Liability on the bill

- You become liable to parties to the bill down the line whom you are in no direct contractual relationship, **by virtue of s28**
- Holder when facing acceptor default would usually proceed against party from who you purchased the bill, being a prior indorser. You could also go for drawer.

Liability of the Acceptor (upon acceptance of the bill): s59

- Acceptor will pay it according to the tenor of his or her acceptance: s59(a)
  - If Drawee only signs as accommodation party, but accepts it – still liable as acceptor (ss33, 59(1))
- Precluded from denying what they have had a chance to check
  - *to a holder in due course*: s59(b), from denying stuff that happened before the they accepted the bill
  - E.g. verifying existence and validity of signature of drawer
- And is (b) is precluded from denying to a holder in due course:
  - *(i) the existence of the drawer, the genuineness of his or her signature, and his or her capacity and authority to draw the bill; and*
  - *(ii) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his or her indorsement; and*
  - *(iii) in the case of a bill payable to the order of a third person, the existence of the payee and his or her then capacity to indorse, but not the genuineness or validity of his or her indorsement.*
- Not estopped: defects in bill that occurred after the bill left the possession and control of the acceptor (s59(b))

Liability of the Drawer: s60(1) The drawer of a bill, by drawing it:

- (a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he or she will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken; and
- (b) is precluded from denying to a holder in due course the existence of the payee and his or her then capacity to indorse.
  - Drawer chose to put those into the doc, they have control

Holder in due course

- **Rule:** prima facie all holder in due course (s35(1)), cannot be a holder where takes title to order bill from theft that requires indorsement of holder + delivery.
  - s34(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:
    - (a) That he or she became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact; and
    - (b) That he or she took the bill in good faith and for value, and that at the time the bill was negotiated to him or her he or she had no notice of any defect in the title of the person who negotiated it.
  - **Trade bills acceptor non-payment dishonouring** → HID sought enforcement against an indorser. That indorser (the drawer's bank) debited the drawer's account in making the payment and the bill was handed to the drawer. Drawer derived title from the HID, gaining all the rights of HIDs → notice of dishonouring at this stage did not disentitle them to such rights. (***Jade***)
- **Did the putative holder in due course take title from a theft/fraudulent party?**
  - **YES**
    - Need to show that value in good faith given for the bill (s35(2)) → Holder in due course
  - **NO**
    - Holder in due course
- **Result:**
  - Takes free of all defects in title (s43)
  - **S43: free from defect of title**
    - s43(b) Where he or she is a holder in due course, he or she holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.
    - *Jade International* → Midland Bank was holder in due course
      - One who derives title from a holder in due course also obtains entitlement as holder in due course
    - *Rigg Case* at page 267 — no set-off for unliquidated damages
- **If takes title from theft of order bill (paid to …)**
  - **Not a holder**
    - Holder (s4): means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.
  - But may be treated as holder of due course for the purposes of ascertaining the liabilities of the acceptor (s59), indorser (s60)

***Gillespie-Jones* [2013] HCA 35 at [119], (2013) 249 CLR 493**

- **(2) If there is a trust, where does the beneficial interest lie?**
  - Justice Gummow → lay with C

SET-OFFS

- **Contractual**
  - **Rule:** Bank may combine and set-off all accounts held with it subject to implied or express agreement to the contrary, such as a loan account (***Garnett v McKewan; Cinema Plus; Halesowen 890***). Parties may contract to the contrary (***Cinema Plus*** [86], [117]).
- **Insolvency/Bankruptcy**
  - **Set-off when (s86(1) BA; s553C CA):** where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company
  - **You cannot contract out & is self-executory upon insolvency (Halesowen v Westminster Bank; Stein v Blake)**
  - **Mutual dealings**
    - **YES**
      - **Mutual dealings as to debt owed/owing despite there was agreement to freeze one of them (*Halesowen*) –** two accounts
      - **Contingent debt on existing obligation (e.g. Principal borrower to indemnify guarantor once guarantor pays) is also available for set-off under s86 (by extension s553C) (*Day & Dent*)**
        - To achieve legislative purpose in doing substantial justice bw the parties
        - **Gibbs CJ at 91:** *"The principle that it is enough that at the date of the liquidation there existed on the one hand a debt and on the other hand a liability which in due course might mature into a debt is supported by other decisions"*
      - **Granting of property (book debts) as security**
        - **Rule: Unless mutuality destroyed by security agreement → fixed charge**
        - **ASK:** Does the party giving property as security to borrow money have the right to use payments received (from sale of property) for its own benefit → if yes; mutuality between this party and its creditor is not lost.
        - **Not destroyed → circulating security interest (*Hamersley v Forge*)**
  - **[Agreement permitted Grantor of ALLPAP to collect debt and use proceeds absent any contrary direction by the grantee upon the grantor's insolvency] — *Hamersley v Forge***
    - **FACTS:** Forge obtained funding from ANZ and gave ALLPAP security, including its accounts (PPSA debt). ANZ gave loan to Forge. Forge building power station for Hamersley. Forge went into administration, became insolvent.
    - **ISSUE:** Hamersley entitled to exercise insolvency set-off, to only prove the balance of what Forge owed it. Hamersley getting in ahead of ANZ. Forge argued Hamersley had not rights to insolvency set-off due to no mutuality as required by section.
      - Did the ALLPAP, all present and future assets including accounts, destroy mutuality between Hamersley and Forge?
    - **Trial Judge:** Yes, when entering that with ANZ, Forge lost all its beneficial rights including the contractual rights against Hamersley.
    - **WASCA: Mutuality not destroyed by entering into ALLPAP – permitted by terms of security agreement**
      - **Page 34:** Whether the security interest was a fixed charge or floating charge?
        - Latter permitted borrower (chargor who gives property as security) to collect its debts and use proceeds: p 34
      - **Page 42-3, 46-7:** Even though ANZ had right to direct that proceeds collected from debts by Forge should be deposited in a controlled bank acc; it had not yet made such direction [at no material times did ANZ instruct the maintenance of a controlled acc; albeit it had the power to do so under the agreement]. Until such direction was made, Forge permitted by security agreement to collect the debt and use it for its own purpose.
      - Operated as a circulated security interest
      - **s553C is not a code; but parties cannot contract out of it (*Halesowen*)**
        - General law set-off may still apply

Contractual duty of confidentiality by bank to customer

- **Rule**: Implied in the contract, continues to exist even after account is closed (***Tournier***).
- ***Tournier*** → Inspected destination of where money went from customer – bookmaker; then told customer's employer that customer might be a gambler.
- **Exceptions: (*Parry Jones*)**
    1. Disclosure under compulsion of law
    2. Disclosure in the public interest
    3. Disclosure in the interests of the bank
    4. Disclosure with the customer's express or implied consent
- **Banker's Opinion** → modern law no implied consent (***Turner; cf Tournier***)

Duty of care to avoid economic loss → statements by bank causing economic loss

- **Rule:** Combination of foresight of the likelihood of harm ***(Perre v Apand)***
- **Different formulations by the the justices, Gaudron J broadest** → if one foresees, **McHugh** prefers incremental approach and takes into consideration that D is exempted if protecting legitimate personal interest
- **Gaudron J:** where a person knows or ought to know that his or her acts or omissions may cause the loss or impairment of legal rights possessed, enjoyed or exercised by another, latter person is in no position to protect his or her own interests, there is a relationship such that the law should impose a duty of care on the former to take reasonable steps to avoid a foreseeable risk of economic loss resulting from the loss or impairment of those rights

DOES THE ASIC ACT APPLY?

- Under s 12BAB, a "financial service" includes a "financial product". S 12BAA(7) defines a "financial product" to include (k) a credit facility.

Misleading or Deceptive Conduct – ASIC s12DA

- **Rule:** s12DA(1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is ***misleading or deceptive or is likely to mislead or deceive***".
- **Reliance on misrepresentation to third party sureties of business performance (*Nobile (1987) ATPR 40-787*)** → the creditor told the guarantees that the business to which the loan obligations were owed were operating successfully. The Court found that the surety would not have entered into the agreement absent such misrepresentation, and thus exercised power to declare the guarantee and mortgage void ab initio.

Unconscionable Conduct – ASIC s12CB, s12CA(residual provision where not caught by 12CB)

- **Rule:** Requires a significant element of moral obloquy (***Cash*)**, victimisation and exploitation key features (***Kobelt***). Undue influence and dishonesty relevant (12CB(2)(d)).
    - Gagler J per ***Kobelt*** → The question to be asked is whether the supplier's conduct involves such a departure from accepted community standards in the supply of the financial service as to warrant the characterisation that it is unconscionable [92], [107].
    - **s12CB** – A person must not, in trade or commerce, in connection with: (a) the supply or possible supply of financial services to a person; or (b) the acquisition or possible acquisition of financial services from a person; engage in conduct that is, in all the circumstances, unconscionable.
- **s12CA** → meant to capture contraventions of unwritten law (equity); but s12CB is said to be broader than equitable head of relief (***Cash* [83]). So essentially no use.**
- **Factors Court may take into account (s12CC(1) – supplier unconscionable; s12CC(2) – acquirer unconscionable)**
    - (a) ***relative strengths of the bargaining positions***
    - (b) ***conditions not reasonably necessary for the protection of the legitimate interests***
    - (c) **ability to understand any documents relating to the supply or possible supply of the financial services;**
    - (d) ***undue influence or pressure*** was exerted on, or ***any unfair tactics*** by person or person acting on their behalf
    - (e) ***availability (amount and circumstances) of identical or equivalent financial services***
    - (f) **consistent treatment of all customers? Or targeting this one etc**
    - (g) & (h) if Corporation → ***industry codes:*** or any code victim believed the defendant would have complied with therefore acting upon it
    - (i) the extent to which the supplier ***unreasonably failed to disclose*** to the service recipient:
        - (i) any intended conduct of the supplier that might affect the interests of the service recipient; and
        - (ii) any **risks** to the service recipient arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the service recipient); and
    - (j) if there is a contract between the supplier and the service recipient for the supply of the financial services:

call, the retail client "would be unable to comply with the retail client's financial obligations under the terms of the facility; or could only comply with substantial hardship".

- **Remedy:** s. 1317E of the Corps Act, if a court is satisfied that a person has contravened one of the following sections, it must make a declaration of contravention:
  - (jaa) subsection 985E(1) (issuing or increasing limit of margin lending facility without having made assessment etc.);
  - (jab) subsection 985H(1) (failure to assess a margin lending facility as unsuitable);
  - (jac) subsection 985J(1) (failure to give assessment to retail client if requested before issue of facility or increase in limit);
  - (jad) subsection 985J(2) (failure to give assessment to retail client if requested after issue of facility or increase in limit);
  - (jae) subsection 985J(4) (demanding payment to give assessment to retail client);
  - (jaf) subsection 985K(1) (issuing or increasing limit of margin lending facility if unsuitable).
- Once a declaration has been made, ASIC may seek a **pecuniary penalty against the person** (the bank) under s. 1317G (or a disqualification under s. 206C). Under s. 1317G, a variety of penalties may be ordered, including penalties of up to $1 million in the case of a body corporate.

National Consumer Credit Protection Act 2009 (Cth); in particular, ss. 128-133

- **Application:** credit contract under which credit is or may be provided – s4
- Debtor is a natural person and credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes
- Licensee obligations – ss128, 129
- S131 when credit contract must be assessed as unsuitable → Civil penalty units

Special Equity of Wives

- **Rule:** Where a wife enters into guarantee for her husband (principal borrower), equity will intervene provided the wife is a volunteer and that the bank, having notice of such impropriety, took no steps to ensure the wife receive competent and independent legal advice; or reasonably supposed that the wife had an adequate comprehension of the obligations she undertook and/or understood the effect of the transaction. (***Garcia***)

A. Was the transaction tainted? Two types of cases (*Garcia*)

1. **Actual undue influence [23]**
   - **a.** If proof of undue influence; bank must show it took steps to ensure wife got independent advice [24]; [26]
   - **b.** Where received independent advice; bank ordinarily allowed to assume that bank discharged duty [25]; adopted in ***Burch***[157]
2. **Wife did not understand the terms + volunteer**
   - ***a.*** ***Garcia*** → thinking it was limited guarantee + limited to purchase of gold; nor did she understand her guarantee was secured by mortgage over her home
   - **b.** Bank cant rely → unconscionable; unless ensured she received competent and independent advice OR Bank explained to her themself
   - **c.** If bank explained +reasonably believes she understands the guarantee

B. Did the bank have notice?

- Bank taken to have notice of impropriety if it knows the guarantor is a wife of the principal borrower (***Garcia;*** affirming ***Yerkey v Jones***)

C. Was the wife a volunteer?

a. ***Garcia*** → yes, despite director of Co, had no financial interest, flow to family controlled by husband
   i. The fact that she was a director of the company is nothing to point if, as the trial judge's findings show, she had no financial interest in the fortunes of the company [43], p 412
   ii. Companies benefit sometimes flowed to the family, but they were companies in the complete control of the husband [43]

b. ***Alceon*** → yes, despite beneficiary under discretionary trust linked to the borrowing Co
   i. Significance of Mrs Rose **never been employee, shareholder, or director of Quadwest or QPS,** nor of any other company [44] → volunteer so Garcia may apply
   ii. NB: shares in Quadwest held by QPS; shares in QPS held by Rose Custodians P/L for the beneficiaries of Rose Investment Trust: Son, Dad, and mum
   iii. But distributions from the trust were based on discretionary powers exercised by Dad and Stuart Fowler → so Rose not immediately entitled; she was entitled to be considered

Contracts Review Act

- **Rule:** CRA enables a court to refuse to enforce any or all of the provisions of the contract where a court finds the contract unjust. Unjust is defined to include "unconscionable, harsh or oppressive" (***Alceon*** **[91]; CRA s4(1))**.
  - This is determined by the **'combination of the operation of the contract and the manner in which it was made**' (***West v AGC,*** **620).**

MOD 5 GUARANTEES

Step 0: is it a guarantee (Secondary liability on default) or performance guarantee/standby letter of credit?

- **Principle of autonomy:** Performance bonds/guarantees and letter of credits be treated as independent of the underlying commercial contract (***Ottoway Engineering***) – triggered by demand cf default of account party.
- **Performance guarantee** (***Clough Engineering***) →
  - **Rule:** independent of underlying contract and is invoked on demand for payment, unconditional unless made conditional by contract.
  - ***Clough*** → ONGC had right under performance guarantee in the event ***Clough*** fails to honour any of the commitments → bona fide apprehension of 'failing to honour' is sufficient. Delay attributable to ONGC, ONGC pay costs for extension; does NOT affect right to call under PG.
  - **Exceptions: (*CPB Contractors*)**
    1. **Fraud**
    2. Demand unconscionable
    3. Underlying contract contains conditions preventing beneficiary from calling on the guarantee
- **Standby letter of credit** (***Boral Formwork v Action Makers***) →
  - **Rule:** Beneficiary of letter of credit allowed to call on full amount (despite dispute re price e.g. supply of faulty goods), however, may be estopped if the making of such claim is unconscionable (***Boral***). Primary obligation of the financial institution, triggered by demand of beneficiary holding cert issued by Bank, not by default.
    - **Unconscionability** (statute made out) giving rise to estoppel → ***Boral***
      - supply of defective goods, contract provided AM (supplier) could choose:
      1. AM to replace goods, or
      2. Boral to deduct it from price
      - AM ignored Boral letter asking it to choose; made demand under Letter of credit
    - **NB:** Did not amount to negative contractual stipulation Because it was primary oblig of bank cf Boral → no set-off of the disputed price; letter of standby credit remain as is, AM to account for any overpayment to Boral. No injunctive relief on this basis.

Step 1: Construction of Guarantee

- **Was consideration given?**
  - Consideration must be given (e.g. granting financial accommodation to principal borrower) or else guarantor may withdraw at any time.
- **How to construe ambiguous terms?** (***Docklands Press***)
  - In favour of the surety (guarantor) → thus if agreement does not specify if past debts (prior to signing of guarantee) is included → it is NOT.
- **Payment by surety, if not specified to which debt → Creditor may choose (*Docklands*)**
  - I.e. Creditor chose to apply sum to retrospective debt not covered by guarantee; debt covered by guarantee remains.

Step 2: Rights of Guarantors/Surety

- **Right to indemnity:** any amount paid in reduction of guaranteed debt is claimable (***O'Donovan***)
  - If guarantee entered into by request of debtor
  - Can seek indemnity even if not full obligation under guarantee paid out by guarantor (for that paid amount ofc)
  - If guarantor got discharge of debt from creditor by paying less than as agreed under guarantee → right to indemnity against debtor is limited to that amount
- **Right to subrogation (*Austin v Royal; O'Donovan*)**
  - Once all debts owed to creditor discharged
  - May enforce security interests in C's shoes against debtor, debtor may allege set-off (mutual debts vis-a-vis creditor/guarantor)

Step 3: Any grounds of challenging guarantee – MODULE 4 unconscionability/M&D conduct/CRA unfair etc

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PPSA Regime

- **Unperfected security interest vests in grantor upon VA/winding up/insolvency,** therefore extinguishes upon bankruptcy/winding up/VA (s267 PPSA)
    - Statutory right of PPS lessors to prove in the insolvency of Grantor for the market value of the collaterals lost under s267 **(s269 PPSA)**
- **PPSA Priority**
    - **General:**
        - **Perfected prevails unperfected** (*s55(3) PPSA*)
        - **First in time better in right**
            - ***Perfected*** **= first in Priority Time** i.e. register, possession or control, or temporary perfection (*s55(4) PPSA*)
            - ***Unperfected*** **= first to attach** (*s55(2) PPSA*)
    - **Perfection by control prevails over every other perfection** (*s57(1) PPSA*)
    - **Bank security interests in ADI accounts** held by them ***beat all other SIs in the ADI acc*** **(PPSA s75)**
- **ASK: Does PPSA apply?**
    - In substance security interest (S12(1) PPSA)
    - Deemed security interest (s12(3) which includes PPS lease (S13))
    - S8 exceptions → land, fixtures etc
- **PPS Lease**
    - **S13 PPS lease; is a deemed security interest under s12(3)(c)**
        - (1) A ***PPS lease*** means a lease or bailment of goods:
            - (a) for a term of **more than 2 years**; or
            - (c) for a term of **up to 2 years** that is automatically renewable, or that is renewable at the option of one of the parties, for one or more terms if the total of all the terms might exceed 2 years; or
            - (d) for a term of **up to 2 years, or a lease for an indefinite term, in a case in which the lessee or bailee, with the consent of the lessor or bailor, retains uninterrupted** (or substantially uninterrupted) possession of the leased or bailed property for a period of **more than 2 years after the day the lessee or bailee first acquired possession of the property** (but not until the lessee's or bailee's possession extends for more than 2 years).
        - (2) However, a ***PPS lease*** **does NOT** include:
            - (a) a lease by a lessor ***who is not regularly engaged in the business of leasing goods;*** or
                - ***Forge***: ad hoc (when necessary) is different from reg; but need NOT be in ordinary course of business. Frequency relevant, does not matter where leasing occurred, nor No. of transactions entered into.
            - (b) a bailment by a bailor who is not regularly engaged in the business of bailing goods; or
            - (c) a lease of consumer property as part of a lease of land where the use of the property is incidental to the use and enjoyment of the land; or
            - (d) a lease or bailment of personal property prescribed by the regulations for the purposes of this definition, regardless of the length of the term of the lease or bailment.
        - Bailments for value only
        - (3) This section only applies to a bailment for which the bailee provides value.
- **ASK is it perfected?**
    - **Attachment + enforceability against third parties (ss19, 20) AND**
    - **Registration of financing statement is crucial** (***Forge Group Power***)
    - **Possessory interest (lessee) is sufficient to grant SI to a third party** (***Maiden Civil***) [Page 29]
- **How to perfect a security interest**
    - **Rule:** Rights between grantor and secured party depend on attachment, not perfection but affects priority and vesting when third parties are involved. It must be maintained, continuous in order for it to be effective for the entire period.
    - **Steps involved to obtain perfection of a security interest: (s21(1)(b) PPSA)**
        - **Rule:** Attachment + enforceable against third parties + registration/possession/control (s 21(1)(b))
        1. **Attachment of the security interest to collateral (S19) AND**
        - **Section 19(1):** is enforceable against the grantor when security interest attaches to grantor
        - **When attachment occurs – s19(2)**
            - **Default: 19(2)** A security interest attaches to collateral when:
                - (a) **the grantor has rights in the collateral,** or the power to transfer rights in the collateral

- NB: The debtor may not be the grantor of the security interest e.g. a third party
- (ii) if the debtor is a body corporate – a related body corporate (***Corps Act* 2021 meaning)**
- **S341A(2) a secured party has control under subsection(1) even if the grantor retains the right to direct the disposition of funds from the account**
- **S341(1A) Catch-all provision**
  - Secured party having control of the ADI account within the ordinary meaning of the term "control"

- **Control of ADI can only occur if the secured party is the ADI (s25 PPSA)**
  - Control of an ADI account
  - A secured party has control of an ADI account for the purposes of section 21 (perfection--main rule) if, and only if, the secured party is the ADI.
  - Note: Control has an extended meaning in relation to ADIs in sections 341 and 341A (control in relation to fixed and floating charges).
- Bank cannot take a perfected security interest perfected by control over an account (book debts)
  - Not listed in s21(2) the type of collaterals that can be perfected by control
- S341 control of accounts

2. **When will a secured party have control over a book debt?** PPSA ss 340, 341. Must the account into which the proceeds of book debts are paid be a "blocked account", in order for the secured party to retain control over that ADI account, thereby ensuring that the account is not a "circulating asset" for the purposes of preferential claims under the Corporations Act or Bankruptcy Act?
   a. **Requires** proceeds of debts be paid into a blocked ADI acc held by the secured party (s341(3)(d))
   b. S341(3) circumstances secured party has control over accounts
   - (a) the secured party, and the person to whom the relevant account is owed, have **agreed in writing** that amounts paid in discharge of the relevant account must be **deposited** into a **specified ADI account; and**
   - (b) the **usual practice** is for such amounts to be so deposited; and
     - ***Should not be able to draw on overdraft acc as much as they wanted*** so long not exceeding overdraft the proceeds of the book debts which were held as security interest by the ADI (***Spectrum Plus***)
   - **(c) the secured party controls the ADI account within the meaning of paragraph (1A)(d);** and

(1A) For the purposes of subsection 340(2), a secured party has control of personal property if:

- ***(a) the secured party has control of the property within the ordinary meaning of the term "control"; or***
- (b) the secured party has control of the property within the meaning of Part 2.3 (possession and control of personal property); or
- (c) in a case in which the personal property is inventory or an account--the secured party has control of the inventory or account because of:
  - (i) paragraph (a) or (b); or
  - (ii) subsection (1), (2), (3) or (4); or
- (d) in a case in which the personal property is an **ADI account**--the secured party has control of the account because of ***paragraph (a) of this subsection*** **or section** ***341A.***

   - (d) depositing any such amounts into the specified ADI account **does not result in any person coming under a present liability to pay:**
     - (i) the person to whom the relevant account is owed; or
       - ***The grantor must contract away any right for bank to pay them MUST BE A BLOCKED ACC***
     - (ii) if the person to whom the relevant account is owed is a body corporate--a related body corporate (within the meaning of the Corporations Act 2001).

   c. S341A --- **nothing in s341A requires secured party to have exclusive control/right** to access the ADI account. Bank will have control provided money deposited with them.

1) For the purposes of subsection 340(2), a secured party has control of an ADI account if:
   - (a) one or more of the following applies:
     - (i) the secured party is the ADI;
     - (ii) the secured party is able to direct disposition of the funds from the account without further consent by the grantor;
     - (iii) the secured party becomes the ADI's customer with respect to the account; and