

The exclusion of women from financial services and the prospects of a human rights solution under Australian law

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This paper evaluates the prospects for employing the paradigm of human rights to address the continued exclusion of women from financial services in Australia. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) contains two human rights of relevance: the right to credit as an aspect of women's socioeconomic life and their right to access agricultural credit in the rural context. An examination of state party reports submitted under CEDAW considers four obstacles impeding women's access to credit: lack of land ownership, their marital status, so-called sociocultural barriers and the commercial practices of financial institutions. These obstacles are replicated to varying degrees in the local context. The existence and ambit of a human right to access financial services for women in Australia can be derived from an analysis of consumer credit law, orthodox contractual principles and antidiscrimination legislation. Although the relevant jurisprudence yields important debtor entitlements and the obligations of credit providers, it also suggests several substantive and procedural obstacles hampering the common law development of that right. More explicit resort to a human rights framework, as illustrated by other jurisdictions, is warranted and justifiable.

Introduction

Financial services may be defined as insurance, superannuation, grants, loans, mortgages and other forms of credit. Individuals are excluded from such services when they are unable to participate fully in the socioeconomic structures of mainstream community and lack access on account of their geographic location, economic situation or other 'anomalous' social condition (Connolly and Hajaj 2001, 10). More particularly, the availability of branches, technology, communication, educational levels, financial abilities and the preconditions established by banks operate effectively to exclude women (Connolly and Hajaj 2001, 10). This article considers the obstacles and challenges confronting women generally in their access to financial services and evaluates the feasibility of employing the human rights paradigm to address their marginalisation within Australia. Part 1 argues that women are excluded from financial services. This proposition will be established by

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an analysis of state party reports submitted within the framework of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the observations of the Committee on the Elimination of Discrimination Against Women (the Committee), the UN body responsible for monitoring implementation of that instrument. This material is a useful source for comparing different national experiences and identifying the range of obstacles confronting women in their access to credit. Part 2 critically examines contemporary legislative and judicial approaches within Australia intended to address discrimination against women in their access to financial services. This Part will also extrapolate the existence and content of a human right to financial services from the relatively well-established human right to credit. Although the contours of that right are discernable from antidiscrimination legislation, orthodox contractual principles and consumer credit law, regulatory developments within other jurisdictions suggest that more explicit resort to human rights discourse is necessary in order to protect and promote the financial interests of women.

Part 1: The human rights to credit for women in the context of CEDAW

Access to credit enables immediate consumption in the absence of savings. It typically involves borrowing funds and an obligation to repay. Furthermore, credit access has become an essential part of modern living as an emergency lifeline for unexpected financial situations and to address income shortfalls. Contemporary products include secured property loans, lending for goods and services, overdrafts, running accounts, short-term cash loans and credit or store cards. The range of actors includes banks, credit companies, mortgage lenders, mail-order companies, cheque cashers, debt collectors, financial advisers and credit brokers.

CEDAW envisages two distinct rights to credit for women. First, Art 13(b) contemplates state parties adopting 'all appropriate measures' to eliminate discrimination against women in their socioeconomic life to ensure, on a basis of gender equality, 'the right to bank loans, mortgages and other forms of financial credit'. This right was not mentioned in earlier intergovernmental drafts prior to its adoption until Guyana proposed a right of 'equal access' to loans (Rehof 1993, 148 and 150). Second, Art 14(2)(g) of CEDAW contemplates governments taking 'all appropriate measures' to eliminate discrimination against women in rural areas to ensure, again on the basis of gender equality, their right 'to have access to agricultural credit and loans'. This provision was inserted at the insistence of the United Kingdom and the preparatory materials do not indicate what was intended (Rehof 1993, 160). Thus, while women are entitled to access credit in both the socioeconomic and the rural contexts, the definition and ambit of these rights were uncertain at the time of adoption.

There are other provisions of CEDAW that add to those more specific articles. First, Arts 2 and 3 oblige state parties to adopt all appropriate measures to eliminate discrimination against women and ensure gender equality. Second, under Art 11 state parties must ensure women's right to work and prevent discrimination against them on the basis of marital status. Third, Art 16(1)(h) requires governments to eliminate discrimination against women in marital matters and family relationships, including ensuring identical spousal rights in respect of administering property. Fourth, men and women must enjoy the same legal capacity, including equal rights to conclude contracts under Art 15(2). Hence, '[w]hen a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband's or a male relative's concurrence or guarantee, she is denied legal autonomy' (CEDAW Committee 1994, para 7). Finally, Art 14(2)(e) requires states to ensure a woman's right to organise self-help groups or cooperatives so that they obtain equal access to employment opportunities.

The Declaration and Platform for Action of the Fourth World Conference on Women held in Beijing during 1995 is an additional feature of the internationally agreed mandate concerning women's rights. The Declaration commits states to ensuring equality of access to economic resources including credit as a means of furthering the advancement and empowerment of women (Beijing Declaration 1995, para 35). The Platform for Action noted a direct relationship between women's poverty and lack of credit access (Platform for Action 1995, para 51). Governments attending 'Beijing + 5' additionally undertook to promote women's rights and support women entrepreneurs by increasing their access to credit (UN General Assembly Resolution S-23/3 2000, paras 68(h), 74(a), 75 and 82(g)). Finally, implementing the Beijing Platform for Action and fulfilling CEDAW obligations was considered to be 'mutually reinforcing in achieving gender equality and the empowerment of women' at 'Beijing + 10' (UN Commission on the Status of Women 2005, para 4).

An illustrative sample of national approaches described by governments in state party reports submitted under CEDAW (and listed in References below) is instructive for Australia. Some states ensure woman's rights, including credit access, under their national law. Indeed, constitutional provisions such as those found in Cambodia call upon the government to give particular attention to credit access when promoting economic development. Similarly, the Kuwaiti government (68) must supervise the organisation of credit within the state. Furthermore, public institutions can be legally obliged to afford equal access to financial services. However, a woman's right to access credit is also influenced by the extent to which she enjoys independent legal capacity under other national laws. This includes her ability to conclude contracts, own or inherit property and freely enter commercial transactions. Credit applicants are ordinarily expected to demonstrate majority age,

sound mental health, a bank account, sufficient collateral and regular income (see further Holt and Ribe 1991). Hence, as observed by Togo (111), the prospects of women obtaining credit may be 'slim' as a 'practical matter', notwithstanding gender equality in principle.

Statements extracted from a number of other state party reports indicate a range of 'practical' constraints. Collectively they suggest that, notwithstanding the entitlements outlined above, women face exclusion in seeking to access credit. For example, on the issue of land ownership, Gabon (20) suggested that 'only very few women' can satisfy the required credit conditions. The Angolan government ((1-3rd), para 9.1) reported that within its state women encounter difficulty due to their lack of land ownership, the traditional form of collateral for secured lending under national property or securities law. Guatemala (72) stated that this was particularly a problem for indigenous women. India (para 291) claimed that 'strong cultural traditions in a predominantly patriarchal society', particularly in rural areas, subvert the property rights of women notwithstanding its efforts to encourage greater property ownership. Zambia (46-47) asserted that even when women possess title to real property, 'attitudes hardly change' and spousal consent is required for loan applications. Samoa (81-82) claims that customary land tenure systems prevent banks from obtaining satisfactory security and that collateral substitutes are unavailable.

A number of states identified a woman's marital status as affecting her access to credit. For example, several reported that their national laws enshrined the right of married women to conclude credit agreements with financial institutions without spousal permission (Burundi, 33; Cambodia, para 355; Lebanon, 31; Samoa, 21-22; Tunisia, para 805). This included women married under Sharia law and single mothers (whether widowed or divorced) and unmarried women concluding mortgage arrangements without any family-related preconditions.

Notwithstanding national legal requirements, several states note that financial institutions typically demand additional guarantees (Bhutan, para 11; Brazil, 185; Luxembourg, 86). Benin (para 15.1) and Cameroon (76-77) observed that this commonly includes the husband's consent. In Lao (46-48), women require authorisation from a male 'family representative'. This also arises in Eritea (41-42) for common property acquired after marriage. Brazil (192), Gabon (20), Malta (para 3.10) and Togo (111) reported that neither spouse can sell, assign or mortgage jointly owned property to third parties without having first obtained the other's written authorisation. Although intended to protect both spouses, in practice the operation of these laws adversely affects women. In states such as Brazil (189) and Malta (para 16.12) joint consent is presumed for daily household purchases on credit. As

observed by Burundi (33), such an insignificant amount preserves the male prerogative over relatively larger mortgages and commercial loans. Indeed, a theory of 'restrictions to the actions of spouses' formerly applied in Brazil (192) for the reason that it would be 'very embarrassing' for a man to have to acquire his wife's consent to access credit when conducting his commercial activities. Men were singularly responsible for property administration and assets could be alienated if women assumed financial obligations.

Social and cultural barriers impairing women's economic participation generally are noted in several CEDAW country reports. Lack of credit access is accordingly symptomatic of a broader failure to fully respect women's rights. In countries such as Gabon (3), women's access to credit is also impeded by these 'social and cultural constraints'. Morocco (20) indicated that this form of gender discrimination persists 'on a daily basis'. In Eritrea (47–48), married women are denied credit access due to 'petty obstacles' such as 'prevailing traditional attitudes' and 'religious reasons'. The 'dead hand' of customary practices prevents women from owning land in Cameroon (76–77), whereas in Gambia (39 and 44) women are only entitled to usufructuary rights.

These so-called 'traditional' prejudices against women are particularly prevalent in rural locations. In Brazil (184), existing 'gender asymmetries [are] reinforced by stricter cultural standards' within rural areas. Tunisia (para 919) reported that the 'significant social and cultural constraints' upon women include 'the image of women in rural society'. For 'traditional rural households' within Zambia (46), 'men control livestock, while women cultivate' and 'women are treated as labourers'. In these states, women may be secluded to uphold standards of modesty or morality and subjected to prevailing norms of what is considered acceptable work for each gender. Yemen (75), moreover, observed that 'a good deal depends on the cultural environment of the woman's family'.

In states such as Bhutan (3), women's credit access is influenced by ethnicity. Membership of an ethnic minority in addition to gender is sufficient to disqualify women. Guatemala (12), for example, has undertaken to eliminate de facto or de jure discrimination against indigenous women. Credit programs in Costa Rica (para 39) are designed following consultation and respect for customary traditions. Cross-community interaction through self-help groups is useful for dismantling social barriers, including caste or religion. However, such factors can merely replicate existing patterns of inequality and women become conditioned to 'culturally-patterned behaviour' (Rahman 1999). Hence, where discrimination is socially entrenched, credit access will not improve a woman's community standing.

Sociocultural constraints can also be a euphemism for male stereotypes. Gender stereotypes impeding women's socioeconomic rights apply in all states, operate in different ways and are not limited to national credit law (see, for example, Bunch 1990). 'Traditional viewpoints' prevailing in El Salvador (6th, 25) identify women as unreliable financial managers. Credit was denied to rural women in Brazil (180) because 'they were still considered dependents of men'. Jordan (19) reported that women received less credit given their 'specialized' economic contributions and a 'social system based on male ownership'. In Costa Rica (para 462), financial institutions employ 'male-centred criteria' such as requiring women to register family assets in their husband's name.

Finally, state party reports confirm conclusions elsewhere that the commercial practices of financial institutions effectively discriminate against women (Collard et al 2001). For example, Belgium (76) and Latvia (para 249) reported that financial institutions including banks assess creditworthiness by reference to repayment ability, financial stability and solvency. Guatemala (68–70) observed that a woman's access to commercial credit sources also depends upon age, marital status, religion, ethnicity (including indigenous origin), title to property, education (including literacy), residence (urban or rural), family commitments (including household responsibilities and children) and employment situation.

Gambia (39 and 44) claimed that '[a]lthough there are no discriminatory laws preventing women from accessing credit, in practice women have less access to credit since financial institutions have established conditions that the majority of women cannot fulfill'. Several states employed the example where title to property (real estate or fixed assets) remains the 'prerogative of men', thereby making it impossible for women to satisfy collateral requirements (Burkina Faso (2nd–3rd), 21; Morocco, 47–48; Nepal, 111). Many states identified additional obstacles: insufficient supporting guarantors (including spousal surety), high transaction costs (including interest rates), lack of available funds, irregular employment and insufficient qualifications (in financial planning, funds management or commercial trading) (Albania, para 9.2; Angola (4th–5th), 44; Benin, para 14.11; Burundi, 33; Costa Rica, para 461; El Salvador (6th), 25; Equatorial Guinea, 14–15; Guyana (2nd), para 13.3; Latvia, para 252; Malta, para 13.9; Zambia, 46 and 55). Costa Rica (para 458) and Mali (48–51) noted that assets may be registered in the partner's name, income records may be lacking or application times may be inconvenient.

The terms and conditions demanded by the financial services sector are particularly onerous for women farmers, a point made by Cameroon (76–77). Once again, land ownership is critical (Burkina Faso (2nd–3rd), 23; India, para 307; Nicaragua, 14). Credit access is also impeded by low education, illiteracy and inadequate

information on alternatives (Obina 1996). Time-consuming and complicated banking procedures in Costa Rica (para 509) make credit access 'very limited' for women. Additional difficulties include restricted access to productive resources and lack of marketing in Cameroon (84–85) and Yemen (84), as well as land shortages, impoverished soil, lack of agricultural equipment and marginal profit in Benin (para 14.1). Guatemala (71) claimed that subsistence labour is considered inherently domestic work and is therefore unrecognised and unpaid. Several states noted that such factors divert rural women towards informal credit sources (Costa Rica, para 461; Albania, para 10.2.5; Ecuador, para 263; Eritrea, 41–42; Gabon, 23; Yemen, 85).

Women are not denied credit simply because they lack the attributes desired by financial institutions. Women are more likely than men to apply for loans and less likely to exclude themselves voluntarily from the process (Baydas et al 1994, 1079–80). Uzbekistan (para 79) noted supply-side obstacles, including banker inexperience or apathy with low-income-generating projects, the short-term nature and low quota of loans, underdeveloped insurance and the lack of support services. Additional deterrents confronting rural women include unattractive government regulation, inflexible products or services and long processing times. Women entrepreneurs also receive smaller loans than men (Sanchez 1998). In Brazil (185), women's lack of expertise is compounded by the prejudices of financial agents. For example, 'backward attitudes' persist in Gabon (20) from 'individual banking officials acting on their own initiative'. In Burkina Faso (2nd–3rd, 21) women are perceived as risky clients due to a 'lack of creativity and competitiveness'. In El Salvador (6th, 25) staff must be informed of the importance of gender equality.

Several states (Guinea, para 13.1; Malta, para 15.4; Tunisia, para 812) have commented upon the extent to which the commercial practices of the financial services sector effects discrimination against women, thereby depriving them of their rights to access credit. The fact that this is partly driven by prudential regulations explains the absence of criticism. Yemen (75) hypothesised that profitability considerations and risk assessment accounted for discrimination between working women and housewives. Proposed industry solutions include tailoring banking procedures, female staff, permitting collateral substitutes, reducing male dependency and broadening the scope of eligible commercial activity (UN Capital Development Fund 2002, 13–15).

Several conclusions follow from this brief review of state reports under CEDAW. As noted above, the convention's terminology envisages a right for women to credit per se in the socioeconomic sphere, whereas women are only entitled to equality of opportunity within the rural context. Although governments are insufficiently conscientious about eradicating discrimination, they are only obliged to adopt 'all

appropriate measures'. The reasons proffered by them should be treated skeptically, as possible attempts to disclaim responsibility for persistent discrimination against women.

The adverse situation confronting rural women worldwide is of particular concern. Their circumstances include insecure and seasonal low-skilled employment within casual labour markets, few advancement opportunities, laborious work, long hours, low pay and poor health and safety conditions (UN Research Institute for Social Development 2004, 97–106). Approximately 5 per cent of total agricultural credit reaches rural women and African women receive less than 10 per cent of all agricultural credit (UN Development Programme 1995). Tunisia (paras 924 and 967) acknowledged that rural women are neglected by national policy and underrepresented in decision-making. Financial institutions in Guinea (para 13) are similarly 'uninterested' in small farmers. To ensure food security, credit was provided to farmers through agricultural development banks between the 1950s and the 1970s (Adams 1995). Unsustainable institutions, subsidies captured by wealthy farmers, political patronage, inefficiency and excessive write-offs occurred in the 1980s (Binswanger and Khandker 1995). Liberalisation during the 1990s limited government roles to supervising a minimum financial infrastructure in rural areas (Lapenu 2000). Contemporary initiatives include collateral-free loans, inculcating savings habits, encouraging income-generating activities (Bhutan, para 5.2), training (Peru, para 275) and educational grants (Australia, para 225).

Finally, measuring access is not straightforward. National indicators include the percentage of households possessing savings accounts, mortgages or insurance; maintenance costs; and the number of households within one hour of a financial institution by public transport (Honohan 2005, Table 2). It is also difficult to identify the correct target for credit penetration or the desired degree of consumer participation in credit markets. One hundred per cent credit access has not been a public policy objective, should not necessarily be one and is not achievable in many states (Claessens 2005, 24). Increasing access carries significant risks and households can function without indebtedness. With these considerations in mind, contemporary Australian law and practice will now be evaluated for the prospects of entrenching a human right to financial services generally and for improving women's access to credit in particular.

Part 2: A woman's right to access credit and financial services under contemporary Australian law

An entitlement to access credit within a human rights framework is not an explicit feature of Australian credit regulation per se. However, individual interests are

indirectly protected through the piecemeal application of other legislative measures. For example, the *Trade Practices Act 1974* (Cth) seeks to protect and promote consumer interests. Thus, representations implying continued access to credit may qualify as misleading or deceptive (*Tableau Pty Ltd v Custom Credit Corporation Ltd*, 1992, at [31]). Additionally relevant legislation includes the *Fair Trading Act 1987* (NSW), the *Sale of Goods Act 1923* (NSW) and financial disclosure rules pursuant to the *Corporations Act 2001* (Cth).

Most prominently, the *Uniform Consumer Credit Code* (UCCC) is consumer protection legislation applicable to all states and territories. The UCCC as annexed to the *Consumer Credit Act 1994* (Qld) applies as New South Wales law by virtue of s 5 of the *Consumer Credit Act 1995* (NSW). The NSW *Consumer Credit Code* commenced on 1 November 1996. Credit involves one person (the debtor) incurring a deferred debt to another (the credit provider) (s 4).

Unless otherwise established, the UCCC applies to credit contracts, mortgages and guarantees. It encompasses credit provided for wholly or predominately personal, domestic or household purposes to natural persons resident in NSW (s 6(1)). It is inapplicable where debtors declare that credit is wholly or predominantly intended for business or investment purposes (s 11(2)). Statutory declarations to that effect thereby exclude any protection under the *Consumer Credit Code*. The purpose of the UCCC is to promote truth in lending and to allow borrowers to make informed choices (*Yeshiva v Marshall*, 2004, at [55]). The expression 'personal, domestic or household' is interpreted in accordance with its ordinary meaning and it is determined as a question of fact whether credit was provided for these purposes.

Australian courts have sought to bring credit contracts under the UCCC, particularly where borrowers inattentively relinquish the benefit of its consumer protection provisions. 'Personal', 'domestic' or 'household' are given their full meaning and 'personal' use has a wider ambit than 'domestic' or 'household', which have similar connotations (*Minchello v Ford Motor Co of Australia Ltd*, 1988). The word 'personal' means 'pertaining to the person' (*Le Cras v Perpetual Trustee Co Ltd*, 1967, at 715). 'Pertaining to' means 'belonging to' or 'within the sphere of' (*R v Kelly; Ex parte Victoria*, 1950).

However, judicial opinions have differed in establishing jurisdiction under the UCCC. Early cases considered the relevant intention to be 'that which a reasonable person standing in the shoes of the credit provider would have understood the predominant purpose for which the credit is provided' at the time of concluding the contract (*Rafiqi v Wacol Investments Pty Ltd*, 1998, Brabazon DCJ, approved in

Park Avenue Nominees Pty Ltd v Boon (on behalf of Weir), 2001). Judicial scrutiny has more recently turned to examining the substance of the transaction in light of contractual performance. Hence the 'purpose' of a credit transaction under the UCCC considers what the money was used for (*Linkenholt Pty Ltd v Quirk*, 2000, Gillard J). In *Jonsson v Arkway Pty Ltd*, 2003, Shaw J commented that 'insufficient attention has been given to the need to broadly and liberally interpret beneficial legislation of this kind' (at [28]). Hence, where credit is secured for both personal and investment purposes (for example, re-financing a home loan to benefit another), the UCCC applies if the transaction is predominantly for personal purposes (above, at [31] and [36]).

Prioritising individual above other (especially commercial) interests is consistent with the human rights paradigm. An application for relief was successful where a father entered a loan contract solely to help his son out of financial difficulty and duress was evident (*Boon v Park Avenue Nominees Pty Ltd*, 2001, at [69]). Similarly, 'the substance and reality' of the transaction considered in *Yousef v GE Mortgage Solutions Ltd (Commercial)*, 2003, was to re-finance a home loan. Although substantial compliance with a s 11 declaration is sufficient, courts are reluctant to enforce the possibility that individuals have waived their entitlements under the UCCC.

Consistent with the principle of access to information, consumers must be informed of the terms and conditions of credit contracts. This includes the annual interest rate charged (s 10B, *Consumer Credit Act 1995* (NSW)). Under s 11, the maximum permissible rate is 48 per cent (reg 7, *Consumer Credit Special Provisions Regulation (No 583) 2002* (NSW)). Short-term contracts (62 days or less) are calculated using designated formulas (s 9 and reg 8). Interest rates include all applicable fees and charges (s 4, Sch 2, *Consumer Credit Amendment (Maximum Annual Percentage Rate) Act 2005* (NSW)). Hence, in *Moore v Fast Access Finance*, 2002 (at [31]–[32]), an interest rate of 240 per cent per annum was declared void and excess moneys were recovered.

Credit in NSW includes any form of financial accommodation other than business or manufacturing purposes and the purchase of services (s 5, *Credit Act 1984* (NSW)). Credit contracts must be written (s 31) and disclose the date of signature, description of goods or services purchased, amount financed, commission charges, annual percentage rate and installment details (ss 35 and 36). Similarly, insurance contracts must be in writing and contain information concerning the subject matter, parties, amounts payable, time period and nature of risk covered (s 130). An 'acceptable rate of interest' is that which credit providers agree to accept, assuming that debtors observe all contractual terms (s 5).

Additionally consistent with a human rights framework is that the *Credit Act* does not exclude, modify or restrict any right or remedy that individuals would otherwise enjoy (s 161). Attempts to limit the right to revoke a credit offer before acceptance are void (s 77). Furthermore, debtors can extend time periods and reduce or postpone payments (but not vary annual interest rates) if they are presently unable to discharge their obligations due to illness, unemployment or other reasonable cause but anticipate being able to do so in the future (s 74).

The obligations imposed upon credit providers pertain to billing cycles, chargeable amounts, fees and charges, annual interest rates, statements of account, prior notice of variation of terms, correcting billing errors and refunding moneys owed (ss 48–68). Providers are moreover prohibited from advertising credit availability that is false, misleading or deceptive or omits information concerning amounts repayable, frequency or applicable charges (s 121). Representations concerning interest rates and charges are assessed against similar contracts. Furthermore, providers cannot induce individuals into obtaining credit at their residential or business premises (s 122).

It is readily apparent that NSW law employs a contractual offer and acceptance approach to financial services provision. The debtor's statutory rights and obligations must be disclosed before contracts are concluded (s 14, *Consumer Credit Act 1995* (NSW)). Contracts must additionally contain the credit provider's name, the credit amount, security offered, annual percentage rate, basis for calculating interest charges, repayments and their frequency, interest fees and charges payable, notification of changes, statements of account, default rates, enforcement expenses, commissions and insurance (s 15). Debtors can terminate in writing before credit is obtained or goods and services acquired (s 19).

The respective entitlements and obligations of debtors and providers as well as their interaction are relevant to ascertaining the scope and content of a general right to access credit. For example, debtors can pay out credit contracts at any time (s 75). Courts may determine amounts if credit providers fail to do so (s 77). Debtors also enjoy the opportunity to remedy default within the notice period (s 81). Where credit providers do not vary contractual terms by agreement with debtors, then courts may do so (s 68).

Access to judicial remedies and considerations of equity are additional attributes of a human rights orientation. Courts can reopen transactions where credit contracts are concluded in unjust circumstances (s 70). 'Unjust conduct' includes dishonesty, unfairness, breach of contract or contravening consumer credit law (s 17) and is unconscionable, harsh or oppressive. Courts analyse public interests, likely

consequences, relative bargaining power, the practicality of negotiation, compliance difficulties, protecting legitimate interests, age, physical characteristics, mental conditions, contractual forms, language intelligibility, independent legal or other expert advice, contractual disclosure and comprehension, unfair pressure, awareness of hardship, justification, comparable arrangements and any other relevant factor. The court can consider subsequent conduct but not circumstances that were unreasonably foreseeable.

In terms of remedy, the court can reopen accounts, relieve debtors of unreasonable amounts, set aside or revise agreements, discharge mortgages, afford other relief thought fit to grant, transfer goods and make any ancillary or consequential orders (s 71). Furthermore, courts can annul or reduce interest rates, establishment fees or early termination charges if their maintenance is unconscionable (s 72). Unconscionability is assessed against unreasonableness, cost or unjustifiable discrimination against similarly situated individuals.

These enforcement possibilities complement the obligations of credit providers. First, credit providers must not advertise the availability of credit unless regulatory requirements are satisfied (s 140). False or misleading representations in relation to 'a matter that is material to entry into a credit contract' cannot be made (s 144). Harassment is also prohibited (s 145). Providers cannot visit residential premises to induce individuals into obtaining credit ('canvassing'), except by prior arrangement (s 146). Second, their obligation to account includes regular statements enclosing specific information (ss 31–36A). Third, contractual enforcement is preconditioned by default and 30 days' notice (s 80).

Finally, several industry-specific regulations are noteworthy. Home loans fall under the *Credit (Home Finance Contracts) Act 1984* (NSW) and the *Credit (Home Finance Contracts) Regulation (No 523) 1984* (NSW). The *Consumer Credit Administration Act 1995* (NSW) ensures that finance brokers provide adequate information and protection from unfair practices (s 4A). Contracts must disclose similar information to that identified above (s 4C). Clients can apply to a tribunal alleging breach of contract, unjust conduct or excessive commission and seek orders for payment, an injunction or a declaration (s 4J). The *Consumer Credit Administration Regulation (No 582) 2002* (NSW) further regulates the industry.

Having considered the contours of a right to financial services generally, it remains to identify additional laws of particular relevance to the position of Australian women. National antidiscrimination legislation prohibits differential or less favourable treatment where impermissible requirements are imposed (direct discrimination) and where 'facially neutral' conduct has substantially the same

adverse effect as a discriminatory practice (indirect discrimination) (*Waters v Public Transport Commission*, 1991, Mason CJ and Gaudron J, at 357 and Deane J, at 382). 'Direct' discrimination between men and women is also defined as 'acts involving different treatment' and 'indirect' discrimination as 'acts having a disparate impact' (*Australian Iron & Steel Pty Ltd v Banovic*, 1989, Deane and Gaudron JJ, at 175).

The *Discrimination Act 1991* (ACT) seeks to eliminate discrimination, promote gender equality and ensure equal opportunities for all (s 3). It applies to discrimination on the basis of inter alia sex, marital status, pregnancy and age (s 7). The Act makes it unlawful to discriminate against individuals when providing goods, services or facilities (s 20). Discrimination occurs if individuals on account of their attributes are treated unfavourably or conditions and requirements have the effect of disadvantaging them (s 8). As noted above, these two categories are not mutually exclusive (*Edgley v Federal Capital Press of Australia Pty Ltd*, 1999, at [35] and [36]). Unfavourable treatment produces different consequences as between persons with different characteristics. Conditions and requirements are unreasonable in light of the degree of disadvantage, feasibility of mitigation and proportionality. Although a causal link must be established between the impugned conduct and the adverse consequences, a discriminatory intention, motivation or attitude is unnecessary (*Best Practice Education Group Ltd t/as Blue Gum School v Department of Education & Community Services*, 2002, at [18]).

The *Anti-Discrimination Act 1977* (NSW) also prohibits discrimination for reasons of sex or marital status. Discrimination occurs where a 'perpetrator' treats an 'aggrieved person' less favourably than in similar circumstances or requires them to comply with unreasonable conditions on the basis of characteristics generally appertaining to individuals of that sex or marital status (ss 24 and 39). Refusing to provide goods and services or imposing terms for their provision are captured (ss 33 and 47). 'Services' include those relating to banking, insurance, grants, loans, credit or finance (s 4). However, discrimination concerning superannuation is permissible if there is reasonable reliance upon actuarial or statistical data (ss 36 and 49). Insurance policies are exempted with respect to sex discrimination (s 37).

CEDAW is locally implemented through the *Sex Discrimination Act 1984* (Cth). Discrimination arises where the 'discriminator' treats an 'aggrieved person' less favourably than individuals of the opposite gender for reasons of sex or generally imputed characteristics and in the same or not materially different circumstances (s 5(1)). Discrimination includes refusing to provide goods, services and facilities or the conditions or manner of their provision (s 22(1)). Although 'services' are defined in identical terms as above (s 4(a)) to include financial services, its meaning can become arguable. For example, Kirby J in *IW v City of Perth*, 1997, considered that the

term was not unarguably clear, whereas Brennan CJ and McHugh J concluded that providing advice or information constituted a service. Significantly, 'services' should be narrowly construed only when clearly required by definition or context because Australian courts have a 'special responsibility' to purposively interpret legislation designed to protect basic human rights (*IW v City of Perth*, 1997, at 710–11 per Dawson and Gaudron JJ). It accordingly becomes a matter of properly characterising the offending conduct (*Best Practice Education Group Ltd t/as Blue Gum School v Department of Education & Community Services*, 2002, at [36] and [38]).

Although credit is ordinarily distinguished from superannuation, it is important to note that 'services' includes that dimension (*Wylie, Torvaldsen & Torvaldsen v WA Govt Employees Superannuation Board*, 1996. In New Zealand, non-discriminatory treatment was adjudged to apply to superannuation services in *Coburn v Human Rights Commission*, 1994 (at 333–36), under its *Human Rights Act 1993* (NZ). However, this conclusion does not resolve all superannuation issues: for example, whereas employer contributions do not involve the provision of a service (*Re Manufacturing Grocers Employees Federation of Australia; Ex parte Australian Chamber of Manufactures*, 1986, at 351), superannuation schemes administered by trustees are otherwise (*Australian Education Union v Human Rights and Equal Opportunity Commission*, 1997).

Finally, credit access has arisen as an issue in several other legal contexts. For example, credit cards and joint credit lines were taken into account for assessing migration applications (*Luu, Thi Thu Hang*, 2003, at [22]). The same is true under Australian refugee law (*RRT Reference N98/23844*). The financial obligations of spouses are relevant to family law. Finally, removing access to a credit card — 'a vital tool of trade' — was held not to breach an employment contract (*Vincenzo Tranchita v Wavemaster International Pty Ltd*, 1992).

Although such examples illustrate the range of contexts in which credit access plays a role, there need not be greater equality between men and women. The impact of credit access upon socially vulnerable individuals and their entitlements under social security legislation is a case in point. The *Sex Discrimination Act 1984* (Cth) does not apply to the *Social Security Act 1991* (Cth). In *Secretary, Department of Social Security v Kozhaya Dagher*, 1996, it was adjudged that the definition of a 'special widow' was limited to women. Since the 'matter is one of policy, and policy change is a matter for the legislature', courts must 'with regret' apply the law as it stands (above). In *Cahill and Secretary, Department of Family and Community Services*, 2005, a woman was entitled to a sole parent pension notwithstanding that she enjoyed access to her former husband's credit union account to purchase food, school items and clothing for their children (at [12]). Would a more holistic approach offer any advantages to the existing patchwork of different national laws?

The merits of employing a human rights framework

If the existence and scope of an individual entitlement to access financial services is discernable from consumer credit and antidiscrimination law, is it necessary or desirable to characterise it theoretically as a human right? Such a perspective raises questions of access (individual convenience and market barriers), reliability (available when desired), flexibility (tailoring the range, type and quality of financial services or products to individual needs) and continuity (one-off or repeat loans). There are several advantages arising from an explicit human rights orientation. First, basic needs are formally recognised and operationalised by raising awareness in favour of individuals currently lacking access. Second, the paradigm pursues equality between individuals because human rights are universally applicable and enjoyable by all. Third, as a corollary to the obligations incumbent upon government, individuals are empowered to claim a beneficial entitlement through the rule of law.

It is arguable whether consumer protection provisions and orthodox contractual principles are sufficient for protecting and promoting women's financial interests. The bargaining inherent in the offer and acceptance approach need not ensure equality of access to credit. It is unfortunate that one franchise provision envisaging 'the Franchisor's absolute discretion as to whether to grant credit to the Franchise Owner and that the Franchise Owner has no right to credit' did not arise for judicial consideration (*Gardner Corporation Pty Ltd v Zed Bears Pty Ltd*, 2001, at [26]).

The degree to which individuals enjoy a 'right' to credit is moulded by the nature of the duties owed by credit providers. The obligations of credit providers to debtors do not rise to the level of a fiduciary nature. Fiduciary relationships occur when an individual exercises a power or discretion on behalf of the interests of another. Fiduciary obligations are unlikely to arise since credit contracts are negotiated at arm's length and contractual rather than equitable remedies are appropriate (*Hunter Business Finance v Australian Business and Equipment Finance*, 2003, at [75] and [82]).

Furthermore, the prospects of superimposing a common law duty of care as an implied contractual term are not good. The High Court considers that contracts for the provision of professional services 'declare completely and exclusively what are the legal rights and obligations of the parties' (*Astley v Austrust Ltd*, 1999, Gleeson CJ, McHugh, Gummow and Hayne JJ at [47]). Similarly, the Privy Council does not 'believe that there is anything to the advantage of the law's development in searching for a liability in tort' where the parties are in a commercial relationship (*Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*, 1986, Lord Scarman at 107). The same is true of New Zealand:

Where parties are in a contractual relationship, it will, in the absence of special circumstances be a normal, natural and reasonable inference that they intend and expect

their relationship to be governed solely by the contract and the law relating to contractual obligations. If an asserted obligation does not arise under the express terms or by clear and necessary implication, a party to the contract can reasonably expect the Court to take the view that there is no such obligation. [*Simms, Jones Ltd v Protochem Trading NZ Ltd*, 1993, Tipping J at 377.]

As observed in *Tomlin v Ford Credit Australia*, 2005, the law 'should be slow to remake their bargain by imposing a duty of care the effect of which would be to fetter that contractually uncontrolled discretion' (at [124] and [129]). Other than the ad hoc protection of consumer interests, respect for contractual autonomy will impede the common law development of an individual right to access credit.

Furthermore, although all men and women are entitled to benefit from the right to access credit, it may be necessary to establish restrictions upon its exercise. Consumer credit laws are intended to exclude certain individuals from the marketplace and not to ensure universal access to credit or financial services generally. Creditworthiness assessments employed by financial institutions identify those individuals most likely not to satisfy their repayment obligations or avoid indebtedness where financial management skills are lacking. Credit cards encourage expenditure by those lacking the discipline to control impulse consumption and are relatively expensive compared to alternative payment forms. Hence, 'access' to credit only ensures equality of opportunity and does not support immediate demands to financial resources. A concomitant expectation for individuals to save and budget would be a desirable attribute of any asserted human right.

Judicial consideration of the term 'access' is instructive. Credit cards enable the payment of goods and services where issuers offer revolving credit lines to users in return for substantial interest rates. To control expenditure, credit cards cannot be debited without written authorisation (*Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd*, 2002, at [18]). In 2001 the Reserve Bank indicated that the restrictions imposed by credit card schemes did not serve public interests and regulatory oversight was established (Reserve Bank of Australia 2002). This included imposing an access regime on the participants in a credit card arrangement (s 12, *Payment Systems (Regulation) Act 1998* (Cth)). 'Access' involved the eligibility of individuals to participate as commercial users on fair and reasonable terms (s 7). In *Visa International Service Association v Reserve Bank of Australia*, 2003, it was determined that an 'access regime' was broader than the concept of 'access'. Such a regime included formulating rules designed to provide effective access and did not merely prescribe entry rights (at [532] and [534]). In other words, individual rights must be underpinned by government intervention, such as complementary prudential regulation or competition policy and monitoring access conditions including fees.

The self-regulatory practices of financial institutions can include human rights considerations and particular appeals to female customers. The financial services sector must address employee rights, personnel security, supply chain management, litigation, loan default and the reputational risks of association with human rights violations (KPMG/F&C Asset Management 2006). An industry consensus on integrating human rights into credit risk assessments, policy formation, executive accountability, training, performance indicators and external reporting is yet to emerge (CO3 2004). Directed at clients and employees, the human rights policy of Friends Provident commits the firm to providing financial security for individuals, protecting livelihoods, equal opportunity and ensuring privacy through employee training, stakeholder engagement and annual reporting. The Universal Declaration of Human Rights will be respected in commercial operations wherever located and business partners and suppliers will be encouraged to observe those principles.

One prospective model for promoting women's rights builds upon the initiative of the Human Rights and Equal Opportunity Commission (HREOC) to enhance access to electronic commerce for disabled and older persons (HREOC 2000). 'Services' under the *Disability Discrimination Act 1992* (Cth) include financial and information services provided by financial institutions. The banking sector developed an action plan and voluntary standards in conjunction with HREOC and other groups (Australian Bankers' Association 2001 and 2002). Although HREOC welcomed this effort as a means of re-asserting human rights (HREOC 2002), there is little indication that access has improved for disabled persons (HREOC 2005).

The ambit of a human right to financial services also raises issues of access to information. Credit applicants must provide all information necessary to enable credit providers to assess creditworthiness. The potential dissemination of financial information between credit companies gives rise to privacy concerns. Access to an individual's financial information is addressed by the *Privacy Act 1988* (Cth). Credit reporting and information files are subject to regulatory requirements concerning access (including under false pretences — see further *R v Araya*, 2005), contents, accuracy, alteration, security, transfer and reasons for refusal (ss 18C–18V). Credit reporting agencies must take reasonable steps to ensure that individuals can access their personal credit reports (s 18H). Although a topic of ongoing law reform (Bargon 1994), it is noteworthy that information requests can qualify as sexual discrimination in certain circumstances (s 27, *Sex Discrimination Act 1984* (Cth)).

To be effective, a human right to access financial services must also capture organisations other than financial institutions. Credit reporting agencies cannot disclose personal credit information to another individual or entity (s 18K, *Privacy Act 1988* (Cth)), unless a person applies for credit and credit providers use that

information for assessment purposes. Furthermore, individuals cannot access another person's credit information in the possession or control of credit reporting agencies unless duly authorised (s 18S). Corporate liability was avoided in *I v Major Wholesaler*, 2003, when potential access problems were recognised in advance, credit application functions consolidated into a single specialist department, deviant employees counseled, apologies offered and compensation paid. Credit reporting agencies are expected to comply with the same Code of Conduct as credit providers (ss 18A–18BI). Hence, disclosure requirements concerning fees and charges are also satisfied through regular statements of account (*Australia and New Zealand Banking Group Ltd v Bollas*, 1999).

By itself, a right to access financial services will not wholly rectify women's marginalisation or exclusion from credit markets. Comparable to conditions prevailing in other states, as noted above, the plaintiff in *Geyer v Harris Scarfe Pty Ltd* depended upon her husband's income and required his consent before credit accounts were opened in her name. It was adjudged permissible that creditworthiness is reduced as a 'rule of thumb' to minimum incomes and that applicants had to establish the unreasonableness of this requirement. However, the rarefied legal issues arising from spousal consent to the provision of loan security mask complex private relationships (Fehlberg 1997, 89; Lovric and Millbank 2003, Ch 3). Furthermore, women may experience unfavourable treatment if members of a particular class or where generally attributed with certain characteristics on account of their occupation. Although imposing additional terms and conditions may indirectly discriminate against women, businesses are nonetheless entitled to inquire into a client's creditworthiness and need not grant 'instant' credit (*Edgley v Federal Capital Press of Australia Ltd*, 1999, at [41] and [64]).

Reflecting the position in other states, the economic discrimination experienced by Australian women in accessing financial services is a particular impediment for women entrepreneurs. For example, in *In the Marriage of James Robert Doyle*, 1982, a former husband was allegedly 'starving' his ex-wife 'of access to her proper share of the partnership income', converting funds to his own use and failing to pay rent or council rates (at [38]). Woman may be informed about financial issues but powerless to influence business decision-making (Singh 1995, 19–20). Such disadvantages also extend to women entrepreneurs from indigenous backgrounds. The Aboriginal and Torres Strait Islander Commission (ATSIC) may grant housing loans to Aboriginal persons and Torres Strait Islanders and support business enterprises on such terms as it determines. In *Campbell v ATSIC*, it was alleged that ATSIC had discriminated against a successful businesswomen by reason of her gender and marital status in administering a loan application. ATSIC demanded her half-share in her former matrimonial property as security, thus requiring her former husband's consent. This

was adjudged perfectly lawful and there was no evidence of unfavourable treatment for women applicants.

Woman complainants must overcome several significant procedural obstacles. First, statements of claim must be formulated precisely. In *Re Judith Margaret Mullally; Ex parte National Westminster Finance Australia Ltd*, 1991, the plaintiff argued that denying appropriate negotiating opportunities qualified as discrimination. However, as debtor she had 'fallen well short' of establishing a fair prospect of success (at [38]). Second, discriminatory acts with ongoing adverse effects, as distinguished from ongoing acts of discrimination, can become statute barred. For example, a time requirement before women retirees could access superannuation benefits was justifiable in *Sumner v PSS Board and Commonwealth of Australia*, 1998, notwithstanding that this effected indirect discrimination. Remedying this anomaly 'must be pursued through political channels' and courts have 'no option but to dismiss the complaint' (Pt 6).

Australian courts are also mindful of the separation of powers doctrine. For example, in *Southwell v Victorian Superannuation Board*, 1997, the plaintiff alleged that the failure to restore superannuation benefits on account of her marital status was discriminatory. Relief was refused because the omission was legislatively required and could not be judicially amended. Similarly, in *Schofield v Department of Community Services and Health*, 1990, the refusal to approve financial assistance under the *First Home Owners Act 1983* (Cth) allegedly effected discrimination on the basis of marital status. However, President Wilson opined that requiring both spouses to be first home-owners in respect of matrimonial dwellings is properly a matter for the legislature.

Do such outcomes warrant regulatory reform within Australia? The gendered operation of existing law can perpetuate women's inequality (see generally Charlesworth et al 1991). One obstacle is that the scope and content of a human right to access financial services is yet to be authoritatively delineated within the UN system. In the United States, the right to access credit is defined as the right to receive loans, mortgages and other financial products or services in one's own name (Iowa Commission on the Status of Women, 2005). Its ambit includes accessing credit information and educational materials, notification with reasons for rejected credit applications, accessing credit records, correcting historical inaccuracies and accessing dispute resolution mechanisms (New Jersey Department of Banking Insurance 2005). The Human Rights Commission for the State of Washington is also empowered to investigate alleged discrimination concerning credit, collateral and insurance (see further <www.hum.wa.gov/complaintProcess/>).

Contemporary regulatory developments within the European Community (EC) also offer useful insights. Member states have adopted varying levels of consumer protection and different financial practices are permitted (EC 1997). A proposed EU directive outlines consumer rights and lender obligations (EC 2004). Consumers enjoy the rights to withdraw from credit agreements, early repayment and redress. They are, moreover, entitled to complete information concerning the agreement's duration, total loan amounts, number and frequency of repayments, recurrent charges and annual interest rates. Consumers are also entitled to adequate notification in certain circumstances, regular account statements and creditworthiness assessments.

In terms of lender obligations, creditors cannot impose unfair terms, adopt disproportionate measures to recover outstanding amounts or distribute personal information. More controversially, financial service providers must ensure that consumers choose the most appropriate product for their needs (the duty to provide advice) and must assess whether they can reasonably be expected to discharge their obligations (the concept of responsible lending) (EC 2002). Although lenders and the UK government object to these proposals, the latter accepts the desirability of adequate pre-contractual information, advertising and licensing (UK Department of Trade and Industry (DTI) 2005, 7). Even if these proposals do not become law, the review is useful for harmonising disparate national positions (Nemeth and Ortner 2003, para 30).

Recent legal developments specific to the UK are also instructive. In the interests of justice, English courts can re-open credit agreements or set them aside where credit bargains are extortionate (s 139(1), *Consumer Credit Act 1974* (UK)). Under s 19 of the proposed Consumer Credit Bill 2005 (UK), English courts can declare creditor-debtor relationships to be unfair on account of the credit terms imposed or the manner by which creditors exercise or enforce their rights. Courts can also order repayment or alter agreement conditions. These initiatives seek to improve consumer rights and provide adequate protection from exploitative moneylenders (UK DTI 2004, para 15.2). Consumers may not fully understand credit products due to their complexity (UK DTI 2003a). They also require protection against purchasing unnecessary products, high interest payments, excessive fees, default charges, recovery or legal costs and early repayment penalties. Several policy objectives are being pursued: empowering consumers (through greater industry transparency and information access), providing affordable credit for low-income consumers and regulating industry (including eliminating unfair practices) (UK DTI 2003b).

Significantly, these proposals initially raised several human rights implications: whether simple interest for default sums was compatible with property rights;

whether information disclosure requirements respected privacy and family life; and whether civil penalties were compatible with judicial access (UK Parliament 2004–05). Under s 19(1)(a) of the *Human Rights Act 1998* (UK), these reforms were declared consistent with the European Convention on Human Rights. Interestingly, in *Wilson v Secretary of State for Trade and Industry*, 2003, a credit company argued that failure to enforce an improperly executed agreement disproportionately infringed its rights to property and access to a judicial remedy. Such a consequence was upheld as a legitimate consumer protection measure since borrowers are vulnerable to lender exploitation and transactional clarity is important (Lord Hobhouse, at [138]).

Conclusions

The human rights of women, particularly in the long-neglected rural context, must be more rigorously affirmed since women continue to experience discrimination in accessing credit. Disparities between national law and practice can partly be rectified through continuing regulatory reform (particularly with respect to land ownership and matrimonial property) and subsequent enforcement against governmental bodies and financial institutions. Even if it is true that ‘men’s and women’s rights are equal from the legal standpoint, and it is only sociocultural traditions that we need to cast aside’ (Paraguay (5th), 36), male prejudices are equally if not more detrimental for women.

A review of state party reports under CEDAW offers a useful additional source of comparative information on national law and policy that is frequently overlooked by Australian practitioners. Australian courts should be mindful of international legal and policy developments concerning women’s rights when construing consumer credit legislation. The CEDAW Committee is an unparalleled intergovernmental institution entrusted with monitoring international progress on implementing women’s rights to credit and consistently devotes attention to contemporary credit issues. That said, the Committee could fruitfully clarify the scope and content of the two human rights to credit enjoyed by women.

The obstacles and impediments confronting women discernable from the reporting mechanism of CEDAW are replicated in the local context. Although not a human right per se, the components of an entitlement to access financial services can be approximated from a juxtaposition of consumer credit law, antidiscrimination legislation and contractual principles. These regulatory arrangements support several individual rights (for example, to revoke credit offers, early repayment, remedying default and prior notification) in addition to identifying the obligations owed by credit providers (for example, to account, to renegotiate in the event of hardship, to satisfy enforcement preconditions, to advertise accurately and to impose reasonable

or just terms and conditions). Discriminatory credit access means denying credit or imposing special conditions upon any applicant or class of applicants in circumstances where other applicants of similar overall creditworthiness are not so treated. It is not discriminatory to make credit decisions based upon factually supportable, objective differences in an individual's creditworthiness by reference to their income, asset ownership or prior credit history. Furthermore, respect for the right to privacy influences access to and the disclosure of financial information.

Although judicial opinion suggests a broad interpretation of credit access for personal use in the consumer protection context, substantive and procedural obstacles limit the degree to which a human right to financial services can evolve under the common law. Individuals also enjoy recourse to a range of other tribunals to resolve their financial services disputes. Since 'no single tool can address financial exclusion on its own' (Connolly and Hajaj 2001, 53), the human rights paradigm, notwithstanding its limitations, offers an important complement to other mechanisms. ●

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