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New Terms of Reference

The New Terms of Reference for the Australian Banking Industry Ombudsman Limited ("ABIO") took effect on 11 March 2002.

The December 2001 Bulletin (No 32) contained a detailed discussion of the main changes to the Terms of References. The key changes are:

- The Ombudsman has jurisdiction to consider disputes about the whole banking group and to consider privacy disputes;
- The small business definition has been expanded;
- The Ombudsman's decision making criteria has been expanded;
- The Ombudsman's powers for resolving disputes have been expanded; and
- Reporting and other obligations have been set out.

A number of information sessions were held in February and March to inform banks and consumer groups about the changes.

In addition to the December Bulletin, information about the new Terms of Reference and their impact on ABIO's jurisdiction and approach can be found on our website, www.abio.org.au, and in the re-published Guidelines to the Terms of Reference.

As always, please contact us if you would like copies of any of these publications or other material about ABIO. We can be contacted on:

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Unsolicited invitations for credit card limit increases

It is not uncommon for banks to invite existing customers to take up a pre-approved increase in the credit limit of their credit cards.

Some banks invite customers to do so by letter and provide a short tear off slip to be returned and some require completion of a form. While it is usual for those forms to include name and address confirmation and a statement that the increase may be subject to credit reference checks, they do not usually seek information about income and capacity to repay.

We understand that often the increase in credit limit suggested by the bank is based on an assessment of the repayment history on the account. As a result, a customer who has managed to consistently meet the monthly minimum repayment on a credit card account may be offered a limit increase notwithstanding the fact that the customer has no capacity to repay the whole increased amount. In some cases a customer may make the minimum repayment on the due date and then use the card to the value of that payment the next day because without those funds they cannot pay for expenses. In other cases customers find themselves unable to resist accepting such an invitation although they cannot repay the total amount of credit.

This office takes the view that increases in credit card limits ought to be assessed in the same manner as the initial granting of credit. Accordingly, if no assessment of the capacity to repay is undertaken and it is found in an investigation that the customer could not do so, we may reach a view that there has been maladministration.

The question of loss would then require assessment and the approach would be that set out in Bulletin 26 on Guidelines for the Resolution of Credit Card Complaints (pages 15-17).

These same comments apply to invitations issued by banks to customers to obtain an additional credit card based on the bank's assessment of the repayment history on an existing credit card.

In relation to the form of the invitations issued by banks, in general it has been found that the document does not amount to an offer which a bank would be bound by on receipt of a positive response from the customer. However, some invitations use the word "offer" and make other comments which may convey a representation that all that is required is return of the relevant documents and the increase will be automatically granted.

To avoid misunderstandings and complaints from customers whose responses are rejected, it is advisable for the "invitation" document to be carefully drafted to ensure it is clear what steps will be taken by the bank after the customer responds.

The approach taken by the Ombudsman to this class of disputes is illustrated in the following case studies:

Case study A

At the time A's dispute came to this office there were a total of 12 credit cards issued by three member banks and three other credit facilities held by he and family members with a combined credit limit of $100,000 in issue.

A and his wife and three children had applied for a number of credit cards some 20 years ago. The children believed that the credit cards had been paid out and the accounts closed. In fact A had continued to operate the credit cards and had forged signatures on unsolicited credit limit increase offers made in relation to his children's accounts. A was able to do this because the address for each account remained his address despite the fact that the children had moved. A also accepted credit limit increases on the credit cards in his and his wife's name. As a result the total credit available was $100,000 and the amount of debt owed on the credit cards totalled approximately $90,000.

The credit cards had been used for a number of purposes including payment of the minimum amount on the other credit cards. This meant that the conduct of the accounts was assessed as good by the banks while in reality A could not afford to repay the credit advanced from his and his wife's sole income, the aged pension.

The disputes with two of the banks were resolved by the waiver of the whole of the debt on some credit card accounts and/or the waiver of the amount of the debt above the original credit limit. In the case of the third bank, the dispute was not resolved and so we investigated further. We expressed the view that the credit limit increases ought not to have been granted without an assessment of the capacity to repay. In addition, if that had been done, it would have been apparent that signatures had been forged and those increases would never have been granted. The third bank agreed to resolve the dispute by accepting a payment of $2,500 in full and final settlement. This resolution was reached taking into account the fact that the children were liable for the original amount of the credit cards issued in their names.

Case study B

While a student C had applied for and been granted a credit card with a limit of $1,000. Over the course of the next year and a half the limit was increased to $5,500 as a result of the disputant accepting unsolicited offers from the bank. The credit card limit was then increased to $8,500. At no time was information sought from C about his income or capacity to repay. The bank also offered to C a second credit card with a predetermined credit limit of $2,500, again with no assessment of C's capacity to repay.

At the time the limit was increased to $8,500 C was still a full time tertiary student earning approximately $30,000 per annum. The bank contended that the limit of $8,500 would have been approved if an application for that amount had been assessed as a new application.

Although we were concerned that there had been no assessment of the capacity to repay, it was evident that C, who subsequently graduated and was working as a professional, had used the funds to his benefit and that the loss he claimed resulted from share transactions.

Case study C

B complained about a $7,211 unauthorised transaction made with the disputant's credit card without her knowledge or consent.

B argued, amongst other things, that the bank did not assess her ability to repay the amount of credit when it offered her extensions of credit. B had been employed by the bank when it approved a credit card with a limit of $2,000 but ceased working 13 months later.

The bank subsequently offered B six unsolicited increases in her credit limit which were accepted. This saw her credit limit rise from the original $2,000 credit limit to $10,000.

The bank said that offers for increases in the credit limit were based on the bank's assessment of the good conduct of the account. B said that she did not have the capacity to repay the credit card debt which was mainly made up of the disputed transaction.

The view of the Banking Adviser to the Ombudsman was that, based on the information available and good banking practice, a limit of $2,000 was the maximum that could be justified based on B's capacity to service and her financial position (as evidenced by tax returns).

Based on this advice, the bank agreed to refund the amount of the disputed transaction and interest.

Farm Debt Mediation and *"exceptional circumstances"*

Under clause 5.1 (c) of the new Terms of Reference, this office will have jurisdiction to consider a dispute except:

(c) *"if a dispute is based on the same event and facts and with the same disputant as any matter which is, was, or becomes, the subject of any proceedings in any court, tribunal, arbitrator, or independent conciliation body or an investigation by a statutory Ombudsman of any jurisdiction unless the parties consent."*

Two recent matters have caused us to consider this clause in the context of farm debt mediation in New South Wales under the *Farm Debt Mediation Act 1994* (NSW)("the Act"). The Policies and Procedures Manual currently states that if a mediation takes place pursuant to the Act:

> *"… and no settlement is reached between the disputant and the financial services provider in relation to the subject matter of the dispute, then,* ***in exceptional circumstances only****, this office may be able to consider the dispute further." (emphasis added.)*

In Case A, a mediation had been held and the Rural Assistance Authority, which monitors compliance with the Act, issued a certificate under Section 11(1)(a) of the Act that it was satisfied that a satisfactory mediation had taken place. What took place at the mediation cannot be disclosed in evidence (section 15) and cannot be disclosed to those who are not a party to the mediation, except in limited circumstances (section 16.)

The disputant alleged that the financial services provider had not approached the mediation in good faith. The details of the allegations were not provided due to the confidentiality provisions in section 16 of the Act. We declined to consider the dispute under our Terms of Reference because a certificate had been issued under section 11.

Does the issue of Section 11 Certificate prevent the ABIO considering the dispute?

As noted above, the Authority can issue a certificate under Section 11 of the Act if it is satisfied that a satisfactory mediation has taken place. In certain circumstances, a certificate can issue even if a mediation has not taken place – if, for example, the farmer refuses to participate. Once that certificate has issued, the bank can take legal action.

The New South Wales Supreme Court in the matter of *State Bank of New South Wales v Freeman* (Unreported 31 January 1996) held that a decision of the Authority to grant a Section 11 certificate could not be reviewed or overturned by the Court.

In that case, a mediation had taken place at which the farmer was represented by a rural counsellor. Heads of Agreement were reached. The Authority issued a certificate under Section 11 to the effect that a satisfactory mediation had taken place. The bank's solicitors sent a draft Deed of Release to give effect to the mediated settlement. The farmer refused to sign the Deed.

The farmer's solicitors made allegations of misconduct by the mediator and the bank's solicitor to the effect that the mediator had placed the farmer under sustained and unconscionable duress to settle and the solicitor had been a party to that duress.

The court said a mediation might be satisfactory even if no resolution of the dispute results. The procedure for obtaining a certificate under Section 11 is that the bank must assert (and verify by statutory declaration if required by the Authority) that the creditor has attempted to mediate in good faith and that:

> *"It remains the case, that that may be all that is required unless the farmer brings to the notice of the Authority circumstances which put the Authority on enquiry as to the veracity of the creditor's claim." (at p. 16.)*

Accordingly, this office will not consider a dispute where a Section 11 certificate has issued as to do so would necessarily involve going behind the granting of the certificate. Once a Section 11 certificate had issued, there would not be any circumstances that could allow a further review by this office, exceptional or otherwise.

The Policies and Procedures Manual will be amended to clarify that we will not consider a dispute:

- When a notice has been issued under Section 8 requesting mediation and the matter is yet to go to mediation, on the basis that farm debt mediation is a more appropriate forum;

and that once a certificate has issued for any of the reasons set out in Section 11, this office will not consider the dispute where:

- Mediation has taken place and a settlement is reached;

- A section 11 certificate has been issued by the Rural Assistance Authority, even if there has been no mediation or no settlement; or

- The dispute is about the conduct of the mediation or the conduct of a party to the mediation.

Circumstances where we may consider a dispute?

The circumstances where we may consider a dispute involving farm debt mediation which is not covered by the above will depend on the facts of each case. In Case B, for example, a Notice had issued under Section 8 of the Act that the financial services provider wished to mediate the dispute. Before a mediation could take place, the disputant refinanced the debt. No certificate issued under section 11. The disputant was concerned about the interest rate applied by the financial services provider and sought the assistance of this office in resolving that aspect of the dispute. As no mediation under the Act had taken place, nor was it likely to as the facility had been refinanced, this office considered the dispute to be within its Terms of Reference.

Colin Neave
Australian Banking Ombudsman