THE Financier

THE FINANCIERS ASSOCIATION OF AUSTRALIA LIMITED NEWSLETTER

DECEMBER 2005

Welcome to the Summer 2005/06 edition of The Financiers Association of Australia Limited newsletter. We trust you had a Very Merry Christmas and we wish you a Prosperous New Year . Our apologies for the late publication of the summer newsletter. As usual we try to keep up with any legislative changes in the credit code as well as inserting any interesting general business pieces gleaned from various sources.

A welcome is also extended to new members at this time.

Consumer credit – maximum annual percentage rate

On 19 October this year the Government introduced into Parliament the Consumer Credit (New South Wales) Amendment (Maximum Annual Percentage Rate) Bill 2005. The Bill passed through both Houses of Parliament on 10 November 2005 and was assented to on 17 November 2005. The Act is proposed to commence on 1st March 2006.

The main features of the Act are:

- It extends the requirement to disclose charges that are in the nature of interest as interest to all consumer credit contracts regulated by the Consumer Credit Code;
- It extends the provision requiring the inclusion of credit fees and charges in the calculation of the maximum annual percentage rate, to all consumer credit contracts regulated by the Consumer Credit Code;
- It includes an exemption for any fees charged in connection with a temporary credit facility offered by an authorised deposit taking institution such as an overdraft, and;
- To provide that contracts entered into before the date of commencement (proposed as 1 March 2006) are not affected except in relation to new fees and charges levied after commencement.

press release NSW Fair Trading

The wording of the relevent section change Section 11

11 Maximum annual percentage rate

(1) The regulations may prescribe a maximum annual percentage rate for a credit contract or class of credit contracts to which the Consumer Credit (New South Wales) Code applies.

(2) The regulations may require interest charges and all credit fees and charges under a credit contract or class of credit contracts to be included for the purpose of calculating the maximum annual percentage rate under the credit contract for the purposes of subsection (1).

(3) Division 2 of Part 2 of the Consumer Credit (New South Wales) Code applies in relation to such a maximum annual percentage rate as if that rate had been prescribed by that Code.
Note. The effect of subsection (3) is that a contract is void to the extent it imposes a monetary liability prohibited under subsection (1) and that any amount paid under the contract may be recovered. In addition the credit provider is guilty of an offence for entering into such a contract.

(4) Nothing in this section affects the powers of the Court under Division 3 of Part 4 of the Consumer Credit (New South Wales) Code in relation to a contract that is not, by reason of this section, void.
Note. Division 3 of Part 4 of the Code allows (among other things) the Court to re-open unjust transactions

The full details of the amendment may be found at www.fairtrading.nsw.gov.au/corporate/legislation/consumercreditmaxannualpercentagerate.html

Hardship relief granted under Consumer Credit Code despite breach of contract

Foster v GE Automotive Financial Services (Credit) [2005] VCAT 2147

In March 2004 Mr. Foster borrowed $14000 to purchase a Holden Commodore. He was to make repayments of $300 per month over a period of 60 months.. His partner moved into his house in June and he took out a personal loan of $3000 to buy furniture. As there were now two people living in the house he began to spend more on utilities and food.

In November his partner became unemployed and Foster had to meet all joint household expenses on his own income. From this time no further car repayments were made. In February he also became unemployed

In May he found permanent work and his partner found some casual work. Their combined incomes then totalled $3200 per month with a combined monthly expenditure of $1430. During this time Foster repayed $1800 of prior financial commitments which included a family loan and some arrears in rent.

Under the Consumer Credit Code if a debtor is unable to reasonably meet obligations due to illness, unemployment or some other reasonable cause they can ask their credit provider to change their credit contract, for example, by extending the term and reducing repayments. If the credit provider refuses to make the change the debtor can then apply to the relevant court (in Victoria, VCAT, the Victorian Civil and Administrative Tribunal, Civil Division) who may make the change.

Foster applied to GE for a change. It was refused, primarily on the basis that he had failed to register and insure his car and so was not complying with his contract. He took the matter to VCAT. GE issued a default notice and applied for orders under the Code to enter his property and take possession of his car.

The Tribunal held that Foster's personal circumstances were sufficient to meet the requirements under the Code to grant a hardship application. On the evidence the tribunal held that he was unable to reasonably meet his loan obligations.

The fact that he had also suggested two alternative payment schedules, both extending the term, meant the tribunal viewed his application more favourably. The tribunal held that Foster must immediately register and insure his car and then commence the new repayment arrangement. Foster was ordered not to drive the car until registration and insurance had been arranged.

The Deputy President of the Tribunal said in her judgment. "I am satisfied that Mr. Foster would not reasonably be able to pay for the insurance and registration as well as also paying the additional $200 off loan arrears. Accordingly, the payment of the $200 of loan arrears per month will commerce six weeks after the date of this order and will continue until the arrears are brought up to date." The repossession order was cancelled.

Finance broker unable to collect fees

Alexander v Birch (Credit) [2005] VCAT 2145

In late 2003 Ms Alexander entered into a contract to sell her home and around the same time entered into a contract to buy a block of land. She put down a 10% deposit on the block of land but shortly after that the contract to sell her home fell through.

She decided to try to go ahead with the purchase of the land and approached a finance broker, Mr. Birch of AAA Mortgage Money Pty Ltd. She asked Birch to obtain a loan to complete the purchase of the land and he found a law firm which would lend her the money. Her understanding was told that she would be charged $680 for this service by AAA but there *was* no documentation to this effect.

Just before settlement, Alexander was told that the total fees for the loan would be approximately $10000. She refused to follow through with the loan.

When Alexander later sold her property she found that a caveat had been placed on her property by Mr Birch. The interest claimed was as chargee under an agreement between Alexander and Birch. Someone with an interest in land (in this case, arguably the right to put a charge or mortgage on Alexander's property) can lodge a caveat on the title. This tells other people who might want to deal with the land that they have a claim of some sort which must be satisfied.

As Alexander was keen to complete the sale she contacted Birch and was told that he would

take the caveat off if she paid him $4,959 which she did. She then applied to the court to have the money she had paid refunded.

AAA Mortgage Money's instrument of appointment was brought before the court which purported to set out the terms of the arrangement between Alexander and AAA Mortgage. It stated that any fees payable to the finance broker would result in a charge on Alexander's property and a caveat might be lodged to protect that charge.
However it was unsigned.

It mentioned an amount being loaned but did not give any complete details of either the terms of the loan, interest payable or the breakdown of the fees which were to be payable to AAA and to Mr. Birch.

The court held that the loan Ms Alexander sought was consumer credit and thus fell within the Consumer Credit Code. Under the Code there must be a signed instrument of appointment. As the agreement wasn't signed, all fees paid by Ms Alexander to Mr. Birch were refunded in full.

Vital to get purpose-of-credit declarations exactly right

Edwards *v* $outh Eastern Secured Investments (Credit) [2005] VCAT 2146

In 2004 Mr. Edwards applied for a loan for $270,000 from South Eastern Secured Investments (SESI) in order to build an apartment on top of his 3 flats. The apartment was to be rented out on completion. The flats provided security for the loan.

In order to obtain the loan Edwards signed a declaration purportedly under the Consumer Credit Code. The declaration stated that credit was provided for business or investment purposes.

Later that year Edwards borrowed another $40,000 for the development. The application was in the same form and in similar terms to the previous application. The Consumer Credit Code declaration was in the same form

In 2005 Edwards applied for hardship relief under the Consumer Credit Code. Mediation was organised but Edwards did not attend so his application was struck off. SESI then asked for costs. The effect of s. 109 of the VCAT Act is that each party bears their own costs unless, having regard to a number of listed factors, the Tribunal considers it fair to order otherwise. If Edwards had "made a claim with no tenable basis in fact or law," costs would be awarded against him. The Tribunal first had to decide whether the Code applied.

The code could only apply to a credit contract if it was wholly or predominantly for personal or domestic or household purposes, Edwards had signed declarations saying that the loans were for business or investment purposes. Were the declarations valid?

The declaration had to be in the form required by the regulations. The Tribunal looked at it and compared it with the form in Regulation 10 of the Code. It held that the declarations signed were not in the form required by Regulation 10 because in the form that Edwards signed, a warning to debtors was in a different position The waning says that unless a loan is predominantly for business or investment purposes debtors shouldn't sign as by signing they may lose their protection under the code. The warning on Mr. Edwards declaration didn't appear immediately below the loan purpose declaration. Instead there was a further declaration about what the debtor had told the credit provider the loan was for.

The Tribunal felt this was critical as it meant the reader's eye would be diverted from the warning by the second part of the declaration and the reader would never read the warning. The tribunal also noted that it was unclear whether Mr. Edwards signed the declarations before accepting the loan offers and so entering into the credit contract. For these reasons he found that it was not conclusive that the loan was for business or investment purposes.

Despite all this, the Tribunal noted that it was still an effective statutory declaration. Looking at the other documents it was clear that the loans were business or investment loans and that, accordingly, the Code didn't apply. The tribunal, however, felt that even though the code didn't apply, due to the very serious variation in it's business purposes declaration, he was unwilling to order the rest of the costs in the company's favour.

The Tribunal commented that the declaration form appeared to be a standard form. It would be unfair to award costs against Mr. Edwards in these circumstances

apart from the costs relating to the missed mediation.

The Tribunal also said that SESI should urgently emend its loan purpose declaration.

Statutory demands do you serve the original or the copy?

Emhill Pty Ltd *v* Bonsoc Pty Ltd [2005] VSCA 239 (7 October 2005)

Bonsoc Pty Ltd, a landlord, filed a complaint in the Magistrate's Court that his tenant, Emhill Pty Ltd, was in arrears on its rent and outgoings and claimed damages for the cost of reinstatement of he premises. After a number of counterclaims and appeals Bonsoc obtained a judgment.

Bonsoc then issued a statutory demand to Emhill for the payment of the rent. A solicitor acting for Bonsoc handed a statutory demand to the director of Emhill. *A* statutory demand requires that money be paid to the creditor within 10 days otherwise the debtor will be declared insolvent.

The issue in this particular case was whether there had been good service of the document. The statute states that a 'copy' must be served on the debtor, not the original document. In this case it was the original document that was handed to the director of Emhill.

Emhill applied to have the statutory demand set aside. The court held that the demand should be varied but that it would still take effect from when the original demand had been served.

Emhill appealed and lost

Emhill appealed again.... and lost. The judge said that as the document had been served on the sole director, secretary and shareholder of Emhill this could constitute the document being brought to the actual attention of the company.

Emhill appealed yet again. The court agreed with the previous judge's decision that there had been proper service but came to the conclusion on different grounds. The judge saw the issue as one of statutory interpretation. He said, "the task of the Court is to give effect to Parliaments intention as conveyed by the words of the relevant statutory provision. The statutory words are to be construed, of course, in the context of the legislation as a whole." The lawyers for Emhill conceded that "it was not possible to discern any reason why Parliament might have sought to distinguish..... between an original and a copy of a statutory demand." The judge said it was "universally absurd" to contend that if an original was served rather than a copy of the original this would rot constitute good service.

Serving the original was proper service of the statutory demand. The appeal was dismissed.

If you come across or would like to contribute any article that may be of interest for the newsletter please fax on (02) 9299 1433 or post to the Association c/- GPO Box 3463 Sydney NSW 1043.

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