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14 July 2017

Mr Phil Johnston
5 Ronald Ave
Freshwater NSW 2096

PRIVILEGED AND CONFIDENTIAL

Dear Mr Johnston

Proposed class action regarding credit cards

Thank you for your letter and documentation in relation to a proposed class action on behalf of credit card consumers.

As a firm with a long history and track record of promoting social justice and protecting the interests of vulnerable Australians, we understand your interest in researching the impact of banks' practices in issuing credit cards to individuals with lower incomes and your advocacy on behalf of these individuals.

We have reviewed and considered the material you provided to us, however unfortunately the circumstances outlined in your letter and accompanying materials do not meet our criteria for the pursuit of a class action.

Unconscionable conduct

The *Australian Consumer Law*, the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and the *Corporations Act 2001* (Cth) contain provisions prohibiting unconscionable conduct in relation to trade and commerce, goods and services, and financial services.¹

However, the legal threshold for unconscionable conduct is difficult to establish. This was recently illustrated by the 2016 decision of the High Court of Australia in *Paciocco v Australia and New Zealand Banking Group Limited*,² where arguments regarding unconscionable conduct associated with credit card and other bank fees and charges were ultimately not accepted by the Court.

The generality of unconscionability provisions, as well as the effect of the High Court's decision mentioned above, mean that there are significant risks in pursuing a claim for unconscionable conduct in relation to the circumstances outlined in your letter.

¹ See *Australian Consumer Law*, Part 2.2; *ASIC Act 2001* (Cth), s 12CA; *Corporations Act 2001* (Cth), s 991A.
² [2016] HCA 28.



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Duty of care

Additionally, on the issue of negligence, it would be difficult to establish that the Australian Securities and Investments Commission (**ASIC**) owed a legal duty of care to individual consumers of credit card products. Although the *ASIC Act* provides that one of its objects is to promote the confident and informed participation of investors and consumers in the financial system, based on our consideration of legal principles of the law of negligence, in our view it is unlikely that a Court would hold ASIC liable for debts and interest charges incurred by individual consumers through their use of credit cards.


We have similar concerns in relation to a potential claim against the Reserve Bank of Australia, which has a broad duty to exercise powers in a manner that, in the opinion of the board, best contribute to the economic prosperity and welfare of the people of Australia.³ However, duties framed in the broad public interest are unlikely to extend to the individual circumstances of consumers such as those outlined in your letter.

Conclusion

In our view there would be legal risks associated with a claim in relation to the circumstances outlined in your letter and for this reason the proposed claim does not meet our criteria for the pursuit of a class action.

Although it may be the case that financially vulnerable consumers are at risk when it comes to credit card products, we think that the concerns outlined in your letter would be best addressed by legislative or regulatory change that is designed to protect the interests of these consumers. In this regard, we suggest that you contact your local Member of Parliament to continue your advocacy on behalf of vulnerable consumers.

Yours faithfully


per **Julian Schimmel**
MAURICE BLACKBURN

³ *Reserve Bank Act 1959* (Cth), s 10(2).