

Remedies for financial abuse: *advising older clients*

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In its study entitled *Older People and Consumer Fraud* of 7 April 2002, the Australian Institute of Criminology reported that among the older age group (65 and over) consumer fraud was 2.2 times more frequent than assault, 2.4 times more frequent than theft and 13 times more frequent than robbery. Ben Slade discusses some of the legal principals involved when dealing with financial abuse cases.

Fraud lies at the extreme end of unjust conduct and one can assume that the incidence of fraud represents the tip of the sharp practice iceberg. Unjust guarantees and oppressive home equity loans, lost or depleted superannuation funds, failed managed investments and stock market collapses often spell financial ruin for older people. While fraud may be committed by an impoverished rogue against whom suit is futile, accessible and worthwhile remedies are available where an injustice is perpetrated by an insured or wealthy adviser.



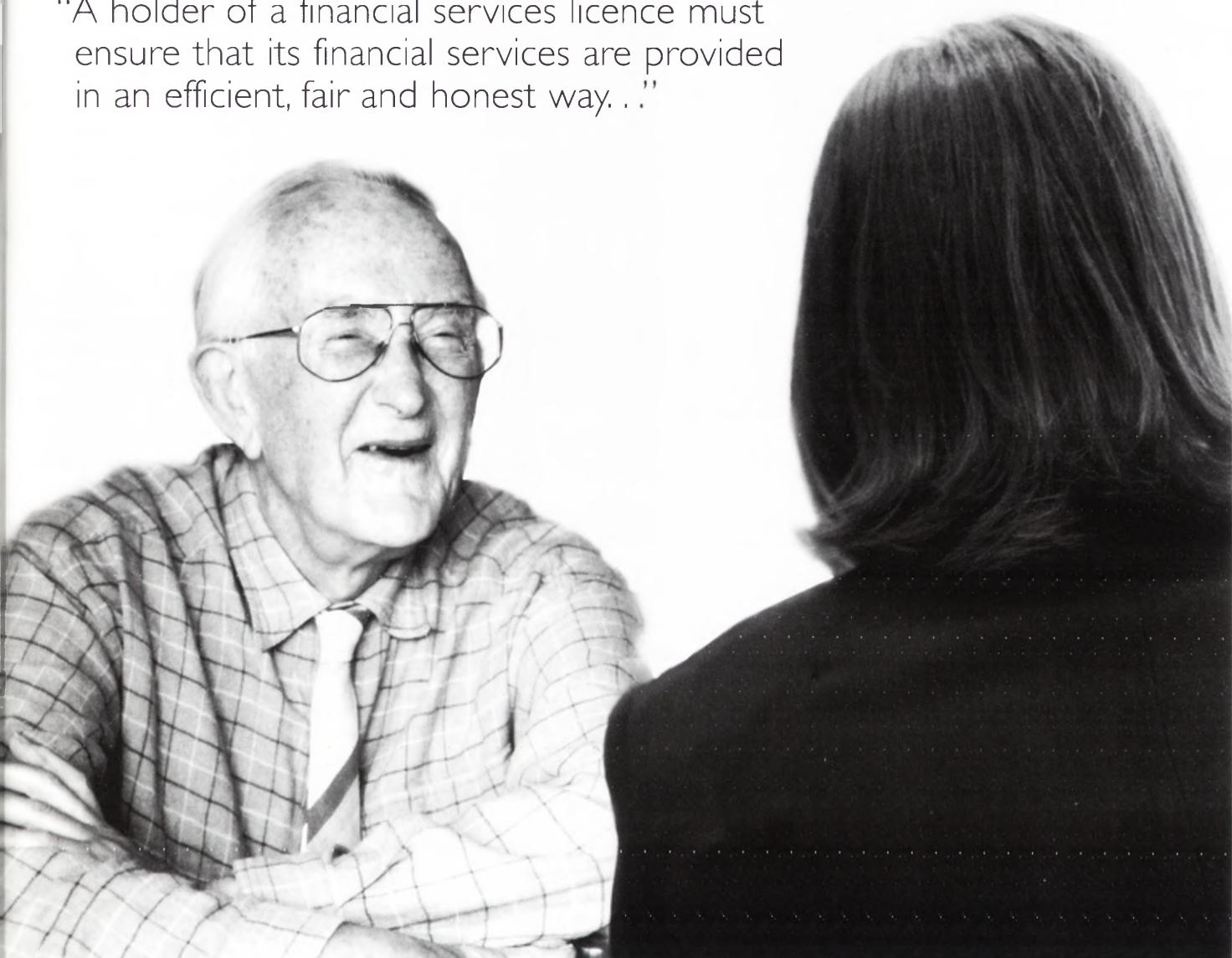
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Where there is a serious and substantial injustice there is a minefield for the lawyer to traverse to find the best solution for the client. The following is a brief attempt to identify the hierarchy of legal principles that are available to attack questionable conduct. In addition, brief mention will be made of the new consumer protection provisions governing financial advisers. The remedies are available to all consumers of financial services but, as will be noted, the vulnerability of the elderly is often a relevant factor in support of a claim for relief.

Mistake

When a common mistake of fact is made at the time of contract formation it is possible that a court will find the mistake was of such importance that the mistake will be fundamental to the existence of the contract. Although there is no common law doctrine of mistake as such, if there is an absence of any contractual subject matter, the agreement fails and is *void ab initio*.¹

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Breach of Contract

Claims for damages for breach of contract can be made where, on the face of the contract, its terms have been breached. Courts will also, depending on the circumstances, imply terms into contracts as being implicit from the nature of the contract itself, or from the obligation it creates.² In the recent Victorian Supreme Court decision in *Ali v Hartley Poynton Limited*³, where a retiree's life savings were squandered by a stockbroker, Justice Smith found that there was an implied term in a retainer between a stockbroker and his client that:

'...the stockbroker would, in performing its obligations under the retainer, exercise such reasonable care, skill and diligence as might be expected of a reasonably competent stock broker.'

In *Astley v Austrust Ltd*⁴ the court recognised that 'the law has evolved to the conclusion that concurrent liabilities in both contract and tort may arise in cases of professional negligence'.

Misrepresentation

If a statement or promise intended to induce entry into a contract becomes a term of a contract then damages can be claimed. If a misrepresentation of fact substantially induces entry into the contract then legal consequences flow depending on whether it was innocent, fraudulent or negligent.

An innocent misrepresentation does not give rise to a claim for damages but will allow rescission before the contract has been carried out, or a defence to damages, or a specific performance claim.

A fraudulent misrepresentation allows rescission plus an action for damages, or an affirmation of the contract plus an action for damages. The action for damages is one of deceit in tort and not a contractual action. The one suffering loss may recover not just the difference in the price paid and the honest price, but also any consequential loss flowing directly from the fraud.

A negligent misrepresentation will give rise to a claim for ►

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actual damage suffered where the adviser had a duty to take reasonable care or where the adviser has a special skill on which the victim relies.⁵ This duty will be imposed on a number of categories of professional advisers such as lawyers and accountants. In *Ali v Hartley Poynton*, Justice Smith said:

'Where a stockbroker holds himself out as having an expertise in advising on investments and is approached for advice on investments and undertakes to give it, in circumstances where the stockbroker has a financial interest, a stockbroker's duty is: "to furnish the client with all the relevant knowledge, which the adviser possesses, concealing nothing that might reasonably be regarded as relevant to the making of an investment decision including the identity of the buyer or seller of the investment when that identity is relevant, to give the best advice which the adviser could give if he did not have but a third part did have a financial interest in the investment to be offered, to reveal fully the advisers financial interest, and to obtain for the client the best terms which the client would obtain from a third party if the adviser were to exercise due diligence on behalf of his client in such a transaction. (See *Daly v The Sydney Stock Exchange Limited*.)'"

Where a person suffers pure economic loss, McHugh J in *Perre v Apand Pty Ltd*⁶ held that the law is willing to impose a duty of care on the defendant and order the payment of compensation only where:

- the loss suffered by the plaintiff was reasonably foreseeable;
- the imposition of the duty of care would not impose an indeterminate liability on the defendant;
- the imposition of the duty of care would not impose an unreasonable burden on the defendant;
- the plaintiff was vulnerable to the loss from the conduct of the defendant;
- the defendant knew or ought to have known that its conduct would cause harm to individuals such as the plaintiff; and

- the defendant's conduct did, in fact, cause the plaintiff's loss.

In determining the existence of a duty of care, *Perre v Apand* emphasises the need to consider the victim's vulnerability rather than the defendant's assumption of 'responsibility and reliance'.⁸ Reliance is, of course, an indicator of vulnerability and is relevant to causation.⁹

The victim of a negligent misrepresentation may have a claim for exemplary damages where 'the defendant can be seen to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff'.¹⁰ In *Ali v Hartley Poynton*, Justice Smith held:

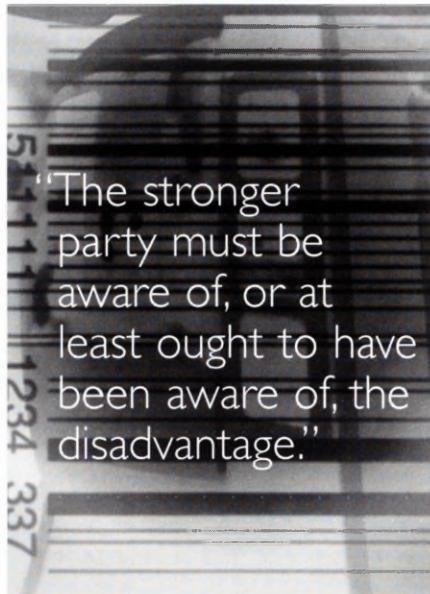
'It would be appropriate to award exemplary damages on the basis that it [the defendant] should not retain any benefit from its wrongdoing. That would address the proper purposes. To award exemplary damages in the amount of the total commission ensures that the defendant retains no benefit.'

Misleading or Deceptive Conduct

Under statute, the prohibition against misleading or deceptive conduct appears in s52 *Trade Practices Act* 1974 (Cth), s42 *Fair Trading Act* 1987 (NSW), s12DA *Australian Securities and Investment Commission Act* 2001 (Cth) and s1041H *Corporations Act* 2001 (Cth). Specifically: 'A [person] shall not . . . engage in conduct that is misleading or deceptive or is likely to mislead or deceive.' The statutes provide for damages to be claimable for a person who suffers loss by the misleading or deceptive conduct.

The conduct may be deceptive, in a subjective sense, in so far as there was an intention to deceive, or misleading in an objective sense, in that it did actually mislead, regardless that it was not so intended. Conduct 'cannot be categorised as misleading for the purposes of s52 unless, in all the circumstances, it contains or conveys a misrepresentation'.¹¹

The person who is misled must prove, on the balance of probabilities, that the representations as alleged were made, that the representations were misleading or deceptive, that they were, in fact, relied on and the representations caused the loss claimed. In *Marks & Ors v GIO Australia Holdings Limited & Ors*¹² the High Court stated that the test is whether the claimant has sustained or is likely to sustain 'a prejudice or disadvantage as a result of altering his or her position under the inducement of the misleading conduct'.¹³ This requires comparison between the position in fact of the party alleging loss and the position that he or she would have been in had there been no contravention. In *Marks* the primary judge was held to have erred in treating GIO as obliged to 'make good' its representations. Their Honours concluded:



'Accordingly, the position of the borrowers is that they were misled into taking a loan which cost them more than was represented to them but which, even so, cost less than any other loan available to them in the market. They suffered and will suffer no loss or damage as a result of the misleading and deceptive conduct of the respondents. No order can be made under ss 82 or 87.'

The intention of the person engaging in the conduct is not necessarily relevant. It is how the conduct was received by the other party that is important, not what was intended by the conduct.

Representations with respect to future matters are taken to be misleading where the corporation did not have reasonable grounds for making the representation.

The damages payable are damages as in a deceit action in tort. 'The loss that the plaintiff can recover includes consequential losses flowing directly from the misrepresentation including losses from opportunities forgone'.¹⁴

An action for compensation must be commenced, under ►

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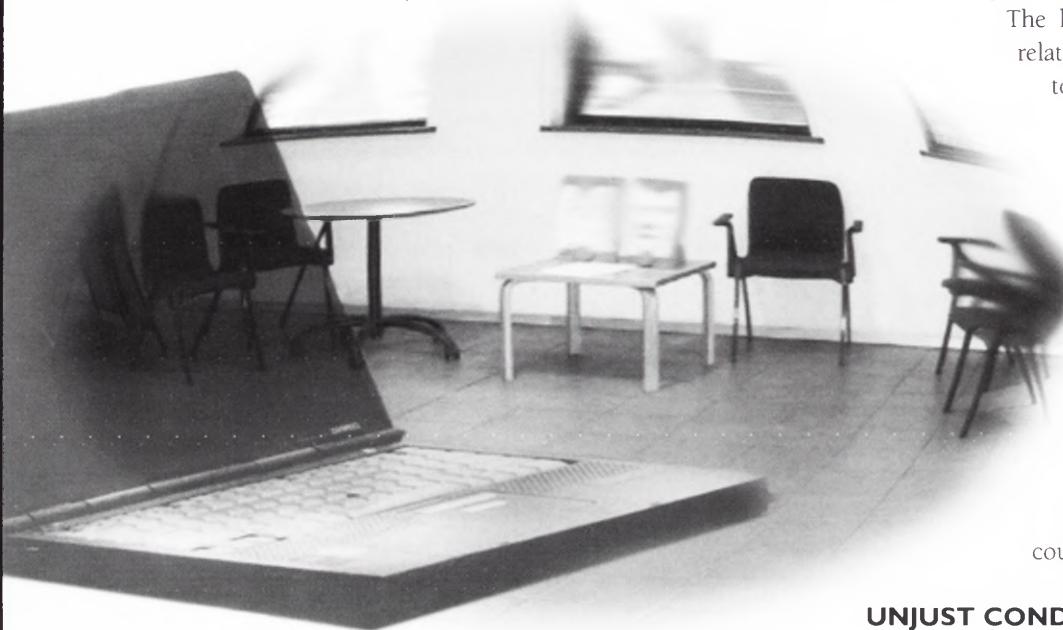
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the *Trade Practices Act* 1974 (Cth) ('the TPA'), the *Corporations Act* 2001 (Cth), and the *Australian Securities and Investment Commission Act* 2001 (Cth) ('the ASIC Act') within six years after the day on which the cause of action that relates to the conduct accrued, and under the *Fair Trading Act* 1987 (Cth) ('the FTA') within three years.



It is important to note that the *Trade Practices Amendment Act* (No. 1) 2001, which commenced on 26 July 2001, amended s82(2) to provide for the six-year limitation period to coincide with s1005 *Corporations Act*. The amendment applies in relation to conduct engaged in before the commencement of the amendment but only if the action would have been within time (three years) at the date of the amendment. The ASIC Act similarly had a three-year limitation period until the passage of the *Financial Services Reform (Consequential Provisions) Act* 2001 which amended section 12GF(2) to substitute three years for 'six years after the day on which the cause of action that relates to the conduct accrued'.

The cause of action accrues when the damage occurs rather than when the misleading conduct was engaged in. This is usually when the contract is entered into but can be when, under a guarantee, the demand is made to pay.¹⁵ It may also be when an insurance policy will not pay as expected.¹⁶

Duress

A party to a contract can avoid it if they can show that unacceptable pressure from one party persuaded the other to enter the contract. It has recently been said that 'duress does not deprive a person of all choice but merely presents him with a choice between evils'.¹⁷

For a contract to be set aside, the party benefiting from the contract must be aware of the duress, or at least aware of circumstances that would put a reasonable person on notice of the duress.

Undue Influence

If one party, having a 'special relationship' with another, exerts influence over another party which prevents that other party from exercising independent judgement, the resulting contract may be set aside where there is either actual undue influence or presumed undue influence.¹⁸

The law will automatically presume a special relationship between a solicitor and client, doctor and patient, guardian and ward, parent and child, religious adviser and disciple, and trustee and beneficiary.

The person who seeks to uphold a contract has the burden of establishing that undue influence was not used in the particular case.

The doctrine of undue influence is an equitable one and therefore there are no time limits as such. However, a party's claim to set aside a contract can be prejudiced by conduct that is considered to affirm the transaction in question. Delay can also lead a court to refuse to grant relief.

UNJUST CONDUCT

Contracts Review Act 1980 (NSW) ('the CRA')

Section 7 of the CRA empowers a court to grant relief if it finds a 'contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made'. Section 4(1) defines unjust as including 'unconscionable, harsh or oppressive'. The CRA directs the court to have regard to 'the public interest', to 'all the circumstances of the case' and to various 'signposts' listed in s 9(2). This list is not exhaustive.

The CRA provides a wide range of remedies, including giving a court the power to rewrite contracts to alleviate the injustice concerned. Courts are also likely to note any benefit that the complaining party may have received from the contract when deciding on the appropriate remedy.¹⁹

Consumer Credit Code – Reopening Unjust Transactions

The Consumer Credit Code gives various courts and tribunals power to reopen unjust transactions (s70(1)), and grant relief as is necessary (s71). 'Unjust' is given the same meaning as in the CRA. An 'unjust transaction' is distinguished in the Code from an 'unconscionable' establishment, prepayment or early termination fee or an 'unconscionable' change to the 'annual percentage rate'. An application to reopen an unjust transaction giving rise to a contract, mortgage or guarantee can be made under s70 and s71, whereas an application relating to an unconscionable fee or change to the annual percentage rate may be made under section 72.

Like the CRA, s70(2) provides that the court must have regard to the 'public interest and to all the circumstances of the case' as well as providing a list of 'signposts' which include 'any other relevant factor'. The Code's list has a number of common factors to those in s9 of the CRA but others, such as s70(2)(l) on 'overcommitment' are novel.

Section 106, Industrial Relations Act 1996 (NSW)

Section 106 empowers the NSW Industrial Relations Commission to declare wholly or partly void, or to vary, any contract or arrangement that leads directly to a person working in an industry if the Commission finds that the contract is an unfair contract. Section 105 defines 'unfair contract' as one that is unfair, harsh or unconscionable, or that is against the public interest.

This broad jurisdiction opens the way for investors in managed investment schemes, for example, to challenge various aspects of their investment if the arrangement is sufficiently closely associated with the arrangement under which work is performed under the scheme. The provisions have been held to apply to franchise arrangements²⁰ and superannuation schemes that operate unfairly at the time of termination of employment.²¹

The Commission can award costs when in 'Court Session' (s181). There is no time limit on applications under s106.

UNCONSCIONABLE CONDUCT

Common Law

Unconscionable conduct is proscribed both in the common law and in statute.²² At law it is established that '...whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscientious advantage is taken of the opportunity thereby created', and the stronger party 'knows or ought to know of the existence' of the matters giving rise to the special disadvantage, then the victim can claim relief.²³

A party to an unconscionable contract may seek to have the contract set aside, have the other party account for profits made from the contract, or seek equitable damages. Where appropriate a court may partially rescind a contract.²⁴

Statutory Unconscionable Conduct

Unconscionable conduct is regulated generally under the TPA (s51AA) and the ASIC Act (s12CA). Section 12CA of the ASIC Act states:

'A corporation shall 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 or Territories.'

Section 991A of the *Corporations Act* specifically prohibits ►

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a financial services licensee from engaging in conduct that is in all the circumstances unconscionable.

On one view, these provisions can go no further than the common law but the Full Federal Court in *ACCC v Samton Holdings*²⁵ appears to have accepted that unconscionability as specified in section 51AA might extend to situations beyond 'special disadvantage' to a point where the 'disadvantage' could be either 'personal' (in the *Amadio* sense of constitutional disadvantages engendered by such disabilities as illiteracy or lack of education, illness or infirmity) or 'situational' (arising from the parties' legal and financial circumstances). The court limited the scope of the extension of the law by stating:

'At least in the case of an experienced business person there must, in our opinion, be something more than commercial vulnerability (however extreme) to elevate disadvantage into special disadvantage.'

The stronger party must be aware of, or at least ought to have been aware of, the disadvantage. The Full Court in *Samton Holdings* held:

'Characterisation of disadvantage as "special" involves the recognition that it would be unconscionable knowingly to deal with the person so affected without regard to his or her disability, be it constitutional, in the sense of inherent, or situational, in the sense of arising from a particular set of circumstances. In effect this may require some special conduct or care which is not necessary in the absence of such disadvantage. If, for example, the disability relates to language, illiteracy or lack of education, conscientious dealing may ensure the

bargaining deficit is compensated for by the provision of special assistance such as independent advice which will either enable a proper understanding of the transaction or overcome the disadvantage arising from want of a proper understanding.'

Unconscionable Conduct in Consumer Transactions

The TPA, FTA and ASIC Act each contain extensions to the general unconscionability provisions for consumers and small businesses. Like the CRA, the sections also set out a number of non-exhaustive signposts to which the court can have regard to in deciding whether conduct is unconscionable. The unconscionability criteria clearly catches 'situational' disadvantage.

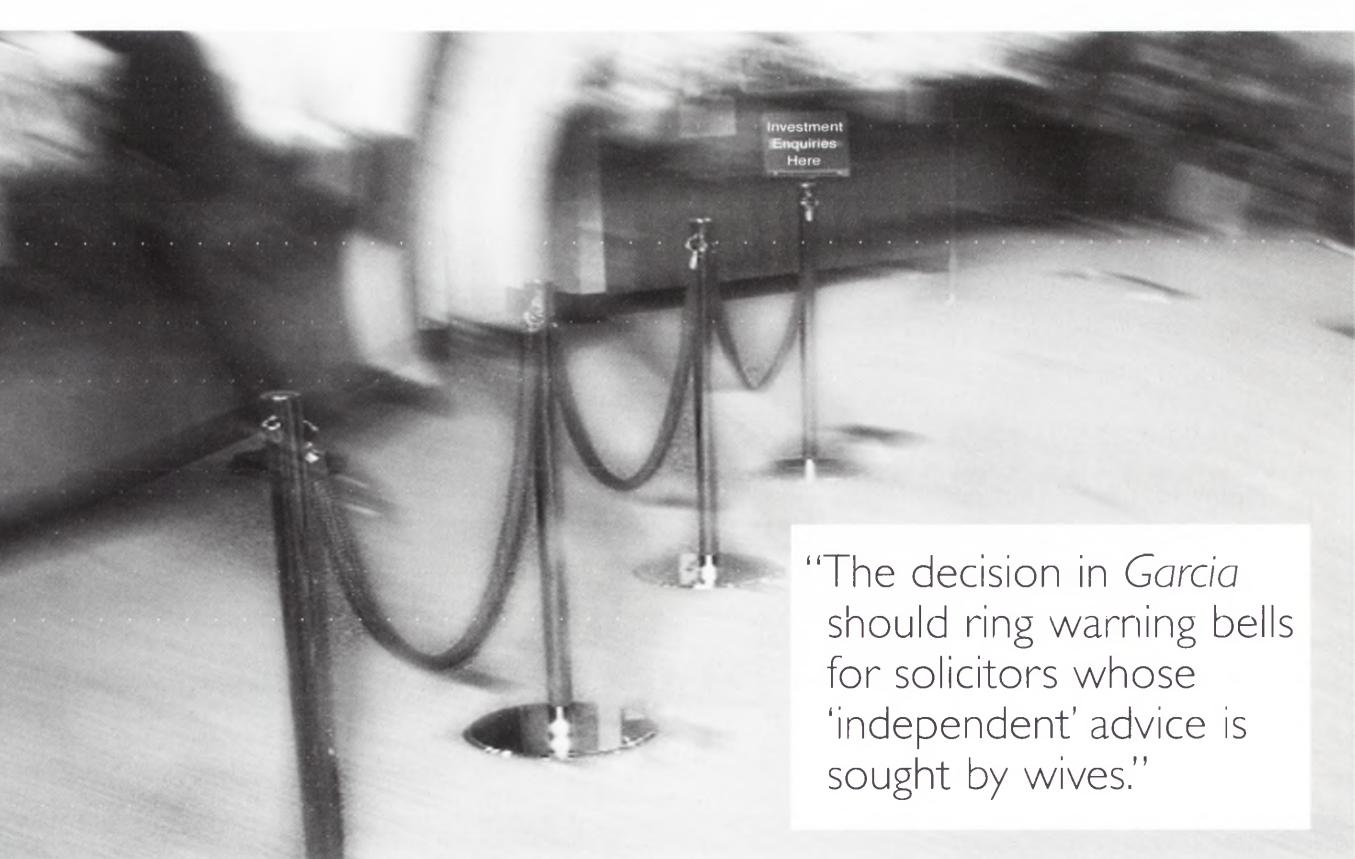
Private actions may be brought for contraventions of each Act. The time limit for such actions is six years in the case of the TPA, the ASIC Act and the *Corporations Act*, and three years in the case of the FTA, from the date the cause of action arose.

Wife's Equity

*Yerkey v Jones*²⁶ established that a wife who guarantees her husband's debts will get relief from the guarantee where:

'... she understood the nature of the guarantee but the husband exerts undue influence over her and she did not get independent advice or other relief from the undue influence; or she did not understand the nature and effect of the guarantee and the lender did not take steps itself to explain the transaction nor satisfy itself that a competent, independent, stranger did so.'

The wife will get relief even though the lender did not



"The decision in *Garcia* should ring warning bells for solicitors whose 'independent' advice is sought by wives."

know about the undue influence or misunderstanding, although the lender must have known that she was married to the borrower.

Despite criticism of the anachronistic nature of the decision, *Yerkey v Jones* was found by the High Court in *Garcia v National Australia Bank*²⁷ to be good law in Australia. The majority of the court noted that it is possible that in the future the rule will apply to people other than wives:

'It may be that the principles applied in *Yerkey v Jones* will find application to other relationships more common now than was the case in 1939 - to long term and publicly declared relationships short of marriage between members of the same or opposite sex - but that is not a question that falls for decision in this case.'

The decision in *Garcia* should ring warning bells for solicitors whose 'independent' advice is sought by wives. The House of Lords recently identified a number of matters which a solicitor must address as a 'core minimum' when giving legal advice to a wife considering executing a guarantee over her husband's business.²⁸

Financial Advisers, Disclosure and Unjust Conduct

Financial advisers are not only subject to the legislative and common law constraints discussed but they must now also comply with complex amendments to the *Corporations Act*

2001 (Cth). The amendments were introduced by the *Financial Services Reform Act 2001* and the related *Financial Services Reform (Consequential Provisions) Acts of 2001 and 2002*.

The regime subjects a range of financial products to the same disclosure standards and imposes a single licensing regime on all suppliers of financial services. The provisions apply to any new product sold but will not apply to existing financial products for two years from 11 March 2002.

All those who provide a 'financial service' must be licenced and must comply with the new disclosure regime. A 'financial service' covers anyone in the business of giving advice in relation to or dealing in financial products. 'Advice' is also widely defined in s766B to include recommendations and statements of opinion that are intended to, or could be regarded as being intended to, influence a person in making a decision in relation to a financial product. Most financial products are covered including shares, insurance, superannuation, all deposit facilities, managed investment scheme products, managed funds and all 'financial investments'.

A holder of a financial services licence must ensure that its financial services are provided in an efficient, fair and honest way, that it has and maintains relevant competence, skills and experience and not only has an internal resolution procedure but is also a member of an external resolution procedure approved by ASIC to handle complaints from retail clients.



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Financial service licensees are also required to have adequate arrangements to compensate retail clients for any pecuniary losses. To be able to pay for such claims a financial service licensee will need to have indemnity insurance and be able to satisfy ASIC that it has adequate resources to both provide the financial services they offer and to compensate clients.

A licensee must only provide advice if there is a reasonable basis for it. The requirement is for the adviser to 'know the client' and 'know the product'. The advice must be appropriate to a client's personal circumstances and the licensee must have 'conducted such investigation of the subject matter of the advice as is reasonable in all the circumstances'. A written warning that the advice is based on incomplete information may protect the adviser.

Advisers must also provide their clients with the following documents:

- A Financial Services Guide as soon as it becomes apparent that the financial services will be, or are likely to be, provided;
- A Statement of Advice when giving personal advice to a retail client; and
- A Product Disclosure Statement when making a recommendation, sale or issuing a product.

Section 1019A provides for a 14-day cooling-off period for many products and imposes an obligation on the issuer of the products to confirm transactions as soon as is reasonably practicable after the transaction occurs.

Failure to provide advice that is reasonable in all the circumstances, or providing advice that fails to comply with the disclosure requirements, gives rise to a civil action for loss or damage as well as exposing the adviser to a criminal charge. There is a six-year limitation period for a civil action. A court has the power to make orders including voiding contracts or such other orders as are necessary or desirable.

Conclusion

Actions on behalf of those aggrieved may be commenced in a range of jurisdictions or conducted by way of defence and/or cross-claim. Venues for claimants include the Local, District and Supreme Courts, the Federal Court of Australia, the Federal Magistrates Court and various consumer tribunals. A representative action in the Federal Court may be an option if there are seven or more people who have a claim 'arising out of the same, similar or related circumstances'.²⁹

Actions seeking compensation can be made to various industry dispute resolution schemes, including the Financial Industry Complaints Service. When making such a complaint one should also consider the various industry codes of practice such as the Code of Banking Practice, and the Financial Planners Code of Ethics and Rules of Professional Conduct, as the codes are binding on members of the schemes. It should be noted that these schemes do not have the power to award exemplary damages.

Such actions can be conducted by private practitioners on behalf of their clients without resort to government agencies. Indeed, agencies such as the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission should encourage private practitioners to participate in the prosecution of civil recovery actions as there are many victims of injustice who are not able to be helped by the agencies alone. **PL**

Footnotes:

- ¹ *Taylor v Johnson* [1983] 151 CLR 422.
- ² *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance Aust Ltd* [1986] 160 CLR 226.
- ³ [2002] VSC 113 (16 April 2002).
- ⁴ [1999] 73 ALJR 403 at 413-415; 161 ALR 155 at 168-170.
- ⁵ *Hedley Byrne and Co. v Heller* [1964] AC 465.
- ⁶ [1986] 160 CLR 371, 385 per Brennan, J.
- ⁷ [1999] HCA 36 (12 August 1999) at para 133.
- ⁸ *Hawkins v Clayton* [1988] 164 CLR 539; *San Sebastian Pty Ltd v The Minister* [1986] 162 CLR 341 at 357.
- ⁹ *Esanda Finance Corporation Ltd v Peat Marwick Hugerfords* [1997] 188 CLR 241.
- ¹⁰ *Gray v Motor Accident Commission* [1998] 196 CLR 1.
- ¹¹ *Taco Co of Australia Inc. v Taco Bell Pty Ltd* [1982] 42 ALR 177.
- ¹² [1998] 196 CLR 494.
- ¹³ McHugh Hayne and Callinan JJ at para 46.
- ¹⁴ *Henville v Walker* [2001] HCA 52 per McHugh J at para 133.
- ¹⁵ *Wardley Australia Ltd. v Western Australia* [1992] 175 CLR 514.
- ¹⁶ *Zoneff v Elcom Credit Union* [1990] 94 ALR 445.
- ¹⁷ *ACCC v Samton Holdings* [2002] FCA 62 at 67.
- ¹⁸ *Johnson v Buttress* [1936] 56 CLR 113.
- ¹⁹ *Demetrios v Gikas Dry Cleaning Industries Pty Ltd* [1991] 22 NSWLR 561.
- ²⁰ *Majik Markets Pty Ltd v Brake & Service Centre Drummoyne Pty Ltd* [1992] 28 NSWLR 443.
- ²¹ *Fernacare v Wreckair Pty Limited* [1991] ALIR 261.
- ²² TPA 51AA; ASIC Act 12CA.
- ²³ *Commercial Bank of Australia v Amadio* [1983] 151 CLR 447.
- ²⁴ *Vadasz v Pioneer Concrete (SA) Pty Ltd* [1995] 130 ALR 570.
- ²⁵ [2002] FCA 62.
- ²⁶ [1939] 63 CLR 649.
- ²⁷ [1998] 72 ALR 1243.
- ²⁸ *Royal Bank of Scotland v Etridge* [2001] UKHL 44.
- ²⁹ s33C Federal Court of Australia Act.