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OMBUDSMAN

BULLETIN

Banking and
Financial Services
Ombudsman Limited
GPO Box 3
Melbourne 3001
Tel: 1300 78 08 08
Fax: (03)9613 7345

www.bfso.org.au

A.B.N. 48 050 070 034

Credit card limits and maladministration

Introduction

Over the course of the last 12 months we have received an increasing number of disputes regarding credit card limits.[1] While some of those disputes have questioned the initial approval of the credit card facility, many have concerned increases to existing credit card limits.

The disputes raise issues about whether the lending arose as a result of unconscionable or misleading conduct, whether the contract was unjust in accordance with the provisions of the Uniform Consumer Credit Code ("UCCC") or whether there was maladministration in the decision to lend in accordance with our Terms of Reference. The usual claim is that the credit card holder should not have to repay all or part of the credit provided.

In Bulletins 26 (September 2000) and 33 (March 2002) we set out our approach to issues arising in disputes concerning credit cards. Each of those Bulletins touched on the issue of maladministration in the context of the granting of credit cards and increases in limits applicable to those credit cards. This Bulletin sets out in detail the rationale for our approach to disputes about maladministration in granting credit on credit card accounts and illustrates our approach to loss and the resolution of disputes. We also make some comments about cases that raise a possible claim that the contract was unjust.

A note on the language used in this Bulletin: we have used the term "appropriate credit limit" to refer to the credit limit which would be regarded as the limit which would have been appropriate if the member properly applied its credit assessment method used for new applications to a complete and correct application. References to "excess credit" are to amounts of credit available above the appropriate credit limit.

The appropriate credit limit reflects the assessment issues which arise under our maladministration jurisdiction and the obligations to assess capacity to repay which arise under the Code of Banking Practice ("CBP") and the UCCC.

The focus of this Bulletin is maladministration. While there is discussion about unjust contracts under the UCCC and the *Contracts Review Act 1980* (NSW) ("Contracts Review Act"), cases which raise those claims require a different analysis of the circumstances and may also require a different approach to compensation.

Role of the Ombudsman

When reading this Bulletin it is important to keep in mind that the primary role of the Ombudsman is dispute resolution on a case by case basis. The Ombudsman also has a responsibility to identify and report on systemic issues and this office contributes to discussions on policies and decisions which affect our members and their customers. However, it is not for this office to take on a regulatory role whether explicitly or implicitly via its decisions.

The Independent Review of the Scheme completed in December 2004 noted that the Scheme was somewhat unfairly the subject of some frustration because it does not take on a regulatory role. As the Review confirmed, the Scheme's role is based in dispute resolution rather than industry regulation.[2] Accordingly, questions around the prevalence of credit cards in Australia and the general level of credit card debt are outside the scope of the Ombudsman's powers and so, this Bulletin.

Terms of Reference

The Ombudsman operates under Terms of Reference that describe the types of disputes he can consider. Clause 5.1(a) of the Ombudsman's Terms of Reference says:

> "*The Ombudsman can consider any dispute described in 3 except:*
>
> *(a) to the extent the dispute relates solely to a financial services provider's commercial judgment in decisions about lending or security. A dispute will relate to commercial judgment if the financial services provider made an assessment of risk, or of financial or commercial criteria or of character.*
>
> *The Ombudsman may consider disputes about maladministration in lending or security matters which involve an act or omission contrary to or not in accordance with a duty owed at law or pursuant to the terms (express or implied) of the contract between the financial services provider and the disputant;"*

It is likely that financial institutions will respond differently to an application for credit from the same applicant because of their different considerations of credit risk and the profile of the applicant. The Ombudsman is not able to interfere with the lending policies of its members to the extent that they reflect the lender's commercial judgment. So disputes solely about a lender's decision not to advance credit or its decision to demand repayment of a debt properly owed and exercise its legal entitlements to recover the debt are about the lender's commercial decision and, as long as no other claims arise, are matters which are outside the Ombudsman's jurisdiction.

If, however, a dispute raises a question about whether there was maladministration in a decision about lending or security, it falls within clause 5.1(a) of the Terms of Reference.

Criteria for decision making

The Terms of Reference also specify the criteria for decision making. Clause 1.3 states that the Ombudsman must have regard to the law, applicable industry codes or guidelines, good industry practice and fairness in all the circumstances.

Accordingly, when assessing disputes that raise issues of maladministration in the decision to lend we will also take into account:

- The provisions of the UCCC, particularly the considerations under section 70;
- The provisions under section 7 of the Contracts Review Act [3], where applicable;
- A member's common law contractual duty and whether the particular circumstances of the case give rise to a claim of unconscionable or misleading conduct under the *Trade Practices Act* 1974 (Cth);
- The specific requirements for credit assessment contained in the ACT *Fair Trading Act 1992* if the disputant was, at the relevant time, an ACT resident and/or
- The provisions of clause 25 of the CBP if the member is a bank which has adopted the CBP.

Whilst the focus of this Bulletin is on maladministration in lending, we have also commented further in this Bulletin on the UCCC and Contracts Review Act provisions.

Ombudsman's Approach to Disputes about Maladministration and Credit Card Limits

The first and most important principle is that we consider each dispute on its particular facts and so we apply the general approach to maladministration discussed here with care. The specific circumstances of a case may require broader considerations and the resolution may be different from the outcome described here.

Maladministration in credit card lending

Our approach has always been that, in determining whether there has been maladministration in the lender's decision, the issue of the applicant's ability to repay is critical. This is reinforced by clause 25.1 of the CBP and sub section 70(2)(l) of the UCCC.

Clause 25.1 of the revised CBP contractually binds adopting banks to "*exercise the care and skill of a diligent and prudent banker in selecting and applying* [its] *credit assessment methods and in forming* [its] *opinion about your capacity to repay*."

Banks have a duty under the banker-customer contract "*to exercise reasonable care and skill in carrying out* [the bank's] *part with regard to operations within its contract with its customer*". The standard of care for a bank is that of "*the reasonable competent banker acting in accordance with accepted current practice.*"[4]

Section 70 of the UCCC gives a court the power to reopen contracts it concludes are unjust. One of the factors the court may have regard to when assessing a particular contract is the enquiry made of the debtor as to his or her capacity to repay as set out in s. 70(2)(l):

> "*(l) at the time the contract, …… was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship;*"

Our approach to disputes raising a claim of maladministration in lending on a credit card account is to:

1. Consider the information obtained and provided in the application process;

2. Consider whether the amount of credit approved was appropriate at the time the application for new credit or an increased limit was offered and accepted; and

3. Assess what amount should be repaid if the credit limit approved was not appropriate and there was maladministration in lending.

The application for credit

Situations when credit is provided on a credit card account include:

(a) a new application for credit;
(b) an application by a cardholder for an increase in the credit limit; and
(c) an unsolicited offer to increase the credit limit.

As long as the amount of credit is not increased, the transfer of credit from one lender to another is unlikely to lead to maladministration in lending because the consumer's overall credit position is not changed by such transfers.

New applications

We expect lenders to obtain sufficient information from the consumer about his/her personal and financial position to assess the capacity to repay the debt. We take the view that in most cases the lender is entitled to rely on the information provided by the consumer. However, we will consider whether the information provided was clearly incorrect or nonsensical or ought to be regarded as questionable because of other information held by the lender.

The following questions may be asked in the course of an investigation:

- Did the lender obtain sufficient information from the consumer about his/her personal and financial position to assess the capacity to repay the debt?

- Did the applicant disclose all/accurate information about his/her current financial position as sought on the application form?

  If not, and the lender assessed the application on the basis of the information provided, there is unlikely to be maladministration in the decision to lend.

- Is there anything on the face of the application that would prompt further enquiry from a diligent and prudent lender?

  Failure to make further enquiry may lead to maladministration in the decision to lend.

  An applicant for a credit card completed an application stating that his gross monthly income was $80,000, that he had property and other assets totalling $151,000 which included $100 in a bank account and liabilities requiring monthly repayments of $80. Rather than contacting the applicant to ask about the income figure and for supporting documents for his financial position, the lender processed the application treating the stated gross income as annual rather than monthly.

- Did the lender provide advice or instruction to the applicant about how to complete the application that resulted in the provision of inaccurate information?

A young woman had commenced work at a telephone research company and received her first weekly wage. When she applied for a credit card she said that she was told by a bank officer to multiply that weekly amount by 52 to ascertain her annual income which was required to complete the application. As her hours varied considerably over the following months, that calculation was considerably in excess of her actual annual income.

- Did the lender manipulate or amend confusing information provided by the applicant without checking the accuracy with the applicant?

  If so, such action may lead to maladministration in lending.

<u>Applications by the cardholder for an increase in the credit limit</u>

- Did the lender obtain sufficient information from the consumer about his/her personal and financial position to assess the capacity to repay the debt?

  If not, there may be maladministration in lending.

- Did the applicant disclose all/accurate information about their current financial position as sought on the application form?

  If not, and the lender assessed the application on the basis of the information provided, there is unlikely to be maladministration in the decision to lend.

- Is there anything on the face of the application that would prompt further enquiry from a diligent and prudent lender?

  Failure to make further enquiry may lead to maladministration in the decision to lend.

- Did the lender manipulate or amend confusing information provided by the applicant without checking the accuracy with the applicant?

  If so, such action may lead to maladministration in lending.

<u>Unsolicited offers for credit limit increases</u>

Unsolicited offers for credit limit increases are usually based on behavioural scoring. We understand that lenders believe that behavioural scoring is a good indicator of the chance of default and is a cost effective method for determining unsolicited credit limit offers. However, from the cases we have seen, a small number of cardholders obtain credit far in excess of what would have been granted had the lender made enquiries about their current financial position.

Our view is that the failure to make enquiry of the cardholder to reveal his/her current income and their level of credit commitment at the time the offer is made may lead to an inappropriate offer of credit. This is because there needs to be enquiry about whether there has been a change in the cardholder's circumstances, such as cessation of employment, change to a fixed income such as a disability or age pension or an increase in their financial commitments.

Assumptions about the cardholder's financial position based on the payment history may be false if the cardholder is obtaining assistance with the debt repayment from a third party or is using other sources of credit to maintain the minimum monthly payment. Further, in the absence of additional enquiry, the ability to repay the minimum monthly payment on the approved credit limit does not necessarily mean that the cardholder has the ability to service or repay an increased level of credit.

Increases in the credit limit to accommodate persistent over the limit spending may also amount to maladministration in lending.

Assessment of the decision to lend

In order to make an assessment of the decision to lend, we ask the following questions:

<u>What was the financial position of the disputant at the time of the application or credit limit increase?</u>

If this information was not sought by the lender at the time of the credit limit increase we will require the disputant to provide details of his or her financial position at the time the credit was approved. This is effectively a retrospective statement of financial position with supporting documentation. Such information will include details of the disputant's gross income at the time, financial commitments, including mortgage payments or rent, and number of dependents.

<u>Was the approved credit limit appropriate?</u>

The information provided by the disputant about his/her financial position at the time the credit was advanced will be provided to the lender. We will ask:

- If the lender had applied its credit assessment method used for new applications for credit at that time, after obtaining relevant information about the applicant's financial commitments and his/her capacity to service the credit limit, what amount of new credit or increased limit would have been approved?

Depending on the amount of time which has passed since the approval, a lender may be able to process a 'dummy' application using the appropriate credit assessment method or it may be necessary for a manual assessment to be made by an experienced credit officer.

While different lenders may approve differing amounts of credit depending on their lending policy, we will identify if the credit provision appears not to be in accordance with the conduct of a prudent lender by utilising the expertise of the Ombudsman's banking adviser and consulting with the industry.

Resolution of credit card maladministration disputes

If there is maladministration in the provision of credit we encourage the parties to resolve the dispute by negotiation. If the dispute cannot be resolved by the parties we will assess how much of the debt is repayable and in appropriate cases, we may assist the parties reach a mutually acceptable repayment arrangement.

The following discussion explains the rationale behind the assessment of how much of the credit card debt should be repaid when we consider there was maladministration in the decision to lend.

The reported cases and commentary we have reviewed have not dealt directly with sub-section 70(2)(l) of the UCCC. While that sub-section is untested, the reported cases and commentary suggest that a failure to make enquiries of the type referred to in sub-section 70(2)(l) of the UCCC would not be a sufficient basis alone to conclude that the contract was unjust under the UCCC. The cases which may be regarded as comparable indicate that a person who has had use of credit provided by a lender will not ordinarily be relieved from the obligation to repay at least the principal advanced.[5]

In most cases where we consider there has been maladministration in granting credit on a credit card account, the cardholder will be liable for the principal advanced (by way of purchases or cash advances) but the lender will not be able to collect interest or fees on the credit that was advanced beyond the appropriate credit limit.

However, in some of the cases we have seen when credit is provided above an appropriate credit limit, repayment of the resultant debt can cause hardship. We encourage lenders to take into account the disputant's personal position and current financial circumstances to reach a resolution of the dispute which is commercially practical and does not cause unnecessary hardship.

If there is maladministration, what amount should be repaid?

When assessing the amount repayable in claims of maladministration we take the following approach. It is important to stress again that the Ombudsman considers disputes on a case by case basis and the general approach described here may be varied depending on the circumstances of the case.

It should also be noted that it is not intended that we will undertake a complex and time consuming accounting exercise but rather calculate our best estimate.

- From the point in time when the appropriate credit limit is exceeded we will calculate (a) the sum of the cash advances and purchases, excluding interest and fees charged, and (b) the repayments made to the credit card account;

- The repayments already made are treated as first repaying the debt on the appropriate credit limit together with any interest which applied to the appropriate credit limit and any annual fee charged;

- Any amount outstanding in terms of the appropriate credit limit debt will be repayable with interest at the usual rate under the credit contract;

- The sum of purchases and cash advances over and above the appropriate credit limit will then be repayable but without interest and fees ("outstanding principal debt");

- Any payments over the amount sufficient to repay the appropriate credit limit with interest are applied to reduce the outstanding principal debt; and

- The disputant may elect to sell or otherwise redeem purchases to assist in repayment.

In several cases we have found in broad terms that, once the repayments which had been made were applied to the amount of credit repayable with interest, only the outstanding principal debt was left due. The repayments made may also reduce the outstanding principal debt.

The following example illustrates the approach although the particular case was resolved by negotiated settlement.

Mr X, who was on a disability pension, had been given access to a $12,000 credit limit on his Visa card. The appropriate credit limit for Mr X was $1,000. The credit card statements showed the following use of funds and the payments made, after the appropriate limit of $1,000 was exceeded:

Date	**Purchases and cash advances over appropriate limit of $1,000**	**Payments**		
Nov 03	$ 5,100	$ 0		
Dec 03	$ 3,000	$ 150		
Jan 04	$ 3,450	$ 600		
Feb 04	$ 200	$ 300	Sub-total (a)	$1,050
Mar 04	$ 200	$ 250		
Apr 04	$ 260	$ 350		
May 04	$ 0	$ 140		
June 04	$ 0	$ 150	Sub-total (b)	$890
Totals	**$ 12,210**	**$ 1,940**		

- Purchases and cash advances over the appropriate credit limit of $1,000 do not accrue interest or charges, and therefore all interest and charges detailed on the credit card statements between November 2003 and June 2004 were disregarded.

- Payments of $1,050 in the period December 2003 until February 2004 (sub-total (a)) were sufficient to repay the appropriate credit limit with interest at the applicable interest rate.

- Payments of $890 (sub-total (b)) from March 2004 were applied to reduce the outstanding principal debt of $12,210.

- In this case, Mr X's outstanding liability was in the order of $11,300.

In order to resolve the dispute the bank offered to reduce the debt to $8,369, interest free, payable at the rate of $30 per month. Mr X accepted the bank's offer.

What repayment arrangements are appropriate?

It should be understood by all parties that the assessment of maladministration in the decision to lend applies to the disputant's circumstances at the time the credit was granted. However, negotiations between the parties about a repayment arrangement are often taking place some months or years after the granting of credit and in some cases, the disputant's financial position has deteriorated.

As stated previously, we encourage lenders to take into account the disputant's personal position and current financial circumstances to reach a resolution of the dispute which is commercially practical and does not cause unnecessary hardship. Such an approach is consistent with an adopting bank's undertaking to assist consumers overcome their financial difficulties as set out in clause 25.2 of the CBP.

One approach for establishing an arrangement for repayment of the interest-free principal is to take into account the minimum monthly repayment determined by the lender on the appropriate credit limit. This repayment amount and the time it would take the consumer to repay the debt at this rate could be taken into consideration by the parties when negotiating a repayment arrangement. If a shorter time frame is appropriate because of the consumer's circumstances or age, the resolution of the dispute may involve a waiver of some or all of the outstanding principal debt.

Practical considerations for repayment

We understand that financial service providers can separate debts into interest bearing and non-interest bearing components. While that may not be done within a credit card account, we understand that it can be done in other ways. In some cases it may be that a lender would prefer to forgo interest on all amounts to make the account management easier. The implementation of our approach may vary by agreement of the parties from case to case.

Section 70 UCCC and section 7 Contracts Review Act

We will consider the particular facts of the case to decide if, in addition to a claim of maladministration, the dispute raises a question about whether the contract (or a change to that contract) was unjust, unfair or unconscionable. Such cases may require a different approach to compensation as compared to that discussed above. The following are some relevant matters for consideration in relation to unjust contracts under the UCCC or the Contracts Review Act.

Both section 70 of the UCCC and section 7 of the Contracts Review Act provide a remedy where a contract contains provisions which are unfair (substantive injustice) or where the circumstances or conduct which induced entry into the contract were unfair (procedural injustice).[6]

Unjust is defined in both the UCCC and the Contracts Review Act as including unconscionable, harsh or oppressive.[7] In both Acts it is expressly stated that the Court cannot have regard to any injustice arising from circumstances which were not reasonably foreseeable at the time the contract was made.[8]

Each of the Acts refer to certain matters to which a court is to have regard: the public interest (understood to mean the public interest in upholding contracts[9]) and to all of the circumstances of the case. There is also a separate list of other factors in each Act. There are some differences between the factors listed in the two Acts, in particular the inclusion in the UCCC of subclause (2)(l) (whether there were any enquiries made of the debtor regarding capacity to repay) and (2)(m) (the risk to the credit provider from the transaction).

There are a number of other factors in the UCCC which may require consideration in some cases – eg whether any of the provisions of the contract impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the contract (e); whether the disputant could protect their interests having regard for their age or physical or mental condition (f); whether independent advice was obtained (h); the extent of the explanation and the understanding of the disputant about a change in the contract (i) & (k); and whether unfair pressure, undue influence or unfair tactics were present (j).

Having regard to these provisions, in the cases we deal with it is appropriate to consider what information was sought and received by the lender, any different or unusual terms of the contract and any other circumstances which raise concerns of the type mentioned.

It is clear that the provisions of the two Acts are concerned to provide relief where a contract which may not reach the threshold of being declared unconscionable, harsh or oppressive at law is nevertheless regarded as unjust.

Section 71 of the UCCC sets out the remedies available to a court which has determined that a contract or a change to a contract was unjust. The remedies include:

(a) The reopening of an account already taken between the parties;

(b) Relieving the debtor from payment of any amount in excess of such amount as is considered, having regard to the risk involved and all other circumstances, to be reasonably payable; and

(c) Setting aside either wholly or in part or revising or altering an agreement made in connection with the transaction.

The following matters are discussed in Butterworths' *Australian Consumer Credit Law*[10] and, while largely concerned with secured facilities, can be considered in the context of credit cards:

- A contract will not be unjust merely because it was not in the claimant's interests to enter into it or because the claimant cannot perform when called upon to do so;[11]

- It is important to distinguish between the contract itself and the transaction – it is the former which is to be considered under the legislation to determine whether the contract was substantively or procedurally unjust;[12] and

- A failure to ensure a customer obtained independent legal advice or a failure to comply with other terms of the UCCC are unlikely of themselves to amount to unfair conduct but they would be matters to take into consideration.

Account must be taken of the fact that a number of the court decisions relate to contracts where security was provided and so part of the analysis concerned the imbalance between the risk position of the borrower/debtor and the financier arising from this. In the case of credit cards, security is only rarely offered and so that form of inequality does not ordinarily arise.

In the absence of more decided cases dealing with credit cards under section 70, it is difficult for this office to express a view about how the law ought to be applied in any general sense.

Other considerations

The approach set out above has been reached having had regard to our Terms of Reference and a broad range of other matters.

Time to bring a dispute

Under clause 5.5 of the Terms of Reference, the Ombudsman can only consider a dispute if the dispute was lodged in writing with the financial services provider within six years of the events giving rise to the dispute. This means that we will only be able to consider disputes about maladministration in granting credit on a credit card account if the application or increase in the credit limit occurred within six years of the complaint being made in writing to the financial services provider or BFSO.

For example, if a disputant wrote to the Ombudsman on 1 March 2005 about a credit limit increase which occurred seven years before, in January 1998, the Ombudsman would not consider the dispute unless the disputant wrote to the financial services provider about the dispute within six years, that is, by January 2004.

Unjust enrichment and mistaken payments

If the funds have been spent by the disputant then, in general terms, it would amount to unjust enrichment if repayment was not required.

Disputes regarding credit card limits can be distinguished from disputes regarding mistaken payments. In cases of mistaken payments we may consider the nature of the spending and the obligation to repay may not arise when the funds are given away or spent on one off purchases/expenses which would not usually be made. This is in part because the recipient of the funds believed that the funds were his or hers to spend.

In the case of credit obtained by use of a credit card, though, usually the funds were spent by the disputant with the knowledge that they were required to be repaid with interest. Accordingly the distinctions between forms of expenditure made in mistake cases do not arise here.

Gambling

In several cases gambling is raised by the disputant to explain the expenditure and in some cases is cited as a reason why the debt should be waived.

A variety of courts have considered gambling. The contexts have ranged from whether gambling winnings amount to assessable income and gambling losses are allowable deductions[13] to whether a wife's gambling losses were to be allocated to her in a Family Court property settlement [14] to whether what was said to be a gambling addiction amounted to mental incompetence under the *Criminal Law Consolidation Act 1985* (SA)[15].

There is little case law though which has looked at gambling in the context of lending or other advances. However, in the decision of the NSW Court of Appeal in *Reynolds v Katoomba RSL All Services Club Ltd*[16] the court was asked to consider whether the cashing of cheques by the RSL Club amounted to negligence and/or unconscionable conduct. One of the matters raised was whether the recipient of the cash funds did receive a benefit where those funds were used at least in part for gambling. The court concluded that he did.

It is sometimes said that an individual is a compulsive gambler such that he or she could not be said to have benefited from the funds and that this effectively amounts to a psychiatric condition. In order to prove such a claim, medical evidence would be required. Because we cannot test an expert's opinion by cross-examination under oath, it is our view that these claims are best dealt with in a court.

The relationship between a financial services provider and its customer is a contractual one. As a general proposition, an account holder is entitled to operate his or her account to withdraw credit funds and spend them and a financial services provider is entitled to rely on the authority of the account holder to pay over the available funds. Generally, a financial services provider is not required to concern itself with how a customer chooses to expend his or her own funds. In the absence of a fiduciary obligation or an express agreement, the financial services provider does not have to take particular care to protect a customer from his or her own actions.

In a particular case there may be no information showing that a credit card account holder had a special disability within the law dealing with unconscionable conduct, about which the lender was aware, which prevented the customer from properly controlling his or her own affairs. In such a case, a financial services provider could not be held liable for the withdrawal and spending of funds from the credit card account.

> In one case the parents of the disputant advised the bank that their son had a drug and gambling problem and made arrangements to limit his access to his own accounts. The bank agreed to those limitations being imposed without confirming the instructions with its customer. The disputant later revoked the instructions and then accessed funds and, according to his parents spent at least some of them on gambling. In that case it was concluded that there was no information to confirm the funds were used for gambling and no information showing that the disputant was under a special disability within the terms of unconscionable conduct. The case manager concluded that, in the absence of unconscionable conduct or a fiduciary relationship arising and taking into account the decision in *Reynolds*, there was no obligation on the bank to monitor or limit the disputant's access to his own funds.

Improved disclosure with unsolicited credit offers

We have noted with interest that some of the unsolicited offers issued by members now contain statements inviting card holders to consider whether the offer should be accepted if their circumstances have changed. In others, information is included in the letter stating what minium monthly payments are required on the then current fully drawn limit and what they would be if the new limit was fully drawn. In the case of at least one member, in order for an existing cardholder to act on an unsolicited offer of an increased limit, it is now necessary to provide updated financial information including income and expenses.

While the contents of such offers provide some additional information for cardholders to consider, unless current financial information is sought from the cardholder, maladministration could still arise.

As is always the case, we welcome feedback on this Bulletin.

Colin Neave
Banking and Financial Services Ombudsman

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[1] BFSO February 2005 Submission to the Economics References Committee's Public inquiry into the possible links between household debt, demand for imported goods and Australia's current account deficit
[2] Review Report, para 5.7, BFSO website
[3] As the unfair contracts provisions do not apply to consumer credit, the *Fair Trading Act 1999* (Vic) does not arise in these cases
[4] *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555
[5] See for example: *Godfrey v National Australia Bank Limited* (2001) NSWSC 977 (30 October 2001) concerning the capacity to repay; *Elders Rural Finance Ltd v Smith* (1996) 41 NSWLR 296 – The trial judge concluded that, although a loan for an investment in a property and business was unjust under the Contracts Review Act, the principal borrowed to purchase the property was repayable. The Court of Appeal dismissed the appeal by Elders; In *National Commercial Banking Corporation of Australia Ltd v Roberts* (1985) NSW Conv R 55-232 it was held that, as the guarantee which was found to be unconscionable supported an advance which included funds which discharged a debt of the guarantor, repayment of that amount was required with interest; In the context of the NSW *Credit Act,* Hunt J of the NSW Supreme Court said that it was difficult to imagine circumstances where a debtor who had received the benefit of the whole sum lent should not be required to repay at least the principal – *Esanda Finance Corporation Ltd v Murphy* (1989) ASC 55-703 at 58,358. See also McGill & Willmott *Annotated Consumer Credit Code*, LBC Information Services, 1999 para [71.11.2]. Some other Credit Act cases are discussed in an article by Clare Miller "*Debtor over-commitment*" published in Butterworths' Commentary on Consumer Credit including *Bogan v Australian Financial Services Group (NSW) Ltd* (1989) ASC 55-938 where the NSW Supreme Court said that neither the Credit Act nor the law support a proposition that not to seek confirmatory evidence of matters going to ability to repay is alone sufficient to make a contract unjust.
[6] Butterworths' *Australian Consumer Credit Law*, Chapter 9, the meaning of "unjust" – para [9.15]
[7] Sections 70(7) UCCC/4 Contracts Review Act
[8] Section 70(4) UCCC/9(4) Contracts Review Act
[9] *Nguyen and Anor v Taylor* (1992) 27 NSWLR 48 – see Kirby P at 54 referring to his decision in *Baltic Shipping Co v Dillon "Mickhail Lermontov"* (1991) 22 NSWLR 1 at 20 and Shellar JA at 70 also referring to that decision
[10] Butterworths' *Australian Consumer Credit Law*, Chapter 9, paragraph [9.15]
[11] *Esanda Finance Corp Ltd v Tong* (1997) 41 NSWLR 482
[12] *West v AGC (Advances) Ltd and Ors* (1986) 5 NSWLR 610; *Beneficial Finance Corporation Ltd v Karavas* (1991) 23 NSWLR 256; *Elders Rural Finance Ltd v Smith*
[13] *Brajkovich v Federal Commissioner of Taxation* (1988) 88 ATC 4457 per Jenkinson J; affirmed on appeal: *Brajkovich v Federal Commissioner of Taxation (1989)89 ALR 408*
[14] *De Angelis & De Angelis* [1999] FamCA 1609, 12 November 1999
[15] *R v Telford* [2004] SASC 248, 26 August 2004
[16] *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234 – an application to appeal to the High Court was rejected in August 2002