An Automated Teller Machine (ATM) cannot give a Bank's consent to money being taken from an account which had been closed, according to the High Court of Australia. But the Court did not find it necessary "to consider what the position might have been if the account had remained current but had insufficient funds to its credit".

ATMs still under the Age of Consent

The judgment of Gibbs CJ, Mason, Wilson, Deane and Dawson JJ in *Kennison v Daire* (unreported, High Court of Australia, 20 February 1986) is as follows:

The appellant was convicted of larceny contrary to s.131 of the Criminal Law Consolidation Act, 1935 (S.A.), as amended. He was the holder of an Easybank card, which enabled him to use the automatic teller machine of the Savings Bank of South Australia to withdraw money from his account with that bank.

It was a condition of the use of the card that the customer's account could be drawn against to the extent of the funds available in that account. Before the date of the alleged offence, the appellant had closed his account and withdrawn the balance but had not returned the card. On the occasion of the alleged offence, he used his card to withdraw $200 from the machine at the Adelaide branch of the bank.

He was able to do so because the machine was off-line and was programmed to allow the withdrawal of up to $200 by any person who placed the card in the machine and gave the corresponding personal identification number. When off-line, the machine was incapable of determining whether the card holder had any account which remained current and, if so, whether the account was in credit.

It is not in doubt that the appellant acted fraudulently with intent permanently to deprive the bank of $200. The appellant's submission is that the bank consented to the taking. It is submitted that the bank intended that the machine should operate within the terms of its program and that when it do so, it gave effect to the intention of the bank.

In the course of an interesting argument, Mr. Tilmouth pointed out that if a teller, having the general authority of the bank, pays out money on a cheque when the drawer's account is overdrawn, or on a forged order, the current conclusion is that the bank intends the property in the money should pass and that the case is not one of larceny; see, for example, *Chambers v. Miller* (1862) 13 C.B. (N.S.) 125 {143 E.R.50} and *Reg. v. Prince* {1868}1 C.C.R.150.

He submitted that, in effect, the machine was invested with a similar authority and that if, within the instructions in its programme, it handed over the money, it should be held that the property in the money passed to the card holder with the consent of the bank.

With all respect, we find it impossible to accept these arguments. The fact the bank programmed the machine in a way that facilitated the commission of a fraud by a person holding a card did not mean the bank consented to the withdrawal of money by a person who had no account with the bank.

It is not suggested any person, having the authority of the bank to consent to the particular transaction, did so. The machine could not give the bank's consent in fact and there is no principle of law that requires it to be treated as though it were a person with authority to decide and consent.

The proper inference to be drawn from the facts is that the bank consented to the withdrawal of up to $200 by a card holder who presented his card and supplied his personal identification number, only if the card holder had an account which was current. It would be quite unreal to infer the bank consented to the withdrawal by a card holder whose account had been closed.

The conditions of use of the card supplied by the bank to its customers support the conclusion that no such inference can be drawn.

It is unnecessary to consider what the position might have been if the account had remained current but had insufficient funds to its credit. The decision in *Reg. v. Hands* (1887)16 Cox C.C.188 is consistent with the view that no inference of consent can be drawn although, as Mr Tilmouth submitted, there are points of distinction between that case and this.

For these reasons, which are substantially those expressed by King C.J. in the Full Court of South Australia, the appeal should be dismissed.

Graham Greenleaf concludes his views on the the ultimate in plastic

Australia Card: The Noes have it

This tax file number scheme and the other essential reforms that go with it, if taken as a whole, represent a thorough and realistic alternative to the Australia Card, concentrating on the real problems in current practices without resort to a public-relations panacea.

It includes almost all of the valuable features of the Australia Card proposals: an effective means of identifying those in employment, operating accounts and entering significant financial transactions, so as to reduce the level of tax evasion; a consistent means of identifying and matching persons entitled to obtain government benefits; and a higher degree of integrity in identification for all these purposes.

On the other hand, the tax file number scheme does not threaten privacy and other liberties in the way the Australia Card does. It does not purport to be an all purpose identifier, and its uses are clearly limited to tax collection and Commonwealth benefits.It does not involve a card designed to be customarily carried and machine readable.

If it is introduced with suitable legislation limiting its use to these purposes, it will be quite possible to contain it to these uses, and not to allow its uses to expand incrementally so that it becomes a de facto ID card.

The level of public concern about universal ID cards raised by the Australia Card debate should assist in ensuring there is continuing public vigilance.

The Australia Card is not containable, and is not intended to be. A tax file number scheme is containable.