underlying collateral.

If the senior lenders commence foreclosure proceedings, accelerate the loan or if the senior borrower is a debtor in an insolvency proceeding, the senior lender will allow the subordinate lenders the opportunity to acquire the senior loan. The purchase price will always be at least equal to the sum of the principal balance at par plus accrued but unpaid interest. However, in portfolio loan documents, the senior lenders will often seek to include default interest, late fees, breakage charges, yield maintenance and the like.

In securitized transactions and multi-tiered financings, the convention seems to be that such additional items are foregone by the senior lenders. Still, senior lenders would be well advised to prevent the existence of an open-ended option to buy the senior loan at par. Senior lenders can shorten the purchase option by making default interest, late charges and other fees part of the purchase price if the subordinate lender fails to purchase the senior loan within 90 days after notice of a purchase option event.

If the borrower becomes involved in a bankruptcy proceeding, the senior lenders will generally allow the subordinate lenders to file a claim in that proceeding (in the case of mezzanine lenders, only to the extent such a claim is necessary for the mezzanine lender to preserve or realize on the mezzanine lender's collateral) but will rarely allow the subordinate lenders to vote on a plan of reorganization or otherwise act upon their claim. In fact, in most instances, the senior lender is afforded the opportunity to vote on behalf of the subordinate lenders

with respect to any proposed plan of reorganization (but only if the proposed plan would result in the senior lender being "impaired" (as defined in the US Bankruptcy Code).

While a default under the senior loan documents invariably constitutes a default under the subordinate loan documents, the reverse is almost never the case. When a default occurs under the subordinate loan documents, the senior lenders may allow the subordinate lenders to foreclose upon their collateral but any third-party transferee at such foreclosure sale (or if the subordinate lenders bid the collateral in or obtain a deed-in-lieu of foreclosure, any transferee thereof) must generally meet certain eligibility requirements negotiated into the inter-creditor agreement.

By empowering senior lenders at the expense of subordinated lenders' ability to influence or oppose proposals, inter-creditor agreements reduce decision-making costs in the event of default. However, it is possible for an investor to exploit this imbalance, increasing its own return by damaging other creditors. When considering inter-creditor agreements that waive or assign bankruptcy rights, courts are forced to weigh the benefits to the agreement's signatories against the potential for harm to subordinated creditors and non-signatories.[4]

Second-lien lenders face a host of other considerations unique to their status. In particular, they may become a "silent second" by agreeing contractually to refrain from exercising some or all of their rights as secured creditors. The key elements usually included an inter-creditor agreement which pertains to "silent second" terms are as follows:

- prohibitions (or limitations) on the right of the second lien holders to take enforcement actions, with respect to their liens (possibly subject to time or other limitations)
- agreements by the holders of second liens not to challenge enforcement or foreclosure actions taken by the holders of the first liens (possibly subject to time or other limitations)
- prohibitions on the right of the second lien holders to challenge the validity or priority of the first liens
- waivers of (or limitations on) other secured creditor rights by the holders of second liens[5]

Equally, mezzanine lenders face a host of other issues which are unique to their status. Perhaps the most heavily negotiated and most important provision of the multi-tiered financing inter-creditor agreement is the right of a mezzanine lender to pursue a claim against a guarantor, which is also the guarantor of the senior loan. Senior lenders will often prohibit the mezzanine lender from pursuing a claim against a common guarantor while the senior loan is outstanding, or in the alternative, will require the mezzanine lender to turn over to the senior lender the proceeds of any judgment the mezzanine lender obtains from such common guarantor. Mezzanine lenders, however, should seek to eliminate any blanket prohibition on pursuing claims. They should also limit the requirement to turn over proceeds to those instances:

- when the senior lender is simultaneously pursuing a claim against the common guarantor or
- when the senior lender has notified the mezzanine lender that it has a claim against the common guarantor and thereafter pursues such claim within a negotiated time period

Lastly, inter-creditor agreements will include a fair amount of deal-specific provisions. Such deal-specific provisions generally include the right of a subordinate lender to exercise a senior borrower extension option, rights with respect to ground leases and provisions relating to future funding obligations. The provision that receives the most deal-specific language is often the modification section of the inter-creditor agreement. Since any increase in obligations on the part of a borrower of either class of debt can impact the owner of the other class of debt, the modification section of the inter-creditor will prevent both the senior and the subordinate lenders from modifying key terms of their respective loan agreements without the consent of the other. Such key terms often include cash management or cash sweep terms, transfer provisions, interest rates and other payment terms.

Defaults and payment priorities

The syndication documents typically specify both a pre-default and post-default waterfall. For A/B loan structures or senior or subordinate note structures, the senior group will be paid first. The subordinate group has taken on more risk by being subordinated to the senior group and will not be paid until after the senior group is fully repaid. Therefore, the subordinate group is usually entitled to collect a higher interest rate in exchange for taking on such risk. Losses of principal and interest due to a default can also be allocated among the senior and subordinate groups. In most cases, the losses will be allocated first to the subordinate group and then to the senior group.

Before an event of default, the agent lender will generally receive its administrative and servicing fees as well as reimbursement for its legal or other out-of-pocket expenses before reimbursement for further payments (such as protective advances, interest and principal payments) are distributed to lenders. Interest is paid

before principal is repaid because the primary interest of all lenders is to have the debt paid current. If there are tranches among the lenders, the senior lenders will negotiate to have their interest and principal paid before any payments are distributed to the subordinate lenders because being paid first is consistent with their lower level of risk.

In some cases, the subordinate lender can negotiate for priority of its interest payments over the principal payments to the senior lender. Such concessions are justifiable in specific transactions in which the borrower does not agree to an accrued interest feature as long as no event of default exists. Such accrued interest rate features shift the multiple interest payments during the term of the loan to a one-time interest payment at the maturity date. This is usually granted in exchange for the calculation of a substantially increased interest rate throughout the term of the loan.

After an event of default occurs, the senior lenders will be even more likely to insist that their interest and principal are paid before subordinate lenders can collect any payments. Administrative and servicing fees (including special servicing fees), collection and other out-of-pocket expenses of the agent lender will be paid before default interest, late charges, regular interest and principal to the senior lenders. Subsequently, the interest and principal are paid, all before costs, expenses, fees and principal of the subordinate group are paid.

Although the lead lender typically has wide latitude in addressing loan defaults, limitations still exist. Certain provisions of the loan documents may require a prescribed vote before the lead lender can act. In other cases, remedies may need to be effected within a certain time period lest the lead lender be deemed to have, through inaction, waived enforcement rights or accepted a de facto loan modification. Participation and co-lending agreements may also restrict the lead lender's options after foreclosure occurs.[6] During this period, several possible "outs" may allow the lead lender to cede its lead lender duties, including a purchase option or a buy-sell option.[7] Each specific contract must be considered and interpreted to determine what, if any, approvals may be needed before action can be taken. Examining relevant court cases, such as *New Bank of New England v Toronto Dominion Bank*, one paper argues that the US case law preserves unaltered the contractual rights of the creditors among themselves during a debt restructuring process. A creditor's right to enforce its claim against the borrower is not affected by the problems such action may cause other lenders. Similarly, the rights of the lending group's majority are not impacted by an implicit obligation to a minority lender or its interests.[8]

Lender default

When one co-lender fails to perform its obligation to fund its percentage of the loan to the borrower, it has breached its agreement with the borrower (if a direct or regular participant) or with the other lenders (if an indirect participant). In lending relationships with additional funding obligations, such as construction loans or lease-up loans, the mechanism for dealing with a defaulting lender must be clearly set forth in the primary and/or syndication loan documents. Some loans are structured to allow the non-defaulting lenders to advance the defaulting lender's share in exchange for the benefits associated with that advance. In some cases, defaulting lenders must take a step down in priority with respect to distribution of payments and fees received from the borrower. In addition, some primary and/or syndication loan documents state that a defaulting lender loses its right to have its vote counted in any decision requiring the consent of co-lenders.

Summary

As syndication and multi-tiered financings continue to grow in popularity among lenders and as the number of syndicated and multi-tiered loans continue to rise, lenders and their counsel must make themselves familiar with the legal issues surrounding such transactions. Particular attention should be given, in the case of syndicated loans, to the relationship between the lenders within the syndicate group, especially between the agent lender and the participant lenders and in the case of the multi-tiered loans, to the relationship between the senior and the subordinate lenders set forth in the inter-creditor agreement.

General Editor's note

The full article "Understanding syndicated loans and multi-tiered financings" by Gary A Goodman, Gregory Fennell and Jon E Linder was first published in the Australian Property Law Journal ((2023) 31 APLJ 50 (1)). The article is republished in the Australian Banking and Finance Law Bulletin with the author's permission. This is Part 2 of a 2-part article series. In Part 1, the authors examined the driving forces behind loan syndication, participation structures for real estate loans, matters relating to documenting syndication relationships, and considerations relevant to assignment and assumption agreements. In this Part 2, the authors explore information rights of co-lenders and notice provisions, liability and reliance on agent lenders, the decision-making process, inter-creditor agreements, default and payment priorities and lender default.

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Footnotes

1. E M Schiller *Co-Lender Issues on Defaulted Loans* ACREL Paper (2010) www.acrel.org/resource/collection/A8884E11-BB06-403B-A32B-B5035F9613C3/Schiller_-_S10-Syndicated_Loans_in_Default Special_Issues_ for_Borrowers_and_Lenders.pdf.
2. Above.
3. Above n 1.
4. E R Morrison "Rules of Thumb for Intercreditor Agreements" (2015) 2 *University of Illinois Law Review* 721.
5. N Cummings and K A Davenport "A Primer on Second Lien Term Loan Financings" (2004) 19 *Commercial Lending Review* 9.
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7. H M Gevondyan "Keys To Co-Lending Agreements In Commercial RE" *Law360* 16 May 2012.
8. M Gruson "Restructuring Syndicated Loans: The Effect of Restructuring Negotiations on the Rights of the Parties to the Loan Agreement" (2004) 3 *International Law: Revista Colombiana de Derecho Internacional* 322 www.redalyc.org/articulo.oa?id=8240031.

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Lawful act economic duress in English and Australian law

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The concept of economic duress

In Australian law there is ongoing uncertainty as to the boundaries between duress, undue influence and unconscionable conduct. Indeed, there is a real question as to whether the doctrine of economic duress forms part of Australian contractual jurisprudence. Historically, a contract induced by a threat to life or limb was void under the rules of the common law which were subsequently expanded to include duress to goods. However, in *Universe Tankships Inc of Monrovia v International Transport Workers' Federation (The Universe Sentinel)*[1] (*Universe Sentinel*), the House of Lords recognised economic duress as a part of English law. More recently, the UK Supreme Court in *Pakistan International Airline Corp v Times Travel (UK) Ltd*[2] (*Pakistan International Airline*) characterised economic duress as an equitable doctrine founded on unconscionable conduct to be distinguished, however, from unconscionable conduct as explained by Mason J in *Commercial Bank of Australia Ltd v Amadio*[3] (*Amadio*). Importantly, the Supreme Court also held that a contract induced by a threat of a lawful act fell within the rubric of economic duress but within narrow limits. Lord Burrows in his separate judgment adopted a less restrictive view of the doctrine.

Pakistan International Airline is considered in detail below.

Returning to the *Universe Sentinel*, Lord Diplock in discussing the development of economic duress in English law, said:

> It is, however, in my view crucial to the decision of the instant appeal to identify the rationale of this development of the common law. It is not that the party seeking to avoid the contract which he has entered into with another party, or to recover money that he has paid to another party in response to a demand, did not know the nature or the precise terms of the contract at the time when he entered into it or did not understand the purpose for which the payment was demanded. The rationale is that his apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind. It is a rationale similar to that which underlies the avoidability of contracts entered into and the recovery of money exacted under colour of office, or under undue influence or in consequence of threats of physical duress.[4]

Two points arise out of the above passage. First, economic duress involves the imposition of illegitimate pressure which vitiates the consent of the victim. Secondly, the avoidability of a contract on the ground of economic duress has an equitable foundation akin to the doctrine of undue influence.

His Lordship in analysing the relationship between economic duress and tort observed:

> The use of economic duress to induce another person to part with property or money is not a tort per se; the form that the duress takes may, or may not, be tortious. The remedy to which economic duress gives rise is not an action for damages but an action for restitution of property or money exacted under such duress and the avoidance of any contract that had been induced by it; but where the particular form taken by the economic duress used is itself a tort, the restitutional remedy for money had and received by the defendant to the plaintiff's use is one which the plaintiff is entitled to pursue as an alternative remedy to an action for damages in tort.

Lord Scarman shared Lord Diplock's view that economic duress, if proved, vitiates the consent of the victim. His Lordship said:

> It is, I think, already established law that economic pressure can in law amount to duress; and that duress, if proved, not only renders voidable a transaction into which a person has entered under its compulsion but is actionable as a tort, if it causes damage or loss: *Barton v Armstrong* [1976] AC 104 and *Pao On v Lau You Long* [1980] AC 614. The authorities upon which these two cases were based reveal two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted. There must be pressure, the practical effect of which is compulsion or the absence of choice. Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him. This is the thread of principle which links the early law of duress (threat to life or limb) which later developments when the law came also to recognise as duress first the threat to property and now the threat to a man's business or trade. The development is well traced in Goff and Jones, the *Law of Restitution* 2nd ed (1978), [Ch] 9.

After referring to the dissenting joint reasons of Lord Wilberforce and Lord Simon in *Barton v Armstrong*,[5] his Lordship said:

> As the two noble and learned Lords remarked, in life, including the life of commerce and finance, many acts are done "under pressure, sometimes overwhelming pressure": but they are not necessarily done under duress. That depends on whether the circumstances are such that the law regards the pressure as legitimate.
> In determining what is legitimate two matters may have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case. And so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support.
> The origin of the doctrine of duress in threats to life or limb, or to property, suggests strongly that the law regards the threat of unlawful action as illegitimate, whatever the demand. Duress can, of course, exist even if the threat is one of lawful action: whether it does so depends upon the nature of the demand. Blackmail is often a demand supported by a threat to do what is lawful, e.g. to report criminal conduct to the police. In many cases, therefore, "What [one] has to justify is not the threat, but the demand . . . ": see per Lord Atkin in *Thorne v Motor Trade Association* [1937] AC 797 at 806.

An important point made by Lord Scarman is that where a threat consists of a lawful act the focus of the enquiry is on the nature of the demand, a point subsequently developed by Lord Burrows in *Pakistan International Airlines*.

Economic duress in Australian law

In *Thorne v Kennedy*[6] the plurality made the following observations on duress:

> The vitiating factor of duress focuses upon the effect of a particular type of pressure on the person seeking to set aside the transaction. It does not require that the person's will be overborne. Nor does it require that the pressure be such as to deprive the person of any free agency or ability to decide. The person subjected to duress is usually able to assess alternatives and to make a choice.
> . . .
> Historically, the primary constraint upon an action based on duress was the threats that were recognised as sufficient for an action. The early common law rule was that the duress which was necessary to set aside an agreement required an unlawful threat or conduct in relation to the person's body, such as loss of life or limb. Even duress in relation to a person's goods was not a basis upon which an agreement could be avoided at common law, although it was a basis for restitution of a payment of money. The abandonment of this common law restriction introduced a difficult question. This question is whether duress should be based on any unlawful threat or conduct or, alternatively, whether other illegitimate or improper, yet lawful, threats or conduct might suffice. In 1947, Dawson described that question as one "which has chiefly arrested the modern development of the law of duress".[7]

However, the court not having received detailed submissions on lawful act economic duress did not consider it necessary to provide an opinion on whether recognition of such a principle would add anything to the equitable doctrine of unconscionable conduct as formulated by Mason J in *Amadio*.

As to the relationship between the equitable doctrines of undue influence and unconscionable conduct the plurality noted:

> Although undue influence and unconscionable conduct will overlap, they have distinct spheres of operation. One difference is that although one way in which the element of special disadvantage for a finding of unconscionable conduct can be established is by a finding of undue influence, there are many other circumstances that can amount to a special disadvantage which would not establish undue influence. A further difference between the doctrines is that although undue influence cases will often arise from the assertion of pressure by the other party which might amount to victimisation or exploitation, this is not always required. In *Amadio*, Mason J emphasised the difference between unconscionable conduct and undue influence as follows:
>
> > "In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position."[8]

The starting point, however, of an analysis of economic duress is McHugh JA's judgment (Samuels and Mahoney JJ, agreeing) in *Crescendo Management Pty Ltd v Westpac Banking Corp*[9] (*Crescendo*). His Honour in questioning the correctness of the House of Lords' approach in *Universe Sentinel* said:

> In my opinion the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate[.] Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.[10]

Subsequently, the New South Wales Court of Appeal (Beazley, Ipp and Basten JJA) in *Australia and New Zealand Banking Group Ltd v Karam*[11] examined the role of economic duress in Australian law and the significance of McHugh JA's judgment in *Crescendo*. The court made three key points.

First, there were a number of difficulties with McHugh JA's characterisation of illegitimate pressure in the passage set out above. The court said:

> Two aspects of this passage were to cause difficulty. First, although the context was one in which his Honour was

> considering an extension of the common law doctrine of duress, the introduction of the criterion of "unconscionable conduct" appeared to invoke equitable principles. As Lord Diplock had referred to "undue influence" as enjoying a similar rationale, the reference to equity may have been deliberate. Secondly, the reference to "overwhelming pressure", in a context in which his Honour had rejected the need for the will to be overborne, was also apt to create uncertainty. The term appears to have been a reflection of the passage in Lord Diplock's speech in . . . *Universe Sentinel*.[12]

The court also noted that it was unclear how the doctrine of economic duress fitted with the equitable doctrines of undue influence and unconscionable conduct.

Secondly, the court cited with manifest approval the following passage in Kirby P's judgment in *Equiticorp Finance Ltd (in liq) v Bank of New Zealand*:

> The doctrine of economic duress may be better seen as an aspect of the doctrines of undue influence and unconscionability respectively. If relief, beyond statute, is appropriate, courts would be better able to provide such relief in a consistent and principled fashion under the rubric of undue influence and undue unconscionability rather than by pretending to economic expertise and judgment which they generally lack . . .[13]

The court agreed with Kirby P's view that the term "economic duress" should be abandoned and that questions of "illegitimate pressure" should be accepted.

Thirdly, in explaining their approach, the court said:

> The vagueness inherent in the terms "economic duress" and "illegitimate pressure" can be avoided by treating the concept of "duress" as limited to threatened or actual unlawful conduct. The threat or conduct in question need not be directed to the person or property of the victim, narrowly identified, but can be to the legitimate commercial and financial interests of the party. Secondly, if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage, in the sense identified in *Amadio*. Thirdly, where the power to grant relief is engaged because of a contravention of a statutory provision such as s 51AA, s 51AB or s 51AC of the Trade Practices Act, the court may be entitled to take into account a broader ranger of circumstances than those considered relevant under the general law. Pursuant to both Trade Practices Act provisions and the Contracts Review Act, the relative strengths of the bargaining positions of the parties, and their ability to negotiate terms, will be relevant. However, it does not follow that because, for the purposes of s 9(2)(a) of the Contracts Review Act, there was a material inequality of bargaining power, a contract between such parties will necessarily be set aside. Most "contracts of adhesion" will fall into that category, but most will be valid.[14]

The constraint on illegitimate pressure to threatened or actual unlawful conduct was doubted by Nettle J in *Thorne v Kennedy*. His Honour said:

> Were it not for the decision of the Court of Appeal of the Supreme Court of New South Wales in *Australia & New Zealand Banking Group v Karam*, I should be disposed to decide this appeal on the basis that Ms Thorne's entry into the agreements was the result of illegitimate pressure (or duress, as the primary judge aptly described it) of such degree as to engage equity's jurisdiction to grant relief. The difficulty with doing so, however, as the plurality observe, is that *Karam* decided that the concept of illegitimate pressure should be restricted to the exertion of pressure by "threatened or actual unlawful conduct", and, by and large, Karam has since been followed without demur.
> . . .
> *Karam* was a significant departure from the preponderance of relevant Australian authority. Moreover, *Karam*'s rejection of illegitimate pressure by lawful means was largely based on a view that the concept is too uncertain to be acceptable. Yet it is by no means immediately obvious why it should be considered any more uncertain than the equitable conceptions of unconscionable conduct and undue influence to which *Karam* held it should be consigned.
> . . .
> The equitable doctrine of unconscionable conduct is not restricted to unlawful means. Equity may intervene to relieve against the consequences of a party taking unconscientious advantage of another party's position of special disadvantage regardless of whether the conduct is otherwise lawful.[15]

However, the plurality made no adverse observations on the correctness of the approach in *Karam*. The uncertainty in Australian law as to the effect of economic duress was exacerbated by the decision of the Court of Appeal of Western Australia in *Electricity Generation Corp t/as Verve Energy v Woodside Energy Ltd*.[16] In addressing a submission that Verve entered into short term gas supply agreements as a result of economic duress McLure P said:

> Economic duress is a common law doctrine which is part of the law of contract and unjust enrichment and is a close cousin of the equitable doctrine of undue pressure . . .
> It is apparent from the pleading that Verve relied on the common law doctrine. There are two material facts of the cause of action in economic duress being (1) that illegitimate pressure was applied which (2) induced the victim to enter into the contract (or make a non-contractual payment); the illegitimate pressure does not have to be the sole reason for the victim entering into the contract, it is sufficient if it is one of the reasons: *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 46 (McHugh JA).
> If the pressure involves an actual or threatened unlawful act, it is prima facie illegitimate. If the pressure is lawful, it may be illegitimate if there is no reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports: *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 401 (Lord Scarman); *R v Her Majesty's Attorney-General for England and Wales (NZ)* [2003] UKPC 22 [at][15]–[20].
> An actual or threatened breach of contract is unlawful conduct for the purposes of the economic duress doctrine: *Furphy v Nixon* (1925) 37 CLR 161; *Smith v William*

Charlick Ltd (1924) 34 CLR 38; [1924] HCA 13; *TA Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* [1956] SR (NSW) 323.[17]

Murphy J in his judgment said:

> The buyer claimed, in its prayer for relief (par (d)) "restitution or repayment of the amounts of money by which the [sellers] were overpaid and unjustly enriched". There was no pleaded claim for damages in tort, contrary to the formulation of this issue in the grounds of appeal. The absence of a damages claim for the "tort" of duress accords with the view that economic duress is not, in and of itself, a species of tort: *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 385 per Lord Diplock (cf Lord Scarman at 400); *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck)* [1992] 2 AC 152 at 166. That would seem to me, with respect, to be the correct view, particularly as the modern law of duress has been developed under the influence of equity and the exercise of the Chancellor's jurisdiction in respect of pressure which the Chancellor considered to be illegitimate: *Barton v Armstrong* [1973] 2 NSWLR 598 at 631 and 634 (*Barton v Armstrong* [1976] AC 104 at 118 and 121); *Royal Bank of Scotland plc v Etridge (No 2)* [2000] 2 AC 773 at 795.[18]

These judgments of the Western Australia Court of Appeal are inconsistent with the approach of the New South Wales Court of Appeal in *Karam* and do not sit comfortably with *Thorne v Kennedy* in which the High Court relied on undue influence rather than economic duress.

Pakistan International Airline

The facts

Times Travel (TT), the plaintiff is a travel agent. It entered into an agency agreement with Pakistan International Airline Corporation (PIAC) under which PIAC paid TT by way of commission in an amount determined by PIAC from time to time. The agreement was terminable by PIAC on 1 month's notice. There was no dispute that the agreement was heavily biased in favour of PIAC. Subsequently, PIAC failed to pay outstanding commission to a number of travel agents including TT. However, TT did not participate in recovery proceedings brought by the other travel agents against PIAC. In September 2012 PIAC notified TT that its agency agreement would terminate at the end of October 2012.

Following this notice TT's ticket allocation from PIAC was suddenly reduced from 300 to 60. As a result of pressure TT agreed to a new agency agreement with PIAC which included a provision under which TT waived outstanding claims against PIAC for unpaid commission. If the original reduction in ticket allocation had continued TT would have been put out of business. Subsequently, TT commenced proceedings against PIAC claiming that it was entitled to rescind the new agency agreement on the ground of economic duress. TT also sought recovery of unpaid commission.

Disposition

Lord Hodge delivered the majority judgment which contained three key elements.

First, in enunciating the basic principles Lord Hodge said:

> . . . As I will seek to show, the courts have developed the common law doctrine of duress to include lawful act economic duress by drawing on the rules of equity in relation to undue influence and treating as "illegitimate" conduct which, when the law of duress was less developed, had been identified by equity as giving rise to an agreement which it was unconscionable for the party who had conducted himself or herself in that way to seek to enforce. In other words, morally reprehensible behaviour which in equity was judged to render the enforcement of a contract unconscionable in the context of undue influence has been treated by English common law as illegitimate pressure in the context of duress.
>
> The boundaries of the doctrine of lawful act duress are not fixed and the courts should approach any extension with caution, particularly in the context of contractual negotiations between commercial entities. In any development of the doctrine of lawful act duress it will also be important to bear in mind not only that analogous remedies already exist in equity, such as the doctrines of undue influence and unconscionable bargains, but also the absence in English law of any overriding doctrine of good faith in contracting or any doctrine of imbalance of bargaining power. As I will seek to explain, the absence of those doctrines in English law leads me to conclude that Times Travel's claim for lawful act economic duress would not have succeeded in this case even if it had shown that Pakistan International Airline Corporation ("PIAC") had made what Lord Burrows has defined as a bad faith demand.[19]

Secondly, Lord Hodge considered that lawful act economic duress operated within narrow limits. His Lordship identified two circumstances in which the courts have upheld a plea of lawful act duress, namely, where a defendant uses his knowledge of criminal activity by the claimant or a member of the claimant's close family and where the defendant having exposed himself to a civil claim to the claimant by illegitimate means forces the claimant to waive his claim.

Thirdly, lawful act duress has an equitable basis, and in this context, interestingly, his Lordship cited McHugh JA's judgment in *Crescendo* in support.

Lord Hodge in disagreeing with Lord Burrows' wider formulation of the scope of lawful act economic duress continued:

> I therefore do not accept that the lawful act doctrine could be extended to a circumstance in which, without more, a commercial organisation exploits its strong bargaining power or monopoly position to extract a payment from another commercial organisation by an assertion in bad faith of a pre-existing legal entitlement which the other organisation believes or knows to be incorrect.[20]

Turning to Lord Burrows' separate judgment. His Lordship summarised the principles in the following series of propositions:

> (i) Lawful act duress, including lawful act economic duress, exists in English law.
> (ii) Three elements need to be established for lawful act economic duress: an illegitimate threat; sufficient causation; and that the threatened party had no reasonable alternative to giving in to the threat.
> (iii) As the threat is lawful, the illegitimacy of the threat is determined by focusing on the justification of the demand.
> (iv) A demand motivated by commercial self-interest is, in general, justified. Lawful act economic duress is essentially concerned with identifying rare exceptional cases where a demand, motivated by commercial self-interest, is nevertheless unjustified.
> (v) In relation to a demand for a waiver by the threatened party of a claim against the threatening party, a demand is unjustified, so that the lawful act economic threat is illegitimate, where, first, the threatening party has deliberately created, or increased, the threatened party's vulnerability to the demand and, secondly, the "bad faith demand" requirement is satisfied. The demand is made in bad faith where the threatening party does not genuinely believe that it has any defence (and there is no defence) to the claim being waived.[21]

Returning to Australian law. The decision of the New South Wales Court of Appeal in *Karam* remains an obstacle to the development of economic duress. As Nettle J in *Thorne v Kennedy* observed:

> Nevertheless, there would need to be detailed argument and deep consideration of the ramifications of departing from Karam before this Court would contemplate that course, and, although counsel for Ms Thorne essayed something of that task in written submissions, in oral argument it was accepted that what was said about illegitimate pressure by lawful means was subsumed by what was advanced under the rubric of unconscionable conduct.[22]

A "deep consideration" of current Australian law on duress would be welcome.

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Footnotes

1. *Universe Tankships Inc of Monrovia v International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 AC 366.
2. *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40.
3. *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; 57 ALJR 358; [1983] HCA 14; BC8300072.
4. Above n 1, at 384.
5. *Barton v Armstrong* [1976] AC 104.
6. *Thorne v Kennedy* (2017) 263 CLR 85; 350 ALR 1; [2017] HCA 49; BC201709420.
7. Above, at [26]–[27].
8. Above n 6, at [40].
9. *Crescendo Management Pty Ltd v Westpac Banking* (1988) 19 NSWLR 40.
10. Above, at 45–46.
11. *Australia and New Zealand Banking Group Ltd v Karam* (2005) 64 NSWLR 149; ATPR 42-089; [2005] NSWCA 344; BC200507693.
12. Above, at [54].
13. *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50.
14. Above n 11, at [66].
15. Above n 6, at [70], [72] and [74].
16. *Electricity Generation Corp t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36; BC201302384.
17. Above, at [23]–[26].
18. Above n 16, at [150].
19. Above n 2, at [2]–[3].
20. Above n 2, at [52].
21. Above n 2, at [136].
22. Above n 6, at [73].

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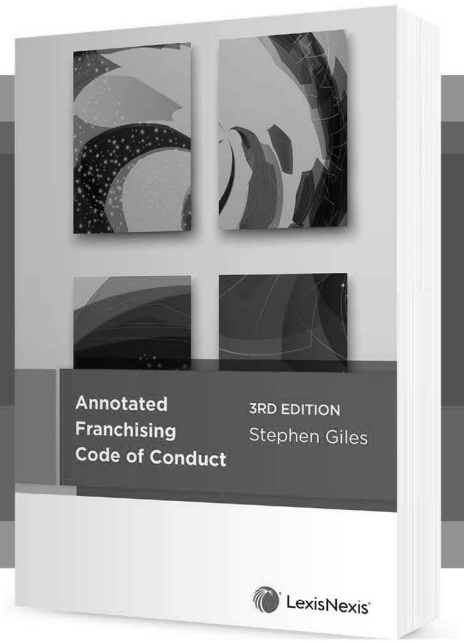

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Australian
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Book review: Navigating the labyrinth: a review of Annotated National Credit Code 7th edn

Karen Lee *LEGAL KNOW-HOW*

Annotated National Credit Code 7th edn
by ***Andrea Beatty***
LexisNexis 2023
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The Australian consumer credit landscape is complex, and practitioners can easily find themselves lost in the ever-evolving maze. Enter the *Annotated National Credit Code 7th edn*, a reliable source of guidance for those navigating this often-tricky territory.

This comprehensive text (details below) is authored by the accomplished legal mind Andrea Beatty. With her vast expertise spanning regulatory intricacies, corporate governance, compliance and risk management, Beatty offers a lifeline to those grappling with the complexities of consumer credit.

This latest edition is an invaluable resource that caters to a diverse audience — credit licensees, regulators, compliance officers, consumer advocates, and of course, legal practitioners. Whether unravelling the nuances of responsible lending obligations or ensuring compliance with the latest regulations, this book provides a trusted roadmap through the labyrinth of consumer credit law.

Structure and depth

Readers will undoubtedly be drawn to the structured approach evident in the table of contents. The book begins with an introduction, setting the stage for a detailed exploration of the regulatory framework. It is followed by an overview of the National Consumer Credit Protection Act 2009 (Cth) (Credit Act) regime and separately, an overview of the National Credit Code (NCC), which is in Sch 1 of the Credit Act. These chapters provide readers with a solid foundation, offering clarity and insight into the intricate terrain governing consumer credit.

A noteworthy inclusion is the dedicated chapter on The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Banking Royal Commission). It highlights the main recommendations put forth by Commissioner Hayne and the legislative reforms that follow. Readers will find answers to questions such as how the Banking Royal Commission came about, what were the key findings, what was the courts' likely approach to responsibility for wrongdoing, and what was the Australian Securities and Investments Commission (ASIC)'s response. The inclusion of this chapter underscores the book's commitment to relevance and timeliness in addressing contemporary issues.

Next up is a delineation of ASIC's actions, both in advertising and enforcement activities. It serves to enrich the reader's understanding of regulatory enforcement mechanisms.

Then comes the meticulous examination of Ch 3 of the Credit Act (on responsible lending conduct) and the NCC. The book's depth of analysis ensures readers are equipped with a sound understanding of the legislative framework. There is also commentary on the National Consumer Credit Protection Regulations 2010 (Cth) (Credit Regulations), which offers practical insights into the many operational aspects of the legislation.

Overall, I have found that the clear and coherent structure of the book facilitates ease of navigation, and the author's writing style enables readers to grasp complex legal concepts with clarity and confidence.

Strengths and highlights

Readers will be impressed by several notable strengths apparent in the book:

- Comprehensive updates — the book's most significant strength lies in its timely coverage of recent developments. The 7th edn provides a comprehensive update on issues involving unfair contract terms, product intervention orders, ePayments, small amount credit contracts (SACCs), and consumer leases. It also includes commentary on substantive changes to the Credit Act (particularly the NCC) and the Credit Regulations. Examples include the new rules on obtaining and considering information to verify financial situation of consumers, income requirements for SACCs and consumer leases for household goods, and avoidance schemes.

- In-depth commentary — each section of the NCC is accompanied by insightful commentary, highlighting key points, practical considerations and potential areas of ambiguity. This analysis proves particularly handy for navigating complex or grey areas of the law. I can give the example where, recently, I had to advise on a matter relating to the prohibited monetary obligations in s 23 of the NCC. The commentary on this section includes findings, analysis and implications of key case law, which was especially useful.
- Practical focus — helpfully, the book offers practical guidance for applying the NCC. One example is commentary on s 78 of the NCC, which is about how the court may review unconscionable interest and other charges. The commentary not only provides an outline of the section and an analysis of the relevant key concepts, but it also gives a summary of ASIC's approach as set out in *Regulatory Guide 220 Early termination fees for residential loans: Unconscionable fees and unfair contract*. Throughout the book, practical guidance is also provided through illustrative examples, which renders the book an indispensable tool.

Considerations

As mentioned earlier, consumer credit law is ever-evolving. Legal practitioners will be well placed to always refer to the latest compilation of the legislation on the Australian Government's Federal Register of Legislation. ASIC also updates its regulatory guide from time to time. Readers can make use of ASIC's Regulatory Tracker (available on its website) to access the latest information. The tracker lists and includes links to all new and updated regulatory guides, information sheets, reports, consultation papers, legislative instruments and other documents that have regulatory effect, were issued by ASIC and published on its website.

While the book excels in its coverage of consumer credit law, readers should be mindful of certain exclusions. For example, it does not consider general law enforcement issues and competition law. Further, in the book's introduction, the author points out that personal property securities (PPS) law is not covered, other than with incidental references. These exclusions are understandable, as (for example) PPS is a topic of its own and is beyond the scope of a text primarily focused on consumer credit. The exclusions ensure a focused and readily understandable resource for practitioners navigating credit-related matters. That said, I have found that the commentary on PPS provided by the author is nevertheless relevant and useful, such as those regarding purchase money security interests (PMSIs), including why the concept of PMSI has limited application for NCC-regulated credit.

For those who are looking to add to their e-library, you will be pleased to know that an ePub version of this text is available (ISBN/ISSN: 9780409357455). If, like myself, you like a more traditional approach when it comes to building a reference collection, then the paperback version (ISBN/ISSN: 9780409357448), despite its weightiness due to its comprehensive coverage, will prove to be a valuable tool that you will use day after day.

Final verdict

The *Annotated National Credit Code 7th edn* stands as an essential and indispensable resource for anyone navigating the complexities of Australian consumer credit regulations. Its comprehensive scope, insightful commentary, and practical focus make it a dependable companion for those seeking to understand the rights and obligations of credit licensees. The book's targeted approach and clear writing style ensure it remains an invaluable asset for its intended audience. This is certainly a title I will recommend.

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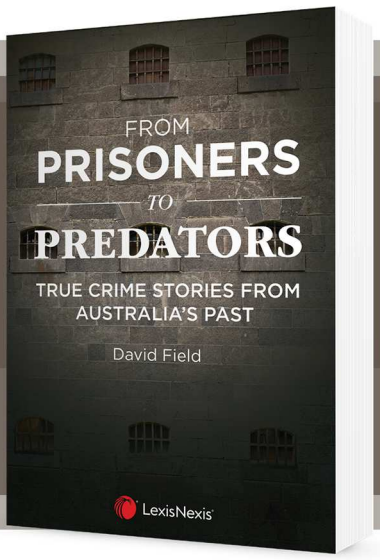

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