



**Submission by the
Financial Rights Legal Centre**

Treasury

Credit Cards: Improving Consumer Outcomes and
Enhancing Competition – Exposure Draft

August 2017

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2015/2016 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

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National Debt Helpline 1800 007 007
Insurance Law Service 1300 663 464
Aboriginal Advice Service 1800 808 488

Monday – Friday 9.30am-4.30pm

Introduction

Thank you for the opportunity to comment on the Expose Draft of the *Treasury Laws Amendment (2017 Measures No 8) Bill 2017: Credit Cards* and the *National Consumer Credit Protection Amendment (Credit Cards) Regulations 2017*.

Financial Rights Legal Centre (**Financial Rights**) has long argued the need for these reforms to a regime that has led to significant over-commitment for many credit card users. Financial Rights therefore strongly supports the introduction and passing of the bills to tighten responsible lending obligations for credit card contracts, prohibit unsolicited credit limit offers, simplify interest charge calculations and reducing credit limits and empowering consumers to terminate credit card contracts including by online means.

We provide the following comments on the bills as currently drafted

Reform 1: Tighten responsible lending obligations for credit card contracts.

Financial Rights notes that the legislation does not mandate a particular “certain period” or any period at all for the repayment of an amount equivalent to the credit limit. Rather the bill empowers the Australian Securities and Investments Commission (**ASIC**) to determine a period. In determining a period ASIC must have regard to:

- (a) *ensuring that a reasonable balance is achieved between:*
 - (i) *preventing consumers from being in unsuitable credit card contracts;*
and
 - (ii) *not preventing consumers from accessing credit through suitable credit card contracts; and*
- (b) *any other relevant matter.*

In other words ASIC must strike a balance between preventing consumers who are unable to pay back a credit card and ensuring access to credit.

Financial Rights notes that ASIC, under *Regulatory Guide 209 - Credit Licensing: Responsible lending conduct* – already provides some guidance with respect to responsible lending conduct seeking to strike a similar balance between access to credit and responsible lending standards. The guidance places minimum requirements on credit providers to ensure that they do not provide a credit contract to a consumer that is unsuitable for the consumer. In it ASIC recommend that credit providers

“consider the likely maximum amount to be payable under the credit contract or consumer lease (including fees) when determining whether a consumer has the capacity to meet these payment obligations.”¹

Also Example 6: Capacity to pay in relation to credit cards states:

“For credit cards, there may be some risks associated with assessing a consumer as having the capacity to repay the contract based solely on being able to meet the minimum monthly repayments. If, by paying only the minimum monthly repayments, the consumer is likely to take a long period of time to repay the maximum limit on the card, the credit licensee should consider whether this would meet the consumer’s requirements and objectives (i.e. taking a number of years to repay a relatively small debt, and paying high amounts of interest on this debt).”

This Guidance has unfortunately failed to date to stem the flow of unsuitable credit contracts. Credit cards remain a major source of hardship for people contacting the National Debt Helpline.

Alexandra’s story

Alexandra earns \$80,000 per annum before tax. She has two credit cards, each with an available limit of \$20,000. She currently has a balance of \$1,000 on one and \$0 on the other. She set up a new transaction account with a new bank in 2014 and applied for a credit card as they offered her low interest rate, and bonus points with her transaction account. Alexandra was asked to provide her payslips and details of her liabilities which includes a large mortgage of \$1,000,000 with a co-borrower. The credit provider did not ask her what the credit card was for, and offered her a limit of \$27,000. Alexandra now has an available credit limit of \$67,000. If she reached the maximum on all three facilities, she could not afford to pay the three credit cards and meet her obligations under her mortgage or pay for her basic living expenses.

Jack’s story

Jack is a 70 year old on the age pension who lives in van in a holiday park in regional NSW. He was facing pressure to service his 2 credit card debts, one of which was over \$16,000. He has serious health issues, including heart disease, diabetes and

¹ RG209.95 p. 34 <http://www.asic.gov.au/media/2243019/rg209-published-5-november-2014.pdf>

kidney failure. He needs knee replacement surgery.

He had been maintaining payments on these debts for years but had no hope of ever paying down the larger limit.

We consider that industry has completely failed to get the balance right in relation to balancing access to credit with responsible lending considerations in relation to credit cards. Competition for market share is rife, but driven by ease of access, limit size and teaser rates like balance transfers rather than price. This has led to a win/lose situation with credit card providers reaping the benefits of high rates and lengthy periods of indebtedness while a significant minority of consumers are trapped in expensive long term debt, with no capacity or wealth building aspect whatsoever. Consumer assistance agencies see many consumers in very long term credit card debt, increasingly carried into retirement. It is imperative that the government set a clear limit on the period applied for responsible lending assessment purposes, preferably in the legislation.

If, as envisaged in the exposure draft, the period is to be determined by ASIC, we are totally opposed to the intention expressed in the Exposure Draft Explanatory Materials at 1.34-1.37. These paragraphs state:

1.34 ASIC may, by legislative instrument, determine the period within which a consumer must be assessed as being able to repay an amount equivalent to the credit limit of the credit card contract. The period may be a fixed period (e.g. 4 years) or a range of time (e.g. 3 to 5 years).

1.35 ASIC may determine different periods in relation to:

- different classes of credit card contracts;*
- different credit limits;*
- different rates of interest.*

1.36 For example, ASIC may determine a period of years for a certain credit limit amount, or a different period of years for a certain rate of interest. These periods would apply to all consumer credit card contracts with that particular credit limit amount or rate of interest.

1.37 In determining a period, ASIC must have regard to ensuring that a reasonable balance is achieved between preventing consumers from being in unsuitable credit card contracts and not preventing consumers from accessing credit through suitable credit card contracts, and any other relevant matter. An example of a relevant matter

that ASIC could consider is the loan terms for other credit products, such as personal loans.

Financial Rights does not support enabling ASIC to vary the period of time according to different classes of credit card contracts, different credit limits and different rates of interest.

The entire point of prescribing the time is to curb unreasonably large credit card limits that are disproportionate to the debtor's ability to repay. To allow a longer period to repay a larger limit, for example, would entirely defeat the purpose. Our proposition is that by selecting a reasonable period over which the debtor should have the capacity to pay, the other factors adjust accordingly. A person with a higher disposable income will be able to pay off a higher credit limit within the predetermined period of time. A card with a higher interest rate will require higher repayments in order to be repaid within the determined period, meaning that the limit able to be approved to the same borrower will decrease as the interest rate increases.

In relation to different classes of credit card contracts, we submit that there is no reason to discriminate and worse, any attempt to do so will lead lenders to game the system by providing the credit card with the least stringent rules, regardless of its appropriateness to the consumer's requirements and objectives.

In our experience credit cards are used for a range of expenses from clothing and every day bills like energy and telecommunications, through to furniture, home appliances, entertainment, cars and holiday expenses. In the overwhelming majority of cases the intention of the borrower is to pay off the expense as soon as possible (if not within the same month). While some consumers definitely use credit cards to purchase items they cannot immediately afford with the intention of spreading the expense over several pay periods, few, if any, would expect to still be paying off the same item more than 3 years later. Indeed the behavioral economic concepts of optimism and over-confidence couple with bounded will-power suggest that it is not uncommon for people to both over-spend and overestimate their ability to repay. Financial Rights argues that even in the small business context customers should not be using credit cards to make purchases that the business does not have the projected cash-flow to repay within the next 3 years. Where there is good reason to permit a longer repayment period (because the debt is incurred for an asset or capacity building investment) then we submit that there are more appropriate credit vehicles available than a credit card.

Financial Rights does not believe that neither the legislation as drafted nor the explanatory memoranda fulfills the Governments expressed intention to "require that affordability assessments be based on a consumer's ability to repay the credit limit

within a reasonable period” as expressed in May 2017.² It will also not “protect vulnerable Australians from predatory behaviour which seeks to make a quick buck from people’s misfortune, and compound their financial hardship.”

Financial Rights is of the view that the period should be set in the legislation and should be no longer than three years. Alternatively, the period to be determined by ASIC should be set at a maximum of three years under the legislation. Anything longer and the credit card could not be regarded as a short term debt obligation. It would also ensure that many consumers will continue to use their cards predominantly as “revolvers” rather than as “transactors”, and remain saddled with damaging long term debt.

Recommendations

1. Financial Rights recommends that the period for the repayment of an amount equivalent to the credit limit should be set in the legislation and should be no longer than three years. Alternatively, the period to be determined by ASIC should be set at a maximum of three years under the legislation.

Reform 4: Reducing Credit Limits and terminating credit card contracts including by Online means

Financial Rights largely supports the introduction of these rules as drafted however would like to note the following to issues of concern.

Minimum credit limit loophole

Financial Rights notes that under the proposed section 133BF(1) the credit provider must not to enter into credit card contract unless it allows credit limit to be reduced, It states that

*A licensee must not enter into, or offer to enter into, a credit card contract under which the licensee would be the credit provider, if the consumer who would be the debtor under the contract would not have a **credit limit reduction entitlement** under the contract. (our emphasis)*

² The Hon. Scott Morrison MP, Building an accountable and competitive banking system, 9 May 2017, <http://sjm.ministers.treasury.gov.au/media-release/044-2017/>

However the definition of “credit limit reduction entitlement” under section 133BF(1) is concerning. It states:

A consumer who is the debtor under a credit card contract has a credit limit reduction entitlement under the contract if:

- (a) for a contract that does not provide for a minimum credit limit—the consumer is entitled under the contract to reduce the credit limit of the contract to any amount (including nil); or*
- (b) for a contract that provides for a minimum credit limit—the consumer is entitled under the contract to reduce the credit limit of the contract to **any amount that equals, or exceeds, the minimum credit limit. (our emphasis)***

Part (b) suggests that where a consumer has a contract that provides for a minimum credit limit (say \$5000) and they are entitled to reduce their credit limit to that \$5000 or higher (say \$6000 or higher), then they will have met the requirements of section 133BF(1) to have a credit limit reduction entitlement.

For example an application for ANZ’s Frequent Flyer Black card allows you to set the credit limit on the application form, but the lowest limit that a consumer can have is \$15,000. Applications can be made up to \$75,000.

The consequence of this is that in order to ensure that consumers do not reduce their credit limit too low, all banks need to do to maintain high levels of credit and stop consumers reducing their credit limits to too low a point is to introduce new contracts that provide for a significant minimum credit limit. Given the long lead time of 1 January 2019, this is enough time to establish these contracts.

This loophole has the potential to undermine the intent of what is a significant and important reform.

Consequently, Financial Rights recommends either the removal of all minimum credit limits or the establishment of a minimum credit limit of \$500 and no higher.

“Information” loophole

Under section 133BFA(2)(b)(i) relating to request to reduce a credit limit, the licensee must establish and maintain a website that

“tells the consumer what information the consumer will need to enter in order to request a reduction in the consumer’s credit limit”

The same wording can be found under section 133BU(2)(b)(i) with respect to requests to terminate credit card contracts.

Financial Rights believes that the word “information” without qualifiers has the potential to be interpreted broadly and exploited to make requesting a reduction of credit limits or termination of a credit card, difficult. We believe that the information must be limited to information that is reasonably necessary to identify the consumer and ensure that the request is valid. Banks have long attempted to make reducing credit limits or terminating credits cards difficult. We believe that any legislation implemented should ensure that it is as simple, and with as few barriers as, possible.

Credit card linked to mortgages loophole

A phenomenon that Financial Rights has increasingly seen is the packaging of mortgages with a mandatory credit card, for example, the ANZ Break Free Home Loan Package.³ While this is not strictly speaking an unsolicited credit limit offer – it is worse – it is the mandatory provision of a credit card to have access to a particular home loan. This practice is inconsistent with the requirements and objectives of the responsible lending provisions. Financial Rights recommends the mandatory packaging of credit cards with home loans should be prohibited under these reforms.

Application of new laws to both new *and* existing credit card contracts

Financial Rights notes that the proposed new credit limitation rules are generally limited to new credit contracts from 1 January 2019. The explanatory memorandum states that

“if a credit card contract entered into before 1 January 2019 contemplates a consumer reducing their credit limit or terminating their credit card contract, the credit card provider will need to comply with therequirements in relation to those contracts from 1 January 2019.”

Depending upon the interpretation of current credit card contracts, the effect of this is that those consumers whose pre 1 January 2019 contracts don’t “contemplate a consumer reducing their credit limit or terminating their credit card contract” will be unable to avail themselves of the new right.. This would be an unfair and harsh outcome for some of the most vulnerable credit consumers who have existing card debt and want a better way to manage it. We recommend that the proposed legislation be clarified to ensure that the entitlement to lower your credit limit or terminate your credit card applies to all existing and new credit card contracts. Having one system applicable to all credit cards for terminating and lowering limits should place no additional burden on industry.

³ <https://www.anz.com.au/personal/home-loans/your-loan/breakfree-package/>

Prohibition on credit provider not to suggest the consumer not reduce the credit limit

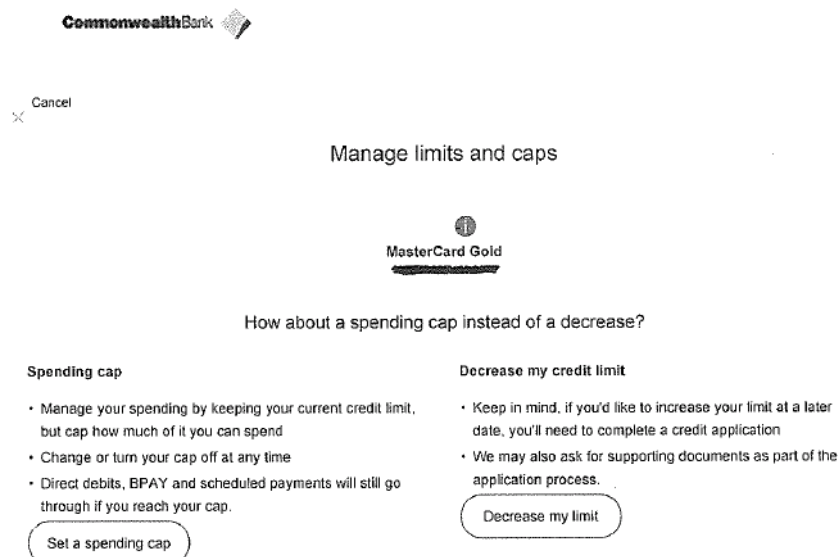
Financial Rights notes the inclusion of a new section 133BFB prohibiting the credit provider from suggesting the consumer not reduce the credit limit. Under subsection (2) it states:

The licensee who is the credit provider under the credit card contract must not do any of the following:

- (a) suggest that the consumer apply for an increase to the credit limit of the credit card contract;
- (b) suggest that the consumer not reduce the consumer's credit limit under the contract;
- (c) suggest that the consumer instead reduce the consumer's credit limit under the contract by an amount that is smaller than the reduction amount.

Financial Rights supports the inclusion of this section but notes that this may not capture every type of attempt to dissuade a consumer to not reduce their credit limit.

Financial Rights is aware of the Commonwealth Bank suggesting alternatives to reducing a credit limit. In the example below, taken from a credit limit reduction request 17 August 2017, a consumer requested to lower their credit limit online but was then presented with the following screen:



The Commonwealth Bank's NetBank application asks the consumer: How about a spending cap instead of a decrease? The screen then presents arguments for the spending cap, and some of the consequences of not reducing the credit limit which

could be construed as difficulties. The screen however does not “suggest that the consumer not reduce the consumer’s credit limit under the contract” as foreseen under s. 133BFB(2)(b). Nor does it “suggest that the consumer instead reduce the consumer’s credit limit under the contract by an amount that is smaller than the reduction amount” as foreseen under s. 133BFB(2)(c).

It does however try to dissuade the consumer from reducing their credit limit by suggesting an alternative. On Financial Right’s reading this is allowed under the Bill as currently drafted and is likely to be used by credit providers moving into the future, as a way to exploit a loophole.

Financial Rights recommends that the Bill ensure that this scenario not occur and that it prohibit suggesting alternatives to reducing a consumers credit limit.

Reasonable steps and outstanding balances loophole

Financial Rights notes that under the proposed new sections 133BFC and 133BW that a credit provider must take

“reasonable steps to ensure that the request [to lower a credit limit or terminate a credit contract] is given effectas soon as practicable.”

At 1.86 of the explanatory memorandum reasonable steps is described to include:

“any further actions that must be undertaken by the consumer for the credit provider to complete the request. For example, a reasonable step may be communicating to the consumer that they are required to repay any outstanding balance before the credit card contract can be terminated or communicating to the consumer that they are required to cancel any credit card authorisations (for example direct debits) before the contract can be terminated.”

Financial Rights has significant concerns with this example. Someone who is contemplating a card termination or credit limit lowering request is also very likely to have an outstanding balance. This requirement may be used by the credit provider to prevent or significantly delay the implementation of the request to lower the limit or terminate the contract. It is also likely to lead to further interest charges and fees leading to increased financial difficulties and debt. A reasonable step by a credit card provider should include ensuring that no further fees and charges be provided to allow the consumer to pay off the outstanding balance, otherwise, they will be caught in a debt spiral – the kind of outcome this legislation is designed to prevent.

Furthermore, reasonable steps should include assisting the consumer to identify and cancel recurrent direct debit arrangements in their credit accounts. The significant differences in approaches to the cancellation of direct debit for transaction or savings

accounts versus credit account remains one of the great frustrations to consumers, despite there being absolutely no legitimate reason that this be the case. We are concerned that this continuing issue that has yet to be resolved by the industry will enable credit card providers to avoid terminating a card.

Recommendations

2. Financial Rights recommends either the removal of all minimum credit limits or the establishment of a minimum credit limit of \$500 and no higher.
3. Financial Rights recommends that either the legislation or the explanatory memorandum be amended to clarify that the information sought under sections 133BFA(2)(b)(i) and 133BU(2)(b)(i) be limited to information that is reasonably necessary to identify the consumer and ensure that the request is valid.
4. Financial Rights recommends the mandatory packaging of credit cards with home loans should be prohibited.
5. The proposed legislation must be clarified to ensure that the entitlement to lower a credit limit or terminate a credit card applies to all new *and* existing credit card contracts.
6. Financial Rights recommends that section 133BFB(2) be clarified with an amendment to ensure that a credit provider cannot suggest an alternative (or alternatives) to reducing a consumer's credit limit.
7. "Reasonable steps" sections 133BFC and 133BW should be clarified to ensure that credit card providers cannot constructively prevent a consumer's request to terminate a card or lower the limit of a card. This should include ensuring that where an outstanding balance remains, credit card providers should be required to stop all additional charges being incurred on the card until the balance is paid off and the card is cancelled. Further the credit card provider should assist the consumer with cancellation credit card direct debits.

Transition Period

Financial Rights notes that the transition period has been set at 1 January 2019 for Reform 1, Reform 3 and Reform 4, with a date of 1 January 2018 for Reform 2. It is unclear why the government has chosen such a long lead time for important reforms. Sixteen months is a very long time for what should be simple systems changes for well-resourced highly profitable companies. The long lead time means that there will be a further 16 months of unfair and predatory practices harming vulnerable Australians.

Financial Rights recommends that the transition period be set at 1 July 2018 for Reform 1, Reform 3 and Reform 4.

Recommendations

8. Financial Rights recommends that the transition period be set at 1 July 2018 for Reform 1, Reform 3 and Reform 4.
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Reform 2: prohibit unsolicited credit limit offers in relation to credit card contracts, and;

Financial Rights strongly supports the introduction of a prohibition on unsolicited limit offers in relation to credit card contracts.

Jacinta's story

Jacinta called Credit and Debt Hotline owing over \$47,000 to a Bank on her credit card. Her sole source of income is currently the Parenting payment single. She is ill with depression and chronic back pain. She has recently separated from her husband. The limit on the credit card had been increased over many years by the bank and my client had sometimes been working and other times not.

To this day, Financial Rights assist clients who have been offered credit limit increases in situations where such increases are unwarranted and which appear to be contravening the spirit of the existing restrictions on unsolicited credit increase offers. This is a significant reform and will help prevent many people falling into financial hardship.

Financial Rights notes that the amendment will not stop credit providers from sending further promotional material about products and services (including other credit cards and other credit products) from the credit provider or their subsidiaries and corporate partners.

The following example was taken from a recent ANZ credit card application that provides no choice as to whether you will be sent promotional material about products and services from the ANZ, their subsidiaries or corporate partners: see the last line of the Declarations, terms and conditions section below. It is essentially mandatory to

receive this material in order to access the credit card. (Note too the “Credit limit increase invitation” consent that will be prohibited under the draft Bill.)

The screenshot shows the ANZ Frequent Flyer Black application interface. At the top, there is a navigation bar with four tabs: 'About me', 'Finance', 'Card', and 'Summary'. The 'Card' tab is currently selected. Below the navigation bar, the main content area is titled 'Credit limit increase invitation'. It contains a paragraph explaining that ANZ may occasionally send written invitations to apply for a higher credit limit, but only with the user's consent. It also states that providing consent does not mean ANZ will send invitations, and that users can apply for a credit limit increase or decrease at any time by contacting ANZ on 13 22 73. A second paragraph explains that if an invitation is sent, it's always the user's decision whether to apply, and that ANZ may approve or decline the application based on its criteria. A third paragraph states that users can withdraw their consent at any time by calling ANZ on 13 22 73. Below this text is a question: 'Do you agree to receive written credit card limit increase invitations that ANZ may occasionally make to you?'. There are two radio buttons: 'Yes' and 'Not now'. Below the consent section is another section titled 'Declarations, terms and conditions'. It contains two checkboxes: 'I have read and accept the [declarations and acknowledgements](#)' and 'I have read and accept the [Balance Transfer Terms and Conditions](#) and the terms of any promotional offer if applicable'. Below these checkboxes is a paragraph stating that government legislation requires ANZ to provide a [Credit Card Key Facts Sheet](#) when applying for a credit card. A final paragraph states that by clicking submit, the user authorises ANZ to send commercial messages (both paper and electronic) about products and services of ANZ, its subsidiaries and corporate partners. At the bottom of the form, there are two buttons: 'Back' and 'Submit'.

Reform 3: simplify the calculation of interest charges under credit card contracts

The reform with respect to interest charges will bring practice into line with consumer expectations and understanding, and will reduce costs for consumers who do carry a credit card balance over from one statement period to the next. The reform will play a role in assisting consumers to pay down existing debts and work towards using their credit card(s) as transactors, rather than revolvers. We strongly support these changes.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on (02) 9212 4216.

Kind Regards,



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