

BFSO Bulletin 46

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BULLETIN

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Dealing with customers in financial difficulty including hardship variations.

Code of Banking Practice clause 25.2 and section 66 of the UCCC.

Guidelines for disputes

We have been considering the role we should play when customers write to us to complain that a credit provider has refused to agree to a proposed repayment plan for a debt that the customer is unable to repay because of general financial difficulties.¹ This might include rejection of a hardship variation application (that is, a formal application under s 66 of the Uniform Consumer Credit Code, ('UCCC').²

These guidelines apply where there is no maladministration or other breach in relation to the original lending but there has been a subsequent change in the customer's circumstances. If maladministration in lending is an issue, credit providers and customers should refer to our guidelines on maladministration. And if breach of statutory provisions to do with misleading, deceptive or unconscionable conduct or unjust or unfair contracts is an issue, our approach will be different.

Background

Financial difficulties can be caused by a number of factors: some of them short term, some of them long-term. The factors include:

- Income reduction resulting from illness, unemployment or other reasonable cause (the factors relevant to a hardship variation application under s 66 of the UCCC);
- An increase in overall liabilities; and
- A credit product that the customer could not reasonably repay from the outset (maladministration).

¹ Recommendation 25 of the BFSO Review Report Recommendations (see www.bfso.org.au under News) was that 'BFSO should re-examine its approach to hardship variation disputes with a view to establishing a sensible, complementary role in this area. For example, the BFSO could undertake some research so as to form a view about what should be expected of a bank receiving a hardship variation application'. The BFSO Board response was 'The General Counsel for the Ombudsman has been asked to consider what role the Ombudsman can properly play in relation to hardship cases.'

² See Duggan A and Lanyon E *Consumer Credit Law*, (Butterworths 1999 at 5.1.19 – 26 for a discussion of ss 66-68 of the UCCC and also ss 86-88 of the UCCC relating to applications by guarantors and mortgagors. See www.creditcode.gov.au for hardship application thresholds.

Before the introduction of the new Code of Banking Practice 2003/2004, our view was that, unless there was maladministration or some other claim in law, a credit provider's response to a customer's request that repayments be reduced because of financial difficulties was a commercial decision of the credit provider that the Ombudsman could not review.³ Our Policies and Procedures noted that if the UCCC applied to the credit, the customer could apply to the credit provider for a hardship variation and, if necessary, seek an order from the relevant court or tribunal. The UCCC provisions are discussed further below.

Code of Banking Practice Obligations

The new Code of Banking Practice introduced an obligation to try to help individual and small business customers overcome their financial difficulties and to provide information about the UCCC hardship variation processes if they could apply to the customer's circumstances.

Clause 25.2 sets out the duties on a subscribing bank:

With your agreement, we will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan. If at the time, the hardship variation provisions of the Uniform Consumer Credit Code could apply to your circumstances, we will inform you about them.

These are positive, contractual obligations and our view is that we can consider disputes that a bank has not done what it promises to do under clause 25.2.

We also think that the Code of Banking Practice reflects good industry practice and is relevant to our assessment of a dispute under that criterion in our Terms of Reference. Non-subscribing banks and other credit providers should therefore consider implementing these guidelines.

Hardship variation provisions of the UCCC

Section 66 of the UCCC sets out the general principle that a debtor who is unable, reasonably, because of illness, unemployment or other reasonable cause to meet their obligations under a credit contract but reasonably expects to be able to repay the debt if the contract is changed in the ways described, may apply to the credit provider for such a change.

³ See BFSO Terms of Reference clause 5.1(a): a dispute which relates solely to a member's commercial judgment in decisions about lending or security cannot be considered by the Ombudsman.

The application under s 66 must seek to change the contract in the following ways:

- extending the contract and reducing repayments (no change to interest rates);
- postponing during a specified period the dates on which payments are due (no change to interest rates); or
- a combination of both.⁴

Under s 67 any agreed change must be documented.

Failure to agree to a hardship variation application is not a breach of the UCCC. The UCCC confers a right on the debtor to seek a variation but does not impose an obligation on the credit provider to agree. The UCCC provides, however, that if a credit provider refuses to vary the contract the debtor can apply to the relevant state court or tribunal for an order varying the contract.⁵

Changes ordered by the court or tribunal under s 68 may include those set out in s 66 and any other orders it thinks fit.⁶ The Victorian Civil and Administrative Tribunal (VCAT), which is the relevant tribunal in Victoria, has on its website, www.vcat.vic.gov.au under Credit List, case studies and case reports of successful and unsuccessful hardship variation applications.⁷

When considering compliance with clause 25.2 of the Code of Banking Practice it is important to note that although the hardship variation provisions of the UCCC are limited to particular circumstances and outcomes, and to consumer lending, the general obligations in clause 25.2 are not so confined.

⁴ As a matter of logic, a debtor may ask a credit provider and a credit provider may agree to vary the contract in any number of different ways. For ss 67 and 68 to apply, however, the application must be limited to the changes set out in s 66.

⁵ Section 68(2), variation to a credit contract (application by the debtor). See also section 88, application for postponement of exercise by creditor of contractual rights (application by debtor, guarantor or mortgagor). In some states & territories, the power is given to a tribunal, eg, Vic: VCAT (Credit List); NSW: Consumer Trader & Tenancy Tribunal (Commercial Division), WA: State Administrative Tribunal; ACT: Credit Tribunal.

⁶ See, for example, *Jones v ANZ* (NSWCTTT) referred to below.

⁷ See *Garner v Capital Finance Australia Limited* [2003] VCAT 1171 (12 June 2003, (application successful); *Pereira v Australian Guarantee Corporation Pty Limited* [2003] VCAT 1173 (23 May 2003) (application unsuccessful). Similarly, decisions of the Commercial Division of the Consumer, Tenancy and Trader Tribunal of NSW, can be accessed through the Tribunal's website. See, for example *Jones v ANZ* [2004] NSWCTTT 381 (21 July 2004) (repayments reduced and interest ceased).

Discussion

'We will try to help you overcome your financial difficulties'

Subscribing banks have an obligation under clause 2.2 of the new Code of Banking Practice to act fairly and reasonably in a consistent and ethical manner taking into account the conduct of the parties and the contract.⁸ This is a key commitment and we think it must be kept in mind when looking at compliance with clause 25.2, as should the obligation under clause 29 to comply with the 1999 ACCC Debt Collection Guidelines.

Financial difficulties may be short term or long-term. Clause 25.2 is not limited to short term difficulties.⁹ Depending on the circumstances, including the type and duration of the credit contract, a short term solution will not be appropriate and a long-term solution will need to be considered. The aim of any repayment arrangement should be, however, that the debt is repaid, even if that happens over a longer period. This means that any repayment proposal should be realistic and should not simply be postponing inevitable default.

If there is to be a moratorium on payments, but the credit provider does not agree to waive interest, the moratorium should not be for so long that the debt blows out and becomes unmanageable in the long term. A moratorium on payments should only be sought where there is some prospect that the customer's circumstances will improve and they will be able to catch up on missed repayments within a reasonable time. Similarly, reduced repayments that are insufficient to repay interest should only be in place for a limited period unless the credit provider agrees to forgo interest.

If what is proposed is a permanent reduction in repayments those repayments should be manageable and should also be sufficient to repay the debt within a reasonable time – though that will necessarily be a longer time than would otherwise have been the case. In other words, unless the credit provider makes the commercial decision to agree to waive interest or write off debt, long term reductions in repayments should be sufficient to repay interest and principal within a reasonable time.

Acting fairly and reasonably, in our view, requires that credit providers:

- give genuine consideration to a repayment proposal or hardship variation application and any reasonable alternatives that will help the customer overcome their financial difficulties;
- give reasons for any rejection of the proposal, preferably in writing;

⁸ Clause 2.2 "We will act fairly and reasonably towards you in a consistent and ethical manner. In doing so, we will consider your conduct, our conduct and the contract between us."

⁹ Nor is section 66 of the UCCC. See Duggan and Lanyon, reference above, at 5.1.22 including the discussion of *Celand v Westpac Savings Bank Ltd* (1987) ASC ¶¶55-581.

- ensure that those reasons reflect legitimate considerations¹⁰ and are referable to the particular customer's circumstances;
- not start or conclude enforcement action before a decision is made and communicated; and
- respect the customer's appointment of an advisor and, if one is appointed, not deal directly with the customer.

Acting consistently and ethically, in our view, requires that credit providers:

- have clear and reasonable internal processes for assessing hardship variation or enforcement postponement requests and other repayment proposals;
- be able to demonstrate that their staff have followed those processes;
- record and keep any promises made, for example, about suspending enforcement action, and record and keep to any agreement reached. If that includes that the arrangement be reviewed at a certain date, credit providers should not seek to review the arrangement earlier if the customer is keeping to it. Any review should be based on a genuine consideration of the customer's position at that time;
- ensure that any collection related correspondence is consistent with what has been promised or agreed; and
- confirm in writing any agreement reached and ensure that collection agents and/or later assignees have a copy.

For the customer's part, our view is that customers seeking a hardship variation or otherwise proposing changes to repayments should:

- do so sooner rather than later;
- seek assistance if necessary from a financial counsellor or other adviser and be prompt in providing written authority to that adviser;
- be willing to provide updated and accurate information about their financial position;
- keep any proposals realistic so that, once agreed, repayment arrangements are able to be maintained; and
- keep a record of any promises made or agreements reached with the credit provider.

¹⁰ In the context 'legitimate', from the dictionary definition (Oxford) means logically acceptable. Reasons given should also reflect the overall obligation in clause 2.2.

'If the hardship variation provisions of the UCCC could apply to your circumstances, we will inform you about them'

Apart from the obligation, in the first part of clause 25.2, to try to help customers overcome general financial difficulties, there is also a requirement to inform them of the hardship variation provisions of the UCCC, if those provisions could apply to the customer's circumstances. This requirement does not limit the other more general obligations in the first part of clause 25.2.

Our view is that informing a customer of the UCCC provisions includes telling the customer, at the time of any rejection of a hardship variation application, that they can apply to the relevant court or tribunal under s 68 of the UCCC for an order changing the contract. This information should be given whether or not the credit provider thinks that the application would succeed – the obligation is to do so if those provisions *could* apply to the customer's circumstances.

How will we approach claims about a breach of clause 25.2?

What questions will we ask?

If we receive a claim that a subscribing bank has breached clause 25.2, and there is not otherwise an issue of maladministration or breach of other duties, we will ask the bank to respond and include in its response the following:

- Has the bank given genuine consideration to the hardship variation application under s 66 of the UCCC or other repayment proposal?
- If so, which area considered the matter?
- What processes were followed? Were these processes consistent with the bank's internal guidelines for compliance with clause 25.2? Provide copies of any internal guidelines.
- What were the reasons for rejection?
- Did those reasons reflect legitimate considerations?
- Were those reasons communicated to the customer? If so, how?
- Has any counter proposal been made to the disputant? Is that counter proposal realistic taking into account the customer's financial position?
- What would be the effect on repayment time and overall debt of the disputant's proposal compared to the original repayment schedule and any counter proposal by the bank?
- Have any default charges or fees, enforcement or other costs been charged to the disputant that might have been avoided had the hardship variation or repayment proposal been fairly and reasonably considered?

What decisions can we make?

We have considered whether we have the power to take the steps set out in s 68 of the UCCC where what has been rejected is a formal hardship variation under s 66, that is, the power to make a Finding, Recommendation or Determination that the contract be varied in a particular way.¹¹

The power in s 68 is expressly reserved to the relevant court or tribunal. We do make decisions in other contexts that take into account remedies available under common law or statute for breach of a common law or statutory obligation. However, unlike other powers of the court set out in the UCCC and other consumer protection legislation,¹² the power in section 68 is not a power exercisable on a finding that there has been a breach of another section or that otherwise involves a finding of prohibited conduct. Section 66 of the UCCC does not require a credit provider to agree to a hardship variation request, although it is implicit in the fact that the section exists that credit providers should at least give genuine consideration to an application. There is therefore a compelling argument that, while we can certainly review the process involved in making the decision, the actual decision to agree to or reject a variation is a commercial decision of the credit provider, rather than a breach of a legal duty or obligation. If that is so it is not within our powers to make a decision under s 68 in the terms of that section.

Under clause 25.2 and our TOR, however, what we can clearly do is:

- consider and make a decision as to whether the credit provider has complied with clause 25.2, including, where applicable, giving genuine consideration to a hardship variation application made by the customer under s 66;
- seek to facilitate a negotiated agreement;
- as part of that facilitation, if the credit provider's reasons appear inadequate, ask the credit provider to reconsider what appears to be a reasonable repayment proposal; and
- where appropriate, make a decision that the credit provider has not complied with clause 25.2 and award compensation for any loss.

In cases, however, where we reach a view that the credit provider has complied with any obligations it has under clause 25.2, and the customer nevertheless still seeks a variation of the contract, the relevant court or tribunal may well be the appropriate forum. Customers should in any event be informed of their ability to seek a variation by application to the relevant court/tribunal under s 68 of the UCCC and, of course, have the option of going straight to court.

¹¹ As part of the consideration recommended in the Independent Review Report. See footnote 1 above and para 11.13 of the Review Report.

¹² For example, a finding that a contract or change is unjust within the meaning of section 70 of the UCCC, or, in other contexts, that a credit provider has engaged in misleading or deceptive or unconscionable conduct.

Approach to loss

If we consider that there has been a breach of the obligations in clause 25.2, we will consider whether any loss, financial or non-financial, has been suffered by the disputant. Financial loss might include unnecessary default charges or enforcement costs which might have been avoided had the bank complied with clause 25.2. Non-financial loss might include some compensation if there has been added, unnecessary stress or inconvenience (to be distinguished from the general stress of financial difficulties).

If we think that there is a breach but no loss has been suffered, we will tell the disputant that they can refer the complaint to the Code Compliance Monitoring Committee (CCMC) and will otherwise close our file.

Follow up to these guidelines

We will publish case studies, illustrating the application of these guidelines, once the guidelines have been in place for a sufficient time. As always, we welcome feedback.

Guide to Searching for Unclaimed Moneys

June 2005

Old Accounts and Unclaimed Moneys

We receive regular disputes from consumers about funds which they deposited to an account, sometimes many years ago, and of which a member says it no longer has a record.

What happens to Unclaimed Money?

Members have been required under federal and/or state legislation to transfer funds held in dormant accounts to a Commonwealth or State Unclaimed Moneys Fund after a certain number of years.

It is our view that a member is obliged to assist customers, where necessary, to retrieve funds and to ensure that any referral information provided is accurate and up to date.

In relation to old bank accounts, a customer should check with the bank first and then with the Unclaimed Moneys Funds administered by ASIC and the Office of State Revenue in NSW (which received many savings bank accounts prior to 1989). A search of the local state fund is also recommended in case the funds were transferred there.

Recent Dispute

The importance of checking with Unclaimed Moneys Funds was underlined by a recent dispute received by this office. A claim was made for funds invested in a deposit stock account in 1988 which could not be located after enquiries by the disputant's solicitor and our staff.

The Unclaimed Moneys Fund located the money after making further enquiries with a money finding company which had previously written to the disputant about the investment.

Good Industry Practice relating to Dormant Accounts

We are aware that many members have an established practice of sending letters of notification to customers or attempting to telephone them when an account becomes dormant or inoperative. We regard this procedure to be good industry practice. Further, we expect members to check all their available records for an old account upon a customer's request.

Please refer to Bulletin No 25 for information about our approach to disputes about old passbook and term deposit accounts.

A Guide to Searching for Unclaimed Moneys

We have put together a table of the different places that we are aware of where lost or unclaimed funds may be found. We thought it could be helpful information for financial services providers or their customers who are trying to find out what might have happened to the funds in an old account or where there is a dispute between them about what has happened to an old account.

The table is to be used as a guide only and we recommend reference be made to the relevant website for up to date information.

Organisation and Contact Details	Details of Unclaimed Moneys Held
<p>Australia wide: Australian Securities & Investments Commission Tel: 1300 301 198</p> <p>www.fido.asic.gov.au</p>	<ul style="list-style-type: none"> • Unclaimed savings bank accounts back to 1989; and • Some trading bank accounts back to 1959, where the account has not been used by the account holder for more than seven years and any applicable account threshold is met (see below). <p><i>Account balance threshold</i> 1989 to 1993 \$100 or more From 1993 \$500 or more</p> <ul style="list-style-type: none"> • Unclaimed money held by credit unions and building societies last accessed by the account holder after 1992 and where the balance exceeds \$500; • Unclaimed life insurance policy money from life insurance companies (back to 1988) and friendly societies (back to 2000) unclaimed for more than seven years after the maturity date; and • Unclaimed company money from the compulsory acquisition of shares resulting from takeovers back to 1991.
<p>ACT: The Public Trustee Tel: (02) 6207 9800</p> <p>www.publictrustee.act.gov.au</p>	<ul style="list-style-type: none"> • ACT accounts inactive for over six years; • Includes deposits, dividends, trust account funds, interest, refunds, overpayments, sale proceeds, bonds, superannuation benefits and retirement savings accounts; • Also, includes trust moneys held by licensed agents for more than three years and moneys held in solicitors' trust accounts for more than six years; and • Does not include bank, building society or credit union accounts. • Online database holds listings back to 1989.

<p>NSW: Office of State Revenue Tel: 1300 366 016</p> <p>www.osr.nsw.gov.au</p>	<ul style="list-style-type: none"> • Unclaimed moneys held by businesses, government agencies and local councils that operate in NSW where it has not been possible to locate the rightful owner for six years or more and where the amount is \$100 or more; • Includes interest from investments, dividends, council deposits, profits and some superannuation benefits; and • Also includes the following savings accounts last used during the years shown in brackets: <ul style="list-style-type: none"> → All banks (1976-1982) (except Commonwealth Bank); → State Bank of NSW (1976-1986); → All credit unions, building and friendly societies (1976-1991); → St George Building Society (1976-1985).
<p>NT: Department of Treasury Tel: (08) 8999 6620</p> <p>www.nt.gov.au/ntt</p> <p>Online search not available.</p>	<ul style="list-style-type: none"> • Unclaimed moneys related to a Northern Territory company, such as profits, dividends, bonuses or any other monies payable to a member of a company; • Unclaimed superannuation from Northern Territory government funds; • Unclaimed funds from telephone or internet betting accounts in the Northern Territory; and • Unclaimed Tattersall's and Keno winnings in the Northern Territory where the ticket is over 12 months old. <p>The Public Trustee for the Northern Territory administers unclaimed money relating to beneficiaries of estates (Tel: (08) 8999 7271).</p>
<p>VIC: State Revenue Office Tel: 13 21 61</p> <p>www.sro.vic.gov.au</p>	<ul style="list-style-type: none"> • Includes all share dividends, salaries and wages, rents and bonds, debentures and interest, unrepresented cheques, trust moneys, and superannuation benefits held by Victorian businesses, trustees and superannuation providers; • Unclaimed Tattsлото or TAB winnings in Victoria • Database may be searched online for funds lodged since 1/7/97 where amount is \$10 or more. However, this database does not hold information about banking institutions, life insurance, Tattsлото prizes, or TAB dividends; and • For funds transferred prior to 1/7/97, hard copy records are kept which may be searched by the SRO.

<p>QLD: Public Trustee Tel: (07) 3213 9368</p> <p>www.pt.qld.gov.au</p>	<ul style="list-style-type: none"> • Unclaimed money from deceased estates in Queensland; • Unclaimed moneys and property from companies (unclaimed for three years), hospitals and institutions (unclaimed for three months), trustees, local authorities, landlords, pawnbrokers, storers and traders located in Queensland; and • Unclaimed superannuation where the member has reached the eligibility age for a pension and the superannuation fund is unable to locate the member or if the member has died and the funds have not been claimed by an executor or administrator. <p>No bank account funds are transferred to this organisation. This website register dates back to 1996.</p>
<p>SA: Department of Treasury & Finance Tel: (08) 8226 3106</p> <p>www.treasury.sa.gov.au (click on the “enquiries” tab and then scroll down to the Unclaimed Monies link)</p> <p>Online search not available.</p>	<ul style="list-style-type: none"> • Unclaimed moneys includes funds deposited by businesses, government agencies and local councils with a head office registered in South Australia and where the rightful owner was not located for nine years or more; and • Includes principal and interest, dividends (not company shares), deposits, refunds, unpresented/void/stale cheques, deceased estates, superannuation benefits where the member is at retirement age, wages and salaries, bank balances prior to 1989 and building society and credit union balances prior to 1992.
<p>TAS: Department of Treasury & Finance Tel: (03) 6233 2948</p> <p>www.treasury.tas.gov.au</p> <p>Online search not available.</p>	<ul style="list-style-type: none"> • Unclaimed Superannuation money in Tasmania where the beneficiary has reached the eligibility age for a pension; • Money legally payable by a company with a registered office in Tasmania where the entitled person has been unable to claim the funds for a six year period; and • Includes principal and interest, dividends, profits and bonuses. <p>Does not include unclaimed bank accounts.</p>
<p>WA: Department of Treasury and Finance Tel: (08) 9222 9185</p> <p>www.dtf.wa.gov.au</p>	<ul style="list-style-type: none"> • Receives funds mainly from Western Australian based businesses and government organisations; and • Does not retain information about bank accounts, life insurance, company shares or superannuation where a claimant has not reached retirement age.

Also refer to the Australian Taxation Office for lost superannuation (www.ato.gov.au or telephone 13 10 20).