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UNFAIR DEALING AND CONSUMER PROTECTION IN ASSET-BASED LENDING IN AUSTRALIA

Abstract:

The lenders and mortgage brokers operating in Australia have introduced variety of credit products to consumers which include 'subprime' or 'non-conforming' loans, which are made to borrowers who cannot obtain loans from traditional lenders, and 'low-doc' or 'no-doc' loans, which 'do not require as rigorous proof of creditworthiness'. Another type of credit product namely 'asset based' lending or 'equity stripping' has attracted borrowers, where lenders grant housing loans based solely on the value of the borrower's security (i.e. the sole residence) without regard to his or her income or ability to make repayments. These inappropriate practices have the potential to lead to unconscionable dealing, and they have opened the door for unscrupulous lenders to engage in 'morally repugnant' lending practices.

This research is significant in light of the recent judicial decisions that exemplify the tough stance that Australian courts are taking against lenders that operate in the business of providing non-conventional loans with higher risk factors. It considers the possibility of a loan made to a borrower unable to conserve his or her own interests and secured on the family home being set aside through common law and equitable principles of unconscionable dealing and the courts' jurisdiction to reopen an unjust contract under the National Credit Code 2009 or the Contracts Review Act 1980 (NSW).

Firstly, this paper examines some judicial decisions where loans secured over the family home were made to borrowers with little capacity to repay and who were arguably limited in their ability to protect their own interests. It discusses the circumstances leading to the creation of unconscionable conduct as borrower redress against asset-based lending, and the recent development of the doctrine of unconscionable conduct in the case law, including the current requirement to show a 'situational special disadvantage'.

Secondly, this study considers the knowledge being attributed to a lender on the ground that a broker was its agent. In addition, this part considers the role of knowledge in setting aside a loan contract made through a broker on the grounds of unconscionable conduct against the borrower by a third party.

Thirdly, this paper considers the legislation that has been enacted in Australia to combat irresponsible lending practices. This section will also involve suggestions for law reform to adequately respond to the challenges posed by the global financial crisis and the victims of inappropriate asset-based lending.

Keywords:

Sub-Prime Lending, Unfair and Unconscionable conduct, Consumer protection, Mortgage Brokers, Australia.

JEL Classification: K20, K30