

### Preface

I make this submission as a private citizen of Australia. I have previously made submissions to the Senate Economics Reference Committee's inquiry into the Performance of ASIC, submission number 422 and 281. The content of my submission 281 was later used as a source of reference for the speech made by Senator Alan Eggleston in Federal Parliament on 25<sup>th</sup> March 2014 with regards to the unilateral termination of credit contracts by CBA during and after the purchase of Bankwest.

I hereby make this submission to the Treasury as part of The Hon. Bruce Billson's review as Minister for Small Business to extend unfair contract term protections to small business.

### Introduction

The CBA takeover of Bankwest generated allegations from hundreds of Bankwest customers that they were unfairly and aggressively foreclosed on for no apparent reason. Most Small to Medium sized Enterprise (SME) customers who were either not in any financial difficulty or had minor difficulties that in any other situation could have been easily mitigated by a bank found themselves forced into receivership and bankruptcy. The abruptness of the bank's actions subsequently created mental and physical health issues for the Bankwest customers which led to the break-up of many families. The financial ramifications of the conduct flowed on to losses to creditors and suppliers such as builders, labourers etc.

The traditional banking process for customers in difficulty involves placing the customer into a specialised "turnaround" team. The specialised nature of this team warrants the charging of higher interest to cover the cost. After the customer is turned around the customer is then returned to local area management to continue business as usual. The CBA/Bankwest conduct exposed serious flaws in access to regulator assistance and protection legislation for SME's and shows that there are circumstances where it is in a bank's commercial interest to act in contravention to the customer's commercial interests and aggressively foreclose on the customer.

The three situations arising from the Bankwest takeover are:

- 1) If, such as Bankwest did in 2008, a bank becomes insolvent due to the withdrawal of its funding base by its parent company;
- 2) If, such as CBA did in 2008/9, a bank is engaged in a Basel strategy that requires a higher Basel Capital Adequacy ratio; and
- 3) If, such as CBA did in 2010/11, a bank wishes to adjust its risk portfolio and exposure to certain sectors.

### Non-monetary covenant defaults

The solution used to address all of the above situations was to manufacture 'non-monetary' covenant defaults on the Bankwest SME customers. By 'non-monetary' covenant default I refer to any default not related to a regular monetary payment pursuant to the terms of the agreed credit contract.

The list of the most prevalent non-monetary defaults used by CBA/Bankwest are:

- 1) LVR defaults – The bank unilaterally decides that a customer’s security has decreased in value and hence breaches the prescribed minimum loan to value ratios. N.B. There is no legal requirement for the bank to engage a registered valuer.
- 2) Documentation defaults – Provisions within commercial credit contracts allow for banks to request financial reports from SME’s. I met with one Bankwest customer who was placed into administration simply because he had not prepared financial reports in time. He was subsequently bankrupted and lost all his assets and savings.
- 3) Earnings Before Income Tax (EBIT) default – I met with one Bankwest customer who was sent an EBIT default letter indicating that his pub takings had dropped below the prescribed minimum levels of the credit contract terms. After being told to ignore the letter because “everybody gets these” he was then placed into receivership and lost his business.
- 4) Anniversary date expiration – Many customers were never told of any problems with their loans and after the expiration of their contract continued with their business and made repayments relying on the law of conduct by estoppel to continue only to be abruptly terminated without notice.

Banks have a myriad of non-monetary methods to terminate a customer when needed but they all have one thing in common. They are done unilaterally without the customer having any chance to make any changes to their business finance.

All businesses require a short, medium and longer term plans so that businesses can plan their cash flow. If an SME owner is aware that they may struggle to make a mortgage payment in a few months then they can make the necessary changes to sell down assets or cut expenses to make sure they have the money for the repayments to avoid a monetary default.

**However, an SME owner has no warning about whether a non-monetary default may arise as these are unilaterally determined by the bank. This is fundamentally unfair.**

#### Proposed changes to Unfair Contract Terms

My submission focusses on the abuse of non-monetary covenants by banks as a tool for removing customers from their balance sheets as economic and risk profiles change. For this reason I base my suggestions on the use of standard form contracts for financial products.

#### Focus questions

1. How widespread is the use of standard form contracts for agreements with small business and in what circumstances are they used?
2. What types of transactions are they commonly used for, that is for which goods and services, in which industries and over what range of transaction values?
3. What are some of the benefits and disadvantages of standard form contracts?

Almost all contracts provided by banks are a standard form ‘take-it-or-leave-it’ contracts. Banks use standard form contracts for all services provided whether they are credit facilities, investment products or savings accounts. Standard form contracts provide economies of scale savings and have an important part in small businesses however, it is clear from the many banking related scandals,

whether it be the CBA unilateral termination of Storm margin loans, or, CBA CFPL financial planner scandal or CBA's unilateral termination of Bankwest commercial customer loans it is clear that the over use of these contracts by banks has created a significant imbalance of negotiation power between banks and small businesses.

#### Focus question

4. To what extent are businesses reviewing standard form contracts or engaging legal services prior to signing them? Does this depend on the value or perceived exclusivity of the transaction?

From my experience whilst small businesses will engage legal services before signing a contract with suppliers most find that it is a waste of money getting legal services to review a bank credit contract because there is nothing that can be done to change it anyway. Nearly all bank credit contracts are non-negotiable and it is for this reason that the government, through legislation, needs to increase the bargaining power of small business to improve how businesses interact with their bank.

Whilst this may create an increase in costs for the businesses it is outweighed by the protection the business gets from unconscionable conduct and enforcement by the banks of unfair contract terms.

#### Focus question

5. To what degree do small businesses try to negotiate contracts that are presented on a 'take it or leave it' basis? Are there types of goods and services where small businesses are more likely to try to negotiate contracts?

There is currently very little room for a business to negotiate for financial services for banks. This goes to the imbalance of power between banks and small businesses which is why banks can rely on draconian clauses embedded in credit contracts to call in loans.

#### Focus questions

6. What considerations influence the design of terms and conditions in standard form contracts?
7. What terms are businesses encountering that might be considered 'unfair'?
8. Do these terms relate to the operation of the contract or to remedies available under the contract?
9. What detriment have businesses suffered from UCTs and are there examples of business sectors where detriment is particularly prevalent?

The most publicised example is the recent **NSW Supreme Court case O'Brien vs Bankwest (NSWCA 71)** where on appeal it was found that clauses known as suspension clauses are incapable of defeating a claim of misleading, unconscionable or deceptive conduct. That is, **the clause embedded in all credit contracts – a clause which still exists to this day – which attempts to suspend the customer's right to sue the bank until all monies are repaid, is unlawful if there is a claim of misleading, unconscionable or deceptive conduct.** This new precedent protects the customer from any attempt by the bank to get summary judgement over them.

Interestingly the Unfair Contracts Review Consultation Paper released by Treasury contains a list of examples of what are considered to be unfair terms in standard form consumer contracts. It is worth

noting that nearly all of these are standard for commercial credit contracts. Is there any wonder why banks are running riot over small businesses?

30. Below are some common examples of terms that may be regarded as unfair if they are included in standard form consumer contracts:

**Terms that may be regarded as unfair in consumer standard form contracts include terms that:**

- Permit the supplier but not the customer to avoid or limit the performance of the contract, terminate it, vary its terms or renew or not to renew the contract.
- Permit the supplier to:
  - change prices without the customer's right to terminate the contract (lock in terms);
  - unilaterally determine when the contract has been breached;
  - unilaterally vary the characteristics of the goods or services to be supplied; and
  - assign the contract to the customer's detriment without the customer's consent.
- Penalise the customer but not the supplier, for breach or termination of contract.
- Limit the customer's right to sue the supplier.
- Limit the supplier's explicit liability for its agents.
- Limit the evidence the consumer can lead in proceedings on the contract.
- Impose the evidentiary burden on the customer in proceedings on the contract.

Bullet Point 1 – I have previously discussed above how banks can manufacture non-monetary covenant defaults within credit contracts. The CBA's conduct in the takeover of Bankwest shows that, in practise, a bank can unilaterally terminate or vary or chose not to renew a credit contract without having any obligation to inform the customer. There is a myriad of non-monetary covenants that can be invoked as a 'get out clause' for the bank. The most prevalent being the unilateral revaluing of the security, at the customer's expense and without the customer's knowledge which in turn creates a LVR breach. Whilst most Australians believe a bank has a duty to give the customer time to 'tip-in' extra funds to bring the LVR back down to agreed levels, we now know that it is far more profitable for the bank to immediately foreclose and then use cross-default provisions in the credit contract to seize the customer's cash. After all, why wait 30 years for a customer to pay back a loan when the bank can induce a default and seize all cash and assets immediately?

Bullet Point 2 – The Bankwest 2008 Annual Report uses the phrase "proactive repricing" as a euphemism for drastically changing the price of a credit contract (i.e. increasing the interest rate) after the start date.

Using the current state of the law, let's assume that a bank sells a credit contract to a business for a term of, say four years, for 8% and then half way through the term of the contract the bank is affected by a global crisis. The bank finds itself in a position where it should have sold this four year credit contract for 13% rather than 8%. The bank has a simple way of retrospectively repricing that contract. The bank need only manufacture a non-monetary covenant default and then charge 18% penalty interest for the second half of the contract, thereby raising the average price of the contract to 13%. (i.e. The average of 8%+8%+18%+18%). This is what has made CBA so profitable since the

takeover, by transferring the wealth of Bankwest customers to the CBA. This is the process referred to by Bankwest as “proactive repricing”. Hence, non-monetary covenant defaults can be (and are) used by banks to unilaterally reprice credit contracts.

Profit & Loss
The results for the year ended 31 December 2008 show an increase in operating profit before tax, provisions and associated undertakings of 62.1% at \$597.0 million compared to the prior year (2007: \$368.3 million).
Net operating income of \$1,505.6 million increased by 32.4% from the prior year (2007: \$1,137.3 million) driven partly by <u>pro-active repricing of the variable lending book throughout the year</u> and enhanced by a \$121.4 million revaluation of securitisation notes and swaps (made up of a \$129.6 million gain on the notes and a \$8.2 million loss on the swaps). The improvement in profit before tax, provisions and associated undertakings was delivered despite the continued and significant investment in physical distribution (the national expansion), brand recognition, customer facing staff, new products and back office infrastructure to support our growth in the future.

Figure 1 - Bankwest Annual Report 2008, page 5

Bullet Point 3 – It is now common knowledge that in early 2008 Bankwest was trading in insolvency and could not fulfil its lending obligations to its contracted commercial loan customers. With the current laws not only is there no penalty placed on the bank, but the bank can manufacture a non-monetary covenant defaults on the customer and charge penalty interest to extract more funds from the customer. Bankwest passed the parent company’s (HBOS) default onto the customers in the form of penalty interest and receivership asset fire-sales. The Bankwest takeover has shown there is no legislative protection for SME customers in this situation.

Bullet Point 4 – See discussion above on suspension clauses, (O’Brien vs Bankwest).

Bullet Point 6 & 7- The current financial services and credit contracts are written with such favour for the banks that consumers have a raft of ‘challenges’ trying to even get to trial, let alone actually win at trial. I will leave this to more experienced legal minds to list.

#### Focus questions

10. How do unfair terms in standard form small business contracts impact on confidence and trust in the market?
11. Who is including ‘unfair’ terms in contracts to small businesses? Is it larger business and/or a third party (such as a lawyer) drawing up the contract?
12. Is it the terms or the process by which some contracts are negotiated between small business and business to be the primary issue for small businesses?

Bank credit contracts have been drawn up for many years by highly paid bank lawyers. They are then thrust upon SME’s to take-it-or-leave-it with no room for negotiation. If we add to this, the banking oligopoly that exists in Australia then SME’s and in turn the Australian economy, are effectively held hostage to these contracts with no protection against any unfair terms.

Furthermore the Australian public, media and politicians are only now starting to understand through the various inquiries, be it, CBA Storm Senate Inquiry, CBA post-GFC Senate Inquiry (2012) and CBA/CFPL (performance of ASIC) Senate Inquiry 2014 that there is no effective regulatory protection – FOS, COSL, and ASIC are toothless tigers. This does not bode well for market confidence and will discourage foreign investment.

**Focus question**

15. How are small businesses currently addressing issues with respect to UCTs? Are they resolving complaints informally or addressing complaints through more formal channels such as regulators?

The current process of complaint handling for contractual breaches by banks is beyond farcical. The customer must first complain via the banks Internal Dispute Resolution (IDR) process. If this fails then the customer may progress the complaint to COSL/FOS, which in the case of CBA may include the same person. The most publicised example of this is that of Dr Brendan French who was concurrently a FOS Board member and CBA General Manager of Customer Service until this alleged conflict of interest was highlighted in a social media campaign.

If the FOS/COSL process fails then the customer may progress the complaint to ASIC. ASIC have shown that they are reluctant to prosecute high level systemic misconduct by the banks. From my experience this is related to career progression by ASIC senior management. After all, once ASIC senior management complete their tenure at ASIC they will most likely be using their financial services skills at a private financial institution. It can then be safely argued that prosecuting one's potential future employer does not bode well for career progression.

Whilst I cannot provide a solution on what the government can do to fix this, I can however suggest what the government should not do. It should not reward repeated failures by ASIC management but rather remove those who repeatedly fail to act, and final accountability lies with the Chairman and Deputy Chairman.

**Focus question**

18. To what extent are businesses relying on/enforcing unfair contract terms?

In terms of financial services, nearly all recent banking scandals are based on banks unilaterally enforcing unfair terms of financial services contracts. (i.e. CBA unilaterally called in Storm financial margin loans without issuing a margin call. CBA unilaterally called in Bankwest commercial loans using non-monetary covenant default).

**Focus questions**

32. Would the benefits of a targeted legislative response (such as only deeming specific unfair terms offered to small business as void) outweigh the costs of such an approach?
33. How would such an approach interact with existing regulatory protections?
34. Are particular types of terms in standard form contracts (such as unilateral contract variation, or termination rights) more likely to be considered 'unfair' by small businesses?

I would applaud any government moves to specifically target non-monetary defaults to deem them as unfair for use in financial credit contracts. Such a move would be a swift and decisive solution to the many bank scandals and improve business productivity and confidence through enabling long term business planning without the inherent fear of the bank acting unilaterally on such unfair contract terms to terminate the SME's credit contract.

It is safe to assume that banks will lobby against such changes by arguing that deeming non-monetary clauses as unfair will mean the increase of risk in the bank's portfolio so the banks will need to reprice this risk in the form of higher interest rates passed onto customers. The reality is that banks currently already have a risk premium priced into the interest rates charged, but the legislation is such that they currently have little or no risk in their portfolio, hence this argument is mute.

Furthermore, any threat to increase in interest rate risk premium by such changes can be mitigated by an accompanied government policy to increase competition in the banking sector. The idea has been floated of the divesting of Bankwest and St George Bank, however, the topic of competition is beyond the scope of this submission.

### Summary

<b>Issue A</b>	To extend the provisions to small business, an amendment will be required to repeal the term 'consumer contract' so that small business standard form contracts, where goods and services are not purchased for personal consumption, are also captured by the provisions.
<b>Option A.1</b>	Define on the basis of whether a business is publicly listed.

For the purposes of this submission I nominate option A.1.

#### **Focus questions**

41. What are the benefits and disadvantages of each definition option?
42. What option is the most appropriate definition for extending the UCT laws? Should it be defined by business or transaction size?

It is my opinion that UCT laws should extend to any financial service or credit contract entered into by a small business with another business defined as a credit provider pursuant to the National Consumer Credit Protection Act 2009.

<b>Issue B</b>	Currently, the UCT provisions only apply where a consumer acquires goods or services.  Small businesses play a dual role in the consumer policy space – they acquire goods and services from businesses for the purpose of using them or transforming them in the process of production or manufacture, and they supply goods and services to businesses.
<b>Option B.1</b>	The amendments could capture small business contracts involving supply or acquisition of goods or services with another business.
<b>Option B.2</b>	The amendments could capture small business contracts only involving the acquisition of goods or services from another business.

For the purposes of this submission I nominate option B.1.

#### **Focus question**

43. Should the extension of the UCT provisions provide protection for small business when they acquire and supply goods or services?

Yes.

<b>Issue C</b>	There is a question whether the UCT extension should cover contracts between two small businesses (however defined).
<b>Option C.1</b>	The extension could allow for a contract between two small businesses to be captured by the laws.
<b>Option C.2</b>	The UCT provisions could be restricted to where there is one small business (however defined) to the transaction.

For the purposes of this submission I nominate option C.1.

**Focus question**

44. Should any extension void unfair terms in a small business to small business contract?

Yes. The extensions should also cover situations where small businesses enter into financial contracts with smaller credit wholesalers or brokers. Essentially, the extensions should cover any credit provider who must apply for a credit license pursuant to the National Consumer Credit Protection Act 2009.

**Issue D**

The UCT provisions in the ACL are substantially replicated in the Australian Securities and Investments Commission Act 2001 (ASIC Act), as they apply to financial services and credit.

In the context of the ASIC Act, a consumer contract is defined as a standard form contract that is a financial product or a contract for the supply, or possible supply, of services that are financial services.

**Option D.1**

The extension of the UCT provisions could also cover financial products and services provided to small business so that the ASIC Act provisions remain consistent with equivalent ACL provisions.

For the purposes of this submission I nominate option D.1.

**Focus question**

45. Do you consider that the UCT laws within the ASIC Act should be extended to apply to small business contracts?

Yes! Most Definitely! This would be a good start to addressing the imbalance of power between banks and SME's. Of course, getting ASIC to act on breaches of this nature by banks is another issue altogether. As it is now clear from the many senate inquiries into CBA misconduct that ASIC are unwilling to pursue cases of high level banking misconduct it would be of further benefit for SME's if the government were to extend these protections such that SME's could seek remedy themselves rather than rely on ASIC.

A colleague of mine who is a lawyer with a financial services enforcement background has suggested that the consumer protections within the Corporations Act could be extended to financial products with the simple changes in Appendix A below.

### Conclusion

CBA used the imbalance of legislative power to unfairly manufacture non-monetary defaults on Bankwest SME customers. It did so to make the Bankwest loan book fit within the constraints of CBA's more stringent Basel strategy. Basel 3 will be implemented in 2015.

For the reasons detailed above I suggest that the government take legislative steps to either directly target the deeming of non-monetary defaults in credit contracts as unfair contract terms and/or the changes highlighted in option(3), option (A.1) , option (B.1), option (C.1) and option (D.1). These options provided in the consultation would be a good start to the process of increasing protections to stop banks from using unconscionable methods for foreclosing on otherwise viable SME's.

Appendix A**Issue:**

Legislative changes to ensure bank customers have the same rights as clients of other financial services providers.

**The Problem:**

Section 1041 of the Corporations Act is intended to establish fair standards of practice by providers of financial services and financial products by prohibiting certain conduct, the relevant provisions being:

1041E False or misleading statements

1041F Inducing persons to deal

1041G Dishonest conduct

1041H Misleading or deceptive conduct (civil liability only)

(See Sections Attachment -1)

A person who suffers loss or damage as a consequence of such conduct is entitled to take civil action to recover such loss or damage, in accordance with Section 1041I.

However, bank loans are excluded from the definition of financial products despite the fact that bank loans are probably the most common financial product, especially for small businesses.

(See Sections Attachment-2)

**A Solution:**

Amend the Corporations Act to remove common financial products issued by banks from S765A (Specific things defined not to be financial products for the purposes of the Act) and add these products into S764A (Specific things that are financial products for the purposes of the Corporations Act) and similarly amend Regulation 7.1.06

Prepared by

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<sup>1</sup> Contact details of author of suggested Corporations Act changes can be provided on request

Attachment -1

## Sections 1041E to 1041G and S1041I Corporations Act

### CORPORATIONS ACT 2001 - SECT 1041E

#### False or misleading statements

(1) A [person](#) must not (whether in [this jurisdiction](#) or elsewhere) make a [statement](#), or disseminate [information](#), if:

(a) the [statement](#) or [information](#) is false in a material particular or is materially misleading; and

(b) the [statement](#) or [information](#) is likely:

(i) to induce [persons](#) in [this jurisdiction](#) to apply for [financial products](#); or

(ii) to induce [persons](#) in [this jurisdiction](#) to [dispose](#) of or [acquire financial products](#);

or

(iii) to [have](#) the effect of increasing, reducing, maintaining or stabilising the price for trading in [financial products](#) on a [financial market operated in this jurisdiction](#); and

(c) when the [person](#) makes the [statement](#), or disseminates the [information](#):

(i) the [person](#) does not care whether the [statement](#) or [information](#) is true or false; or

(ii) the [person](#) knows, or ought reasonably to [have](#) known, that the [statement](#) or [information](#) is false in a material particular or is materially misleading.

Note 1: Failure to comply with this subsection is an [offence](#) (see [subsection 1311\(1\)](#)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: Failure to comply with this subsection may also lead to civil [liability](#) under [section 1041I](#). For relief from [liability](#) under that section, see Division 4.

**CORPORATIONS ACT 2001 - SECT 1041F****Inducing persons to deal**

(1) A [person](#) must not, in [this jurisdiction](#), induce another [person](#) to [deal](#) in [financial products](#):

(a) by making or [publishing](#) a [statement](#), promise or forecast if the [person](#) knows, or is reckless as to whether, the [statement](#) is misleading, false or deceptive; or

(b) by a [dishonest](#) concealment of material facts; or

(c) by recording or storing [information](#) that the [person](#) knows to be false or misleading in a material particular or materially misleading if:

(i) the [information](#) is recorded or stored in, or by means of, a mechanical, electronic or other device; and

(ii) when the [information](#) was so recorded or stored, the [person](#) had reasonable grounds for expecting that it would be available to the other [person](#), or a [class](#) of [persons](#) that includes the other [person](#).

Note 1: Failure to comply with this subsection is an [offence](#) (see [subsection 1311\(1\)](#)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: Failure to comply with this subsection may also lead to civil [liability](#) under [section 1041I](#). For relief from [liability](#) under that section, see Division 4.

(2) In this section:

**"dishonest"** means:

(a) [dishonest](#) according to the standards of ordinary people; and

(b) known by the [person](#) to be [dishonest](#) according to the standards of ordinary people.

(3) This section applies in relation to the following conduct as if that conduct were [dealing](#) in [financial products](#):

(a) applying to become a standard [employer-sponsor](#) (within the meaning of the [Superannuation Industry \(Supervision\) Act 1993](#)) of a [superannuation entity](#) (within the meaning of that Act);

(b) permitting a [person](#) to become a standard [employer-sponsor](#) (within the meaning of the [Superannuation Industry \(Supervision\) Act 1993](#)) of a [superannuation entity](#) (within the meaning of that Act);

(c) applying, [on behalf of](#) an employee (within the meaning of the [Retirement Savings Accounts Act 1997](#)), for the employee to become the [holder](#) of an [RSA product](#).

**CORPORATIONS ACT 2001 - SECT 1041G**

**Dishonest conduct**

(1) A [person](#) must not, in the course of carrying on a [financial services business](#) in [this jurisdiction](#), engage in [dishonest](#) conduct in relation to a [financial product](#) or [financial service](#).

Note 1: Failure to comply with this subsection is an [offence](#) (see [subsection 1311\(1\)](#)).

Note 2: Failure to comply with this subsection may also lead to civil [liability](#) under [section 1041I](#).

(2) In this section:

**"dishonest"** means:

- (a) [dishonest](#) according to the standards of ordinary people; and
- (b) known by the [person](#) to be [dishonest](#) according to the standards of ordinary people.

**CORPORATIONS ACT 2001 - SECT 1041H****Misleading or deceptive conduct (civil liability only)**

(1) A [person](#) must not, in [this jurisdiction](#), [engage in conduct](#), in relation to a [financial product](#) or a [financial service](#), that is misleading or deceptive or is likely to mislead or deceive.

Note 1: Failure to comply with this subsection is not an [offence](#).

Note 2: Failure to comply with this subsection may lead to civil [liability](#) under [section 1041I](#). For [limits](#) on, and relief from, [liability](#) under that section, see Division 4.

(2) The reference in subsection (1) to engaging in conduct in relation to a [financial product](#) includes (but is not [limited](#) to) any of the following:

(a) [dealing](#) in a [financial product](#);

(b) without [limiting](#) paragraph (a):

(i) issuing a [financial product](#);

(ii) [publishing](#) a [notice](#) in relation to a [financial product](#);

(iii) making, or making an evaluation of, an offer under a [takeover bid](#) or a recommendation relating to such an offer;

(iv) applying to become a standard [employer-sponsor](#) (within the meaning of the [Superannuation Industry \(Supervision\) Act 1993](#)) of a [superannuation entity](#) (within the meaning of that Act);

(v) permitting a [person](#) to become a standard [employer-sponsor](#) (within the meaning of the [Superannuation Industry \(Supervision\) Act 1993](#)) of a [superannuation entity](#) (within the meaning of that Act);

(vi) a trustee of a [superannuation entity](#) (within the meaning of the [Superannuation Industry \(Supervision\) Act 1993](#)) [dealing](#) with a beneficiary of that [entity](#) as such a beneficiary;

(vii) a trustee of a [superannuation entity](#) (within the meaning of the [Superannuation Industry \(Supervision\) Act 1993](#)) [dealing](#) with an [employer-sponsor](#) (within the meaning of that Act), or an [associate](#) (within the meaning of that Act) of an [employer-sponsor](#), of that [entity](#) as such an [employer-sponsor](#) or [associate](#);

(viii) applying, [on behalf of](#) an employee (within the meaning of the [Retirement Savings Accounts Act 1997](#)), for the employee to become the [holder](#) of an [RSA product](#);

(ix) an RSA [provider](#) (within the meaning of the [Retirement Savings Accounts Act 1997](#)) [dealing](#) with an employer (within the meaning of that Act), or an [associate](#) (within the meaning of that Act) of an employer, who makes an application, [on behalf of](#) an employee (within the meaning of that Act) of the employer, for the employee to become the [holder](#) of an [RSA product](#), as such an employer;

(x) carrying on negotiations, or making [arrangements](#), or doing any other act, preparatory to, or in any way related to, an activity covered by any of subparagraphs (i) to (ix).

(3) Conduct:

(a) that contravenes:

- (i) [section 670A](#) (misleading or deceptive takeover document); or
- (ii) [section 728](#) (misleading or deceptive fundraising document); or
- (iii) section 1021NA, 1021NB or 1021NC; or

(b) in relation to a [disclosure document or statement](#) within the meaning of [section 953A](#); or

(c) in relation to a [disclosure document or statement](#) within the meaning of [section 1022A](#);

does not contravene subsection (1). For this purpose, conduct contravenes the [provision](#) even if the conduct does not constitute an [offence](#), or does not lead to any [liability](#), because of the availability of a defence.

**CORPORATIONS ACT 2001 - SECT 1041I****Civil action for loss or damage for contravention of sections 1041E to 1041H**

(1) A [person](#) who suffers loss or damage by conduct of another [person](#) that was engaged in in contravention of [section 1041E](#), [1041F](#), [1041G](#) or [1041H](#) may recover the [amount](#) of the loss or damage by action against that other [person](#) or against any [person involved in](#) the contravention, whether or not that other [person](#) or any [person involved in](#) the contravention has been convicted of an [offence](#) in respect of the contravention.

(1A) Subsection (1) has effect subject to [section 1044B](#).

Note: [Section 1044B](#) may [limit](#) the [amount](#) that the [person](#) may recover for a contravention of [section 1041H](#) (Misleading or deceptive conduct) from the other [person](#) or from another [person involved in](#) the contravention.

(1B) Despite subsection (1), if:

(a) a [person](#) (the ***claimant***) makes a claim under subsection (1) in relation to:

(i) economic loss; or

(ii) damage to [property](#);

[caused](#) by conduct of another [person](#) (the ***defendant***) that was done in contravention of [section 1041H](#); and

(b) the claimant suffered the loss or damage:

(i) as a [result](#) partly of the claimant's failure to take reasonable care; and

(ii) as a [result](#) partly of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to [cause](#) the loss or damage; and

(ii) did not fraudulently [cause](#) the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which [the court](#) thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

Note: Division 2A also applies proportionate [liability](#) to a claim for damages under this section for a contravention of [section 1041H](#).

(2) An action under subsection (1) may be begun at any time within 6 years after the day on which the [cause](#) of action arose.

(3) This section does not affect any [liability](#) that a [person](#) has under any other law.

(4) [Section 1317S](#) (which [provides](#) for relief from [liability](#)) applies in relation to [liability](#) under subsection (1) as if:

- (a) the sections referred to in subsection (1) were [civil penalty provisions](#); and
- (b) proceedings under subsection (1) were eligible proceedings.

Note: Relief from [liability](#) under this section may also be available (depending on the circumstances) under Division 4.

Attachment 2 - Corporations Act and Regulations that exclude Bank loans from Definition of Financial products and thereby excludes bank loans from this prohibited conduct.

## **CORPORATIONS ACT 2001 - SECT 765A**

### **Specific things that are not financial products**

(1) Despite anything in Subdivision B or Subdivision C, the following are not [financial products](#) for the purposes of this Chapter:

(a) an [excluded security](#);

(b) an [undertaking](#) by a [body corporate](#) to pay [money](#) to a [related body corporate](#);

(c) health insurance [provided](#) as part of a health insurance business (as defined in Division 121 of the [Private Health Insurance Act 2007](#));

(ca) insurance [provided](#) as part of a health-related business (as defined by [section 131-15](#) of that Act) that is conducted through a health [benefits](#) fund (as defined by section 131-10 of that Act);

(d) insurance [provided](#) by the Commonwealth;

(e) [State](#) insurance or Northern [Territory](#) insurance, including insurance entered into by:

(i) a [State](#) or the Northern [Territory](#); and

(ii) some other insurer;

as joint insurers;

(f) insurance entered into by the Export Finance and Insurance [Corporation](#), other than a short-term insurance contract within the meaning of the [Export Finance and Insurance Corporation Act 1991](#);

(g) reinsurance;

(h) any of the following:

(i) a credit [facility](#) within the meaning of [the regulations](#) (other than a [margin lending facility](#));

(ii) a [facility](#) for making non-cash payments (see [section 763D](#)), if payments [made](#) using the [facility will](#) all be debited to a credit [facility](#) covered by subparagraph (i);

(i) a [facility](#):

(i) that is an approved RTGS system within the meaning of the [Payment Systems and Netting Act 1998](#); or

(ii) for the [transmission](#) and reconciliation of non-cash payments (see [section 763D](#)), and the establishment of final positions, for settlement through an approved RTGS system within the meaning of the [Payment Systems and Netting Act 1998](#) ;

(j) a [facility](#) that is a designated payment system for the purposes of the [Payment Systems \(Regulation\) Act 1998](#) ;

(k) a [facility](#) for the exchange and settlement of non-cash payments (see [section 763D](#)) between [providers](#) of non-cash payment facilities;

(l) a [facility](#) that is:

(i) a [financial market](#); or

(ii) a [clearing and settlement facility](#); or

(iii) a payment system operated as part of a [clearing and settlement facility](#); or

(iv) a [derivative trade repository](#);

(m) a contract to exchange one currency (whether [Australian](#) or not) for another that is to be settled immediately;

(n) so much of an [arrangement](#) as is not a [derivative](#) because of paragraph 761D(3)(a);

(p) an [arrangement](#) that is not a [derivative](#) because of [subsection 761D\(4\)](#);

(q) an [interest](#) in a superannuation fund of a [kind prescribed](#) by regulations [made](#) for the purposes of this paragraph;

(r) any of the following:

(i) an [interest](#) in something that is not a [managed investment scheme](#) because of paragraph (c), (e), (f), (k), (l) or (m) of the definition of [managed investment scheme](#) in [section 9](#);

(ii) a legal or equitable [right](#) or [interest](#) in an [interest](#) covered by subparagraph (i);

(iii) an option to [acquire](#), by way of [issue](#), an [interest](#) or [right](#) covered by subparagraph (i) or (ii);

(s) any of the following in relation to a [managed investment scheme](#) (whether or not [operated in this jurisdiction](#)) in relation to which none of paragraphs 601ED(1)(a), (b) and (c) are satisfied and that is not a [registered scheme](#):

(i) an [interest](#) in the scheme;

(ii) a legal or equitable [right](#) or [interest](#) in an [interest](#) covered by subparagraph (i);

(iii) an option to [acquire](#), by way of [issue](#), an [interest](#) or [right](#) covered by subparagraph (i) or (ii);

(t) a deposit-taking [facility](#) that is, or is used for, [State](#) banking;

(u) a [benefit provided](#) by an association of employees that is [registered](#) as an organisation, or recognised, under the [Fair Work \(Registered Organisations\) Act 2009](#) for a [member](#) of the association or a dependant of a [member](#);

(v) either of the following:

(i) a contract of insurance; or

(ii) a life policy or a sinking fund policy, within the meaning of the [Life Insurance Act 1995](#), that is not a contract of insurance;

[issued](#) by an employer to an employee of the employer;

(w) a [funeral benefit](#);

(x) physical equipment or physical infrastructure by which something else that is a [financial product](#) is [provided](#);

(y) a [facility, interest](#) or other thing declared by regulations [made](#) for the purposes of this subsection not to be a [financial product](#);

(z) a [facility, interest](#) or other thing declared by [ASIC](#) under subsection (2) not to be a [financial product](#).

(2) [ASIC](#) may declare that a specified [facility, interest](#) or other thing is not a [financial product](#) for the purposes of this Chapter. The declaration must be in writing and [ASIC](#) must [publish notice](#) of it in the *Gazette*.

**CORPORATIONS REGULATIONS 2001 - REG 7.1.06****Specific things that are not financial products: credit facility**

- (1) For subparagraph 765A(1)(h)(i) of the Act, each of the following is a **credit facility** :
- (a) the provision of credit:
    - (i) for any period; and
    - (ii) with or without prior agreement between the credit provider and the debtor;and
    - (iii) whether or not both credit and debit facilities are available; and
    - (iv) that is not a financial product mentioned in paragraph 763A(1)(a) of the Act; and
    - (v) that is not a financial product mentioned in paragraph 764A(1)(a), (b), (ba), (f), (g), (h) or (j) of the Act; and
    - (vi) that is not a financial product mentioned in paragraph 764A(1)(i) of the Act, other than a product the whole or predominant purpose of which is, or is intended to be, the provision of credit;
  - (b) a facility:
    - (i) known as a bill facility; and
    - (ii) under which a credit provider provides credit by accepting, drawing, discounting or indorsing a bill of exchange or promissory note;
  - (c) the provision of credit by a pawnbroker in the ordinary course of a pawnbroker's business (being a business which is being lawfully conducted by the pawnbroker);
  - (d) the provision of credit by the [trustee](#) of the estate of a deceased person by way of an advance to a beneficiary or prospective beneficiary of the estate;
  - (e) the provision of credit by an employer, or a related body corporate of an employer, to an employee or [former](#) employee (whether or not it is provided to the employee or [former](#) employee with another person);
  - (f) a mortgage:
    - (i) that secures [obligations](#) under a credit contract (other than a lien or charge arising by operation of any law or by custom); and
    - (ii) that is not a financial product mentioned in paragraph 763A(1)(a) of the Act; and
    - (iii) that is not a financial product mentioned in paragraph 764A(1)(a), (b), (ba), (f), (g), (h) or (j) of the Act; and

(iv) that is not a financial product mentioned in paragraph 764A(1)(i) of the Act, other than a product the whole or predominant purpose of which is, or is intended to be, the provision of credit;

(g) a guarantee related to a mortgage mentioned in paragraph (f);

(h) a guarantee of [obligations](#) under a credit contract.

(2) The provision of consumer credit insurance that includes a contract of general insurance for the [Insurance Contracts Act 1984](#) is not a credit facility.

(2A) A litigation funding scheme mentioned in [regulation 5C.11.01](#) is not a credit facility.

(2B) A litigation funding arrangement mentioned in [regulation 5C.11.01](#) is not a credit facility .

(3) In this regulation:

**credit** means a contract, arrangement or understanding:

(a) under which:

(i) payment of a debt owed by one person (a **debtor** ) to another person (a **credit provider** ) is deferred; or

(ii) one person (a **debtor** ) incurs a deferred debt to another person (a **credit provider** ); and

(b) including any of the following:

(i) any [form](#) of financial accommodation;

(ii) a hire purchase agreement;

(iii) credit provided for the purchase of goods or services;

(iv) a contract, arrangement or understanding for the hire, lease or rental of goods or services, other than a contract, arrangement or understanding under which:

(A) full payment is made before or when the goods or services are provided; and

(B) for the hire, lease or rental of goods--an [amount](#) at least equal to the value of the goods is paid as a deposit in relation to the return of the goods;

(v) an article known as a credit card or charge card;

(vi) an article, other than a credit card or a charge card, intended to be used to obtain cash, goods or services;

(vii) an article, other than a credit card or a charge card, commonly issued to customers or prospective customers by persons who carry on business for the purpose of obtaining goods or services from those persons by way of a loan;

- (viii) a liability in respect of redeemable preference shares;
- (ix) a financial benefit arising from or as a result of a loan;
- (x) assistance in obtaining a financial benefit arising from or as a result of a loan;
- (xi) issuing, indorsing or otherwise dealing in a promissory note;
- (xii) drawing, accepting, indorsing or otherwise dealing in a negotiable instrument (including a bill of exchange);
- (xiii) granting or taking a lease over real or personal property;
- (xiv) a letter of credit.