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Balancing consumer protection and commercial viability: The impact of the new hardship provisions in the NCCP Enhancements Act

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Balancing consumer protection and commercial viability: The impact of the new hardship provisions in the NCCP Enhancements Act

Presented by Dr. Franci Cantatore
6 September 2012
Introduction

What is the impact of the new Hardship Provisions in the Consumer Credit Legislation Amendment (Enhancements) Bill 2012 on Credit Providers?

- Considering the scope of the amendments – a distinct consumer focus
- The effect on Credit Providers
- Problematic issues in the new provisions
- Related COSL/FOS provisions for hardship applications:
  - If lender refuses to consider a hardship application or
  - if parties cannot agree on a variation
- COSL Complaint fees – impact on Credit Providers’ business
Key Elements

- Hardship provisions commencement date: 1 March 2013
- Easier for debtors to apply for hardship variations – oral or in writing
- Credit providers must respond to an application for a hardship variation before commencing enforcement proceedings
- Widening the range of remedies available to consumers - consumers can also seek restitution or compensation for an offence, in addition to civil remedy
- ASIC’s enforcement capacity increased by giving it standing to apply to court for an order under section 124 of the NCCP Act, irrespective of civil remedies
### COMPARISON OF KEY HARDSHIP FEATURES: NEW AND CURRENT LAW

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
</tr>
</thead>
<tbody>
<tr>
<td>All debtors can request a hardship variation <strong>regardless of the credit amount.</strong></td>
<td>Amount of credit provided must be <strong>less than $500,000.</strong></td>
</tr>
<tr>
<td>There are <strong>no limits to the form of hardship variation</strong> that can be requested.</td>
<td>An application for hardship variation must seek to change the contract in <strong>one of three ways</strong> stipulated in the Code.</td>
</tr>
<tr>
<td>Credit providers <strong>must respond</strong> to an application for a hardship variation before commencing enforcement proceedings.</td>
<td>Credit providers are <strong>not required to respond</strong> to applications for hardship variations before they can commence enforcement proceedings</td>
</tr>
<tr>
<td>ASIC has standing to apply to the court for an order regardless of whether a civil remedy is also available.</td>
<td>ASIC does not have standing under section 124 of the Code to apply to the court for an order for offences which provide for civil remedies.</td>
</tr>
<tr>
<td>Consumers may seek restitution in relation to offences for which a specific civil effect is already provided.</td>
<td>Consumers are not able to seek restitution in relation to offences for which a specific civil effect is already provided.</td>
</tr>
</tbody>
</table>
Summary: New Hardship Procedures

1. Where a debtor cannot meet their obligations under a credit contract, they may give the credit provider notice (a *hardship notice*) orally or in writing [*Section 72*].

2. **Within 21 days** after receiving a hardship notice, the credit provider must give the debtor notice of whether or not they agree to negotiate a change to the credit contract.

3. If the credit provider does not agree to negotiate, the credit provider must give a written notice that includes:
   - the reasons for not agreeing to negotiate;
   - the name of the credit provider’s external dispute resolution (EDR); and
   - the debtor’s rights under that scheme [*Section 72(2)*].
Summary: New Hardship Procedures

4. If credit provider has given notice that they agree to negotiate, but then decides not to change the contract they would need, **within 21 days of the first notice**, to give the debtor another notice to this effect [*Section 72(3)*].

5. Where credit provider does not agree to change terms of credit contract, the debtor can apply to court under **section 74** for a change in the terms. **Note:** The court is restricted to making orders affecting **amount and timing of payments** made under the credit contract.

6. If the credit provider agrees to a change to the terms of the credit contract, he must:
   - comply with the existing requirements in **section 73** of the Code;
   - Give the debtor written notice **within 30 days** with particulars of change in credit contract.
1. CONSUMER - HARDSHIP NOTICE (WRITTEN OR ORAL) CP CAN GIVE NOTICE REQUIRING INFORMATION WITHIN 21 DAYS

2. AGREE TO NEGOTIATE NOTICE - 21 DAYS FROM APPL OR RECEIPT OF INFORMATION (OR 28 DAYS AFTER REQUEST FOR INFORMATION)

3. IDR PROCESS CHANGE CONTRACT NOTICE - 30 DAYS, SET OUT CHANGES

2. REFUSAL TO NEGOTIATE NOTICE – 21 DAYS FROM APPL OR RECEIPT OF INFORMATION (OR 28 DAYS AFTER REQUEST FOR INFORMATION) INCLUDE:
- REASON
- NAME OF EDR SCHEME
- CONSUMER’S RIGHTS

CONSUMER CAN COMPLAIN TO COSL/FOS

CONSUMER CAN COMPLAIN TO COURT (S 74)
- COMPLAIN TO COSL/FOS

CONTRACT CHANGED AS AGREED

CONSUMER CAN COMPLAIN TO COURT (S 74)
- COMPLAIN TO COSL/FOS
Effect of Amendments

ISSUE # 1

- ‘Hardship notices’ by consumers can be oral or in writing
- Difficult to distinguish genuine hardship from an excuse not to pay
- This requires:
  - greater awareness by credit providers
  - better staff training to record hardship complaints
  - more effective complaints resolution procedures

Relevance: Credit provider has to give notice in 21 days, otherwise criminal penalties apply, thus important to identify hardship complaints
Effect of Amendments

ISSUE #1 (cont.)

- Relevant COSL Hardship Provision is **Rule 17**

- COSL Hardship Guidelines:
  - Lender must consider whether appropriate to vary repayments “even where the borrower has not directly advised the lender that they are having financial difficulties”.
  - **A lender should enquire** whether a borrower is in financial hardship “if he has defaulted or a direct debit has been dishonoured”.
  - A lender must consider the hardship application **in good faith**, otherwise it may affect ability to charge default fees, interests and costs.

- **Relevance**: These EDR guidelines go beyond what the legislation requires, thus important to **contain complaints within your business**.
Effect of Amendments

ISSUE #2

- No longer specified that there must be a reasonable cause (e.g. illness or unemployment) – wide scope for complaint

- **Onus** also no longer on debtor to make a request in a specific way, i.e. 3 ways currently provided in section 72(2):
  - Extending contract and reducing payment amounts;
  - Postponing payment dates during a specific period; or
  - Extending contract and postponing payment dates during a specific period.

- Effect is to expand circumstances which a credit provider will need to consider in deciding whether to change the terms of the credit contract.
Effect of Amendments

ISSUE #2 (cont.)

Consider: Does an increase in the price of petrol or the mortgage rate create hardship? A car breakdown? Unforeseen school fees?

A statement by the debtor: “I’m a bit short this month”?

Relevance: Credit providers must be prepared to treat all defaults as potential hardship cases and put systems in place to deal with complaints.

Suggest Courts will follow the existing interpretation of ‘reasonable cause’:

In *Permanent Custodians Limited v Carolyn Joy Upston [2007] NSWSC 223*, the Court held that the phrase "other reasonable cause" was to be read widely. [In that case, the Court found that the borrower had suffered hardship as a result of her business failing. This was despite the fact that the borrower had voluntarily left her employment to investigate her business' decline and despite the fact that she obtained employment shortly after the business was sold.]
ASIC’S view: A glass half empty approach

- In its 2009 Report 152 ASIC identified the following preferred definition of ‘financial hardship’:

  *Financial hardship is when a customer wants to pay what they owe but is unable to do so.*

- In expectation of hardship:
  - Lenders should provide borrowers with general information about financial hardship before they experience financial difficulties. Set up a dedicated toll-free number for borrowers to make inquiries about financial hardship.
  - Make inquiries with a borrower who is in arrears to ascertain whether they could meet their obligations if their repayment terms were varied.
Prohibition on Enforcement Action

New section 89A

Introduced to restrict the capacity of credit providers from commencing enforcement action until they have responded to any hardship notice under section 72.

This means:
1. Credit providers will be prohibited from commencing enforcement action where the following conditions apply:

- they are required to serve a default notice under section 88;
- the debtor has given a current hardship notice under section 72; and
- the debtor has not previously given a hardship notice or had given one not materially different from the current hardship notice in the four month period before the current hardship notice was given [Section 89A(1)].
Prohibition on Enforcement Action

2. Credit providers cannot begin enforcement proceedings until they have given the debtor notice of their refusal to negotiate and 14 days have passed from the day on which this notice was given [Section 89A(2)].

- [NOTE: Under the current section 88, the credit provider must allow the debtor at least 30 days from the date of the default notice to remedy the default. The 14 day period from the day the debtor gave the hardship notice may occur before, during, or after the 30 day period].

3. A breach of this section will attract a criminal penalty of 50 penalty units and is an offence of strict liability [Sections 89A(2) and (4)].
Mortgaged Goods

Credit providers may take possession of any mortgaged goods if the credit provider believes on reasonable grounds that:

- the debtor has, without the credit provider’s permission, removed or disposed of the mortgaged goods, or intends to do so; or
- urgent action is necessary to protect the goods [Section 89A(3)].

For example: Secured contracts, Rent to Buy contracts, Sale by Instalment contracts

**NOTE:** The onus rests on the credit provider to show that they held this belief on reasonable grounds [*Sections 89A(2) and (3)*].
Related Provision: Postponement Request

- A debtor who has been given a default notice can make a postponement request regarding postponement of enforcement proceedings or of any acceleration clauses. (Only minor changes to the wording of this provision) [section 94(1)].

- If a debtor makes a postponement request the credit provider must not begin enforcement proceedings unless they have responded to the postponement request and 14 days has elapsed from when they gave that response [Section 94(3)].

- A breach of this section will attract a criminal penalty of 50 penalty units and is an offence of strict liability [Sections 94(3) and (5)].
Consumer Leases: Hardship and unjust provisions

- **Sections 177B and C** duplicate hardship provisions *(section 72)* for leases

- Consumer can apply to Court for variation if not satisfied – *Section 177D*

- Court can reopen ‘unjust transactions’ – *Section 177F*. Can consider e.g. Public interest, all the circumstances, relative bargaining power of parties (list of 15 issues but can be wider). ASIC can also apply to court if in the public interest under *section 177H*.

- **Note**: *Section 177F(4)*: In determining whether a consumer lease is unjust, the court should not have regard to any injustice arising from circumstances that were not reasonably foreseeable when the lease was entered into or changed.
Consumer Leases: Hardship and unjust provisions

ISSUE #1:

If payment amount on lease is varied, how does the lessor recover residual balance at the end of the lease?

- No clear guidelines – suggest the lessor would be entitled to return of the goods at the end of lease and continue to collect from lessee until arrears are paid – currently a grey area
Consumer Leases: Hardship and unjust provisions

ISSUE #2:

Can the lessor recover the leased goods if lessee defaults?

- Goods will have to remain with lessee until proper default procedures followed under sections 179D and 179F.

- **Section 179F** duplicates enforcement provisions (section 89A) for leases, preventing repossession of the leased goods.

- **Section 179F(3)** provides [similar to section 189A(3)] - The lessor may take possession of goods if the lessor reasonably believes that:
  (a) the lessee has removed or disposed of the goods, or intends to remove or dispose of them; or
  (b) urgent action is necessary to protect the goods.

  [Suggest this will be difficult to prove unless there is strong evidence in support.]
Hardship complaint fees

If a consumer makes a hardship complaint to COSL:

- Where no internal dispute resolution (IDR) process has occurred, COSL will usually refer the complainant back to the member to follow the member’s IDR process.

- A complaint fee of $165.00 is charged to the credit provider at this point.

- The credit provider then has 21 days to try and resolve it directly with the complainant.

- Where IDR has already occurred, or the credit provider has refused to accept a hardship application or has refused to alter the contract, COSL will register the complaint, do an assessment letter and refer the complaint to the credit provider.

- Complaint fees of $165.00 (registration), $300.00 (assessment letter) and $600.00 (referral) – a total of $1,065.00 - are charged to the credit provider up to this stage.
Hardship complaint fees

- If a Conciliation Conference is held, the credit provider is charged a further $750.00.

- If the complaint amount is under $3,000.00, the credit provider is charged an additional $500.00 (expedited fee).

- Thereafter, if COSL varies the contract the credit provider is charged $500.00, and a further $500.00 if an order/award is made by COSL.

- **This means** that the credit provider can be charged up to $3,315.00 for a single hardship complaint where the loan amount could be less than $3,000.00.

- Translates into losses for the credit provider
COSL Guidelines for variation of contracts

COSL suggests the Lender may:
- reduce the interest rate for a specified period
- reverse default fees, default interest and enforcement costs
- waive default fees and default interest for a specified period
- waive part of the arrears or principal
- extend periods of reduced or nil repayments
- capitalise all, or a portion of, the arrears.

(COSL Position Statement Issue 2, May 2010)
Avoiding Hardship complaints

- Increase due diligence, especially for lower income groups.
- Ensure all Responsible Lending obligations are met.
- Consider using Statutory Declarations for borrowers.
- Can the borrower reasonably comfortably afford the credit?
- There is no substitute for common sense.
Suggested Guidelines in dealing with Hardship complaints

1. **Develop procedural guidelines for staff and ensure compliance with prescribed time limits.**

2. **Set up a contact number:** Set up a dedicated toll-free number for borrowers to make inquiries about financial hardship

   **Consider:**
   - Is the contact number for financial hardship promoted and easy to obtain by borrowers? Is the number adequately staffed to meet the needs of borrowers?
   - Are staff adequately trained to discuss options with borrowers that are realistic and appropriate to the borrowers circumstances? Are the options clearly explained with implications?

3. **Give borrowers financial hardship information early**

   Provide *all* borrowers with information about options available to them if they are experiencing, or begin to experience financial hardship.

   **Consider:**
   - Can borrowers easily obtain information about financial hardship and the options that may be available to them on your website?
   - Is information about financial hardship targeted to reach borrowers who are likely to be experiencing financial difficulties? For example, is it included in all correspondence sent to borrowers about overdue payments?
   - Is the information easy to understand and written in a friendly manner that won’t intimidate?
Suggested Guidelines in dealing with Hardship complaints

4. Record all hardship or financial complaints in writing.

5. If more information is required under section 72(2), obtain telephonically if possible and record in writing. Simplify information requested. Ensure that documentation you request is not overly burdensome. Consider:
   - What documents do you currently need to obtain to assess an application for financial hardship?
   - Can you take more information about the borrowers’ financial situation over the phone?

6. Check with borrowers who are in arrears
   Ensure that you have made reasonable inquiries with a borrower who is in arrears to ascertain whether they could meet their obligations if their repayment terms were varied.

Finally: Assess hardship variations promptly and fairly within prescribed time limits
Conclusion

TIME = MONEY

Try to resolve hardship issues with customers as early as possible to avoid delays and hardship complaints to EDR Schemes.
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