

THE Financier

THE FINANCIERS ASSOCIATION OF AUSTRALIA LIMITED NEWSLETTER

SEPTEMBER 2006

Welcome to the Spring 2006 edition of The Financiers Association of Australia Limited 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 newmembers at this time.

E-Commerce - Update on E-Commerce Amendments

The Consumer Credit and Trade Measurement Amendment Bill 2006 and the Consumer Credit Amendment Regulation (No.1) 2006 will commence on 9 October 2006. Copies of the Act can be downloaded.

The Consumer Credit Amendment Regulation (No.1) 2006 were gazetted on 4 August 2006 and will commence on the proclamation of the e-commerce Code amendments. A copy of the regulations can now be downloaded.

It is not possible to release the Regulations prior to the Bill being assented however we recognise the desire of credit providers to be fully prepared for the enactment of the new provisions. The following exemptions were proposed in conjunction with the Bill. Note that until the Regulations are made formally the following list is simply an indication:

- a guarantee under section 9

- a copy of a guarantee under section 52(1)(a)
- a copy of a credit contract under section 52(1)(B);
- a copy of a contract document under section 54(2)(a);
- a notice of particulars of change under section 56(1)(a);
- a default notice under section 80(1);
- a default notice under section 80(2);
- information provided to the occupier under section 91(1)(b);
- a request for entry under section 24(a);
- a consent to enter premises under section 24(c);
- a notice under section 94(1);
- a demand on the supplier under section 120(5)(a);
- a demand on the supplier under section 120(6)(a);
- a notice of intention to repossess under section 156(1);
- a transaction on which duty is only charged under the laws of a

jurisdiction if the transaction is effected or evidenced by an instrument in hard copy form;

- an instrument on which duty is only charged under the laws of a jurisdiction if the instrument is in hard copy form.

Bill Facilities Regulation

Consultation on the bill facilities regulation amendment has now closed. UCCCMC would like to thank those stakeholders that made submissions to the consultation. These will now be considered by UCCCMC. If you would like to view a copy of the explanatory package, including the regulation amendment it is still available for download.

Fringe Lending Discussion Paper

A Regulatory Impact Statement has been prepared and approved by the Office of Regulatory Review. Approval of the RIS is now being sought from SCOCA and MCCA. The RIS will be released together with a draft amendments to effect the fringe lending proposals for public comment later this year.

above articles from www.creditcode.gov.au

Victorian Consumer Credit Initiatives

September 2006 The Victorian Government has announced its response to the wide ranging Consumer Credit Review conducted by Victoria earlier in 2006. A full copy of the response can be obtained at www.consumer.vic.gov.au

The response released on 28 September 2006 concludes that credit regulation does not need a fundamental overhaul, but important improvements do need to be made. The response is a well balanced and sensible response to the issues raised in the Review.

Overall the Government's response focuses on making the credit market work more effectively and imposing only the minimum regulatory burden. For example, the Government decided not to impose an interest rate ceiling like NSW and ACT, but rather to strengthen the power of consumers to challenge unconscionable fees and charges, enhance financial counselling, and expand Victoria's No Interest Loan Schemes.

The main focus of the report is on small amount lending and credit card lending where it is felt consumers are vulnerable.

The report strongly supports maintaining national regulatory consistency wherever possible and practical. However, in some cases Victoria has decided to "go it alone" as shown below.

A more detailed summary can be found at [code summary...](#) The proposals relate to UCCC regulated credit only.

Option 5.3: Credit fees and charges should be linked to the underlying cost of the service

Report Finding – Further work needed to balance consumer protection and business interests.

Option 5.6: Remove business purpose declarations

Report Finding – Progress nationally through the MCCA (national consumer affairs group)

Option 6.2: Impose a positive obligation on lenders to assess the borrower's ability to repay

Report Finding – Further work needed. Any change should be national

Option 8. 1: Uniform national regulation of finance brokers

Report Finding – Progress nationally

Option 12.3 and 12.4: Credit providers in Victoria must be members of an ADR and internal dispute resolution scheme

Report Finding - Supported - Victoria may pass legislation to this effect in due course.

Option 14.1 : Allow class actions to re-open credit contracts under s.70 and 72 of the UCCC

Report Finding - Supported - Victoria may pass legislation to this effect in due course.

Option 14.3: Empower consumer bodies to bring class actions under s.70 and 72

Report Finding – Progress nationally

Comparison rates

One of the main changes is to clarify the comparison rate warning. There now is a short warning and a long comparison rate warning. The shortened warning can be used in credit advertising however the long warning must still appear in the comparison rates schedules. The warning should be given in the same form as the comparison rate unless the advertisement is on television, the Internet or other electronic display medium. The two warnings are alternatives (that is, either can be used). The short warning is as follows:

'WARNING: This comparison rate is true only for the examples given and may not include all fees and charges. Different terms, fees or other loan amounts might result in a different comparison rate.'

The previous warning in regulation 33C has been adopted as the long warning without amendment..

These regulations were made in Tasmania on 20 September 2005 and 13 June 2006 in Western Australia

Bankrupting the insane

Owners - Strata Plan No. 23007 v Cross, in the matter of Cross [2006] FCA 900 (14 July 2006)
Ms Cross is 66 years old. She owns assets in excess of half a million dollars including a home unit worth \$375,000, money on deposit with major banks of more than \$130,000 and shares and securities in major listed companies worth

approximately \$90,000. In 2003 she owed the Owners of Strata Plan No. 23007 for unpaid contributions of \$1,813.58 in relation to her unit so they started proceedings against her in the Local Court . Judgment was entered by default. The creditor then proceeded to bankrupt her.

The process servers and the lawyer for the creditor had some difficulty serving the various documents that needed to be served on Cross. This was in part because she was schizophrenic and refused to answer the door and in part because she was committed as a psychiatric patient at times during the process. The creditor's lawyers found out that she was under psychiatric care in Sutherland Hospital and the creditor's petition was served on her while she was there. This, among other things, told her that the petition would be heard in court in four weeks. Her social worker, who was present when she was served, organised a meeting with Legal Aid. Unfortunately, this meeting was three days after the hearing. (Cross was discharged from hospital a few days later and it seems unlikely that she attended the meeting.)

While she was in hospital, an application was made to the Mental Health Review Tribunal for a Protected Estates Order. The order was not made because Cross would not disclose any details about her finances. On 11 April 2005, the Protective Commissioner was appointed as financial manager of Ms Cross' estate under the *Protected Estates Act 1983* (NSW).

Cross didn't appear at the bankruptcy hearing, nor did any lawyer on her behalf. The registrar who made the order to bankrupt her was not aware that she was mentally disabled. The creditor's lawyer, Mr Bentley, couldn't recall whether he told the registrar or not.

A Deputy Protective Commissioner of New South Wales subsequently applied to have the sequestration order which made Ms Cross bankrupt set aside. The judge used strong language to describe the action (or lack of action) of the creditor's lawyer. He said, "Mr Bentley was blinded by an obsession to ensure that whatever else happened, Registrar Tesoriero made the sequestration order on that day. As an officer of the Court, he had an overriding duty to do more to draw to the Court's attention Ms Cross' circumstances and the circumstances under which she was purportedly served with the Creditor's petition."

Special rules apply to the service of people with mental disabilities and the judge concluded that she was not properly served. He said, "It is quite clear that Ms Cross should not have been bankrupted. She was solvent at the time. A creditor who issues a creditor's petition runs the risk that if the debtor is solvent, the likelihood is that the petition will be dismissed with costs. The evidence suggests that Ms Cross, due to her state of mind, may have thought that the body corporate of her home unit building did not exist and that she therefore did not owe it any

money. Whether that be right or not, bankruptcy proceedings are not for debtors who won't pay debts. They are for debtors who can't pay debts."

He said, "I have come to the firm conclusion that it would be totally unfair, indeed a miscarriage of justice, for Ms Cross to be saddled with any of the relatively considerable costs of the administration of her estate." The trustee therefore missed out on payment for any of the work he had done.

However, the judge ordered that the creditor pay the full legal fees in the current court case for both Cross and the trustee.

Man acquires debt in order to be able to try to halt proceedings

Fiorentino & Anor v Mohamed [2005] NSWSC 1177

Fox Home Loans Pty Limited was a mortgage broker which arranged mortgage finance for borrowers. Fox did not actually lend money itself but introduced borrowers to third party lenders.

Fox was ultimately wound up and the liquidators ordered an examination of the directors and those involved with the company. The liquidators report said, ""The examinations which have been conducted since August 2005 ... have uncovered conduct by officers and agents of the Company which on a preliminary view may constitute fraud..."
