

List of legislation changes required to address CBA/Bankwest abuse of non-monetary covenant defaults.

13/8/2014

Dear Mr David Murray (via [www.fsi.gov.au](http://www.fsi.gov.au))

Please find below a list of the legislation changes we seek in order to prevent the CBA/Bankwest misconduct reoccurring with regards to the abuse on non-monetary covenant defaults:

- 1) The abolition of all non-monetary covenant defaults. This is currently being addressed by Bruce Bilson's Unfair Contract Term review. I have previously submitted my Unfair Contract Term Review submission to the FSI review.
- 2) The abolition of "Suspension clauses" – a clause within all credit contracts allowing the banks to suspend the customer's right to sue a bank until all monies are repaid. This allows the banks to obtain immediate Summary Judgement against a customer.
- 3) The abolition of "offset clauses". These allow a bank to take funds from a customer's cash account in order to pay off any disputed debt. By doing this the bank guarantees that the customer will not have the money to get a lawyer to dispute the original debt.
- 4) In the event of a monetary default the borrower needs to be given a reasonable opportunity to rectify the default or have the matter considered by a mediator.
- 5) As a commercial loan progresses towards its expiry date the bank must give the borrower reasonable notice (in our view 6 months) of its intention to require repayment of the loan on the due date.

This imbalance of power between banks and customers was used by CBA to unconscionably force unsuspecting customers into default in order for CBA to gain benefit from the terms of the Bankwest sale contract.

Further to these changes the Bankruptcy Act needs to be amended as follows:

- 6) Amend the Bankruptcy Act to allow a quashing of unconscionable/unjust bankruptcies resulting from banking misconduct. Currently there is no way of deleting ITSA records which means bankrupts will fail security tests for job applications for the rest of their lives.

Corporations Act/ASIC Act amendments as follows (prepared by my ex-ASIC enforcement lawyer colleague Gary Donovan):

- 7) Amend the Corporations Act so that banking products are covered by the deceptive conduct provisions in the act. (See Appendix A).
- 8) Amend the Corporations Act and ASIC Acts to be more self-enforcing to reduce the reliance on ASIC acting.

Sections 206 C,D &E enable the court to ban directors from managing a corporation but only "on the application of ASIC". It should not only be ASIC who can apply. One option is to make it an automatic disqualification (as is the case in 206B). A person could then apply under S206G for a court order to be allowed to so manage. This is reversing the onus of proof and not require any ASIC resources. Another option is to broaden the range of persons who could apply as is the case in S459A of the Act where "any one or more of the following may apply to the court for a

company to be wound up ..." includes a shareholder, creditor, liquidator, etc.

I appreciate your help in getting these law changes addressed.

Regards

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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 is 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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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 1041L](#). 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.