



## Banking & Finance - Bulletin 56 December 2007

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*\* On 1 July 2008, the Banking & Financial Services Ombudsman (BFSO), Financial Industry Complaints Service (FICS) and Insurance Ombudsman Service (IOS) merged to form the Financial Ombudsman Service (FOS).*

## Overview: The Issue of Financial Abuse of the Vulnerable Older Person

In 2001 we published Bulletin 31 on Disability, Incapacity and Banking Issues. Since then, there has been an increased Australian and international focus on financial abuse of the vulnerable older person, or elder financial abuse as it is often called.

Financial abuse of vulnerable older people has emerged as a national and international issue as a result of a number of factors including:

- An increasingly ageing population – a combination of increased life expectancy and sustained low fertility means that the percentage of people in the population who are over 60 is increasing;<sup>1</sup>
- A projected increase in the number of people with dementia;<sup>2</sup>
- Age-related distribution of assets – the wealth held by older Australians is currently estimated as 22% and projected to increase to 47% by 2030;<sup>3</sup>
- The asset boom has made the home-owning generations wealthier, while housing affordability issues have made home-ownership less achievable for younger generations. This can result in the belief on the part of adult children and grandchildren that the assets of older relatives should be regarded as 'family' assets;<sup>4</sup>
- Concerns that older people's assets have become a 'contested site';<sup>5</sup> and
- The high representation of alleged financial abuse in helpline calls and agency cases, against a background of concerns about under-reporting – financial abuse was noted in 34% of calls to the Elder Abuse Prevention Unit in Queensland<sup>6</sup> and was noted in the recent report *Older People and the Law*<sup>7</sup> as the fastest growing type of abuse.<sup>8</sup>

### The role of banks and other financial institutions

A recognised challenge in this area is to develop policies, practices and educational programs that reduce the risk and incidence of financial abuse. In addition to information and education strategies, regulatory measures and criminal law responses, part of the recent focus has been on the role that banks and other financial institutions can play.<sup>9</sup>

This is understandable given that financial abuse often takes the form of misuse of or theft from a bank account or other facility or financial services product; employees of financial institutions may be in the best, and sometimes the only, position to recognise financial exploitation as it occurs.

Financial institution staff are also, however, in an unenviable position. In disputes we see arising from alleged financial abuse, a common claim is that the bank and its staff should have recognised that exploitation was taking place and could have taken steps to prevent loss. Whether potential exploitation was visible at the time and what could and should have been done are always the difficult issues.

## Older People and the Law Report

In September this year the Commonwealth Parliament's House of Representatives Standing Committee on Legal and Constitutional Affairs completed its Inquiry into Older People and the Law and tabled its report, *Older People and the Law*,<sup>10</sup> which included a chapter on fraud and financial abuse. Two of the Committee's recommendations<sup>11</sup> related to initiatives involving the banking sector, including that there be:

- co-operative development of national, industry-wide protocols for reporting alleged financial abuse; and
- development of a training program to assist bank staff to identify suspicious transactions.

## Purpose of this Bulletin

The purpose of this Bulletin is to provide information about financial abuse and how to identify it - to assist in raising awareness of the issue and to highlight some warning signs - and to put that information in the context of the interaction between banks and other financial institutions and their older customers.

We hope that the information in this Bulletin, including the case studies and commentary, will also contribute to the co-operative development of national protocols and training programs for financial institution staff, as recommended in *Older People and the Law*, and will assist individual members of the BFSO scheme to review and build on their internal training programs and manuals.

The Bulletin may also assist members of the BFSO scheme to better understand our approach to allocation of liability in disputes, and thus be useful in internal dispute resolution processes when these issues arise.

The context of this Bulletin is financial abuse of the vulnerable older person. However, most of the observations made can equally be applied to financial abuse of other vulnerable people in the community, and the case studies we have included reflect this.

Also, the observations in this Bulletin are not confined to situations where a person lacks legal capacity. While it is the case that cognitive incapacity can increase the risk of exploitation, reduced mobility, vision or hearing – any physical dependence on another person for care or assistance with tasks including banking - can also increase vulnerability. Financial abuse can occur even when a person has the capacity to make a banking decision.

It is also important to say that age of itself is not an indicator of potential financial abuse. The focus of this Bulletin is on the *vulnerable* older person – those who because of dependence or an inability to defend themselves are more vulnerable to exploitation than those, of all ages, who are well able to look after and protect themselves and their financial well-being.

## Definitions of Financial Abuse

Elder abuse has been defined by Gardner<sup>12</sup> as:

‘Any act or omission that results in harm to an older person which occurs in a relationship where there is an implication of trust.’

The World Health Organisation definition of elder financial abuse is:

‘The illegal or improper exploitation or use of funds or resources of the older person.’<sup>13</sup>

Other definitions of financial abuse, which incorporate express ingredients of vulnerability and harm or detriment, are:

- ‘Illegal or improper exploitation by using funds, property, or other assets of a vulnerable adult for personal gain irrespective of detriment to the vulnerable adult’ [BITS Fraud Protection Toolkit];<sup>14</sup>
- ‘When a person illegally or improperly uses the resources of an incapacitated or dependent adult for the profit or advantage of someone other than the adult’ [Maine Reporting Project].<sup>15</sup>

### The definitions in a banking context

The *Older People and the Law* Report noted the problems associated with finding a generally accepted definition of financial abuse as well as the importance of doing so.<sup>16</sup> In its application to transactions taking place in a branch, it is important that any definition provides assistance to bank staff in the often difficult process of assessing the situation in front of them. Is it a situation for concern and action or is it a case of an older person making an apparently improvident transaction but with full understanding of the substance and effect and free from any improper influence?

In the banking context, the definitions from BITS and the Maine Reporting Project may provide more guidance to bank staff than the World Health Organisation definition.

We thought it would be useful to provide additional guidance by discussing and summarising the ingredients of the definitions. We have set out elsewhere in this Bulletin a section on the commonly accepted indicators of financial abuse – the ‘red flags’ or warning signs. We have also separately set out a discussion of the legal framework – areas of potential liability for third parties such as financial institutions.

Of course, even where financial abuse is taking place, it may not be observable to financial institution staff. The following discussion, and the information about the ‘red flags’, may nevertheless be useful in assessing whether what is visible is potentially financial abuse.

## What does it include?

Financial abuse clearly includes criminal conduct such as fraud, theft or obtaining financial advantage by deception.

There is, however, also a grey area where what is occurring may be improper rather than illegal; where the act or omission may not be deliberately abusive or malicious; or where a relationship of trust or dependence may cloud the question of consent. It is this grey area which is more difficult to define.

### *Improper conduct*

What is meant by improper? We think it covers conduct by a third party which may fall short of criminal conduct but which is within the realm of civil law and equity<sup>17</sup> – conduct which involves, for example, intimidation, deceit, coercion, emotional manipulation, physical or psychological abuse, undue influence or empty promises.

It need not involve malicious intent and, indeed, the available information about abusers is that they often have a mistaken sense of entitlement.<sup>18</sup> It would include conduct which involves an abuse of trust – meaning that it is instituted or encouraged by a trusted third party but is not in the person's interests. It would certainly include conduct resulting in personal gain for a third party in a formal position of trust giving rise to fiduciary duties, such as the holder of a Power of Attorney.

## Summary

In the context of training for bank staff, we think that the necessary ingredients can be summarised as:

- The direct or indirect use of the funds, assets, accounts or facilities;
- By a third party;
- Of an older person;
- Who is vulnerable because of incapacity, or dependence on or trust in a third party (which, together with detriment would make the conduct improper); *or*
- Which is illegal conduct (e.g. forgery or fraud); and
- Which is to the detriment or potential detriment of the older person and to the gain of another person.

We think that the inclusion of *vulnerability* as an ingredient, in combination with *detriment*, assists in identifying improper conduct. It also helps distinguish a situation of potential financial abuse from an informed decision by an older person with capacity to make the decision, and who is making that decision free from any improper or undue influence from a third party. And it is important to underline that vulnerability can arise not only because of incapacity but also because of dependence on or trust in a third party.<sup>19</sup>

# Understanding and Identifying Financial Abuse

## Examples of financial abuse

Financial exploitation is sometimes combined with other forms of abuse and neglect. It may include the following:<sup>20</sup>

- Taking, misusing or using, withholding knowledge about or permission in regard to money or property;
- Forging or forcing an older person's signature or misleading them about what they are signing, including blank withdrawal forms;
- Misusing ATM cards or credit cards or credit facilities;
- Cashing an older person's cheque without permission or authorisation or withholding portions of the cheque funds;
- Misappropriating funds from a pension;
- Getting an older person to sign a will, deed, contract or power of attorney through deception, coercion or undue influence;
- Using a Power of Attorney in a way contrary to the interests of the donor or for direct personal gain;
- Promising long-term care in exchange for money or property and not providing care;
- Overcharging for or not delivering care giving services;
- Failing to provide reasonable consideration for the transfer of real estate or the acquisition of joint property;
- Negligently mishandling assets including misuse by a caregiver;
- Managing, without permission or legal authority, the finances of a competent older person;
- Getting an older person to become a guarantor without them having sufficient knowledge to make an informed decision;
- Pressuring an older person to take out a loan or a product which is not for their benefit – for example a shared equity loan or a reverse mortgage to pay for a relative's debts or expenses;
- Predatory lending – unnecessary (no identified need) or unaffordable lending to a vulnerable older person which will cause a detriment or potential detriment to them and a gain to the lender;
- Scams – telephone, door to door or internet.

## Recognising potential financial abuse: the 'red flags' or warning signs

In the disputes we have seen where financial exploitation has taken place, it is often the case that at least one bank employee had concerns about what they were observing. The North American training materials discussed below talk about the 'hair on the back of your neck' test; an instinct that something is not right. Putting that instinct into words can be difficult. And there is an understandable reserve about voicing a concern that a customer is being exploited, particularly if the suspected exploiter is a family member.

Consistently, however, training resources for identifying potential financial abuse refer to what are called 'red flags'<sup>21</sup> – indicators of financial exploitation of a vulnerable older person that may not be conclusive but require inquiry and caution, including, where appropriate, delaying the transaction or taking other preventative action. Importantly, one or more of these factors has almost always been present in the cases investigated by our office.

We thought it would be useful to categorise these indicators according to who is most likely to observe or recognise them.

The red flags potentially visible to bank staff include that the older person may:

- Be accompanied by a new acquaintance to make a large or unusual withdrawal of cash;
- Be accompanied by a family member or other person who seems to coerce them into making transactions;
- Not be allowed to speak for themselves/the other party does all the talking (particularly in combination with either of the two above situations);
- Start to appear fearful (particularly of the person accompanying them) or withdrawn;
- Have withdrawal slips presented by a third party, with their signature on it but the rest of the slip filled out in a different handwriting;
- Have large withdrawals or transfers made on behalf of the older person without prior direct contact from them.
- Not understand or be aware of recently completed transactions;
- Give implausible explanations about or appear confused about what they are doing with their money;
- Engage in bank activity that is inconsistent with their ability such as apparent use of an ATM card despite the fact that they are housebound or in hospital ;
- Engage in bank activity that is unusual, erratic or uncharacteristic;
- Suddenly register for internet banking when prior banking has been branch based and there has been no preliminary contact with the bank;
- Have unpaid bills that they should be able to afford to pay – e.g. complain of having no heating despite the fact that they can afford to have it, or that they are being evicted;
- Be concerned about missing funds or banking related documents;
- Indicate that mail is no longer being delivered to their home;

Other indicators, more likely to be apparent to someone visiting the older person in their home, are such things as:

- Lack of food, clothing or utilities when the older person can afford them;
- Recent, new acquaintances, who may take up residence with the older person;
- Mail doesn't appear to be arriving;
- Services have been paid for but haven't been received;
- The older person is fearful that they will be evicted, or institutionalised if money is not given to their care-giver;
- The older person is not cared for or the residence is unkempt when arrangements have been made for providing personal care or home-maintenance services.

## Who are the abusers?

It appears that abusers are most likely to be relatives and caregivers; less commonly they are opportunistic strangers who 'befriend' the older person or who make contact through a scam.

In the disputes that we have seen, the most common situation appears to be 'inheritance impatience' on the part of adult children, their spouses or de-facto partners, including competition between siblings for 'their share'.

We also see what appears to be an attitude of deciding that the needs of the older person are secondary, including their future care needs.

There may be an incremental shift in the conduct of a care-giver – initially carrying out tasks like banking responsibly but gradually increasing the amount and frequency of withdrawals in an opportunistic way.

The *Older People and the Law* Report noted that:

'While the motivation of those who commit financial abuse may be complex and at times mired in past family history, it is possible to make some general statements about who the abusers are most likely to be and how they see their behaviour.'<sup>22</sup>

Those general statements<sup>23</sup> are that:

- Close relatives account for about 80% of suspected abuse cases;
- Gender seems to make little difference;
- Abusers often have a sense of entitlement which may come from:
  - A belief that, as they will or should inherit an asset eventually, they might as well get the benefit sooner rather than later;
  - Seeking to protect their perceived inheritance by not incurring expenses even though they are necessary for the health and well-being of the older person;
  - A belief that they are entitled to reimbursement for care-giving; or
  - A belief that, because they have been abused in the past, they are entitled to settle old scores.

We endorse the general statement that a sense of entitlement appears common. There often appears to be a failure to recognise that it is not the abuser's money. In some cases, our sense is that it is simply greed.

Certain events may trigger abuse, such as financial stress, family conflict – including sibling competition for control of the funds or resources – gambling problems and drug and alcohol abuse.<sup>24</sup>

And sometimes the abuser may simply be ill-equipped for a position of trust. They may not understand the obligations, for example, of holding a Power of Attorney - to act in the best interests of the principal and not be swayed by personal interest – i.e. to avoid a conflict of interest; not to act for personal gain or benefit; not to make unauthorised gifts; to keep the principal's funds and property separate from their own.<sup>25</sup>

## **Difficulties in seeking help or reporting abuse**

Where financial abuse occurs in a relationship of dependence, the older person may fear that telling someone about the abuse will lead to the loss of the relationship, possible retaliation, or further loss of independence. They may be reluctant to believe that a trusted person is exploiting them. They may not want the abuser to get into trouble, although they do want the abuse to stop. They may fear that they will not be believed or that reporting will be fruitless.

Clear analogies can be drawn with the concerns of people in situations of domestic violence.

It is important for bank staff who are concerned about suspected financial abuse to recognise that it is highly unlikely that a dependent older person will be able to respond meaningfully about the transaction or transactions if they are asked questions in the presence of the other person. Talking to them separately and in private is essential. We say more about this below.

Reporting of abuse may be difficult for older people with limited mobility or cognitive impairment, or whose English is limited, and who are entirely dependent on family members for support and access to support services.

It is also possible that the older person may not realise that financial abuse is taking place, particularly if information is being withheld from them or bank statements and other mail have been redirected. It is therefore important that any inquiries by bank staff are directed not only to consent but also to awareness of what has been happening on the account.

## **The legal framework: areas of potential liability for financial services providers**

There are two aspects to a discussion of the role of banks and other financial institutions in reducing the risk of financial abuse of the vulnerable older person.

The first is the important role that can be played in being educated about and observant in relation to potential financial abuse. This is not only an important community role, which recognises the unique, 'front-line' vantage point that a bank officer or other financial services provider staff member may have, but is also an important role internally. Training in relation to identifying financial abuse fits squarely within the fraud prevention role of the bank and its officers - to be alert for fraud and to reduce fraud related losses for the bank and its customers.

The second aspect is the one of potential legal liability for the bank. A bank may be liable to reimburse losses to a customer who has been the victim of financial abuse under a number of legal and equitable principles including:

- If the customer is unable to read owing to blindness or illiteracy - the principle of *non est factum* – ‘it is not my deed’;
- If the customer’s signature on withdrawal instructions or other transaction documents has been forged – no mandate;
- If an unauthorised electronic transaction has been performed and liability is allocated to the financial institution under the EFT Code;<sup>26</sup>
- If it is on notice of mental incapacity on the part of the customer;
- If it is on notice of undue influence;
- If it has, with knowledge, assisted in a breach of trust – accessory liability under the second limb of *Barnes v Addy*;<sup>27</sup>
- If it has itself taken advantage of a vulnerable older person so as to have engaged in unconscionable conduct.

The following is an overview of some of the relevant legal concepts, including what it means to be ‘on notice’ of undue influence or incapacity. It is necessarily abbreviated and is not intended to be a complete discussion of some of the more complex equitable principles, such as undue influence and accessory liability. It may, however, provide some assistance in understanding the legal framework in which we consider claims that a member of the BFSO scheme may have some liability where exploitation by a third party has taken place, and in which those who engage in financial exploitation may be found liable by the courts.

## **The banker-customer relationship**

The banker-customer relationship is essentially a contractual one. It is not, usually, a fiduciary relationship.<sup>28</sup> Unlike trustees or professional advisers such as lawyers, who do owe fiduciary duties, a bank does not, in the normal course, have a duty to advise a customer that a transaction or product is not in their interests, nor is it obliged to put the customer’s interests ahead of its own.<sup>29</sup>

As part of the contractual relationship, however, a bank has a duty to exercise reasonable care and skill in carrying out its part of the banking transactions conducted by its customer.<sup>30</sup> The standard is that of the reasonable competent banker acting in accordance with accepted current practice.<sup>31</sup>

A bank that subscribes to the Code of Banking Practice has an obligation to exercise the care and skill of a diligent and prudent lender.<sup>32</sup> As a financial services licensee, a bank will also have a statutory obligation to provide the financial services covered by the licence ‘efficiently, honestly and fairly’.<sup>33</sup>

## **Mandate**

It is fundamental to the banker-customer relationship that a bank promises to repay any part of the amount due to the customer (i.e. his or her account balance) against the unambiguous written order of the customer (the customer's mandate). Conversely, the bank shall not pay away any part of the amount due to its customer without an unambiguous written order of the customer unless under compulsion of law.

The written order must be unambiguous and must be authorised. If there is an ambiguity in the instruction, or uncertainty as to whether the instruction is truly the customer's, reasonable care and skill would require making inquiries to clarify the customer's wishes or ensure that the transaction is authorised.

## **Forgery**

A forged signature, no matter how good the forgery appears to be, or how closely it resembles the customer's actual signature, does not constitute a mandate from the customer to the bank. If a bank pays away money based on a forged signature, it does not have a mandate from its customer and has no authority to debit the customer's account. In effect, the bank has paid away its own money and must reimburse the customer's account.

## **Duty to inquire or question a valid mandate**

A bank's contractual duty to exercise reasonable care and skill may, in particular circumstances, include an obligation to make inquiries or to question an otherwise valid mandate - for example, a cheque validly drawn and signed by an authorised signatory. Whether inquiries are required and what intervention is appropriate will depend on the circumstances.<sup>34</sup>

There is undoubtedly a tension between a bank's obligation to make payment on its customer's unambiguous written order and what may, in particular circumstances, be a duty to question an apparently valid mandate.

A bank officer is not expected to be a detective and is entitled to proceed on the *prima facie* assumption that he or she is dealing with honest people - unless the indications are to the contrary.<sup>35</sup> It is the indications to the contrary that are the important qualification. A bank officer is not entitled to turn a blind eye to known facts that indicate there is a serious possibility that a customer is being defrauded or that funds are being misappropriated.<sup>36</sup>

A bank may also be exposed to liability for any loss if it is on notice of incapacity on the part of the customer or the undue influence of a third party and it proceeds with a transaction which is exploitative of the customer. These concepts are discussed below.

## **Incapacity**

A person may lack the capacity to make a particular decision, or a range of decisions, if they have a disability - such as intellectual impairment, brain injury, mental disorder or

dementia - which affects their ability to understand the nature of the decision and what they are doing by making it.

In the context of determining whether a protective order was warranted, Powell J in *PY v RJS*<sup>37</sup> gave a summary of what was required under the relevant NSW legislation. The person must appear:

- (a) incapable of dealing, in a reasonably competent fashion, with the ordinary affairs of man; and
- (b) by reason of that lack of competence there is a real risk that either:
  - i. he or she may be disadvantaged in the conduct of such affairs; or
  - ii. such moneys which he or she may possess may be dissipated or lost.

There are differences between the NSW and Victorian case law about whether the test should be objective (capable of dealing with the ordinary affairs of people) or subjective (capable of dealing with their own financial affairs, which may be simple or complex).<sup>38</sup>

In a contractual context, a person will lack capacity if they are unable to give full and free consent to the terms of the contract and are not capable of forming the necessary legal intention to enter into contractual relations.

In a banking context, a contract or transaction may be set aside if the customer lacked the required capacity and the bank was on notice of that incapacity.

### **Notice of incapacity**

Notice may be actual or constructive<sup>39</sup> – a bank will be on notice if its officers were aware or ought to have been aware of the customer's incapacity.

This does not mean that a bank officer is expected routinely to question older customers or otherwise seek to assess whether they have capacity. Not only would this be inappropriate but it would be an assessment they are not qualified to make. As with other members of the community, the assumption should be that an older person has capacity, unless there are indications to the contrary.

Where there are indications to the contrary, however, constructive notice may be established. Those observable indications might be, for example, that:

- The customer does not seem to understand the transaction, or its effect on their account or financial position;
- They may not seem to understand what is being suggested by the banker or a third party, or what their options are; and/or
- They may be confused about the state of their account and, despite explanation, appear to remain confused.

Actual notice would be established if the bank had received a copy or notification of an order made by a court or tribunal to appoint a guardian or administrator, or to otherwise make formal arrangements for a person's financial affairs on the basis of incapacity, or had received a medical report to the effect that the customer did not have capacity.

## Undue Influence

Undue influence in equity looks to the quality of the consent of a person who may have contractual capacity but whose acts, because of the improper influence of another person, cannot be said to be free and voluntary in the fullest sense. It can be a basis for setting aside, as against a bank, a transfer of funds or assets or the creation of security, where the bank is on notice, actual or constructive, of the undue influence.

"Undue influence" was defined by Hodges J in *Union Bank of Australia Ltd v Whitelaw*<sup>40</sup>:

'...equity recognises that persons possessed of the usual capacity to contract may, as a matter of fact, not be free agents, and may enter into obligations under the pressure of what it calls undue influence. 'Influence', as I understand the term in this connection, is the ascendancy acquired by one person over another. 'Undue influence' is the improper use by the ascendant person of such ascendancy for the benefit of himself or someone else, so that the acts of the person influenced are not, in the fullest sense of the word, his free, voluntary acts.'

Equitable principles about undue influence are thus concerned with the quality of the consent or the assent of the person who has given a gift or benefit to another,<sup>41</sup> and form a basis for relief where a person's independent and voluntary will is overborne.<sup>42</sup>

Undue influence may be actual or presumed: either proved by evidence of express influence by the defendant over the plaintiff and improper conduct<sup>43</sup> or presumed from a relationship of trust and confidence together with an improvident transaction.<sup>44</sup>

Actual undue influence requires proof of improper conduct. Presumed undue influence does not require proof that improper influence was exercised; it will be for the recipient of the transferred funds or assets to rebut the presumption and establish that the transaction was not improper but was the free outcome of the other's uninfluenced will.

Independent advice is an important factor in determining whether the gift is the purely voluntary and well-understood act of the donee<sup>45</sup> and is likely also to counter a claim of improper conduct.

### *Automatic presumption of undue influence*

Undue influence is automatically presumed in specified relationships which are considered to involve as a matter of course:

'such a repository of trust and confidence and the likelihood of the exercise of authority by one person over the other that any substantial gift had to be justified by the recipient.'<sup>46</sup>

The relationships are:

- Solicitor and client;
- Doctor, or other attendants on the sick, and patient;
- Parent and child;

- Guardian and ward; and
- Religious and spiritual advisers and devotees.

### *Husband and wife*

Judicial analysis of the relationship between a husband and wife has also articulated what is called the 'special wives' equity', based on the trust and confidence which is presumed to exist between a married couple.<sup>47</sup> Although it can appear to be closely related to unconscionable conduct, it has a different rationale – trust and dependence rather than a special disability or disadvantage that is exploited.

The High Court decision in *Garcia v National Australia Bank Ltd* affirmed the principle that a guarantee or mortgage given by a wife<sup>48</sup> will be unenforceable if:

- She did not in fact understand the purport and effect of the transaction;
- She was a volunteer, that is, gained no real benefit from the transaction - with 'benefit' being given a narrow construction; and
- The bank took no steps to explain the transaction and she did not receive independent legal advice.

Although the relationship of husband and wife does not of itself give rise to a presumption of undue influence as such, the special wives' equity operates in a similar way – if the required factors are present, the burden shifts to the person obtaining the benefit of the transaction to prove that it was a transaction undertaken freely with a full understanding of the purport and effect.

### *Presumed undue influence may arise in other relationships with particular ingredients*

The relationship may not be one of the accepted categories but undue influence may nevertheless be presumed to apply where the relationship in fact is one of trust and confidence or dependence *and* where the transaction is improvident or manifestly disadvantageous.<sup>49</sup>

So, for example, there is no automatic presumption of undue influence in the relationship between a child or care giver and a parent, but undue influence may be presumed if the ingredients of the relationship have the necessary degree of trust or dependence.<sup>50</sup>

Undue influence will not usually be presumed where small gifts are made,<sup>51</sup> only where improvident transfers have taken place such as large gifts of money, or a significant portion of a person's savings, or the transfer or mortgage of real estate or assets.

Examples where the courts have presumed undue influence include:

- *Johnston v Buttress*,<sup>52</sup> where the donor was a 67 year old widower who was illiterate and of limited intelligence and who transferred without value the house he lived in. The recipient was a relative by marriage, a woman he relied upon for advice and company.

- *Bank of NSW v Rogers*<sup>53</sup> where the court set aside the provision of security by a 64 year old spinster who had lived with her uncle for 40 years and relied solely on his business advice. She had charged her property to secure his overdraft.
- *Nattrass v Nattrass*,<sup>54</sup> where a woman suffering from dementia was significantly dependent on her son's ex-wife for ordinary day to day personal and domestic needs and for the management of her financial affairs. A gift of \$53,000 to pay off the defendant's mortgage was set aside.

### *Notice of undue influence*

Notice may be actual or constructive. It may be notice of actual undue influence – the bank was or ought to have been aware that improper conduct by a person having influence over the elderly person was taking place. Or it may be notice of presumed undue influence – the bank was aware or ought to have been aware that the elderly customer was either in one of the specified relationships with the third party or was in a relationship of trust or dependence on them, and the transaction appeared improvident.

Whether or not constructive notice is established will depend on the particular circumstances. Reference to the 'red flags' or warning signs may, however, provide some general guidance about the situations where inquiry and caution are required, particularly those where third parties are involved.

### **Unconscionable conduct**

Unconscionable dealing is a separate equitable doctrine to undue influence, based on different considerations.<sup>55</sup> Because there is some overlap, however, it is often raised in the alternative to a claim of undue influence.

Unconscionable dealing 'looks to the conduct of the stronger party in attempting to enforce or retain the benefit of a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.'<sup>56</sup>

Unconscionable conduct was described by Mason J in *Commercial Bank v Amadio*<sup>57</sup> as taking unconscientious advantage 'of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in their best interests'. It is distinguished from undue influence, which is concerned with whether the weaker party's will was overborne – it is the inability to judge what is in their interests, as a result of a special disability or disadvantage, which is the important factor.

The special disadvantage may arise by reason of illness, ignorance, impaired faculties, financial need or other circumstances.<sup>58</sup> To attract the equitable jurisdiction, a person who takes unconscientious advantage of another need only be aware of facts raising that possibility in the mind of a reasonable person.

Unconscionable dealing is not concerned with tough bargaining in a commercial context.<sup>59</sup> What is required is something that is against conscience; a 'high level of moral obloquy'<sup>60</sup> – obloquy meaning shamefulness.

In summary what is required is that:

- The person taken advantage of is under a special disability or disadvantage;
- Which is or ought to be obvious to the other person;
- The transaction is not of benefit to the person under the disability or disadvantage; and
- No steps are taken to ensure that the person understands the transaction or obtains independent advice about the nature and effect of it.

Liability for unconscionable conduct may also arise under the unconscionable conduct prohibitions in the *Australian Securities and Investments Commission Act 2001* (ASIC Act).<sup>61</sup>

### **Knowing assistance in a breach of fiduciary duty**

If a bank knowingly assists a fiduciary, such as a trustee, a director of a company or the holder of a Power of Attorney, to commit a breach of fiduciary duty such as misappropriation or misuse of funds, it may be liable for loss resulting from the breach, even though it received no benefit and even though it was not fraudulent or dishonest itself. It is treated as a constructive trustee of the funds misappropriated and is liable, as an accessory, to account to the beneficiary.

This is known as liability under the second limb of *Barnes v Addy*,<sup>62</sup> - assisting with knowledge in a breach of duty by a fiduciary.

The ingredients of knowing assistance have been the subject of much discussion in the case law and some complex distinctions.<sup>63</sup> In summary, four elements are required:

- A fiduciary obligation;
- A dishonest and fraudulent design by the fiduciary – an innocent breach of trust is not sufficient;<sup>64</sup> and
- The third party must assist or facilitate the breach of trust;
- With knowledge of the breach.

The ingredient of knowledge will be established by:

- Actual knowledge;
- Wilfully shutting one's eyes to the obvious;
- Wilfully or recklessly failing to make inquiries that an honest and reasonable person would make; expressed by the NSW Court of Appeal as a calculated omission to inquire for fear of unearthing fraud or breach of duty;<sup>65</sup> or
- Knowledge of circumstances which would indicate the facts to an honest and reasonable person.<sup>66</sup>

## Privacy and confidentiality

Privacy issues may be raised by a bank where it is claimed that it should have taken steps to notify family members or relevant authorities that fraud or financial exploitation appeared to be taking place.

A bank has a common law duty of confidentiality to its customers. This duty is usually expressed as the *Tournier's duty*<sup>67</sup> and is subject to four qualifications articulated in that case:

- Where disclosure is under compulsion of law;
- Where the interests [legal interests] of the bank require disclosure;
- Where there is a duty to the public to disclose;<sup>68</sup> or
- Where the disclosure is made with the express or implied consent of the customer.

The Code of Banking Practice, in clause 22, contains an express acknowledgement of the common law duty, with the above four exceptions, as well as obligations under the *Privacy Act 1988* (Cth).

Relevantly, the National Privacy Principles, Use and Disclosure principles permit disclosure where 'the organisation has reason to suspect that unlawful activity has been, is being or may be engaged in, and uses or discloses the personal information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities.'<sup>69</sup>

In Bulletin 31, we expressed the view that there is a good argument that disclosure to relevant third parties is in the bank's legal interests in situations where fraud is a real possibility, and thus covered by the second exception to the banker's duty of confidentiality. One of the difficult judgments facing a bank, however, is determining who will be a 'relevant third party' in circumstances where the customer may regard any disclosure as an intrusion on their privacy.

Where fraud is suspected, a bank is clearly entitled to, and may be obliged to, report the matter to the police. A bank may also be entitled, under the Privacy Principle referred to above, to notify protective agencies such as the Public Advocate where a customer has a decision-making disability and appears to be being defrauded by a third party.<sup>70</sup>

It is less clear, in our view, whether a bank would be entitled under the exceptions to the duty of confidentiality or the Privacy Principles to notify a family member without the consent of the customer, if the family member does not hold a formal position such as Attorney under a Power of Attorney or has not been appointed as an Administrator by a guardianship and administration tribunal or a court.

The duty of confidentiality would not, of course, prevent the bank giving its customer information about relevant agencies or seeking direct consent of the customer to notify third parties.

One strategy for addressing privacy concerns is what is called an 'advance directive' – a form of authorisation from the customer permitting the bank in the future to notify named, trusted third parties of activity that is inconsistent with the account holder's usual banking patterns or which may indicate fraud on the account.<sup>71</sup> It is not the same as third party signing authority on an account – the named third party cannot operate the account. It preserves the customer's independence in relation to the account but provides a useful safety mechanism if activity on the account is causing concern.

## **Case studies**

We have included a selection of case studies, from disputes which have come to the BFSO and have required investigation. We have also including a summary of a recent decision by the Victorian Civil and Administrative Tribunal which relates to steps taken by a bank manager.

The case studies need to be seen in the context of the large number of transactions conducted by older Australians, including by people acting on their behalf that do not involve financial abuse, and the transactions where appropriate inquiries have been made and caution exercised. In terms of disputes that come to the BFSO, they also need to be seen in the context of the relatively large numbers of cases that are resolved by the parties without the need for investigation – 93.4% in 2006-2007.

The case studies illustrate, however, some of the complexities involved in identifying potential financial abuse and deciding what steps should be taken. They also illustrate the complexities of investigating claims that a bank was on notice of financial abuse.

For de-identification purposes, the names of the parties have not been used and minor details have been changed.

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### **Case study 1: Three loans too many**

A dispute was brought by the executors of the Estate of Mr L. In the 12 months before his death three loans had been taken out in Mr L's name secured by his home, which was his principal asset. The house had previously been unencumbered. After making inquiries of the bank about the loans and the use of the loan funds, the executors brought a dispute to the BFSO.

The executor's claim was essentially that the bank had failed to exercise reasonable care and skill in making the loans. The bank's response was that Mr L had visited the branch to submit the initial application and that the bank officers who interviewed him on that day and spoke to him subsequently confirmed that he fully understood the nature of the loans and had entered into them of his own free will. His capacity to service the loans had been assessed properly and it directed the funds as instructed by him.

Mr L was in his 70s at the time he died, was in receipt of a veteran's pension and suffered from Parkinson's disease. He lived with one of his three sons, C and C's wife. In the opinion of his doctor, Mr L's mental capacity appeared adequate until shortly before his death, when he also began having a series of falls. The doctor noted that due to his mobility problems his son C assisted him with his financial affairs and that Mr L had indicated that he was happy with the arrangement.

The loans totalled \$120,000, about 110% of the value of Mr L's house at the time of its sale by the executors. The loan applications disclosed that the first loan was for \$80,000 for investment purposes. The second loan, 5 months later, was to refinance the first loan plus an additional \$20,000 to purchase a car. The third loan, 3 months later was to refinance the second loan plus a further \$21,000 to purchase a car. The second and third loan applications were made by telephone and the loan applications mailed to Mr L. It appeared to be the case that the bulk of the loan funds were paid to C, including \$40,000 to C's company. About \$1,000 was paid to Mr L's cheque account.

After Mr L died, the property was sold on the order of the bank to repay the loans. A residual debt remained to the bank.

Early on in the investigation by BFSO, the case manager sought expert handwriting advice. The advice was that none of the loan documents had been signed by Mr L and that his signature had been forged by tracing. Information obtained also included a written agreement between Mr L and C that, when Mr L died, C agreed to honour his father's wishes by buying the house from his two brothers and to pay them one third of the value of the house each. Mr L's will also provided for an equal distribution of his estate to his sons – one third each.

After the handwriting advice was obtained, the bank suggested that the estate should pursue the brother who benefited from the loans. The brother was however bankrupt and his company in the process of being wound up. It also suggested that it was possible that Mr L may have asked someone else to sign his name because his signature was so shaky. It also raised the issue that a payment to the Estate, if distributed under the terms of the will, could result in unjust enrichment to the son who had benefited from the loans. The estate maintained the claim although it said that would be prepared to settle for 2/3 of its claim, to be paid in equal shares to the other sons.

The case was resolved by a negotiated settlement at a conciliation conference called by the Ombudsman.

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## **Case study 2: Was it authorised?**

In a 4 month period, \$96,000 was withdrawn in a series of transactions from Mr R's Investment account, which was operated with a passbook. All the transactions were on the basis of a signed withdrawal voucher and presentation of the passbook.

Shortly after the last withdrawal, and before his death, Mr R gave a statement to police that he had been staying with two people, a man and a woman, at their home during that time, apart from a short stay in hospital. He said that he had given them authority to withdraw a small amount of cash and had given them the passbook and a signed blank voucher (which was then completed for \$8,000). They had then kept his passbook and wouldn't return it. He said he hadn't signed any other vouchers. He did not say, however, that he had been under any duress.

The police interviewed the third parties who said to the police that:

- the withdrawals had been made at Mr R's request and he had signed all the withdrawal vouchers;
- when asked by the bank, identification had been provided and recorded;

- the cash had been given to Mr R except that the last withdrawal was for a bank cheque – Mr R had asked the woman what she would like as a gift for helping him. She said she would like a car and the funds were used to buy one.

It appeared that a will had also been executed during this period naming the woman as executrix. The dispute was brought to the BFSO by two women who had been appointed as Mr R's attorneys and then his executrices under an earlier will which the third party said she would not contest.

Handwriting evidence was obtained and the opinion of the handwriting expert was that Mr R had signed all the vouchers although someone else had written the amounts and account details. Document examination was unable to determine whether Mr R had signed the vouchers before or after the other entries.

Details of identification of one of the third parties appeared on the reverse of five of the vouchers, including drivers licence details. It appeared that this had been done for procedural reasons rather than because of concerns by tellers about the transactions.

As part of the investigation, the case manager sought advice from the Ombudsman's banking adviser about the procedures adopted by other banks when a third party presents a withdrawal voucher signed by the account holder. The advice was that procedures varied but that standard practice was to require something else – prior arrangement to have been made by the account holder and/or verification by direct contact with the customer and/or a signed authority from the account holder.

Best practice, in the banking adviser's view, was not to allow a withdrawal where the person presenting the withdrawal voucher was not the account holder unless prior arrangements had been made, the teller was satisfied that the transaction was legitimate, the third party had been identified and the transaction had been confirmed by a manager. More formal arrangements had to be in place if the need for a third party to present withdrawals was on-going and for amounts over a specified limit, the authenticity of the transaction had to be confirmed by direct contact with the account holder.

In reaching a Finding, the case manager was critical of the bank's lack of clear and standard procedures for dealing with withdrawal requests by third parties. However, she was unable to conclude that the transactions were unauthorised, nor was she able to conclude either that undue influence had operated or that the bank was on notice of any particular vulnerability. In reaching her view, she took into account the fact that Mr R had signed all of the withdrawal vouchers, had given conflicting information to the bank and to the police, which could not be clarified as he had since died, had not said to the police that he was under any duress while with the two people, and appeared to have had full capacity. It was also relevant that the third parties had co-operated with the police investigation and the police had decided not to take the matter further.

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### **Case study 3: Left with nursing home debts**

At the time a dispute was brought to the BFSO by her son, Mrs N was 80 years of age and a full-time resident of a nursing home. She had moved there from a rented unit where she had been helped in her home and with banking, on an informal and unpaid basis, by a third party. Her informal carer was a young man who had been a friend of Mrs N's granddaughter.

The dispute concerned the sum of approximately \$40,000 which had been progressively withdrawn from Mrs N's term deposit and passbook accounts over a 9 month period, emptying those accounts. Mrs N had had \$30,000 in a term deposit account, which by a series of prepayments, had been transferred into her passbook account and then withdrawn from that account. The term deposit had originally been established by her son as a moderate protective measure. About \$20,000 had been withdrawn after Mrs L was admitted to hospital and then transferred to a nursing home, although no monies had been paid towards her nursing home fees.

It was not in dispute that the withdrawals processed to Mrs N's accounts, during this period were always presented by the third party. The last \$10,000 was withdrawn directly by the third party, after he was added as an authorised signatory to the account.

When the withdrawals were discovered by Mrs N's family, her son made a report to police. However the police investigation did not proceed because Mrs N did not wish to be interviewed and provide a statement. Her son said she had initially been reluctant to provide a statement because she had trouble believing that the third party had taken her money. When she accepted that this was likely she became concerned about what the third party might do to her.

Mrs N's son, on her behalf, claimed that the bank was aware that the situation was 'dubious' but had failed to act; it had allowed the third party to continue to present withdrawals and then to operate the account directly. He said that the agent at the post office agency, where many of the passbook withdrawals took place, had been concerned and had reported her concerns to the bank, prior to the bank allowing the third party to be added to the account as a signatory. He said his mother had diminished capacity, and trusted the third party, and this would have been apparent to bank staff. He also claimed that a number of the withdrawals had been forged.

The bank said that it was not on notice of undue influence or diminished capacity as claimed. It was obliged to act in accordance with Mrs N's mandate. It had made inquiries when it was appropriate to do so and took appropriate action. Following the post office agent's report it had required the third party to make any future withdrawals at the branch and had then obtained Mrs N's authority to add the third party as an authorised signatory. It said she demonstrated an understanding of the situation and her capacity was demonstrated by her executing a power of attorney in favour of her son.

#### *The information obtained in investigation*

The post office agent was sent a note from Mrs N, about 6 months prior to the start of the disputed withdrawals, asking that the third party be allowed to do withdrawals on her behalf. The agent said that Mrs N also called to make sure this was all right as the third party was 'her adopted grandson' and she didn't want any problems for him. Mrs N never came into the agency.

The agent said she noticed that the withdrawals were becoming frequent and for relatively high amounts. Shortly before reporting her concerns to the branch, she had noticed that the account balance was getting lower and a new passbook was needed. She said that she contacted the branch to explain her concerns as she did not believe a pensioner would make as many frequent withdrawals. She was told to advise the third party that he would have to go to the branch in future and be identified, which she did.

Prior to the agent's report, the third party had come into the branch on a number of occasions to make pre-payments from the term deposit account to Mrs N's passbook account. A number of branch staff acknowledged that they were aware that the third party was presenting withdrawals on Mrs N's behalf and were aware of the relationship between the third party and Mrs N.

One staff member recalled that she had queried the third party on his relationship with Mrs N as she knew that he collected cash on her behalf. He had told her he was the ex-boyfriend of Mrs N's granddaughter, that she was a nice lady in ill-health and no other family members helped her out so he had decided to help her with her shopping and banking. The staff member also said that the third party's name had come up in a conversation with a friend, a nurse, who said that she had noticed that the young man often helped Mrs N to go to and from hospital.

There was no contemporaneous information to indicate that the bank at any time had a private conversation with Mrs N about the concerns raised by the post-office agent or the frequency and size of withdrawals and their effect on the account. The information was that she had attended the branch with the third party to provide the authority for him to sign. It was probable that she had come out of the nursing home to do so.

The first prepayment from Mrs N's term deposit account, of \$13,000, took place after the third party provided a handwritten note on the back of a shopping list giving general permission for the third party 'to do withdrawal of account'[sic]. The note was signed but not written by Mrs N, and did not specify an amount or an account. A bank officer did, however, ring Mrs N who said she knew the third party was transacting on her behalf and explained he was her carer and she admired him. It was not clear whether the amount of the withdrawal was discussed and that it was from her term deposit account.

The second prepayment occurred after the third party had called in to the branch to make a withdrawal on the term deposit account. A bank officer recalled him saying that Mrs N was in hospital. She told him he didn't have authority and would need Mrs N's signature on a withdrawal voucher or a signed authority form. She recalled seeing him with Mrs N in the branch later, where that authority was signed.

The opinion of a handwriting expert was that, of a sample of withdrawal vouchers, Mrs N's signature on a small number of them had been forged. In addition it was clear from the vouchers that someone other than Mrs N had completed the all details on the vouchers other than the signature.

Two aged care assessments indicated that in the period in question Mrs N's physical condition had deteriorated making her more reliant on assistance from others, principally her informal carer, including in relation to things such as showering, shopping and banking. The second assessment, towards the end of the relevant period, noted occasional memory loss, confusion and disorientation but did not make a formal assessment of incapacity.

The view of the Ombudsman's banking adviser was that at the time at least of the second prepayment, and when the report was received, a detailed and private conversation should have been held with Mrs N independently of her carer. In its absence, the bank could not be sure that Mrs N understood about the frequency and size of the withdrawals and whether they were made with her free consent even if it was likely that some of the money was spent on her expenses.

The case manager gave a preliminary assessment that Mrs N was in a relationship of sufficient trust and dependence to presume at least that Mrs N was under the influence of the carer. Mrs N's mobility difficulties meant that she was dependent on the third party for care and assistance and trusted him. The case manager's view was that the bank was on notice of the relationship and sufficient other facts to indicate potential undue influence from about the time of the second term deposit prepayment, if not earlier, and certainly from the time of the post office agent's report. The transactions, cumulatively, were unlikely to be to Mrs N's benefit, taking into account that she was for part of the time in a nursing home, and that her nursing home fees had not been paid.

According to the bank's procedures, the involvement of a third party warranted caution but in the case manager's view, insufficient caution had been exercised. In particular, although the bank had made some inquiries, it had never sought to speak with Mrs N in private without the third party present. Although it had asked Mrs N if she was happy with the arrangements, it didn't do so in the context of checking whether she was aware of the way the account was being conducted, the term deposit prepayments which had taken place and the volume and extent of the withdrawals. Its branch staff appeared to have made an informal assessment that the third party posed no risks to Mrs N. The decision to add him as a signatory to her account only increased the risks.

So far as loss was concerned, the case manager's view was that not all the funds withdrawn after the bank was on notice of presumed undue influence should be regarded as loss, as it was reasonable to conclude that part of the funds were spent on living. Based on the earlier history of the account, Mrs N normally spent between around \$2,000 per month and a reasonable estimate for living expenses should be deducted from the withdrawals. The case manager considered that the amount that should have been paid to the nursing home could be regarded as direct loss and that this part of any compensation should be paid direct to the nursing home.

The case resolved by negotiated settlement when the bank agreed to pay the sum of \$18,000.

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### ***SMcD (Guardianship) [2007] VCAT 666*<sup>72</sup>**

In that case the manager of a rural branch alerted the tribunal to the possible need for an urgent protective order when a customer, aged in her seventies and with dementia, was taken out of her nursing home and brought to the bank by two people, who identified themselves as the woman's 'adopted children'. The woman had previously had a guardian and administrator appointed – her husband – but he had recently died.

A nursing home representative had contacted the bank manager, as well as the police, after they left. When they arrived at the bank, they told the manager that the woman wanted to withdraw all her savings. The bank manager, believing that the woman was confused, dissuaded her from doing so. She then alerted the Tribunal and an interim order was able to be made. In making the order, which was temporary pending the opportunity to take evidence from all concerned, the Tribunal member commended the bank manager 'for her swift action in notifying the Tribunal about the risks she perceived'.

Note that in this case, the bank had previously been notified that the Tribunal had determined that the customer had lacked capacity and had appointed a guardian and administrator. This meant that the bank was on actual notice of incapacity.

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## **Training Resources for Financial Institution Staff –North American models**

Much of the focus in North America has been on developing training resources for the staff of financial institutions. This focus explicitly recognises the importance of front line staff in observing the indications of possible abuse and acting promptly to prevent loss - in combination with other measures such as community and customer education, law enforcement responses, the protective and advocacy work of Public Advocates / Adult Guardians, and the role of courts and guardianship and administration tribunals.

Many of the North American training resources have been developed collaboratively with community associations, government and adult protective services.

They include:

- Elder Abuse Training Materials on the California Bankers Association website [www.calbankers.com](http://www.calbankers.com) including a training video accessible online;
- The Maine Reporting Project for Financial Institutions, a public/private initiative between state agencies and the Maine Association of Community Banks, the Maine Bankers Association and the Maine Credit Union League. Available on [www.maine.gov/dhhs/beas/aps/bank\\_training.htm](http://www.maine.gov/dhhs/beas/aps/bank_training.htm) The Maine Reporting Project was based on the Massachusetts Bank Reporting Project, which was a collaboration of government and the Massachusetts Bank Association;<sup>73</sup>
- BITS Financial Services Roundtable Fraud Protection Toolkit, available at [www.bitsinfo.org](http://www.bitsinfo.org)

The components of the training materials we have seen include:

- Understanding the need (and the business case) for a response to elder financial abuse;
- What is elder financial abuse - some common scenarios;
- How to spot cases of financial abuse – the 'red flags';
- Response protocols and recommended ingredients;
- Understanding the legal issues;
- Reporting, including protocols for contact with adult protective services;
- Information that can be given to customers about good financial practices to reduce the risk of financial abuse;<sup>74</sup>
- Sample 'fraud alert forms – these are single page forms which ask the customer to consider a series of questions,<sup>75</sup> inform the customer that answering yes to any question makes it likely that they are the victim of fraud, and ask if they would like to talk to an official from the bank in private.

## **Response protocols and sample procedures**

All the training kits emphasise the need to have clear written response protocols for acting on concerns, including:

- A clear procedure to be followed when financial abuse is suspected or disclosed;
- A decision-making chart – who has authority to make particular decisions, when to refer a matter up the line and to whom;
- Procedures for documenting;
- Procedures for reporting – when to report to the police or adult protective agencies.

The materials include, as a template for use or adaptation by individual financial institutions, sample steps for employees to take, such as:

- Teller should seek to learn the reason for the withdrawal or for frequent withdrawals – asking clear, factual, non-threatening questions;
- Check the third party's authorisation and documentation to act for the older person. If a third party presents a withdrawal or instructions carefully verify the third party's authority to act including by direct contact with customer;
- If fraud is suspected, contact supervisor immediately (the Maine Reporting Project Training Manual talks about the 'hair on the back of your neck test'). The teller and supervisor can then review the account history and the transaction to determine if the transaction should be processed, stopped or reported to bank security or a senior bank officer, or legal advice sought;
- Supervisor should separate the customer from any companion so that they can speak to the customer alone, 'Don't let anyone else speak for the customer – this is a red flag that something is wrong';
- Supervisor may decide to offer the customer a fraud alert form;
- If the customer is in immediate danger of losing his or her money, consider delaying transaction and conferring with legal counsel or a senior officer 'Time is the enemy of the financial exploiter'
- If the customer appears to be in immediate physical danger, notify police.

Sample procedures and control measures included in the Maine Reporting Project manual are:

- A mechanism for detecting unusual activity in accounts;
- Placing an alert or 'flag' on an account to alert other tellers in the same branch or in other branches;
- Procedures for verifying suspicious transactions, including arranging a system of phone verification of suspicious transactions with housebound adults;
- Alternative banking practices – guidelines for bank staff on when to recommend such things as:
  - regular cheques being directed to the bank,
  - routine bills being paid by direct debit,
  - alternatives to obtaining ATM cards for the use of a third party or
  - protected accounts (where there may be for example a block on certain electronic banking procedures, or two signatures required for all withdrawals over a specified limit).<sup>76</sup>

## **Adapting the North American training resources**

The North American resources would be relatively easy to adapt for the Australian banking environment. We think they would form a useful basis for the collaborative development of an Australian template training program that could then be used as appropriate or modified by individual financial institutions. In any event we recommend that the North American materials be considered by members of the BFSO in internal reviews of training and procedures.

## **Towards Best Practice**

Financial abuse of the vulnerable older person is a complex issue with no one solution. We have focussed in this Bulletin on the role of banks and other financial institutions

but protecting the financial security and well-being of older Australians is a shared responsibility – shared by the community, government, family members and, where they are able to do so, the older person themselves.

For banks and other financial institutions, it needs to be the subject of internal and external discussion with the aim of well-thought out and up to date policies, practices and training programs that reduce the risk of financial abuse and consequent loss. Raising awareness amongst bank staff is important but the more difficult issue in most cases is what to do next.

We have deliberately not set out in this Bulletin a detailed prescription for best practice - articulating best practice is not a simple process and we think it needs to be the subject of consultation and collaborative discussion. We recommend, however, that such discussions commence soon.

We hope that this Bulletin makes a contribution to the current discussions about financial abuse and the development of solutions.

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

***The Banking and Financial Services Ombudsman and his staff wish you a safe and happy festive season***



**Colin Neave**  
**Banking & Financial Services Ombudsman**

## Appendix

### Resources and References additional to those cited

Queensland Elder Abuse Unit, L Sanders, *Financial abuse of Older People: A Queensland Perspective* (2005)

Elder Abuse Prevention Project, Office of Senior Victorians, *The Mismanagement and Misappropriation of Older People's Assets: How can the Financial Sector Help* Roundtable Discussion Background Paper (3 November 2005)

Wilson et al, 'Population ageing and the implications for financial markets', *Journal of Banking and Financial Services* February/March 2005, 14-16

Thomas L Hafemeister, 'Financial Abuse of the Elderly in Domestic Settings' in Richard J Bonnie and Robert B Wallace (eds), *Elder Mistreatment: Abuse, Neglect and Exploitation in an Ageing America* (2003) 382, 388-9

G Price and C Fox, 'The Massachusetts Bank Reporting Project: An Edge against Elder Financial Exploitation', 8(4) (1997) *Journal of Elder Abuse and Neglect* 64

[www.agac.org.au](http://www.agac.org.au) The website of the Australian Guardianship and Administration Committee (AGAC), which is comprised of Public Advocates, Public and Adult Guardians, Boards and Tribunals and Public and State Trustees or their equivalents throughout Australia, and has links to their sites including information about powers of attorney and protective arrangements in each state.

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<sup>1</sup> Australian Institute of Health and Welfare (AIHW) report, *Dementia in Australia National Data Analysis and Development*, [www.aihw.gov.au](http://www.aihw.gov.au) – from 2004 to 2024 the percentage of people in the population who are over 60 is projected to increase from 13% to 20%, and the percentage of those 85 and older from 1.5% to 2.9%.

<sup>2</sup> From over 175,000 in 2003 to almost 465,000 in 2031, AIHW Report noted above.

<sup>3</sup> National Centre for Social and Economic Modelling (NATSEM) and AMP, report on intergenerational wealth, AMP.NATSEM Income and Wealth Report Issue 5. June 2003, The over 62 age-group owns 33% of Australia's net worth, baby boomers 39%, Generation X 25% and Generation Y 3%.

<sup>4</sup> Deidre Macken, *Hand it Over Now, Grandpa*, *The Weekend Australian Financial Review*, September 8-9 2007.

<sup>5</sup> Dr Cheryl Tilse, quoted in *Weekend Financial Review* article noted above.

<sup>6</sup> Queensland Elder Abuse Protection Unit *Annual Report (2006)* 7.

<sup>7</sup> *Older People and the Law*, Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, Inquiry into Older People and the Law.

[http://www.aph.gov.au/house/committee/LACA/olderpeople/report.htm\\_p15](http://www.aph.gov.au/house/committee/LACA/olderpeople/report.htm_p15)

<sup>8</sup> ASIC noted in its submission to the Inquiry into Older People and the Law in the context of reporting of consumer fraud generally, 'there is an apparent reluctance by consumers to report fraud, probably due to a range of factors including embarrassment, a perception of stupidity or contributory responsibility, or a belief that nothing can be done', p16,

<sup>9</sup> See for example *Older People and the Law*, 2.97 – 2.109.

<sup>10</sup> Above

<sup>11</sup> Chapter 2, recommendations 5 & 6.

<sup>12</sup> Julian Gardner, Public Advocate for Victoria, submission to the Inquiry into Older People and the Law.

<sup>13</sup> World Health Organisation, *World Report on Violence and Health* (2002).

<sup>14</sup> BITS Fraud Protection Toolkit 2006. BITS is a non-profit US industry consortium, [www.bitsinfo.org](http://www.bitsinfo.org).

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- <sup>15</sup> The Maine Reporting Project for Financial Institutions, Trainer Reference Manual.
- <sup>16</sup> Para 2.6-2.13
- <sup>17</sup> Including concepts such as duress, incapacity, undue influence, unconscionable conduct and other equitable fraud.
- <sup>18</sup> See below, pp 9-10.
- <sup>19</sup> Undue influence can operate even if a person has full capacity. See the discussion on the legal framework below.
- <sup>20</sup> Compiled and adapted from the examples commonly appearing in the resources.
- <sup>21</sup> In a case to do with the responsibilities of solicitors acting for an attorney, *Yaktine v Perpetual Trustees Victoria Ltd* [2004] NSWSC 1078, Young CJ referred to 'red lights' which should flash when certain factors exhibit themselves – for example that the donor of the power of attorney is to receive no benefit at all from a transaction yet the donee is to receive a considerable benefit. 'One can rationalise that this is a family dealing but a prudent solicitor, when he or she sees the red light, makes enquiries.' [para. 65]
- <sup>22</sup> *Older People and the Law*, 2.33.
- <sup>23</sup> From the submission to the Inquiry by Mr Julian Gardner, Public Advocate, Victoria.
- <sup>24</sup> *Older People and the Law* 2.32.
- <sup>25</sup> We are indebted to Mr Peter Whitehead, Public Trustee, NSW, who provided a copy of his paper, 'Powers of Attorney Act 2003: How it Assists in Preventing Financial Abuse – Tips and Traps' containing a helpful discussion of the responsibilities of an attorney and relevant case law. See also Chapter 3 of *Older People and the Law*, which discusses issues associated with the financial abuse arising from the exercise of enduring power of attorney arrangements.
- <sup>26</sup> In appropriate cases, BFSO will consider whether card and PIN is an appropriate access method for the older person.
- <sup>27</sup> (1874) LR Ch App 244.
- <sup>28</sup> See *James v Australia and New Zealand Banking Group Ltd* (1986) 64 ALJR 347, 391; *Commonwealth Bank v Finding* [2001] 1 Qd R 168; *ACCC v Oceana Commercial Pty Ltd* [2003] FCA 156 (18 December 2003).
- <sup>29</sup> It can, by its conduct, assume such a duty but 'cases in which a bank lending to a customer comes to occupy a fiduciary position in which it must prefer the customer's interests to its own are rare'. Per Barrett J in *Timms v Commonwealth Bank of Australia* [2004] NSWSC 76.
- <sup>30</sup> *Selangor United Rubber Estates v Cradock (No 3)* [1968] 2 All ER 1073.
- <sup>31</sup> For an extended summary of the banker-customer relationship see *Essential Banking Law and Practice*, E. Wentworth, published on the BFSO web site [www.bfso.org.au](http://www.bfso.org.au), and the references listed in the appendix of that paper.
- <sup>32</sup> Clause 25.1 of the Code of Banking Practice.
- <sup>33</sup> Under s912A(1)(a) of the *Corporations Act 2001* (Cth).
- <sup>34</sup> As in *Lipkin Gorman v Karnale and Lloyd's Bank* [1991] 2 AC 548. Also *Varker v Commercial Banking Co of Sydney Ltd* [1972] 2 NSWLR 967 and the commentary in Tyree, *Banking Law in Australia*, 5<sup>th</sup> ed. Butterworths 2005 at 5-4.
- <sup>35</sup> Bowen LJ and Steyn J in *Macmillan Inc v Bishopgate Investment Trust plc (No 3)* [1995] 1 WLR 978.
- <sup>36</sup> *Lipkin Gorman* above.
- <sup>37</sup> [1982] NSWLR 700.
- <sup>38</sup> See the decision of Starke J in *Re McGregor* [1985] V.R. 861.
- <sup>39</sup> *Gibbons v Wright* (1954) 91 CLR 423.
- <sup>40</sup> [1906] VR 711 at 720.
- <sup>41</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474 (Deane J).
- <sup>42</sup> *Amadio* at 461 (Mason J).
- <sup>43</sup> *Johnson v Buttress* (1936) 56 CLR 113 at 134-135 (Dixon J).
- <sup>44</sup> *Johnston v Buttress* at 119, 122 (Latham CJ), 124 (Starke J), 134-135 (Dixon J), 142 (McTiernan J).
- <sup>45</sup> *Union Fidelity Trustee Co v Gibson* [1971] VR 573 at 577-8.
- <sup>46</sup> Meagher, Gummow & Lehane, 'Equity Doctrines and Remedies' 3<sup>rd</sup> ed. Butterworths [1511].
- <sup>47</sup> *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, affirming the 'rule' in *Yerkey v Jones* (1939) 63 CLR 649, from the judgment of Dixon J.
- <sup>48</sup> In *Garcia v National Australia Bank*, Kirby J, dissenting, gave as reasons for rejecting the principle: historical anachronism, rejection of discriminatory stereotypes, marriage is not 'a suspect tendency', economic arguments and unacceptable discrimination.

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- <sup>49</sup> *National Westminster Bank plc v Morgan* [1985] AC 686. Manifest disadvantage may be, for example, inadequate consideration. Note, however, the discussion in Meagher, Gummow & Lehane, above, at [1524] as to whether manifest disadvantage is required in Australia.
- <sup>50</sup> In relation to the elderly in particular, see F Burns, 'Undue Influence Inter Vivos and the Elderly' [2002] MULR 27 and the cases referred to in that article.
- <sup>51</sup> *Bank of NSW v Rogers* (1941) 65 CLR 42.
- <sup>52</sup> Noted above.
- <sup>53</sup> (1941) 65 CLR 42.
- <sup>54</sup> [1999] WASC 77.
- <sup>55</sup> See F Burns above, fn 13, referring to *Bridgewater v Leahy* (1988) 194 CLR 457, 477-8 (Gaudron, Gummow and Kirby JJ).
- <sup>56</sup> *Commercial Bank v Amadio* (1983) 151 CLR 447 (Deane J).
- <sup>57</sup> Above
- <sup>58</sup> *Blomley v Ryan* (1956) 99 CLR 415. In *Commercial Bank v Amadio*, the factors were age together with limited English.
- <sup>59</sup> *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.
- <sup>60</sup> *Attorney-General NSW v World Best Holdings* [2005] NSWCA 262 at [121].
- <sup>61</sup> Sections 12CA, 12CB and 12CC.
- <sup>62</sup> (1874) 9 Ch App 244. The first limb of liability enunciated by Lord Selbourne at 251, is knowing receipt of some part of the trust property.
- <sup>63</sup> See generally Meagher, Gummow and Lehane above, [1332-1339].
- <sup>64</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, [2007] HCA 22. The approach in the United Kingdom differs. See *Royal Brunei Airlines v Tan* [1995] AC 379.
- <sup>65</sup> *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 at 254.
- <sup>66</sup> Note that 'knowledge of facts which would put an honest and reasonable person on inquiry' is generally not accepted as establishing knowledge, *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, from the comments of Barwick CJ, Gibbs J and Stephen J.
- <sup>67</sup> From *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461.
- <sup>68</sup> Described by Tyree in *Banking Law in Australia* as 'by far the worst-defined of any of the four categories of exception' 4<sup>th</sup> ed. at 17.3.
- <sup>69</sup> 2.1(f) National Privacy Principles, Privacy Amendment (Private Sector) Act 2000 [www.privacy.gov.au](http://www.privacy.gov.au) .
- <sup>70</sup> For information about the various state and territory adult protective agencies see [www.agac.org.au](http://www.agac.org.au) the website of the Australian Guardianship and Administrative Committee and the related links.
- <sup>71</sup> Discussed in 'The Mismanagement & Misappropriation of Older People's Assets: How can the Financial Sector help?' A Roundtable discussion, 3 November 2005, Elder Abuse Prevention Project, Office of Senior Victorians.
- <sup>72</sup> <http://www.austlii.edu.au/au/cases/vic/VCAT/2007/666.html> .
- <sup>73</sup> Information about the Massachusetts Project is at [www.preventelderabuse.org/communities/best.html](http://www.preventelderabuse.org/communities/best.html) .
- <sup>74</sup> For example, know what you are signing, be careful of requests by phone, monitor your accounts and statements frequently, if statements are late contact your bank, keep up with your friends (social isolation is a risk factor), put all financial instructions in writing – be specific, sign your own cheques and withdrawal vouchers and do not sign blank cheques or vouchers, use direct deposits for regular bills, if someone is helping you manage your finances, get a trusted third party to review your account statements, do not sign over money or property to anyone in return for care, even a family member or friends without a written agreement which is reviewed by a lawyer – give someone else a copy, do not allow anyone, even a relative to put their name on your account without your express consent – your financial institutions can set up a separate account in both names with automatic transfer of limited funds [Maine Reporting Project]
- <sup>75</sup> For example, 'Has a stranger asked you to withdraw money for any reason? Has anyone befriended you and is now asking you to put up money or to share cash or valuables? Have you been pressured or threatened by a stranger, friend or family member for money or for access to your account?
- <sup>76</sup> The Trainer Reference Manual notes that 'at present, adults having difficulty managing their finances, or who are unable to visit the financial institution themselves are frequently advised to open joint accounts with caregivers. Joint accounts have proven to be extremely vulnerable to abuse. There is little recourse when the financial institution suspects financial exploitation, or when the victim seeks to recover the funds'.