THE CONSUMER CREDIT CODE - THE EFFECT OF NON-COMPLIANCE

Applying What Has Been Learnt Under The Credit Acts

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INTRODUCTION

To what extent (if at all) are the procedures and principles which have been developed from reinstatement applications under the Credit Act going to have relevance to applications in relation to civil penalties under the Consumer Credit Code?

This paper looks at some practical aspects of that question, with a parochial Queensland emphasis.[1]

REINSTATEMENT APPLICATIONS UNDER THE CREDIT ACT

As most familiar with the Credit Act know, where a regulated contract or a mortgage relating to a regulated contract is not in accordance with specified provisions of the Act:[2]

(a) the credit provider is guilty of an offence;[3]

(b) subject to the reinstatement provisions,[4] the debtor is not liable to pay to the credit provider the credit charge under the loan contract;[5] and

(c) amounts paid by the debtor on account of credit charges can be set off against the principal or recovered from the credit provider as a debt.[6]

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1 Section numbers are those applicable under the Queensland Credit Act 1987.

2 Sections 37, 38, 41, 42(1) and 92(1).

3 Sections 45 and 163.

4 Sections 86 and 87.

5 Section 44(1)(b).

6 Section 44(2).

This regime has the effect of forcing credit providers to apply for an order increasing the liability of the debtor (ie to reinstate the credit charges wholly or in part) under section 86.[7] Section 87 is essentially procedural, facilitating applications to increase the liability of the debtors where more than one contract is affected by a contravention (eg where there is a systemic error affecting all contracts entered into by the credit provider within a particular period). Section 87A provides for the court to determine that the debtors under all contracts the subject of an application under section 87 are liable to pay the whole of the credit charges if it is satisfied that the contraventions "... are minor errors and ought reasonably to be excused."[8] An important procedural feature of the minor error provisions is that the borrowers are not required to be served with the application unless the court otherwise directs.[9]

In Queensland, most (if not all) reinstatement applications by banks and finance companies in relation systemic or widespread human error affecting multiple contracts, have been made by an originating summons in the Supreme Court. In circumstances where it is unclear whether what has occurred involves a contravention at all, it has also become the practice to seek in the originating summons, by way of alternative relief, a declaration pursuant to Order 64 of the Supreme Rules to the effect that the contracts the subject of the application comply with the Credit Act.[10] These applications are dealt with by a single judge in Chambers, and can be brought on for final hearing within a very short time of filing the summons and supporting affidavit material.[11]

The availability of summary procedures which enable a credit provider to expeditiously obtain a declaration as to compliance from a Supreme Court judge has tended to promote Queensland as the first port of call for credit providers where the same error occurs in contracts entered into in various States.

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7 Although commonly referred to as reinstatement applications, the liability of the debtor becomes the liability as determined by the court, not the liability which the debtor would have had under the contract but for the relevant non-compliance: section 86(4).

8 "**Minor error**" is defined in section 87A(1) as "a contravention or failure to comply with this Act which is unlikely to disadvantage the debtors concerned in any significant respect".

9 Section 87A(2)(a). The question of whether the relevant error is a "minor error" is objective, and that it is only exceptionally that a borrower would have notice of the application: *AGC v Short* (1992) ASC 56-181 at p 57,776; *Westpac Banking Corporation v Various Debtors* (1992) ASC 56-187; *National Australia Bank Limited* (unreported Motion No 326 of 1994 delivered 02.12.94) per Mackenzie J.

10 O 64 rr 1A, 1B and 1BB. This procedure was adopted, for example, in applications by Westpac, ANZ, NAB, Bank of Queensland and Avco.

11 O 64 r4 requires service to be effected two clear days before the summons is returnable. It is therefore possible to obtain a hearing within a week, but in practice the court is usually asked to give directions on first return date in relation to matters such as notification of debtors. By requesting the court to deal first with the declaration followed by the minor error application, notification of debtors may be avoided.

CONSUMER CREDIT CODE CIVIL PENALTY APPLICATIONS

Forum

Essentially, the jurisdictions of Queensland courts remain unchanged.[12] However, section 102 of the Code provides that the court (or tribunal) "must", on an application being made, declare whether or not the credit provider has contravened a key requirement in connection with the credit contract or contracts concerned. Consequently, declarations of the kind which are available under Order 64 of the Supreme Court Rules in Queensland may be obtained under the Code in the States which have tribunals.[13]

Nevertheless, credit providers may continue to discern legitimate advantages in selecting Queensland as the forum for applications under Division 1 of Part VI of the Code where there are breaches or possible breaches of "key requirements" which affect contracts in various States. First, the application may be dealt with by a superior court, the decision of which ought to be followed by other courts and tribunals.[14] Secondly, the rules of evidence apply. Thirdly, there is at least an apprehension by credit providers that there are procedural advantages, and time and cost savings to be had by the summary disposal of applications before the courts.[15]

An attempt is made to curtail forum shopping in section 109, which provides that the court may refuse to hear an application on the ground that it is more appropriate that the application be determined in another jurisdiction. Before determining whether to refuse to hear an application, the court must consider, inter alia, whether the number of affected credit contracts in the other jurisdiction exceeds the number in this jurisdiction. An application anticipated by section 109 can only be made by a credit provider or the Government Consumer Agency, or a Government Consumer Agency of another State.

Section 109 raises a number of potential difficulties: section 101 confers jurisdiction in relation to a "credit contract". Relevantly the Code applies to credit contracts where the debtor was ordinarily resident in the particular jurisdiction at the time the contract was entered into.[16] It follows that a debtor can only make an application in relation to a credit contract in the jurisdiction in which he resided at the relevant time. It is difficult to see how a court might refuse

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12 Consumer Credit (Qld) Act 1994 section 7: jurisdiction is exercisable by the court whose monetary jurisdiction is not exceeded by the total **amount in dispute.** "Court" includes a Small Claims Tribunal. What the amount **in dispute** is in the context of applications in relation to civil penalties obviously raises conceptual difficulties. In relation to applications by credit providers and Government Consumer Agencies where there is a maximum penalty cap of $500,000 Australia wide, the Supreme Court will have jurisdiction if the maximum penalty which can be imposed with respect to Queensland contracts is not demonstrably less than the monetary limit on the jurisdiction of the District Court conferred by section 65 of the District Courts Acts 1967. The District Court would therefore have jurisdiction on an application by a credit provider or Government Consumer Agency in every case where no more than 40% of the contracts affected by the particular error relate to debtors who resided in Queensland when the contract was entered into (see section 105(1)).

13 The statutory direction in section 102 would appear to obviate any need for the applicant to secure a proper contradictor: *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, at p 448; *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, at pp 437-438.

14 The High Court has emphasised that uniformity of decisions and the interpretation of uniform national legislation are sufficiently important considerations to require level of judicial consistency, particularly in relation to intermediate appellate court decisions: *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

15 See, for example, the criticisms of the Victorian Supreme Court in *Avco Financial Services v Abschinski* (1994) ASC 56-256.

16 Section 6(1)(a).

to hear the application "on the ground that it is more appropriate that the application be determined in another jurisdiction".

Notification and Intervention of Debtors

This will depend upon who makes the application. "A party" to a credit contract or a guarantor or the Government Consumer Agency may apply to the court for an order under Division 1 of Part VI of the Code.[17] Obviously, where the debtor has made the application, the applicant debtor will be a party to the proceedings.

A credit provider or Government Consumer Agency may make an application in relation to one or more or a class of contracts entered into in a specified period,[18] and section 110(2) provides that the court may require notice of any such application to be published by a notice, in a form approved by the court, in a newspaper circulating throughout the jurisdiction or Australia.[19]

Although there is no analogue in the Code to the minor error provisions under the Credit Act expressly dispensing with service of the application upon debtors,[20] and although there are a number of indications within Division 1 of Part VI of the Code that subjective considerations relating to the debtor are relevant in assessing penalty,[21] in my view debtors have no entitlement to be heard on a civil penalty application made by the credit provider or a Government Consumer Agency. Contravention of the Code does not directly affect the contractual obligations of debtors.[22]

That, of course, does not mean that evidence from debtors will not be adduced on civil penalty applications. Typically that evidence would be adduced by the Government Consumer Agency, may apply to become a party to an application and, if joined, has standing to represent the public interest and the interests of debtors.[23]

In practical terms, a debtors may persuade a court or tribunal to permit the debtors to appear by making an application for compensation under section 107, and applying to have that application heard at the same time as the civil penalty application made by the credit provider or a Government Consumer Agency. Section 101(2) provides that a debtor or guarantor may not make an application for an order under Division 1 of Part VI in respect of a contravention under a contract if the contravention "... is or has been subject to an application for an order made by the creditor provider or a Government Consumer Agency anywhere in Australia ...", but that does not

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17 Section 101.

18 Code section 110(1).

19 Compare section 87(3) of the Credit Act. See also section 172(2)(b) of the Code (which preserves the power of the court to order substituted service) and sections 171 and 172 of the Code (which authorises service of a notice or other document by, inter alia, sending it by post, telex or facsimile to the address of the place of residence or business of the person last known to the person serving the notice or document).

20 Compare section 87A(2)(a) of the Credit Act.

21 Thus, for example, the court "must" have regard to "the conduct of the ... debtor before and after the credit contract was entered into," and "must" have regard to "the loss or other detriment (if any) suffered by the debtor as a result of the contravention": section 102(4)(a) and (c). Contrast this with the objective minor error test under the Credit Act (a contravention or failure to comply which is unlikely to disadvantage debtors: section 87A(1); see also *AGC v Short* (1992) ASC 56-181 at p 57,776).

22 Section 170 of the Code.

23 Section 111.

prevent an application from being made for an order for the payment of compensation under section 107.[24]

Considerations as to Penalty

The considerations to be taken into account under the Credit Act are those which are ordinarily treated as relevant in fixing a penalty for breach of a statute: *Custom Credit Corporation Ltd v Gray*.[25] In *Canham v Australian Guarantee Corporation Ltd*[26] after referring with approval the observation in *Gray*, Kirby P observed that it is necessary under sections 85 and 86 of the Act to take into account the culpability of the credit provider and the precise extent to which it has deviated from the obligations imposed by the Act. Obviously these general principles will apply equally under the Code.

There is a general discretion as to whether a penalty will be imposed where the credit provider has contravened a key requirement under the Code,[27] but in considering the imposition of a penalty, the court **must** have regard to the matters enumerated sub-section 102(4).

In considering the specific matters in sub-section 102(4) which must be taken into account, in my view, it is possible to derive considerable guidance from decisions under the Credit Act. Without intending to be exhaustive, the following sufficiently illustrate the point:

Sub-paragraph (a): the conduct of the credit provider and debtor before and after the credit contract was entered into. The Credit Act requires the court or tribunal to consider the **"relevant circumstances, including the conduct of the credit provider and the debtor and the loss or damage (if any) suffered by the debtor ..."** in deciding whether, and to what extent, the debtor's liability should be increased. In *Custom Credit Corporation v Gray* the Victorian Full Court observed: "The penalty to be imposed as a result of the exercise of its discretion should be duly proportionate to the **relevant conduct of the credit provider and debtor** and any consequent detriment sustained by the debtor."

Sub-paragraph (a) imports a subjective test, and raises questions as to the extent to which conduct unrelated the particular contravention will be relevant in determining penalty.[28] The latter question has arisen under the Credit Act where, in relation to minor error applications, it has been accepted that conduct unrelated to the error the subject of the particular application is generally not relevant. For example, in *National Australia Bank Limited v Various Respondents* (unreported 21 July 1995) the Chairman of the Commercial Tribunal of New South Wales, Mr Cavanagh, observed:

> "I accept that it is for the Bank to satisfy me that the minor errors ought reasonably to be excused but, in doing so, in the present circumstances, I do not consider that it is necessary for the Bank to demonstrate that its procedures reflect each and every requirement of the Act."

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24 Section 101(3) of the Code.

25 [1992] 1 VR 540 at 563.

26 (1993) 31 NSWLR 246.

27 By section 103(2) "The Court **may** make an order, in accordance with this Division, requiring the credit provider to pay an amount as a civil penalty ... ". In some circumstances the word "may" can be mandatory (eg *Finance Facilities Pty Ltd v Commissioner of Taxation* (1971) 127 CLR 106 at 134), but the context here plainly suggests a wide discretion: see sub-section 103(3) of the Code: "The Court, **in considering the imposition of a civil penalty,** must have regard primarily to the prudential standing of any credit provider ..." ; and sub-section 103 (4): "The Court, **in considering the imposition of a civil penalty**, must have regard to ...".

28 Compare sub-paragraphs (b), (c), (d), (f), (g) and (h) of sub-section 102(4) which all involve considerations relevant to the particular contravention the subject of the application.

In *Custom Credit v Gray*[29] the Victorian Full Court observed that "**... what are to be taken into account are the considerations inherently relevant to imposition of a civil penalty for the one or more than one contravention or failure ...**" the subject of the application.[30]

Under the Credit Act, therefore, at least in relation to minor errors, the court's inquiry has essentially been restricted in its ambit to considerations relating to the circumstances and consequences of the contravention itself.

It is not at all clear at this stage what the limits will be upon subjective matters which might be looked at under sub-paragraph 104(4)(a), particularly where the application is made by the credit provider or Government Consumer Agency under section 110 and relates to multiple contracts or classes of contracts. However, I think there are good arguments based both on the approach which has been taken under the Credit Act and as a matter of construction of the Code, that because the penalty relates to a particular contravention, the ambit of the inquiry under sub-paragraph (a) should be restricted to matters relevant to the particular contravention, rather than authorising a roving inquiry as to the subjective conduct of the credit provider and the debtor generally.

Sub-paragraph (b): whether the contravention was deliberate or otherwise. Not surprisingly, analogous considerations are also relevant under the Credit Act. In *National Australia Bank Limited v Director-General, Department of Queensland Emergency Services*[31] the Queensland Court of Appeal spoke of "disentitling conduct on the part of the credit provider" that would justify a refusal to grant relief under section 87A. Apart from sharp or dishonest conduct, the kind of conduct which the court referred to as "disentitling conduct" included making no serious attempt to comply with the legislation or simply flouting the law.

The New South Wales tribunal in *Australian Guarantee Corporation Limited v Short & Ors*[32] referred with approval to a passage from the judgment of Sugerman J in *Jaques v Pacific Acceptance Corporation Ltd*[33] dealing with Moneylenders Act: the "... failure or neglect was not with any conscious or deliberate plan or purpose to mislead or deceive ... and was not accompanied by any other conduct so motivated or intended".

Sub-paragraph (c): the loss or other detriment suffered by the debtor. The Credit Act requires the amount due to the credit provider to be reduced by at least the amount of any loss or damage suffered by the debtor as a result of the relevant contravention or failure.[34] Compare section 103 of the Code in relation to applications by debtors and guarantors.

In *Custom Credit v Gray*[35] the Victorian Full Court rejected the argument that, in exercising a discretion under section 83 of the Victorian Credit Act, the tribunal was entitled to take into account loss or damage to the debtor which did not result from a contravention or failure the subject of the application before the court.

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29 (1992) 1 VR 540.

30 See also Fullagar J (with whom Murray and Hampel JJ agreed), in *Encyclopaedia Britannica (Australia) Inc v Director of Consumer Affairs* (1988) VR 904 cf Mathews J in *Walter Pugh Pty Ltd v Commissioner for Consumer Affairs* (1988) 13 NSWLR 420 at 429-430.

31 Appeal Nos 247 and 248 of 1994 delivered 4 August 1995.

32 (1992) ASC 56-181 at p 57,778; see also Mackenzie J in *Avco Financial Services* (unreported Qld Supreme Court).

33 (1963) 80 WN (NSW) 1308 at 1315.

34 Section 86(3).

35 (1992) 1 VR 540.

In considering what detriment may have been suffered by debtors, there are also now a number of decisions under the Credit Act to the effect that, in the case of a contravention involving a failure to provide some relevant information to the debtor, the fact that the debtor has been provided with that information in another form, will be a matter relevant to penalty.[36]

Sub-paragraph (d): when the credit provider first became aware, or ought reasonably to have become aware, of the contravention. In *Avco Financial Services Ltd v Abschinski* [37] for example, Ormiston J in particular was critical of the credit provider because of the failure, when the omission was drawn to its attention, to take any steps to inform the debtors of their changed obligations for 17 months. It was essentially this conduct and the absence of any proper system to review computer generated forms which resulted in the imposition of penalties in that case.

Sub-paragraph (e): systems and procedures. Again in *Avco Financial Services Ltd v Abschinski* Ormiston J make useful observations upon the extent to which a credit provider can absolve itself from responsibility merely by employing a computer program or setting up information systems.

Sub-paragraph (i): the court may have regard to any other matter it considers relevant. Compare section 86(2) of the Credit Act **"... after consideration of the relevant circumstances ...".**

It is also instructive to look at civil penalty cases under the Trade Practices Act. In *Trade Practices Commission v CSR Ltd*,[38] French J enumerated the following as relevant considerations:

1. The nature and extent of the contravening conduct.
2. The amount of loss or damage caused.[39]
3. The circumstances in which the conduct took place.
4. The size of the contravening company.
5. The deliberateness of the contravention[40] and the period over which it extended.[41]
6. Whether the contravention arose out of the conduct of senior management or at a lower level.
7. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention.[42]
8. Whether the company has shown a disposition to co-operate with the authorities responsible for enforcement of the Act in relation to the contravention.

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36 See, for example, *ANZ v Various Debtors* per Williams J.

37 [1994] 2 VR 659.

38 (1991) ATPR 41-076.

39 Compare sub-paragraph 102(4)(c).

40 Compare sub-paragraph 102(4)(b).

41 Compare sub-paragraph 102(4)(d).

42 Compare sub-paragraph 102(4)(e).

Although not specifically referred to in section 104(4), deterrence, specific and general, is also a relevant element: *Australian Guarantee Corporation Ltd v Roberts.*[43]

CONCLUSION

At both a practical and procedural level, and with respect to considerations bearing upon assessment of penalties, I think much of the experience gained under the Credit Act regime will continue to have considerable utility. The cases under the Credit Act regime will also continue to provide some guide to the nature of the evidence relevant to questions of penalty.

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43 (1989) ASC 58,699.