NEW CONSUMER CREDIT CODE AND CODES OF PRACTICE

How are the Lenders Adapting?

QUESTIONS AND ANSWERS

Question - Written question from the floor:

A leading Victorian academic has recently suggested that a credit provider must provide notice of decreases in interest rate by virtue of section 63 generally applying to notice requirements and the section 59 exclusion being of no assistance as notice is not required under section 59 but still is under section 63. Do you agree with this analysis and what is the practical answer?

Response - Peter Thomas (Speaker):

My view is that it is correct to say the section 59 exclusion is of no assistance. Section 59(5) says that section 59 does not apply to changes that reduce the obligations of the debtor under the credit contract, it is therefore not necessary to give notice of a reduction in interest rate under that clause. Section 63 deals generally with requirements to give notices which have not been specifically dealt with. Section 63(3) says it does not apply to a change of which notice is required to be given under section 59. Therefore the section does apply to reductions in interest rates on the face of it because section 59 does not require notice, it is a fairly circular argument, but I think it is right.

Sub-section (2) of section 63 says it does not apply to a change that reduces the obligations of the debtor and a reduction in interest rates is certainly one of those. But it does require that notice of that change be given with the next statement of account after the change takes effect. That, in my view, is the correct position, that is, that the reduction in interest rate must be shown on the next statement of account.

The practical answer is probably if it is a reduction in interest rate that the lender would be shouting it from the rooftops anyway, and would be happy to give whatever notice it had to give. But it does not have to be 30 days prior notice.

Question - Rowan Russell (Mallesons Stephen Jaques, Melbourne):

Peter Mulligan mentioned the saying "When in doubt, regulate" and the problems with that if the credit provider gets it wrong and as matter of law it is subsequently found that the contract is not regulated. That has been a problem that has been around even in the existing *Credit Act*. I would like a comment from Peter, or perhaps anyone else on the panel. If the credit provider as a matter of practice treats the contract as if it were regulated, grants to the customer all the concessions and rights which are available if the contract were regulated as a matter of law, how serious is the risk of the credit provider's conduct being found to be misleading?

Response - Peter Mulligan (Speaker):

I agree that so long as you can continue to treat the loan as regulated for all purposes then there should not be too much of a risk. I think one of the problems would arise if the borrower has a hardship application complaint about interest rate change and needs to go to a credit tribunal to progress that, and the tribunal finds that it has no jurisdiction, that there you are talking about a situation where the credit provider is obviously disagreeing with the debtor. If the debtor said "I have hardship problems" and the creditor was saying "yes I agree you do, we have to work something out" well then there would not be a problem. But, where there is no compromise and the debtor goes to the tribunal (as his "Things you must know" booklet told him he could) and then the tribunal says "sorry have no jurisdiction", that is the one area where I see a risk, I must say.

Response - Tony Coburn (Speaker):

From a purely civil result point of view, it seems to me that the loss that the person would potentially suffer must not be much different to the outcome if the loan had been regulated. Would you agree with that Rowan? And therefore if the bank was willing to accept that as the ultimate outcome, then the conservative approach you were suggesting seems acceptable.