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## "Lenders Behaving Badly"

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# 1. INTRODUCTION

## (i) Definitions

The book of *Ecclesiastes*(1:1-3) tells us that there is nothing new under the sun. This is certainly true of predatory lending which has existed for centuries.

Predatory lending is a pejorative term used to describe abusive lending practices. It involves "imposing unfair and abusive loan terms on borrowers often through aggressive sales tactics, taking advantage of borrowers' lack of understanding of extremely complicated transactions, and outright deception."[1] The term predatory lending may extend to payday loans, credit cards and other forms of consumer debt, and even overdrafts, involving unreasonably high interest rates or exorbitant fees.[2] Sub-prime lending in the United States does not necessarily involve predatory lending but there are often predatory features in their Australian counterpart: low doc loans.

## (ii) The Targets of Predatory Lenders

The targets of predatory lenders are usually the less educated, racial or ethnic minorities and the elderly, but predatory lending is not confined to any socio-economic group.[3] A study of 26,000 households by the management consultancy firm, Fujitsu, found that disadvantaged borrowers living on the fringes of Australia's capital cities had been heavily targeted by predatory home loan brokers.[4] Females were overrepresented in the "disadvantaged fringe" category, with 13000 women falling victim to predatory lending, compared with 8500 men.[5] Consumers in the "battling urban" category were twice as likely to fall victim to predatory lenders, while there were few victims in the "exclusive/professional"category.[6] Borrowers in the "disadvantaged fringe" category were four times more likely to be victims of predatory lending than the broader population.[7]

While there are many reputable non-bank lenders, predatory lending is generally conducted by non-bank lenders who have different initial credit assessment guidelines from bank lenders and more aggressive repossession strategies[8]. Non-bank lenders provide only about 20 per cent of housing loans but they are responsible for 80 per cent of home repossessions.[9]

(iii) Forms of Predatory Loans

Predatory lending can occur in many different forms: low-doc loans; "Ponzi" loans; pay day loans; and even reverse mortgages.

A low-doc loan is a loan where the borrowers themselves or their agents verify their income, assets and liabilities in the loan application process.[10] Australia does not have a sub-prime lending market comparable to the United States. Indeed, it is estimated that only 1% of Australian borrowers fall in the sub-prime category, compared with 13% in the United States.[11] Nevertheless, it is estimated that around $10 billion has been borrowed in Australia's low-doc home loan industry,[12] and non-conforming loans account for about 6% of all housing loan arrears in Australia.[13] More importantly, unlike US sub-prime borrowers, Australian borrowers will be liable under the personal covenants in their mortgages. They cannot simply walk away from their properties.[14]

A "Ponzi" loan is a loan which can only be repaid by either taking out a larger subsequent loan, or by selling the asset that was purchased or financed using the loan.[15] Ponzi loans are often used in pyramid schemes.

A pay day loan is a high-cost, short –term loan which allows a borrower to discharge an immediate financial burden.[16] If the borrowers are unable to repay the loans on their pay day – usually pension day – they will be charged an expensive late fee and another fee for an extension of the loan for another few weeks. These loans enmesh borrowers in a poverty trap, exacerbating their financial stress and placing their assets such as their house or car in jeopardy.

The growth of pay day lending has been phenomenal. It is estimated that Australia will have 800 outlets offering pay day loans by 2010.[17] In 2002 Victoria's Consumer Law Action Centre estimated that the size of the pay day lending sector's turnover at $200 million, with a customer base of 100,000 to 150,000 users.[18] More recent estimates suggest that pay day lenders turn over $80-100 million in Queensland alone.[19] In 2006-2007 Cash Converters made a net $11.5 million profit from a mix of commission payments and a $124.6 million loan book.[20] In an attempt to under-cut pay day lenders such as Cash Converters, Money 3 and Amazing Loans, Radio Rentals has introduced a trial cash-loan fringe lending scheme directed at an estimated

2 million Australian households that are "cash constrained" in the sense that they are generally reliant on welfare or a very small income.[21]

Reverse mortgages enable retirees to take advantage of the equity in their homes without reducing their pension benefits. Reverse mortgage borrowers can gain access to the equity in their homes without having to sell and without the demands of regular payments. In return for a lump sum or a regular payment from the lender, the borrowers agree to hand over a portion of their homes, including interest payments, when they die or when the property is sold.[22]

The size of outstanding reverse mortgage loan balances grew by 67% to $1.18 billion in the 12 months to June 2007; the number of loans grew by 13% to 31, 544 in the 6 months to June 2007.[23] This growth is likely to continue with improved product feasibility and wider distribution channels. The average reverse mortgage loan size is about $52,000 and the average age of borrowers is 73.[24] However, 23% of borrowers had borrowed additional funds in the 6 months to June 2007, adding an average of $10,500 to their loan facilities.[25] On the other hand, on average, borrowers draw only 75% of the maximum loan amount available and 10% of borrowers each year choose to pay back their loans in full.[26]

It is expected that there will be a growing demand for shared-equity mortgages under which the borrowers, (usually first home buyers, someone upgrading their home or cash-poor retirees) can borrow 10 to 20% of the value of property interest-free.[27] In return, the borrowers may be required to surrender up to 40% of any capital gain. Sometimes 20% of a loan will be funded by a shared-equity loan and the balance by a traditional mortgage. While there is no evidence of abuses in relation to shared equity loans, this sector may require close monitoring.[28] Falling house values may leave banks with little or nothing to collect if borrowers default on a home-equity loan.[29] In the United States delinquent home-equity loans amounted to $A16.6 billion by the end of September 2007. In a US study of 640,000 first mortgages with piggyback shared-equity loans attached it was found that those loans were 43% more likely to go into default than stand alone mortgages.[30]

(iv) Consequences of Sub-Prime and Predatory Lending

Problems in the US sub-prime lending sector have sparked a global financial crisis which has increased the cost of wholesale finance and prompted a significant repricing of credit risk. The price of credit default swaps has surged[31] and there will be a severe strain on the commercial mortgage-backed securities market when $6 billion in these securities mature later this year and in 2009.[32] Banks are attempting to

absorb higher wholesale funding costs[33] but some have recently decided to pass these costs on to their borrowers. While it is expected that Australian banks will weather the storm,[34] many of their borrowers will struggle with their loan commitments and consumer credit obligations. It is estimated that there is an increased risk of default with 700,000 households coming under some form of mortgage stress in the first half of 2008[35] and 300,000 households under severe financial stress.[36] This stress is not confined to first home buyers who may find that the combination of increasing interest rates and falling house process produce a negative equity in their homes.[37] Even middle-class households are suffering financial stress,[38] which is often concealed by using credit cards to pay mortgage instalments[39]Credit card fees and penalties for late payment exacerbate the problem.[40] Indeed, some borrowers are resorting to their superannuation to service their mortgage repayments and credit card debts.[41] Predatory lending is often supported by collateral security over a car or house so that if the borrower defaults, the lender can repossess, foreclose or exercise a power of sale.[42]

Predatory lending in Australia cannot be blamed for the global financial crisis. But there is no doubt that sub-prime lending in the United States contributed to the global credit squeeze. Moreover, in Australia it has been estimated that 90% of the 40,000 households that were victims of predatory lending are in "severe housing stress".[43] Defaults on loans from non-bank lenders are expected to rise by a third to almost 3 per cent of borrowers, more than triple the rate of major banks.[44] It should not be thought, however, that predatory lending is the exclusive domain of non-bank lenders. The Commonwealth Bank of Australia recently admitted to giving unaffordable personal loans to Sudanese refugees some of whom had no job, and no grasp of finance or English.[45] Under pressure from consumer advocates, the bank has waived most of these outstanding debts and introduced an internal investigation into the 18 loans to these families in southeast Melbourne.[46] Moreover, a former employee of the National Australia Bank Ltd interviewed in a recent *Four Corners* program claimed that he was pressured into talking people into bigger loans than they wanted. The bank responded that it had "strict credit policies, processes and controls."[47] One wonders how these allegations of predatory conduct by the Australian banks square with their obligations under clause 2.2 of the Code of Banking Practice (12 August 2002) to act fairly and reasonably towards their customers.

(v) Abusive Lending Practices

Common features of predatory lending include: frequent refinancing or loan flipping, with new fees included in the loan balances; financing of unnecessary products, for example single-premium credit life insurance with the premiums added to the loan balance; excessive prepayment penalties; balloon payments where substantial instalments are payable towards the end of the loan period; excessive fees and high interest rates; failures to disclose that the loan price is negotiable; unaffordable loans that the borrowers have no ability to repay; risk-based pricing; and misleading marketing and sales practices.[48] We shall examine the fragmented response of the legal system to some of these practices as they have developed in Australia.

Predatory lending practices can be divided into two categories: procedural unfairness and substantive unfairness.

## 2. PROCEDURAL UNFAIRNESS

### (i) No Advice about Chapter Loans and Risk of Default

An American court has held that a lender's failure to advise a borrower of a cheaper loan alternative amounted to procedural unconscionability because the alternative loan had a shorter term, lower monthly repayments and incurred less interest over the term of the loan.[49] The lender had initiated discussions with the borrower and had taken unnecessary security for a loan which the court described as "exorbitantly expensive".[50]

In Australia, it is doubtful whether a mere failure to advise a customer of a more advantageous loan alternative would render a lender liable in negligence for economic loss. There is no implied duty to inform a customer of a new account or facility which would benefit the customer. This would impose an onerous and time-consuming burden on lenders to review all their existing facilities with their customers whenever they introduced a new facility.[51] Hence, lender should not incur any liability from a simple failure to advise its customer how to structure a loan so as to minimise interest and bank charges, even where it is alleged that the lender acted as the borrower's trusted adviser.[52]

A lender is generally entitled to seek and obtain the best terms it can in negotiating a commercial loan with its customers.[53] It may have regard solely to its own commercial interest. It is not the lender's obligation to ensure that the borrower has made a correct or wise commercial decision based on a full understanding of all risks,[54] unless the borrower has specifically sought the lender's advice.[55] If the customer approaches the lender merely for a loan to purchase a business, as distinct from investment advice, the lender will not be liable for a failure to disclose that another customer had failed in the same business.[56] Even if the borrower has little

understanding of how the Australian financial system works and the consequences of default, the lender is under no duty to explain these matters to a commercial borrower.[57] Nor is the lender generally obliged to provide a guarantor or third party mortgagor with any commercial advice, although if such advice is proffered, the lender may become subject to a duty of care.[58]

Against this background, *Beneficial Finance Corporation v Karavas*[59] can be seen as an exceptional case decided under the *Contracts Review Act* 1980 (NSW). In that case the New South Wales Court of Appeal held that third party mortgages obtained from guarantors were "unjust" within s7(1) of the Act. The mortgages were given to secure a loan of $564,000 to Socair Pty Ltd to enable it to purchase the business of Murray Valley Airlines Pty Ltd (in receivership). They were held to be unjust because it was, or should have been, obvious to the lender, Beneficial Finance Corporation, that the mortgagors had insufficient knowledge of the risks they were incurring by mortgaging their residences to secure the loan. President Kirby (as he then was) issued this clear warning:

> "Where the borrowers, or their guarantors and mortgagors are ill-educated, inexperienced in business, related to those principally involved by blood or affection and involved in the purchase of a business with some apparent risks, the lesson of this case may indeed that the guarantors and mortgagors receive effective independent financial advice on the risks they are running."[60]

At the trial Giles J identified numerous factors which the mortgagors needed to understand to gain a proper appreciation of their risk, in particular that there was a real prospect of the business failing and that they might not simply lose their residences but also incur a personal liability for the whole of the sum borrowed. Giles J concluded that the mortgages were unjust contracts because the lender's decision to finance the transaction could not properly have been made "on the basis of the capacity of the airline to generate income, and can only have been made on the basis of the security offered."[61] His decision was unanimously upheld by the New South Wales Court of Appeal. [62]

(ii) Aggressive Marketing

Lenders can be held liable for making negligent, reckless or fraudulent misrepresentations to customers in relation to approval of their loan applications. [63] For example, a false assurance that the customer will qualify for a government-subsidised or government-guaranteed loan for the purchase of real estate may render a lender liable for the tort of deceit, negligent misstatement or misleading or deceptive conduct if the customer relies on the assurance to his or her detriment. [64]

In the majority of predatory lending cases, a mortgage broker has been involved. The Mortgage Industry Association of Australasia estimates that brokers will originate up to 50% of home loans in the future. [65] As lenders become more reliant on mortgage brokers to introduce new business, their potential exposure through s12GH of the *Australian Securities and Investments Commission Act* 2001 (Cth) will be tested. However, a lender will not be liable under s12GH for misleading or deceptive statements made by mortgage brokers unless the brokers were acting "on behalf of" the lender. [66] Persons who merely "introduce business" to lenders are not their agents

and are not acting on their behalf. [67] A finance broker will rarely be the agent of the lender even if the broker receives a commission from the lender[68] because of the clear conflict of interest that would arise in the broker's dealings with the borrower. [69]

(iii) Inspections, Valuations and Two-Tier Marketing

In the absence of a special or extended duty assumed by the lender, inspections are intended merely to satisfy the lender that the security is adequate for the loan. [70] The inspection does not, in itself, impose any duty on the lender to the borrower to take reasonable care in carrying out the inspection. [71] Nor will a lender be liable for a negligent valuation which was undertaken by the lender for its own purposes, even if the borrower paid for the cost of valuation. [72] It is immaterial whether the valuation was done by one of the lender's employees[73] or by an independent valuer. [74]

On the other hand, a lender can be liable for a negligent valuation where it knows that the purchasers intend to rely on the valuation to validate their decision to enter into the transaction. [75] Lenders can also be liable to purchasers where they negligently endorse a property as a good buy or a sound investment. [76]

A lenders who is guilty of misleading or deceptive conduct or a breach of fiduciary duty in inducing one of its customers to enter into a transaction with another customer on the basis of an inflated valuation could be liable to the purchaser, particularly where the vendor is in financial difficulties. [77] Indeed, it has been suggested that the lender can be liable for a borrower's losses even if the lender's valuation is not disclosed to the borrower. [78] However, before a lender can be fixed with liability for a negligent or false valuation, which is not disclosed to the borrower, it must be clear that the borrower was relying on the lender not to overvalue the property. [79] Such cases are rare.

In *Commonwealth Bank of Australia v Finding*[80] the Supreme Court of Queensland confirmed that a lender, which has not undertaken to provide investment or financial advice, is under no obligation to disclose a valuation of a hotel property which it sells as mortgagee to one of its long-standing customers at a price substantially higher than the assessed value. Nor is the lender required to disclose information about the doubtful viability of the hotel business, as operated by the mortgagor, when the customers apply for finance to complete the purchase. [81]

Where non-disclosure alone is relied on as constituting misleading or deceptive conduct under s12DA of the *Australian Securities and Investments Commission Act* 2001 (Cth), it is necessary to prove that the failure to disclose was deliberate.[82] However, where the misleading or deceptive conduct takes the form of both representations and non-disclosure, the respondent's intention or knowledge will merely be a relevant, but not a decisive, factor in determining whether a contravention by non-disclosure has occurred. [83] The question is not whether the lender was under a duty to speak out but rather whether, having regard to all the relevant circumstances,

there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. [84]

These principles will determine the liability of lenders who finance property investments, knowing that their customers are paying substantially more for their properties as a result a two-tier marketing scheme preying on interstate or overseas borrowers. Lenders who fail to advise their borrowers of their relationship with the developers or the inflated prices listed for unwary interstate or overseas purchasers may be liable for unconscionable conduct or misleading or deceptive conduct. [85]

(iv) Misleading Loan Applications

Mortgage brokers who make false statements in completing loan applications, such as inflating the borrower's assets or income[86] or misrepresenting that the borrowers or the guarantors have obtained independent advice, [87] can be personally liable for misleading or deceptive conduct or unconscionable conduct. [88] While the brokerage company who engaged the mortgage broker may be held liable for the broker's conduct, [89] it is unlikely that the lender will be deemed to be liable for misleading or deceptive conduct or unconscionable conduct as a result of the mortgage broker's actions. [90]

This is not to say that the lender will be able to enforce the loan agreement or mortgage with impunity. A lender who fails to follow its own internal lending guidelines in assessing a loan application or recommending that certain borrowers or guarantors receive independent legal or accounting advice may find that its security is held to be an "unjust contract" within s7 of the *Contracts Review Act* 1980 (NSW).[91] In determining whether a contract is "unjust" in the circumstances pertaining to the contract at the time it was made, the court must have regard to the public interest and all the circumstances of the case.[92] The court can take into account the commercial or other setting and effect of the contract.[93] In *Perpetual Trustee Company Ltd v Khoshaba*[94] the court found that the lender's failure to follow its own internal guidelines relating to verification of the loan applicants' employment and income, the ascertainment of the true purpose of the loan and proper checks on the execution of the loan documents rendered the contract "unjust"[95]. The fact that the lending guidelines were devised for the lender's own protection did not prevent them from being taken into account in determining whether the contract was unjust. If the guidelines had been followed, the lender would not have made the loan to the borrowers. The lender's failure to follow the guidelines meant that the lender was content to lend on the value of the security provided by the borrowers who were a low

income earner and a pensioner. In the result, the lender lost its right to repayment of the loan.

There are similar provisions in s70 of the *Consumer Credit Code*. While business and investment loans are expressly excluded from the operation of the Code, the court can go behind false declarations that the loan is not to be applied wholly or predominantly for business or investment purposes (or for both purposes).[96] Indeed, in *Permanent Mortgages Pty Ltd v Cook*[97] the court held that a mortgage was unjust despite false statements by the borrowers in the loan documentation because the lender was aware, or ought to have been aware, that the borrowers were not capable of servicing the loan. The court conducted a balancing exercise. The defendants spoke English, were experienced borrowers, engaged a solicitor, were anxious to obtain the loan and were prepared to make false declarations in the loan application. On the other hand, they were poorly educated and unsophisticated and the court concluded that they were the type of people that the Code was intended to protect "from their own foolishness."[98] In essence, the court in *Permanent Mortgages Pty Ltd v Cook* extended the reasoning in *Perpetual Trustees v Khoshaba* to the *Consumer Credit Code*.[99]

The relief available under s71 of the *Consumer Credit Code* should be directed to returning the claimants to the position they were in before the unjust contract. For example, in *Permanent Mortgages Pty Ltd v Cook*[100] the court relieved the defendants of the costs and expenses incurred in respect of the credit provided by the plaintiff, reduced the principal to the sum that was actually applied for the benefit of the defendants in discharging their outstanding debts and relieved the defendants from the payment of interest at a rate exceeding simple interest of 8.8% per annum. This decision was in large part affirmed on appeal,[101] but the Court of Appeal ordered the plaintiff to pay ninety per cent of the defendants' costs of the proceedings.

SUBSTANTIVE UNFAIRNESS

(i) No General Duty to Lend Prudently

Predatory lending involves not just abusive practices but also harsh and oppressive terms in loan contracts and mortgages. Before we examine the legal response to substantive unfairness it may be convenient to consider whether lenders have a duty not to lend excessively or imprudently.

A publican owes a duty to his patrons to take reasonable care to ensure that they are not exposed to injury as a result of their intoxication.[102] If it is reasonably foreseeable that a patron or a third party could suffer harm as a result of the publican serving too much alcohol, then the publican can be liable for the damage caused by his breach of duty.[103]

On the other hand, it is established that a casino or registered club does not owe a duty of care to a person who it knew, or ought to have known, to be a problem gambler to protect the person against financial loss.[104] Only in extraordinary cases will the law allow recovery of economic loss occasioned by gambling.[105] Such losses are an inherent risk of the activity, and individuals must accept personal responsibility for their own actions.[106] Nor is there any no unconscionable conduct where a casino or registered club fails to prevent gambling by refusing a gambler's request to cash cheques.[107]

In a similar vein, a lender does not owe a borrower a general law duty of care to refrain from excessive lending. In *National Australia Bank v Lekais (No 2)*[108] the defendants attempted to raise a counterclaim alleging misrepresentation, misleading or deceptive conduct, unconscionable conduct and breach of duty by the plaintiff because it lent to the defendants a sum of money, knowing that they could not afford to repay the loan. The defendants alleged that their damages were at least commensurate with the amount of the loan. Judge Burley, Supreme Court Master, rejected the counterclaim because of defects in the pleading:

> "…the defendants have not sought to establish damages which are referable to losses that they may have sustained as a result of the allegedly wrongful conduct on the part of the plaintiff prior to and at the time of lending monies to the defendants and their associated companies. In other words, it has not been put that the plaintiff lent money to the defendants and their associated companies, that either or both of the defendants and their associated companies entered into a business venture which failed, that the failure of the business was referable to the conduct of the plaintiff in such a manner that a cause of action arose entitling the defendants to sue the plaintiff for damages, and that the measure of damages exceeded the indebtedness under the mortgages at the time that action was taken to enforce them."[109]

The defendants also raised an equitable set-off but Judge Burley held that "a set off of any description does not arise because damages of the type sought by the defendants are not recoverable as a *matter of law*…"[110]

It is now becoming accepted that lenders owe borrowers a duty of good faith and reasonableness in the performance of contractual obligations,[111] although the content of this duty is difficult to determine. In another context, namely a mortgagee's equitable duty of good faith in exercising its powers, the courts have stated that a mortgagee must not "recklessly sacrifice" the interests of the mortgagor.[112] This may be an appropriate test to apply to lenders' duty of good faith to other borrowers. Yet even if this standard applied, a lender would not necessarily breach its duty of good faith by lending excessively or imprudently.

While it is clear that lenders do not owe any general law duty to borrowers to refrain from lending excessively or imprudently, their obligations to guarantors may be different.
The traditional view is that a lender is under no general duty to disclose to guarantors the borrower's past indebtedness[113] or the outstanding balance of his overdraft.[114] Indeed, in the absence of an express condition in the guarantee, a guarantor has no defence if the lender advances the borrower sums in excess of an agreed limit.[115]

Nor is there any continuing duty to disclose to guarantors features of the principal transaction after the guarantee is executed.[116] American courts have, however, recognised a continuing duty of disclosure. In *Georgia Pacific Corp v Levitz*[117] the Arizona Court of Appeal held that a surety had a defence to an action to enforce a continuing guarantee where the creditor failed to disclose to the surety that the principal debtor was clearly insolvent before it extended further credit to the debtor. It is unlikely that Australian courts would follow this view.

In *Black v Ottoman Bank*[118] the Privy Council stated a general principle that a guarantor would be discharged if there has been:

> "some positive act done by [the creditor] to the prejudice of the surety, or such degree of negligence, as in the language of Vice-Chancellor Wood in *Dawson v Lawes* (1854) 23 LJ Ch 434 at 441," to imply connivance and amount to fraud.[119]

Fraud, in this context, has been defined as conduct that is unfair to a surety.[120] However, it is difficult to find cases where a guarantor has been discharged simply because the creditor acted to his prejudice. All the cases which pay-lip service to the principle can be explained on the basis of the more traditional grounds of discharging guarantors, such as loss or impairment of collateral securities or variation of the principal contract.[121]

Perhaps the first glimpse of new hope for guarantors lies in the suggestion of the Court in *Credit Lyonnais Bank Nederland v Export Credit Guarantee Department*[122] that a lender who does not act as a prudent lender in its dealings with the borrower may give the court grounds for setting aside a guarantee of the borrower's debts. This radical suggestion cannot, however, be regarded as an established principle.

Lending too much is not in itself a form of predatory lending. On the contrary, some of the most egregious examples of predatory lending involve relatively small advances, albeit with excessive interest and exorbitant fees and charges.[123]

(ii) Excessive Interest Fees and Charges

Loan agreements and mortgages commonly stipulate a higher rate of interest in the event of default by the borrower or mortgagor. Alternatively, they provide that the higher rate of interest is the standard rate but that a lower rate will be charged if the borrower or mortgagor is not in default. [124]

Where the default interest clause merely provides for a reduction of the rate if interest be paid punctually, it operates as an incentive to punctual payment and it will not be set aside as a penalty.[125] But a default rate of interest can be challenged as a penalty if the amount payable under the stipulated rate is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have resulted from the breach.[126] Moreover, the amount payable will be set aside as a penalty if the breach is merely a failure to pay a sum of money, and the amount payable is greater than the sum which ought to have been paid.[127] According to the High Court in *Ringrow Pty Ltd v BP Australia Pty Ltd*[128] a payment will be considered to be a penalty if it is extravagant, unconscionable and out of all proportion to a genuine pre-estimate of the damage caused by the breach.[129] On this basis a default rate of interest 9% higher than the standard compliance rate was held to be a penalty in *Beil v Pacific View (Qld) Pty Ltd*.[130]

(a) Interest rate caps

In most jurisdictions a credit contract (and any mortgage given to a credit provider in relation to that contract) is unenforceable where the annual interest percentage rate in respect of the contract exceeds 48.[131] It is also an offence for a credit provider to enter into a credit contract where the annual percentage rate is respect of the contract exceeds 48.[132] Hence, the interest rate is capped in relation to most consumer credit contracts at 48 per cent.

(b) Caps on Fees and Charges

In New South Wales and the Australian Capital Territory the cap applies to all charges in the nature of the interest.[133] These provisions were originally intended to apply to fringe or pay-day lenders who impose flat fees in lieu of interest and to credit

contracts of under 62 days duration.[134] However, they have applied to all regulated credit contracts from 1 March 2006.[135] These changes have not yet been introduced in the other jurisdictions, although the legislation contacts a mechanism to do so.[136]

In its current form, s 72 of the *Consumer Credit Code* allows a court to review interest rate changes, an establishment fee or charge, an early termination fee or charge or a prepayment fee or charge, and the court may reduce or annul the change, fee or charge if it finds it "unconscionable".[137] Other fees and charges are not regulated.

Under s 70 of the *Consumer Credit Code*, a debtor, mortgagor or guarantor can apply to the court to "re-open" an unjust transaction. In determining whether the transaction is unjust, the court must have regard to the public interest and all the circumstances of the case. Under this provision, the court can set aside fees or charges that had not been properly imposed[138] or unjust terms as to price,[139] for example, where the price charged for insurance is exorbitant compared with the market price or the expected cost. Similarly, the court can reopen transactions which are structured in such a way that the borrower has no capacity to repay the debt according to its terms or transactions[140] or transactions on terms that are not reasonably necessary to protect the legitimate interests of the lender.[141]

In theory, these provisions can be used to curb fees and charges by predatory lenders but they can easily be avoided by forcing borrowers to sign a declaration that the transaction is for the purposes of a business or investment, thereby excluding the operation of the *Consumer Credit Code*.[142] Similarly, the prohibition in s12CB of the *Australian Securities and Investments Commission Act* 2001 (Cth) only applies to unconscionable conduct in the supply or possible supply of financial services of a kind ordinarily acquired for personal, domestic or household use.[143]

(c) The Prohibition of Unconscionable Conduct

One of the principal forms of protection available to business borrowers against excessive interest and exorbitant fees and charges is the statutory prohibition on unconscionable conduct. The equitable doctrine of unconscionable conduct is now enshrined in s 12CA of the *Australian Securities and Investment Commission Act* 2001 (Cth) in the following terms:

> "A corporation must not, in trade or commerce, engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories."

The important advantage of s12CA over the equitable doctrine of unconscionable conduct is that it gives litigants access to the wider range of remedies available under

the Act, including damages and injunctive or tailored relief.[144] However, the section does not apply to financial corporations in their dealings with borrowers who are broadly classified as "consumers" or small business enterprises or "business consumers".[145]

A separate regime in s51AC of the *Trade Practices Act* 1974 (Cth) prohibits unconscionable conduct in connection with the supply of financial services to another person or corporation (other than a listed public company)[146]. However, this regime does not apply where the price of the financial services is in excess of $3 million, or such a higher amount as is prescribed.[147] The price for the supply of financial services is taken to include the capital value of a loan or a loan facility.[148] The price is not, therefore, confined to the lender's fees, interests and charges.

In determining whether the lender or other supplier of financial services has engaged in unconscionable conduct in its dealings with business consumers, the court may have regard to a catalogue of factors listed in s51AC. Some of these factors mirror the general law of unconscionability but others have no direct counterparts in the equitable doctrine.

In *Asia Pacific International Pty Ltd as Trustee for Planet Securities Unit Trust v Dalrymple*[149] the plaintiff claimed around $210,000 as moneys allegedly owing under a loan agreement, whereby the defendants borrowed $70,588. It also claimed interest at a rate of 20 per cent per calendar month from 9 June 1998 pursuant to a clause in the loan agreement which provided for the capitalisation of interest monthly. Over a 21 month period the original loan of $70,588 grew to a debt in excess of $3M.

The defendants alleged unconscionable conduct in breach of s 51AA of the *Trade Practices Act* 1974 (Cth), which applied to financial services before s 12CA of the *Australian Securities and Investments Act* 2001 (Cth) came into operation. The basis of their allegation of unconscionable conduct was that the plaintiff had taken advantage of them and inserted clauses in the loan agreement that were not reasonable for the protection of its legitimate interest and that allowed for grossly excessive interest.

Shepherson J found that the transaction was not illegal;[150] it was between parties at arm's length and the plaintiff's solicitors were at pains to ensure that the defendants were properly advised as to the terms of the loan and understood the consequences of default.[151] His Honour also found that the defendants urgently needed a loan of $60,000 for a term of one month and that they were prepared to pay $9,000 interest in return for that loan, a rate of 15 per cent.[152] However, his Honour found that the provision in the loan agreement allowing the plaintiff to capitalise interest at the rate

of 20% per month in the event of default was oppressive and unreasonable. [153] His Honour concluded:

> I realise that it is important that courts do not as a general rule interfere in transactions entered into at arms length between men of commerce. Nevertheless, in the circumstances of this particular case I feel very strongly that there has been unconscionable conduct on the part of the plaintiff by the insertion in the Deed of Loan of provisions enabling unpaid interest to be capitalised and then bear further interest at the rate of 20 per cent per month. This case shows that a lender can be extremely careful to ensure, as far as he can, that the borrower has competent independent advice and understands well the nature of the obligation, yet the contract of loan may amount to an unconscionable dealing. [154]

It should be noted that at the time of the loan the defendants did not appear to be in a desperate financial position, that they received independent legal advice and that at least one of the defendants was experienced in the world of commerce.

Shepherdson J did not set aside the loan agreement. Rather his Honour held the defendants liable for the original advance, plus compound interest at 15% per annum but without capitalising unpaid interest. In the result, his Honour gave judgment for the plaintiff in the sum of $292,936. His Honour based his decision on the equitable doctrine of unconscionability without a detailed analysis of s51AA of the *Trade Practices Act* 1974 (Cth). [155]

*Asia Pacific International Pty as Trustee for Planet Securities Unit Trust v Dalrymple*[156] has been cited with apparent approval in *Multiplan Constructions No 1 Pty Ltd v 14 Portland Street Pty Ltd (No 2)* [157] and *Guardian Mortgages Pty Ltd v Miller*. [158] In the first case it was distinguished on the ground that it involved excessive interest. In the second case a default interest rate of 14.5% for one month was not found to be excessive in the absence of evidence showing the prevailing rate for short term bridging loans secured by second mortgage. However, Wood CJ in CL found that another provision was an unjust penalty because it required the mortgagor to pay the mortgagee all of the costs and expenses incurred by it as a result of any default, including administration and legal costs upon an indemnity basis, as well as interest upon those costs and expenses until their payment at the default rate, and it also permitted the mortgagee, upon default, to take a charge over any property owned by the defendant. [159] By contrast, there is no unconscionable conduct, and no illegitimate economic pressure or economic duress, where a lender seeks further security with cross-collateralisation clauses as a condition of providing additional finance to a borrower in strained financial circumstances and requires these

documents to be signed before making copies available to the borrowers to obtain legal advice. [160]

It appears that the trend of recent authorities is to expand the realm of the unconscionability doctrine to cover the area once served by the doctrine of clogging the equity of redemption.[161] Cases where the mortgagee purports to charge excessive interest or exorbitant fees or obtain a collateral advantage such as an option to purchase the mortgaged property are now more likely to be brought along the battlelines of unconscionability,[162] rather than as a clog on the equity of redemption. Perhaps the only residual significance of a clog on the equity of redemption is where the limitation period for an action based on unconscionable conduct has expired.[163]

## 4. LIABILITY FOR REPACKAGING SUB-PRIME LOANS

Some predatory lenders do not simply exploit vulnerable borrowers, they compound their misconduct by repackaging these loans as tradeable securities known as asset-based securities or collateralised debt obligations for unsuspecting investors. Indeed, sub-prime loans in the United States became so "sliced and diced" through inter-bank trading that it is difficult to determine who "owned" the loans, and the value of the securities deteriorated. In Ohio, courts have refused to grant foreclosure orders in favour of parties who alleged that they were the owners of sub-prime mortgages.[164]

When the sub-prime crisis hit the capital markets in the United States parties were scrambling to find defendants to blame for their losses. It was recently reported that mid-size German lender, HSH Nordbank, has sued Swiss banking grant ,UBS, alleging that UBS sold it $US500 million in complex investments in UBS's now-defunct hedge fund, Dillon Read Capital Management , which was later used as a receptacle for troubled sub-prime mortgage securities. The German bank alleges that UBS exploited the structure for its own ends at HSH's expense in breach of its contractual and fiduciary duties. It is claiming a loss of at least US$275 million.[165]

As a general rule, Australian banks do not owe fiduciary duties to their borrowers or customers.[166] However, in exceptional circumstances, banks can attract fiduciary obligations if they assume the role of investment adviser.[167]

In the United States investors were comforted by the fact that the sub-prime investments they acquired were guaranteed by monoline insurers with AAA credit ratings. [168] Some of these credit ratings have proved to be unjustified.[169] However, the rating agencies are protected by the First Amendment to the *United States Constitution* which guarantees free speech and protects such evaluations. [170] In the

result, what appeared to be solid bricks and mortar investments turned into a house of cards.

Fortunately the direct fallout from the sub-prime crisis does not appear to have had a major long term impact on Australian banks. On the other hand, the 152 municipal councils in New South Wales that could have lost up to A$400 million from their investments in sub-prime securities will follow the UBS litigation with keen interest.[171]

## 5. REFORM PROPOSALS

Australia's fragmentary response to predatory lending has relied a panoply of different regimes with varying degrees of effectiveness. Any reform agenda must incorporate certain key features:

(1) Education of borrowers, consumers and guarantors with "health warnings".[172]

(2) Increased disclosure to consumers.[173]

(3) Compulsory independent legal and financial advice for borrowers and guarantors involved in heavily-geared transactions.

(4) A national system for licensing mortgage brokers and providing professional indemnity and fidelity insurance; [174]

(5) National regulation of consumer credit.[175]

(6) Statutory presumptions that certain terms dealing with excessive interest and exorbitant fees and charges are substantively unfair and invalid.[176]

(7) Relaxation of privacy constraints to allow credit providers more access to the credit history of borrowers.[177] Lenders should then be required to document that a borrower has a reasonable ability to repay based on income, credit history and references.

(8) Increases to APRA's powers to take over distressed financial institutions.[178]

(9) Preventing avoidance of consumer credit obligations through false declarations of business or investment purposes.

(10) Increased resources allocated to ACCC to enable test cases to be run against predatory lenders.

(11) Supporting community-based lending and housing schemes for disadvantaged groups to enable them to avoid the poverty spiral.[179]

(12) Industry Codes of Conduct that could be given the force of law.[180]

(13) While debt forgiveness has an ancient history,[181] it is unlikely to solve the current housing crisis.[182]

The *Mortgage Reform and Anti-Predatory Lending Act* 2007 (HR 3915):[183]

(i) prohibits individuals from becoming loan originators unless they can obtain and maintain registration or a licence under State legislation and an identification number assigned by the federal registry (s 103);

(ii) requires anyone applying for registration as a State-licensed loan originator to supply information for a background check ,undergo at least 20 hours of approved education, and pass a test developed by the Nationwide Mortgage Licensing System and Registry (s 104);

(iii) prohibits the issue of a licence to a loan originator who has had a similar licence revoked in the previous five years or if the applicant has been found guilty or pleaded no contest to a felony in the past seven years (s 104);

(iv) requires regulations to be devised to prohibit mortgage lenders from steering borrowers to loans:

  (a) that the borrowers lack the capacity to repay;
  (b) that include equity stripping or excessive fees; or
  (c) in cases of residential mortgage refinance, that do not provide the borrowers with a net tangible benefit (s 123).

(v) allows civil action to be taken against mortgages for rescission of residential mortgage loans that violate the *Truth in Lending Act*, unless the mortgage corrects the violation within 90 days of notification (s 204);

(vi) requires mortgage contracts to state the maximum amount of any payments and the additional amount required every month to cover taxes or insurance (s 213); and

(vi) establishes the universal mortgage disclosure requirement of good faith estimates, which must disclose:

  (a) the total loan amount;
  (b) the type of loan;

(c) the length of the loan period;
(d) the estimated interest rate;
(e) the maximum interest rate;
(f) the total monthly estimated repayment;
(g) the percentage of the borrower's monthly income required to service the loan;
(h) the period to lock in an interest rate;
(i) any prepayment penalties;
(j) any increased final payment;
(k) any settlement charges; and
(l) the estimated cast need to close the loan(s 501).[184]

It remains to be seen whether this Act will be passed by the US Senate but even if it is not passed it could serve as a possible blueprint for a more comprehensive approach to predatory lending in Australia.

The problems posed by predatory lending will not be solved by competition or market forces.[185] By the same token, any increased regulation must be rational and focused so that it does not exclude vulnerable groups from access to credit.[186] It must be remembered that one of the side effects of deregulation of the banking and financial services industry was to increase competition and allow many borrowers the chance to get ahead. The fact that predatory lenders have taken advantage of vulnerable borrowers is no reason for turning back the clock. In the face of the threat from predatory lending the courts have shown themselves to be surprisingly adaptable and flexible in their application of legal principles. They have moved a long way from a rigid public policy of holding borrowers to their credit bargains. But there is still a long way to go before all consumers will be able to enjoy the benefits of a credit society without falling into a poverty trap.

1. This definition is provided by Acorn, the Association of Community Organisations for Reform Now at www.acorn.org.

2. Credit card fees have increased by 73% since the Reserve Bank introduced its card payment reforms in 2003, and the amount earned by Australian banks from their household credit card operations now exceeds $1 billion in fees alone: K Jiminez, "Reserve eyes soaring fees on fantastic plastic" *The Australian* 31 May 2007, p 23. Moreover, it has been reported that Australians paid out about $90M to banks in 2006 in credit card "penalty fees": P Maley, "Banks net $90M in credit penalties" *The Australian* 5 September 2007, p 3. It will be interesting to see whether Family First's proposed *Fair Bank and Credit Card Fees Bill* 2008 can overcome these problems. The bill has attracted a storm of criticism from the Australian Bankers' Association. See D Bell, " Proposed bank fees bill hurts consumers" *The Australian Financial Review* 2 May 2008, p79.

3. See J Malbon, Predatory Lending (2005) 33 ABLR 224 at 231.

4. A Klan, "Predatory loans sting 40,000" *The Australian* 14 September 2007, p 5.

5. Ibid.

6. Ibid.

7. Ibid.

8. Caitlin O'Toole "Banks: super lifts rates" *The Australian Financial Review* 3 April 2008, p.7.

9. Ibid.

10. *Permanent Mortgages Pty Ltd v Cook* [2006] NSWSC 1104 at [82-84] and [85]. See generally ASIC's Report on Low-Doc Loans at www.fidogov.au

11. See Address by Mr Glenn Stevens, Governor of the Reserve Bank of Australia on 27 March 2008 and S Murdoch, "Banks 'strong enough to weather the storm" *The Australian* 28 March 2008, p 2. It is estimated that home repossessions in the United States have doubled in the past year. See Bloomberg, "Home repossessions double" *The Australian* 18 May 2008, p76.

12. R Gluyas, "Oz low-doc loans safe, say lenders" *The Australian* 14 March 2007, p 34.

13. See C Hart, "Borrowers offered 'too much' for loans" *The Weekend Australian* 11-12 August 2007, p 6 and "Stopping 'equity skimmers' *The Australian Financial Review* 5 September 2007, p 55.

14. See T Blue, "Battling the mortgage squeeze" *The Australian* 5 March 2008, p 5.

15. *Permanent Mortgages Pty Ltd v Cook* [2006] NSWSC 1104 at [82]-[85].

16. See generally C Field, "Pay Day Lending – an exploitative market practice" (2002) 27 (1) *Alternative Law Journal* 36.

17. See T Boreham, "The poor prove profitable prey for lenders" *The Weekend Australian* 24-25 November 2006, p 40.

18. Ibid.

19. Ibid.

20. Ibid.

21. See T Boreham, "The poor prove profitable prey for lenders" *The Australian* 24-25 November 2006, pp 33 and 40. Ironically, it now appears that Amazing Loans' own access to finance is under threat. See R Urban, "Patday lender's credit under review" *The Weekend Australian* 31 May-1 June 2008, p31.

22. See Jonathan Garforth, "Reverse Mortgages" (2006) 22 (1) BLB 12 and J Pascoe, "Reverse Mortgages some regulatory issues and developments" (2008) 23(9) BLB 130.

23. G Newman, "Reverse mortgages getting into top gear" *The Australian* 24 September 2007, p. 31. See also "Demand for reverse mortgages leaps 65 pc" *The West Australian* 30 April 2007, p.33.

24. Ibid.

25. Ibid.

26. Ibid.

27. See Anna French, "Shared-equity loan boom" *The Australian* 14 March 2007, p 34.

28. For useful guidelines for solicitors advising on these products, see the Victorian Legal Practitioners' Liability Committee, "Advising on Reverse Mortgages and Other Release Products"

29. Mara Der Hovanesian, "Home-equity loans squeeze credit crisis" *The Weekend Financial Review* 19-20 June 2008, p 30.

30. Ibid.

31. Patrick Cummins "Cost of default protection soars to record" *The Australian Financial Review* 18 March 2008, p 27. It may well be that the estimated

US$1 trillion cost of the global financial crisis is overstated. See D Uren,"IMF's sub-prime crisis prediction out by 50 pc, according to OECD" *The Australian* 16 April 2008, p33. See also N Tabakoff, "Debt faculty will cost Ten more interest" *The Australian* 29 April 2008, p 23.

32. Florence Chong, "Maturing securities a property time bomb" *The Australian* 14 March 2008, p 26. Even large conglomerates such as Westfarmers are finding the cost of finance has increased dramatically. See M Sainsbury, "Westfarmers to frefinance Coles buy with $4bn war chest" *The Australian* 22 April 2008, p23. See also N Tabakoff, " Debt facility will cost Ten more interest" *The Australian* 29 April 2008, p23.

33. See R Gluyas "Analysts says banks still bear funding cost" *The Australian* 27 March 2008, p 23. Banks normally borrow at 15 basis points over the cash rate but on 18 March 2008 it was 60 basis points over the cost rate: ANZ Blomberg quoted in Patrick Cummins, "Cost of default protection soars to record" *The Australian Financial Review* 18 March 2008, p 27. The current margin is even higher.

34. See S Murdoch, "Banks strong enough to weather the storm" *The Australian* 28 March 2008, p. 2 quoting from an address by Mr Glenn Stevens, Governor of the Reserve Bank of Australia. See also K Jimenez, "Aussie banking sector a top performer in the sub-prime crisis" *The Australian* 2 April 2008, p29 and "Westpac beats credit squeeze with profit" *The Australian Financial Review* 2 May 2008, pp1 and 72.

35. See D Gibson, "Mortgage defaults tipped to rise" *The West Australian* 21 January 2008, p 11 and "Defaults soar 30 pc in rising debt stress" *The Weekend Australian* 15-16 September 2007, p. 35.

36. Katherine Jimenez, "Mortgage pain spreading to affluent families" *The Australian* 14 March 2008, p. 21. The rate of repossessions is increasing in most States. See J Wiseman, "Battlers' super pays mortgages" *The Weekend Australian* 22-23 September 2007, p.11.

37. Adrian Rollins "Most first-home buyers suffering stress" *The Australian Financial Review* 18 March 2008, p. 9 and Sid Marris, "Recent first-home buyers pay dearly" *The Australian* 18 March 2008, p 6.

38. See Majella Corrigan, "Interest-rate pain finally hits the affluent set" *The Weekend Australian* 22-23 March 2008, p 36 and Katherine Jimenez, "Mortgage pain spreading to affluent families" *The Australian* 14 March 2008, pp. 21-22. The numbers of borrowers with mortgage debts is increasing. See Nicola Berkovic and Siobhan Ryan, "More city-dwellers with mortgages" *The Australian* 18 March 2008, p.6.

39. Anthony Klan, "Credit cards hide mortgage pressures" *The Australian* 19 September 2007, p 6.

40. See above n 2.

41. John Wiseman & Jamie Walker, "Battlers' super pays mortgages" *The Weekend Australian* 22-23 September 2007, p 11. In 2006 APRA approved 13,871 applications for home owners to access superannuation funds in a final effort to save their homes, an increase of 30% over the previous year. The value of the superannuation bailouts more than doubled from $64 million to $135 million in the period 2004-2007: Ibid. This is an unfortunate trend because some commentators believe that Australians do not generally have sufficient superannuation and will need to supplement it by their home equity: See James Dunn "Home holds the key to super shortfall" *The Australian* 18 September 2007, p 37.

42. See "Predatory lending" in http://en.wikipedia.org/wiki/Predatory_lending.

43. Anthony Klan, "Predatory loans sting 40,000" *The Australian* 14 September 2007, p 5.

44. Ibid. It appears that 65-86% of applications for repossession come from non-bank lenders. See Katherine Jimenez, "Banks have a choice about lifting rates: NAB" *The Weekend Australian* 25-26 August 2007, p 36.

45. "Spotlight on loans" *The Australian* 31 March 2008, p 31.

46. Ibid.

47. Ibid. See also R Kerbaj, " Escape from the mire" *The Australian* 16 April 2008, p 13 and Four Corners program transcript, "Debtland" 31 March 2008 at www.abc.net.au/4 corners/content/2008/s2203896.htm

48. See Patricia E Obara, "Predatory Lending" (2001) 118 BLJ 541 at 550.

49. *Besta v Beneficial Loan Co* 855 F 2d 532 (8th Cir, 1988); Yen, "Failure to Advise a Loan Applicant of a Less Expensive Loan Alternative May Constitute Procedural Unconscionability" (1989) 106 BLJ 274. See also DR Cassling, "A Bank Was Liable for Beach of Contract and Breach of Good Faith as a Result of its Conduct in Negotiating a Loan Application" (2003) 120 BLJ 762.

50. *Besta v Beneficial Loan Co* 855 F 2d 532 (8th Cir 1988) at 536.

51. See *Suriya & Douglas (a Firm) v Midland Bank Plc* (1999) 3 Lloyd's Rep Bank 103 (CA).

52. *Murphy v HSBC Plc* [2004] EWHC 467; 2004 WL 413037.

53. *Metha v Commonwalth Bank of Australia* (unreported, Sup Ct, Comm D, NSW Rogers CJ, 7 June 1990). Compare Fischel, "The Economics of Lender Liability" (1989) 99 Yale LJ 131; *Lam v Ausintel Investments Australia Pty Ltd* (1990) 97 FLR 458; [1990] ATPR 40-990 at 50, 880.

54. *Ralik Pty Ltd v Commonwealth Bank of Australia* (unreported, Sup Ct, NSW Cole J, 14 August 1990). See also *State Bank of New South Wales v Chia* [2000] NSWSC 552 and *National Australia Bank Ltd v Mullins* [2006] ACTSC 116.

55. *Redmond v Allied Irish Banks Plc* [1987] FLR 307.

56. *Commonwealth Bank of Australia v Bryant* (unreported, Sup Ct NSW, Levine J, 27 October 1993). See also *Commonwealth Bank of Australia v Gatto* (unreported, Sup CT Vic, Beach J, 9 August 1996) and *Mahlo v Westpac Banking Corp* (unreported, Sup Ct, NSW Santow J, 6 February 1998 (where a lender was not held liable simply because it enthusiastically concurred in the borrower's decision to purchase additional farming properties).

57. *Warner v Elders Rural Finance Ltd* (1993) 41 FCR 399; [1993] ATPR 41-238 (lender was not liable for misleading or deceptive conduct for failing to explain system and risks).

58. *Metha v Commonwealth Bank of Australia* (unreported, Court of Appeal NSW, 29 March 1991); *Stanton v Australia and New Zealand Banking Group Ltd* [1987] ATPR 40-755; *Cornish v Midland Bank Plc* [1985] 3 All ER 513; *Bankers Trust International Plc v PT Dharmala Sakti Sejahtera* (unreported, High Court of Justice, Mance J, 1 December 1995).

59. (1991) 23 NSWLR 256; [1991] ASC 56-062.

60. Ibid at 56, 764.

61. Ibid at 56, 761.

62. (1991) 23 NSWLR 256; [1991] ASC 56-062.

63. *Box v Midland Bank Ltd* [1979] 2 Lloyd's Rep 391; *First Federal Savings & Loan Association of Hamilton v Candle* 425 So 2 d 1050 (Ala, 1982); *Brandriet v Northwest Bank of South Dakota* NA 499 NW2d 613 (SD, 1993).

64. Compare annotation "Banks Liability to Real Estate Purchaser for Misrepresentation Respecting Purchaser's Obtaining Government Guaranteed or Subsidized Loan" 37 ALR 4th 773 (1993).

65. Se J Moullakis, "Credit unions weigh odds of mortgage broking" *The Australian Financial Review* 27 May 2002, p. 49.

66. *NMFM Property Ltd v Citibank Ltd* [2000] FCA 1558; BC 20006827 (unreported, Fed Ct, Lindgren J, 10 November 2000).

67. Ibid. The phrase "on behalf of" in s 12GH suggests some involvement by the brokers with the activities of the lender. The phrase has a similar meaning to the phrase "in the course of the" lender's affairs and activities, without being

confined to any notion of master and servant": *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27 at 37.

68. *Esanda Finance Corporation Ltd v Spence Financial Group Ltd* [2006] WASC 177 at [37]; *Custom Credit Corporation Ltd v Lynch* [1993] 2 VR 469 and *Octapon Pty Ltd v Esanda Finance Corporation Ltd* (unreported, Sup Ct NSW Cole J, 3 February 1989) at 27-28.

69. See *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur (Insurance) Australia Ltd* (1986) 160 CLR 226 at 234; *Octapon Pty Ltd v Esanda Finance Corporation Ltd* (unreported, Sup Ct, NSW, Cole J, 3 February 1989) at 27 28; *Custom Credit Corporation Ltd v Lynch* [1993] 2 VR 469 at 486 and *Esanda Finance Corporation Ltd v Spence Financial Group Pty Ltd* [2006] WASC 777 at [37]. See also *Branwhite v Worcester Works Finance Ltd* [1969] AC 552 at 577-578.

70. *Henry v First Federal Savings & Loan Association* 459 A2d 772 (Pa. 1982); *Hughes v Holt* 435A 2d 687 (1981); Hiller, "Mortgagee Liability for Defective Construction and Negligent Appraisals" (1991) 108 BLJ 386 at 391.

71. See note "Mortgage Lender Liability to the Purchaser of New or Existing Homes" (1988) U.Ill LR 215; *Henry v First Federal Savings & Loan Association* 459A 2d 772 (Pa. 1982). The guarantors of the borrower's debt will not be discharged simply because the lender was careless in failing to verify progress payments on a construction project: *Modderno v Australia and New Zealand Banking Group Ltd* (unreported, NSW Court of Appeal, 15 February 1999); *Fidgeon v Westpac Banking Corporation* [2002] VSC 85; BC 200201250 (Special leave to appeal to the High Court was refused: [2003] HCA Transcript 532)

72. *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 1516 at [339]. Compare *Curran v Northern Ireland Co-ownership Housing Association Ltd* (unreported, CA, Northern Ireland, Gibson J, 9 May 1986), where a lender was not held liable for a loss caused by a negligent valuation because the purchaser had not paid for the valuation. See Jones, "Lender Liability for Negligent Building Valuations" (1999) 10 JBFLP 228 at 235.

73. *Westlake v Bracknell District Council* (1987) 282 EG 868.

74. *Davis v Idris Parry* (1988) 20 EG 92; *Roberts v J Hampon & Co* (1988) NLJ 166. By the same token, in exceptional circumstances a lender can be liable for a negligent valuation even if it was done by an independent valuer: *Smith v Commonwealth Bank of Australia* (unreported, Fed Ct of Aust, von Doussa J, 11 March 1991), affirmed: (1991) 42 FCR 390; (1991) 102 ALR 453.

75. *Westlake v Bracknell District Council* (1987) 282 EG 868. No duty of care will arise where a borrower does not disclose to the lender that he is looking for development finance in addition to the finance required to purchase a property. See *Plum v Commonwealth Bank of Australia* [2005] FCA 790 (unreported, Fed Ct, Wilcox J, 15 June 2005) at [137].

76. See *Verity v Lloyd's Bank* (unreported, QB, Robert Taylor J, 4 September 1995); *Contractors Supplies Pty Ltd v Esanda Finance Corporation Ltd* (unreported, Fed Ct FC, 30 September 1991), affirmed (1991) 42 FCR 390; *Smith v Commonwealth Bank of Australia* (unreported, Fed Ct, von Doussa J, 11 March 1991), affirmed: *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453. Compare *Timms v Commonwealth Bank of Australia* [2004] NSWSC 76 where the bank was not liable because it did not represent that the business was a sound investment.

77. *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453; *Loyola Federal Savings & Loan Association v Galanes* 33 Md App 559; 365A 2d 580 (1976); *Contractors Services Pty Ltd v Esanda Finance Corporation Ltd* (unreported, Fed Ct, FC, 30 September 1991).

78. Jones, "Lender Liability for Negligent Building Valuations" (1991) 10 JBFLP 228 at 234-235.

79. See *Australia Breeders Co-operative Society v Jones* (1997) 150 ALR 488 and O'Donovan, *Lender Liability On-Line* (2007), para [4.120]. Compare *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 1516 at [339].

80. *Commonwealth Bank of Australia v Finding* (unreported, Sup Ct Qld de Jersey CJ 23 April 1998), on appeal: *Finding v Commonwealth Bank of Australia* [1999] Q Conv R 60, 370 at para 54-533.

81. Ibid. Contrast *Hong Kong Bank of Canada v Phillips* (unreported, QB Manitoba, Clearwater J, 24 March 1997 (bank should have advised borrowers to obtain independent advice).

82. *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] ATPR 41-696 at 42 888; [1999] FCA 569 at [2]-[4]; *Costa Vraca Pty Ltd v Berrigan Weed and Pest Control Pty Ltd* (1998) 154 ALR 714 at 722.

83. C Lockhart, *The Law of Misleading or Deceptive Conduct* (2nd ed, Butterworths, 2003), para [5.3], cited with approval in *Noor Al Honda Islamic College Pty Ltd v Bankstown Airport Ltd* [2005] NSWSC 20 at [189].

84. *Demangogue v Ramensky* (1992) 39 FCR 31 at 32. See also *Kimberly NZI Finance Ltd v Torero Pty Ltd* (1989) ASC 55-943; (1989) ATPR (Digest) 46-054.

85. See A Fraser, "All eyes on two-tier sales" *The Australian* 20 March 2003, Primespace, p 3 and O'Donovan, *Lender Liability On-Line* (2007), para [4.151].

86. *Australian Securities and Investments Commission v Skeers* [2007] FCA 1551; BC 200708620. As to the dangers of low-doc loans involving loan applications that allegedly contain substantially false information about the borrower's income and assets, see A Klan, "Homeless man's loan" *The*

*Australian* 31 August 2007, p 25. In the United States the FBI is investigating the no-doc loans made by Countrywide Financial because of allegations that the company deliberately overlooked inflated income figures for many borrowers. See G R Simpson & J R Hagerty, " Countrywide suffers $1bn loss as FBI probes no-doc loans" *The Australian* 1 May 2008, p26.

87. ASIC may prosecute a bank for unconscionable conduct if it falsely states that guarantors received independent legal advice. See R Gluyas, "ASIC pursues bank's "false" declaration" *The Australian* 6 September 2007, p 21.

88. *Australian Securities and Investments Commission v Skeers* [2007] FCA 1551; BC 200708620. It has also been reported that a Newcastle broker has been convicted of two counts of fraud under the *Crimes Act* 1900 (NSW) for arranging a low-doc loan with false documentation. See ASIC Media Release "Former director of Newcastle-based investment company found guilty" 12 October 2007 <www.asic.gov.au/asic/asic.nsf/byhead/ine/07-268+Former+director+of Newcastlebased+investment+company+found+guilty?open document > at 19 October 2007 and J Mc Sweeney, "Low-doc loans:broker conduct impact"(2007) 23 (6) BLB 85 at 86.

89. *Australian Securities and Investments Commission v Skeers* [2007] FCA 1551; BC 200708620.

90. See above n.66.

91. *Perpetual Trustee Company Ltd v Khoshaba* [2006] NSWCA 41; BC 200602108.

92. *Contracts Review Act* 1980 (NSW), s 9.

93. Section 9 (2) (l).

94. [2006] NSWCA 41; BC 200602108.

95. Lending on the basis of the security provided rather than the borrower's ability to repay the loan can result in a declaration that the mortgage is an "unjust contract" s 7 of the *Contracts Review Act* 1980 (NSW) and an adjustment of the mortgagee's rights and remedies. See *King Mortgages Pty Ltd v Satchithanantham* [2006] NSWSC 1303; BC 2006 102 34 and David Richardson, "Asset lending foils financier" (2007) 22 (8) BLB 104.

96. *Permanent Mortgages Pty Ltd v Cook* [2006] NSWSC 1104; BC 200608529.

97. Ibid.

98. [2006] NSWSC 1104 at [95].

99. See *Graeme Howatson & Dioni Perera*, "Court finds mortgage unjust despite false statements by borrowers" (2007) 22 (8) BLB102 at 103.

100. [2006] NSWSC 1104 at [95]; [2006] ASC 155-082.

101. See *Cook v Permanent Mortgages Pty Ltd* [2007] NSWCA 219 at [24].

102. *Chordas v Bryant (Wellington) Pty Ltd* (1988) 20 FCR 91; *Hay v Sheargold* (unreported, Sup Ct NSW, 18 April 1996); *Munro v Park Holiday Estates Ltd* [1984] TLR 138; *Mayfield Investments Ltd v Stewart* (1995) 121 DLR (4th) 222; *Jordan House Ltd v Menow* (1973) 38 DLR (3d) 105. See also Marcus Hoyne, "One for the Road – Liability of Servers of Alcohol" (1998) 72 (4) LIJ 46.

103. See *Johns v Cosgrove* (unreported Sup Ct, Qld, Derrington J, 12 December 1997) reversed *Cosgrove v Johns* [2001] QCA 157. See also *Desmond v Cullen* (2001) 34 MVR 186; [2001 NSWCA 238 (no breach of duty where publican relied on assistance proffered by patron's friends who told hotel staff they would look after him) and *Soutter v P & O Resorts Pty Ltd* [1999] Qd R 106 (as to whether a publican owed a duty of care to ensure that an intoxicated patron did not cause injury by dancing wildly). See also "Impaired Judgements? Alcohol Server Liability and "Personal Responsibility" after Cole v South Tweed Heads Rugby Leagues Football Club Ltd" (2005) 13 TLJ 103.

104. *Foroughi v Star City Pty Ltd* [2007] FCA 1503; *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43.

105. *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43 at [27].

106. *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43 at [27]. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 and *Agar v Hyde* (2000) 201 CLR 552.

107. *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43 at [49].

108. [2004] SASC 103 (unreported, Sup Ct, SA, Judge Burley Supreme Court Master, 25 April 2004).

109. Ibid at [15].

110. Ibid at [20]. (emphasis added). Note the recent allegation against Wespac that the "negligent handling of our loans have caused a significant exacerbation of my gambling habits and was the catalyst for my loss of my employment and future earning potential": J Roberts, "Gambler sues Westpac for his addiction" *The Australian* 2 June 2008, p5.

111. See *Commonwealth Bank of Australia v Spira* (2002) 174 FLR 274; [2002] NSWSC 905; appeal dismissed *Spira v Commonwealth Bank of Australia* (2003) 57 NSWLR 544; [2003] ATPR (Digest) 46-237; special leave refused:

*Spira v Commonwealth Bank of Australia* [2004] HCA Trans 465. See also *Varangian Pty Ltd v OFM Capital Ltd* [2003] VSC 444 (on the importation of a duty of good faith in the enforcement of commercial loan agreements). See too *Roselle Enterprises Pty Ltd v Morris* [2003] WASCA 277; *Burger King Corporation v Hungry Jacks Pty Ltd* [2001] NSWCA 187 at [159] and [164] and *Vodaphone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 12 at [125].

112. See *Expo International Pty Ltd v Chant* (No 2) [1979] 2 NSWLR 820; (1979) 4 ACLR 679; *Australia & New Zealand Banking Group Ltd v Carnegie* (unreported, Sup Ct Vic Crockett J, 16 June 1987,

113. *National Provincial Bank of England Ltd v Glanusk* [1913] 3KB 335; *Midland Bank v Kidwai The Independent* 5 June 1995. The creditor has a wider duty of disclosure to guarantors who are individuals or small business customers under the Code of Banking Practice, cl 28.4.

114. *Kelly v ANZ Banking Group Ltd* (unreported, Qld Sup Ct, Demack J, 31 March 1993); *Commercial Bank of Australia Ltd v Amadio* (1983) 151 C.L.R. 447 at 463 and O'Donovan & Phillips *The Modern Contract of Guarantee*, [para 4.220].

115. *Gordon v Rae* (1858) 8 E & B 1065; 120 ER 396.

116. O'Donovan & Phillips, *The Modern Contract of Guarantee*, para [4.210]. Compare *Toronto Dominion Bank v Rooke* (1983) 3 DLR (4th) 715.

117. 716 P 2d 1057 (1986).

118. (1862) 15 Moo PC 472; 15 ER 573.

119. (1862) 15 Moo PC 472 at 483; 15 ER 573 at 577.

120. *Mayor of Durham v Fowler* (1889) 22 QBD 394 at 419 per Denman J.

121. See O'Donovan & Phillips, *The Modern Contract of Guarantee* (Looseleaf ed, Thomson, Lawbook Co Ltd, 2004), para [8.1100].

122. [1996] 1 Lloyd's Rep 200. See also *Bank of Baroda v Patel* [1996] 1 Lloyd's Rep 391.

123. See C Field, "Pay Day Lending – an exploitation market practice" (2002) 27 (1) *Alternative Law Journal* 36. and Therese Wilson, "The inadequacy of the current regulatory response to payday lending" (2004) 32(3) ABLR 193.

124. In *Beil v Pacific View (Qld) Pty Ltd* [2006] QSC 199 at [32] Chesterman J noted that there are many cases that have upheld the payment of a higher rate of interest on default even though the mortgage did not stipulate that the higher rate of interest applied at all times but a lower rate would be charged

for punctual payment. Compare *David Securities Pty Ltd v Commonwealth Bank of Australia* (199) 23 FCR 1 at 29.

125. *Gibbons v Pozzan* [2007] SASC 99; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1990) 23 FCR 1 at 29. See also Meredith, "A nicety in the Law of Mortgage" (1916) 32 LQR 420.

126. *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79; [1914-15] All ER 739.

127. *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79; [1914-15] All ER 739. See also *Kostopoulos v GE Commercial Finance* [2005] QCA 311.

128. (2005) 224 CLR 656; 222 ALR 306.

129. Whether any particular provision represents a genuine pre-estimate of the loss from the breach must be decided as a matter of substance rather than form: *O'Dea Allstates Leasing System (WA) Pty Ltd* (1982-83) 152 CLR 539; *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 185 and 197; *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1989) 15 NSWLR 564 at 572.

130. [2006] QSC 199 (unreported, Sup Ct Qld, Chesterman J, 18 August 2006).

131. See eg *Consumer Credit (Victoria) Act* 1995 (Vic), s 39 (1).

132. See eg *Consumer Credit (Victoria) Act* 1995 (Vic), s 39(3).

133. See *Consumer Credit (New South Wales) Amendment (Maximum Annual Percentage Rate) Act* 2005 (NSW); *Consumer Credit (NSW) Act* 1995, s 10B and *Consumer Credit Act* 1995 (ACT), s 8C. See also A Galvin, "NSW and ACT Amendments to the Consumer Credit Code – the unintended consequences" (2006) 22(1) BLB1.

134. C Nguyen, "Fees in consumer credit: regulatory rumblings" (2007) 23(6) BLB 87 at 89.

135. Ibid.

136. See *Consumer Credit Code*, s 72 and C. Nguyen, opcit, n 134, p. 89.

137. Under a proposed change to s 72 of the *Consumer Credit Code* the word "unreasonable" will be substituted for the word "unconscionable". This is intended to introduce a broad and flexible test for the court following the decision in *Director of Consumer Affairs Victoria v City Finance Loans and Cash Solutions* [2005] VCAT 1989. See R Dennings, S Klimt, M Sneedon and N Smythe, "Proposed changes for Consumer Credit Code" (2007) 23(4) BLB 62.

138. See *McKenzie v Smith* [1998] ASC 55-025; *McNally v Australia and New Zealand Banking Group* [2001] ASC 155-047 and Nicola Howell, "Catching up with consumer realities: The need for legislation prohibiting unfair terms in consumer contracts" (2006) 34 ABLR 447 at 453.

139. *Dale v Niochols Constructions Pty Ltd* [2003] QDC 453; *Espiritu v Australian Guarantee Corporation Ltd* [1997] ASC 155-004 and Nicola Howell, opcit, p. 452.

140. *McKenzie v Smith* [1998] ASC 155-025 *Elders Rural Finance Ltd v Smith* (1996) 41 NSWLR 296; *Goldsborough v Form Credit Aust Ltd* [1989] ASC 55-946 and Howell, opcit, pp 453-454.

141. *Esanda Finance Corporation Ltd v Tong* (1997) 41 NSWLR 482; *Australia and New Zealand Banking Group Ltd v Volemsky* (unreported, Sup Ct NSW, Spender AJ, 14 December 2004).

142. See generally O'Donovan, *Lender Liability On-Line* (2007), para. [5.395].

143. *Australian Securities and Investments Commission Act* 2001 (Cth), s 12CB(5).

144. See *Australian Securities and Investments Commission Act* 2001 (Cth), ss 12GF, 12GD and 12GM.

145. "Consumers" are covered by s 12CB of the *Australian Securities and Investments Commission Act* 2001 (Cth); small business consumers are protected by s 51AC of the *Trade Practices Act* 1974 (Cth). See O'Donovan, *Lender Liability* (2000) paras [5.265]-[5.285].

146. See O'Donovan, *Lender Liability On-Line*, para [5.270].

147. *Trade Practices Act* 1974 (Cth), s 51AC (11)(e).

148. See O'Donovan, *Lender Liability* (2000), para [5.275].

149. (unreported, Sup Ct Qld, Shepherdson J, 31 August 1999).

150. Ibid at [36].

151. Ibid at [57].

152. Ibid at [57].

153. Ibid at [57].

154. *Asia Pacific International Pty Ltd as Trustee for Planet Securities Unit Trust v Dalrymple* (unreported, Sup Ct Qld, Shepherdson J, 31 August 1999) at [58].

155. Ibid at [68] and [69].

156. (unreported, Sup Ct Qld, Shepherdson J, 31 August 1999). Compare *Greenbank New Zealand Ltd v Haas* [2000] 3 NZLR 341.

157. [2001] NSWSC 1047.

158. [2004] NSWSC 1236.

159. Ibid at [110].

160. *Karam v Australia & New Zealand Banking Group Ltd* [2005] NSWCA 344 at [96]. See also Lee Aitken, A "duty to lend reasonably – new terror for lenders in a consumer world" (2007) 18 JBFLP 18 at 25-26.

161. See *Guardian Mortgages Pty Ltd v Miller* [2004] NSWSC 1236 at [114] and Lindy Willmot and Bill Duncan, "Clogging the Equity of Redemption: An Outmoded Concept?" (2002) 2(1) QUTLJ 35.

162. See Lindy Willmott and Bill Duncan, "Clogging the Equity of Redemption…" opcit, pp. 43-49.

163. See *Australian Securities and Investments Commission Act* 2001 (Cth), s 12GM(5).

164. See Lita Epstein, "Ohio court gives victory to homeowners facing foreclosure" http://www.bloggingstocks.com/2007/11/15 and David Nason, "Home owners give thanks to Ohio judiciary" *The Australian* 19 November 2007. Australian lenders are not immune from this type of problem. See Angela Flammery, "Loan agreements and mortgages. What is the effect of a transfer of a mortgage?" (2007) 22(9) BLB 119.

165. See Carrick Mollenkamp, "UBS sued for offloading sub-prime assets" *The Australian* 28 February 2008, p 26 and R Simon, "Mortgage lenders face ire of investors" *The Australian* 29 May 2008, p. 26.

166. *Williams and Glyn's Bank Ltd v Barnes* (181) Con LR 205; *James v Australia & New Zealand Banking Group Ltd* (1985) 64 ALR 347 at 391; *Commonwealth Bank of Australia v Grubic* (unreported, Sup Ct FC, SA 27 August 1993) and O'Donovan, *Lender Liability* (2000), para [4.160].

167. See *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453, affirming *Smith v Commonwealth Bank of Australia* (unreported, Fed Ct, von Doussa J, 11 March 1991), O'Donovan, *Lender Liability* (2000), Ch 4 and *Lender Liability On-Line,* (2007) Ch 4.

168. The bond issuers only provided guarantees in respect of asset backed securities or collateralised debt obligations. See generally Karen Richardson, "Credit rating affirmed for top bond insurer" *The Australian* 28 February 2008, p 56 and A Lucchetti, "Embattled Moody's boss falls on sword" *The Australian* 9 May 2008, p. 23.

169. US monoline insurer, ACA, has been downgraded to junk status. See S Murdock & R Callick, "ANZ's $1bn for loan debts as defaults rise" *The Australian* 8 April 2008, p 27. A monoline insurer is, in effect, a AAA-guarantor that wraps its own credit rating around a debt obligation and guarantees its timely payment of principal and interest in return for a fee.

170. See Frank Pasquale Concurring Opinions: From First Amendment to Financial Meltdown? 22 August 2007 at http://www.concurringopinions.com/archives/2007/08/from_first_amen_html. The ratings agencies, such as Standard & Poor's and Moody's, are considered members of the media: *Jefferson City School v Moody's* (PC No 95-WY-2649-40 (US Court of Appeals, Tenth Circuit, 4 May 1999). This view will be tested by the *US Mortgage Reform and Anti- Predatory Lending Act* 2007 if it is passed by the US Senate.

171. Imre Salucinzky, "Sub-prime hit for ratepayers" *The Australian* 3 April 2008, p2 and S Moran, "Council to sue Lehman" The Australian 22 April 2008, p.22.

172. See Gary Becker, "Should have thought of that before you bought the house" at www.becker_posner_blog.com; S Wright, "Borrowers to blame for homes crisis, says Symond" *The West Australian* 8 May 2008, p 17 and B Salt, "How to keep our consumerist society ticking" *The Australian* 22 May 2008, p. 24. Education should be directed not merely at financial literacy but also risk appreciation. Disclosure without sufficient education to guard against predatory practices will not be effective. See Jean M Lown "Educating and Empowering consumers to Avoid Bankruptcy" (2005) 29(5) *International Journal of Consumer Studies* 401 at 406. But, to be successful, education programs must be tailored and targeted, such as an extended period of one-on-one counselling. See J Malbon, "Predatory Lending" (2005) 33 ABLR 224.

173. See A Hepworth, "States target consumer credit disclosure" *The Australian Financial Review* 28 April 2008, pp 1 and 8.

174. See generally Graeme Howatson, "National regulation of finance brokers" (2008) 23(7) BLB 101 and L Wright, "Tough laws shield loans" *The Sunday Times* 19 August 2007, p 15. The national licensing system should require a maximum level of education and experience, a compulsory dispute resolution system, probity checks, disclosure of commissions and disclosure of the brokers' panel of lenders. The Finance Brokers' Association of Australia has itself called for an overhaul of the laws regulating mortgage brokers: A Klan, "Call for national licensing system to end mortgage broking fraud" *The Weekend Australian* 15-16 September 2007, p 37. This call for a national licensing system is a continuing saga. The States have agreed to transfer power to the Commonwealth to regulate credit. The Federal Government's "Green Paper on Financial Services and Credit Reform" (3 June 2008) proposes a national system for regulating mortgages and mortgage broking advice. For an evaluation of US statutes regulating mortgage brokers, see Lloyd T Wilson Jr, "A Taxonomic Analysis of Mortgage Broker Licensing

Statutes: Devising a Programmic Response to Predatory Lending" (2006) 36(2) *New Mexico Law Review* 297.

175. Ros Grady, "Should credit go to the Commonwealth? Yes!" (2007) 23(6) BLB 82. However, it appears that regulation of consumer credit, as distinct from mortgage lending, may be left to the States. See the Federal Governments "Green Paper on Financial Services and Credit Reform" (3 June 2008)

176. See Nicola Howell, "Catching up with consumer realities: The need for legislation prohibiting unfair terms in consumer contracts" (2006) 34 ABLR 469. See also R Nickless, "Gym offered members unfair contracts" *The Australian Financial Review* 28 April 2008, p. 9.

177. See generally O'Donovan, *Lender Liability* (2000), Ch 3.

178. See Richard Gluyas, "Regulator may get sweeping powers to deal with distressed banks" *The Australian* 28 March 2008, p. 22.

179. See J Malbon, "Predatory Lending" (2005) 33(3) ABLR 224 at 227 for a discussion of Community Development Finance programs.

180. See *Corporations Act* 2001 (Cth), s 1011A and ASIC Policy Statement 103, *Approval of Financial Codes of Conduct* (2005). For an example of a voluntary code of conduct relating to reverse mortgages, see *The Senior Australian Equity Release Association of Lenders (SEQUAL) Code of Conduct* (August 2007) at www.sequal.com.au and A Fenech "Seniors protected in reverse mortgages" *The Weekend Australian* 25-26 August 2007, p 27. Section 51AE of the *Trade Practices Act* 1974 (Cth) provides that regulations may prescribe an Industry Code and declare it to be mandatory. A contract that directly contravenes a provision of an Industry Code is rendered unenforceable by the common law. See *Ketchell v Master of Education Services Pty Ltd* [2007] NSWCA 161 at [27]. Cf *The Cheesecake Shop v A & A Shah Enterprises* [2004] NSWSC 625.

181. Debt amnesties were granted by Sumerian and Babylonian kings. See CL Peterson, "Truth, Understanding and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act" (2003) 55 *Florida Law Review* 807 at 820.

182. See Greg Ip, "Bernanake calls for mortgage forgiveness" *The Australian* 6 March 2008, p 26. See also Stephen Ellis, "Fed's suggestion that lenders take a haircut reflects depth of the US crisis" *The Australian* 6 March 2008 p 30.

183. This Act was passed by the US House of Representatives on 15 November 2007. Law reformers will also pay close attention to the *Consumer Credit Act* 2006 (UK) which introduced a new "unfair credit relationship test" in place of the "extortionate credit bargain" provisions of the *Consumer Credit Act* 1974. The *Consumer Credit Act* 2006 (UK) received Royal Assent on 30 March 2006 but it is thought that the new test may bring more uncertainty to the

debtor/creditor relationship. See Lorna Cromar, "Consumer Credit Bill" (2006) 156 NLJ 662

184. This section draws heavily on the summary of the Act provided by Project Vote Smart. See HR 3915: Mortgage Reform and Anti-Predatory Lending Act of 2007 (GovTrack.us) at http://www.govtrack.us/congresbill.xpd?tab=summary&bill= h110-3915.

185. See Joshua S Gans, "Protecting consumers by protecting competition, Does behavioural economics support this contention?" (2005) 13 *Competition and Consumer Law Journal* 40. Contrast S Sedwick, "Solution to housing affordability 'crisis' is to help the market work better" *The Australian* 13 March 2008, p 30. See also D Wessel, "Learning our sub-prime lessons: we must prevent lenders competing their way to disaster" *The Australian* 30 May 2008, p. 26. If anything, the global credit crisis is destroying competition in the home-lending market. See David Uren, "Call to support mortgage lenders" *The Australian* 28 March 2008, p 2 and "Bank raises broker ire with commission cuts" *The Australian* 15 April 2008, p 21. On the other hand, one Australian bank wants to broaden the role of mortgage brokers. See T Boreham, "NAB seeks broker-advisers" *The Australian* 28 April 2008, p. 29.

186. See Sinclair Davidson, "Let banks and instos make own credit decisions" *The Australian* 22 February 2008, p 28.