THE CONSUMER CREDIT CODE - THE EFFECT OF NON-COMPLIANCE

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THE CONSEQUENCES OF NON-COMPLIANCE - CREDIT ACT

Criminal Penalties

Breaching provisions of the Credit Act (the Act)[1] can result in a criminal penalty, usually $1,000 (section 43, section 158). A regulated contract or regulated mortgage is not illegal, void or unenforceable by reason only that the credit provider or mortgagee is guilty of an offence under the Act: section 125(1). The court may, without proceeding to conviction, dismiss the charge if it is satisfied that the contravention was unlikely to deceive or operate to the disadvantage of the party to the relevant contract. There have been few, if any, prosecutions under the Act.

Civil Penalties

Non compliance with certain requirements may also lead to automatic loss of the interest component of the contract, known in the Act as the "credit charge." The latter consequence is referred to in the industry as the "civil penalty". The civil penalty is imposed in relation to loan contracts and credit sale contracts by section 42 (Queensland section 44) which provides as follows:

"42. Civil penalty

(1) Subject to section 85, where —

(a) a credit sale contract is not in writing signed by the debtor or is not in accordance with section 35;

[1] In this paper, all references are to the Credit Act 1984 (Victoria) unless otherwise indicated. Provisions in the New South Wales Act are to substantially the same effect. Equivalent sections under the Queensland Act will have different numbering. A table setting out corresponding sections can be found in the CCH looseleaf service, *Australian Consumer and Credit Sales Reporter* at 35-000.

(b) a loan contract is not in writing signed by the debtor or is not in accordance with section 36;

(c) the annual percentage rate under a credit sale contract, or a loan contract, is not disclosed in accordance with section 38 and, if applicable, section 39;

(d) a credit sale contract or a loan contract is deemed to be not in accordance with the provisions of this Division by reason of section 40(1); or

(e) a mortgage relating to a credit sale contract, or a loan contract, is entered into in contravention of section 91(1) —

the debtor is not liable to pay to the credit provider the credit charge under the contract.

(2) An amount paid by a debtor in respect of the credit charge that, in accordance with sub-section (1), he is not liable to pay, may be set off by the debtor against the amount that is due or becomes due to the credit provider under the credit sale contract or the loan contract or, where there is not such an amount, is a debt due by the credit provider to the debtor.

(3) Nothing in this section affects the liability of a person to be convicted of an offence under this Act."

There are provisions corresponding to section 42 in the case of continuing credit contracts (section 67). Although section 67 refers to loss of charges for a billing cycle, some of the matters listed would affect each billing cycle under the contract, thus achieving the same effect.

The rationale for section 42, of penalising the offender rather then rewarding the debtor, was explained by Fullagar J in *Encyclopaedia Britannica* [2] and approved subsequently in all jurisdictions, as follows:

> "I do not think it is correct simply to say that the discretion is given in case the statutory penalty would be otherwise too severe; rather, the intention of the legislature was to discourage credit providers from lending without a licence , and to do so by depriving those who so lent of some or all (as the case merited) of the principal and interest within the discretion of a tribunal. Forfeiture against the offender, not the benefiting of the debtor, was the rationale. Any benefit to the debtor was the 'windfall', not any order relieving a provider. I do not think it assists, and that it might in some cases lead to error, to regard the initial deprivation of all rights as anything other than a machinery provision to ensure the proper carrying out of the intention last above-mentioned."

In *Canham* [3] Kirby P said that:

> "In my view it is a mistake to draw a sharp distinction between 'windfalls' to the borrower and 'penalties' upon the credit provider. The former is but the means of achieving the latter. No doubt it was hoped that, by this procedure, borrowers would be educated in their rights and provided with a stimulus to assert them. Creditors, to avoid such 'windfalls', would be stimulated into strict compliance with the Act. To that extent, some windfall benefit to borrowers (if the effect of section 42 is properly to be so described) is inevitable in penalties upon credit providers. The one goes with the other."

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2 *Encyclopaedia Britannica (Australia) Inc v The Director of Consumer Affairs and Ors* (1987) ASC 55-611 at pp 57,852 - 57,853.

3 *Canham v Australian Guarantee Corporation Ltd* (1993) 31 NSWLR 246 at 266.

In a more recent case, the court accepted the proposition of Robert McDougall QC that "the question of the determination of the appropriate civil 'penalty' might properly be considered with due regard to the concepts of punishment, deterrence (both specific and general) and rehabilitation ...".[4]

Section 42 is subject to section 85, which enables a credit provider to apply to the tribunal (court in Queensland) for an order increasing the debtor's liability. Whilst there is some doubt about the relationship between section 42 and the provisions which deal with relief from the penalty (sections 85-87), the better view is that section 42 is self executing and that section 42(2) applies until an application is made under section 85. Once application has been made, there is a stay of the penalty under section 85A until the application is determined.

Applications under section 85 may be in relation to one contract or a class and in relation to one or several errors. A determination by the tribunal (court) under section 85 probably has effect as if the relevant level of charges had been included in the contract from the outset. Recent amendments have also permitted the tribunal to change instalment amounts. Generally, the tribunal orders the financier to pay the debtor's reasonable expenses and legal costs involved in the application. A Queensland court may take a less generous approach, determining the matter of costs more on a case by case basis. In the case of large scale error , tribunal (or court in Queensland) has been presented with nationally mediated agreements:[5] Also, trust funds have been established in some jurisdictions (section 86A Victoria; section 86B New South Wales; section 87B Queensland; section 85AA Australian Capital Territory). Where it would be unreasonable to require the credit provider to adjust each debtor's account or refund money on an individual basis, the tribunal or court may permit payment into the fund. In that case, the tribunal does not have to take into account loss or damage suffered by a particular debtor as a result of the contravention in the course of determining the appropriate penalty.

Some jurisdictions have introduced "minor error" provisions (section 86A New South Wales, Western Australia; section 87A Queensland).[6] These permit the court to excuse the credit provider for a contravention or failure "which is unlikely to disadvantage the debtors concerned in any significant respect" if the credit provider ought reasonably to be excused. Factors which the court will consider include the honesty or otherwise of the credit provider and the nature and number of the contraventions. The test is an objective one. One advantage of the minor error procedure is that only the Commissioner for Consumer Affairs need be notified, not each debtor.

THE CONSEQUENCES OF NON-COMPLIANCE - CREDIT CODE

Criminal Penalties

The Code attaches criminal penalties to virtually every breach of the Code. Robert McDougall has suggested[7] that if civil penalties do not produce compliance, criminal penalties may be more widely utilised under the Code than under the Act to protect consumers. It remains to be seen, however, to what extent government consumer agencies will be prepared (or will have the resources) to launch prosecutions.

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4 *Bing Lee Finance Pty Ltd v Various Respondents* (1994) ASC 56-267 at p 58,811.

5 See *AGC Ltd v Various Debtors (Vic)* (1994) ASC 56-287.

6 There are no equivalent provisions in Victoria or ACT.

7 R McDougall QC, "Consumer Credit Litigation" in *5th Annual Credit Law Conference 1995* proceedings, day three.

Civil Penalties

The Code, like the Act, provides for civil penalties. However, there are significant differences. The civil penalty triggers have been narrowed and made more explicit. The civil penalty is not automatic, and to a certain extent liability is capped for each contravention. Details of the provisions are set out below.

Penalties attach to breach of "key requirements"

The Code provides for civil penalties in relation to breach of what are described as "key requirements": section 100. Requirements differ depending upon whether the credit contract is a continuing one or not.

In summary, the key requirements relate to matters of disclosure at the time the contract is entered into or the inclusion of prohibited amounts. or in the case of continuing credit contracts, errors in the periodic statement of account.

An understanding of the scope of the key requirements can be gained from listing the headings of the relevant provisions for contract documents other than continuing credit documents:

- the amount of credit;
- the annual percentage rate or rates;
- calculation of interest charges;
- total amount of interest charges payable;
- credit fees and charges;[8]
- changes affecting interest and credit fees and charges;
- default rate;
- insurance financed by the contract: name of insurer and amount payable (all contained in section 15);
- inclusion of prohibited charges at the time the contract is entered into (section 21(1)).

In relation to continuing credit contracts, additional key requirements are to show interest charges debited in the statement of account (section 32(E)) and for the opening balance not to exceed the closing balance (section 33(1)).

Not all the requirements of section 15 are identified as key requirements. Some notable exceptions are the statement of what securities are to be given, and the statement of commission payable. On what policy basis were section 15 requirements excluded from the list? In the Second Reading Speech, the Victorian Minister said that the Code "limits [contraventions leading to civil penalty] breaches which have a real potential to mislead." It is likely that some requirements were omitted because they were thought less significant (such as the credit provider's name and address). But there is substantial judicial opinion under the Credit Act that says that disclosure of commissions is very important indeed. A pragmatic explanation is that it is very difficult to determine what a commission is, and credit provider's liability to systemic error

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[8] Note reg 72(2) which effectively removes from the key requirements disclosures about government fees and charges.

ought not to turn on a matter of judicial opinion. A different explanation is that where non-disclosure attracts civil consequences apart from Part 6 they have not been designated as key requirements. For example, mortgages and guarantees must be in writing and so obviously "disclosed" to the debtor. Failure to do so means the mortgage is unenforceable. Undisclosed commissions may attract secret commissions legislation, which carries serious criminal sanctions. However, the omission of these details is open to criticism. These disclosures are relevant to the truth in lending policy of the legislation. Implicit in that policy is that consumers be able to make informed choices between credit products and indeed whether to take up credit or to self finance. Details of security are significant because a secured or guaranteed contract ought to contain a lower interest rate than its opposite. Details of commission payable affect the decision whether to use credit at all. It is difficult to see why those disclosures are less important than others.

A key requirement relating to a disclosure or a statement of account extends to the requirements set out in Part 2 as to the manner in which the disclosure or statement is to be made, but does not extend to any requirements set out in the regulations: section 100(3). At present, all matters dealing with the manner of disclosure are dealt with in the regulations. The transitional regulations have modified the apparent requirements of section 15. Regulation 72 provides that section 100 of the Code applies so that any requirement of sections 15, 21, 32 or 33 of the Code that are modified by regulation are taken to be requirements of the Code. This regulation applies to pre-code credit contracts coming within the Code and new contracts entered into within the first 12 months.

Apparently the civil penalty provisions in the case of credit contracts relate only to information in the credit contract and not the pre-contractual statement. It is questionable therefore how far the civil penalty provisions carry out any policy of truth in lending. This phrase connotes more than accuracy of information. As described about, it is about enabling the consumer to make efficient choices. Information must be delivered in a timely and comprehensible way. Attaching the civil penalty to contractual as opposed to pre-contractual disclosure is closing the door after the horse has bolted.

It is noteworthy that breach of section 21 (prohibited monetary obligations) already carries its own civil penalty. Under section 21 any provision in breach is void and any amount paid is recoverable.

No automatic forfeiture

Unlike the Act, the civil penalty is not automatic upon breach. Application must be made by a party to the credit contract, a guarantor or Government Consumer Agency: section 101(1). (This resolves the doubt present under the Act in jurisdictions other than Victoria or Western Australia, as to whether a debtor had standing to obtain declaratory relief).

The only fetter on enforcement whilst civil penalty applications are on foot is if court makes a direction under section 112. This is apparently confined to the case where the debtor or guarantor makes the application.

Nature of penalty

Where the application is made by the credit provider or the Government Consumer Agency, the tribunal must determine whether a contravention has occurred and may order a monetary penalty in the nature of a fine. The fine will be paid into a trust fund, or, if none is established, to the Government Consumer Agency: section 106. The fine for any one contravention is capped in all jurisdictions (except Western Australia) at $500,000: section 105. The capping is a response to concerns of smaller lenders that a massive reinstatement application could jeopardise their prudential standing. In addition, in setting the fine, the court is required to have regard primarily to the prudential standing but only if the credit provider takes deposits or is a borrowing corporation within the meaning of the Corporations Law and if it so requests.

Since separate applications apparently may be made in Western Australia, there is potential for the cap to be exceeded for any credit provider with operations in Western Australia. It is also important to realise that if there are breaches of different key requirements, each breach may attract a separate fine. Also, the cap does not include any award of compensation to the debtor or guarantor for loss arising from the contravention under section 107 (see below).

Where the credit provider or the Government Consumer Agency has initiated the application, it is clear that a debtor or guarantor cannot make a separate application for an order anywhere in Australia (except Western Australia) except for compensation for loss arsing from the contravention under section 107. That is, no civil penalty will be ordered at the suit of the debtor or guarantor in this circumstance nor will there be a loss of interest charges. Can the debtor's application be supplanted by a subsequent application by the credit provider?

Perhaps this is a possibility given that section 101(2) provides that:

> "(2) A debtor or guarantor may not make an application for an order under this Division in respect of a contravention under a contract if the contravention under that *contract is or has been subject to an application* for an order made by the credit provider or a Government Consumer Agency anywhere in Australia under this Code or a corresponding law of another jurisdiction."

But probably the words in italics refer to the situation at the time at which the debtor's application is lodged. If the contravention been dealt with already or an application currently on foot, then the debtor may not begin her application.[9]

On an application by the debtor or guarantor under section 101, the court may impose a penalty not exceeding loss of interest charges: section 103(1). The court can order a penalty greater than this by way of compensation for the debtor's loss if this loss is proved. It would seem that the court has no discretion to reduce the award for compensation below the measure of the debtor's loss once this is established. The civil penalty may be set off against amounts due by the debtor to the credit provider or may be recovered from the credit provider as a debt due.

It is uncertain what "loss" means in this context. McDougall points out that section 103(2) does not limit the recoverable loss to that "arising from the contravention."[10] In my view, this limitation may be implied from the words of section 103(1). He also draws attention to the use of the words "loss or detriment" in section 102(4)(c) and wonders whether section 103 ought to be confined to loss or comprehends broader compensation principles. It is likely that section 103 was intended to be confined to loss only (as is section 107) and that the reference to loss or detriment in section 102(4) merely picks up the discretionary considerations elaborated by tribunals under the Act. In that context, some weight is given to the issue of whether the debtor would have acted differently given different information despite not actually having suffered a measurable loss because of the contravention. This is a factor relevant to the civil penalty but not to the quantum of the debtor's recovery under section 103. If this interpretation is correct, the result will be that the quantum of loss awarded under section 103 and section 107 will be the same. This result is defensible on policy grounds. It should make no difference to the award of compensation whether the debtor initiates the compensation action or the credit provider.

The guarantor may also apply for compensation under section 107. It is unclear how a guarantor will suffer a loss independently of the debtor's loss. The most probable explanation is that this expansion of section 107 was unnecessary especially given the broad rights to compensation in section 114.

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9 McDougall takes the opposite point of view; McDougall, ibid, 13.

10 Ibid.

Factors to be taken into account

The matters which the tribunal must take into account are listed in section 102(4) and seem to permit the same kind of extensive inquiry as occurred under the Act. McDougall has suggested that since prudential matters can now also be taken into account (section 102(3)), the scope of the inquiry might be even wider.[11]

The factors are:

(a) the conduct of the credit provider and debtor before and after the credit contract was entered into;

(b) whether the contravention was deliberate or otherwise;

(c) the loss or other detriment (if any) suffered by the debtor as a result of the contravention;

(d) when the credit provider first became aware, or ought reasonably to have become aware, of the contravention;

(e) any systems or procedures of the credit provider to prevent or identify contraventions;

(f) whether the contravention could have been prevented by the credit provider;

(g) any action taken by the credit provider to remedy the contravention or compensate the debtor or to prevent further contraventions;

(h) the time taken to make the application and the nature of the application;

(i) any other matter the court considers relevant.

Principles of deterrence suggests the penalisation of dishonest or negligent conduct but balanced by an incentive to modify behaviour. This is accounts for many of the factors listed and also by the adoption of a penalty cap when the credit provider brings the application, as discussed above. A principle of awarding compensation for loss suggests factors (c) and (g) and the ability of the debtor to recover loss under sections 103 and 107.

Extent of applications

The intention of the drafters of the Code was that instead of credit providers being required to take action in each jurisdiction, there should be a "one stop shop". For this reason, the cap applies to all contraventions disclosed by the credit provider throughout Australia. The court or tribunal must determine the penalty and then apportion the amount payable in each jurisdiction. The Code provides for recognition of orders of other jurisdictions under section 102 and 105: section 108. A court in one jurisdiction may refuse to hear an application on the ground that it is more appropriate that the application be determined in another jurisdiction. Submissions to this effect may be made by the credit provider or the Government Consumer Agency, and by a debtor or guarantor if joinder of actions under section 107 is permitted[12] The court must consider:

(a) whether the number of affected credit contracts in the other jurisdiction exceeds the number in this jurisdiction; and

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[11] Ibid, 16.

[12] See the comments of S Cavanagh supporting this approach: "The Consumer Credit Code 1994 - A Commentary", *4th Annual Credit Conference 1994*, Day 2, 13, based on the fact that the court must consider loss or detriment suffered by the debtor and the subsequent conduct of the debtor and credit provider under section 102(4) and the advertising provision: section 110(2).

(b) any other matter the court considers relevant.

A cross vesting scheme under section 177 is essential to the fair and efficient working of the civil penalties regime. It is necessary to allow the tribunal or court to take into account conduct of the credit provider in jurisdictions outside that in which the hearing occurs and for proper jurisdiction to apportion the penalty.[13] It is understood no regulations to effect the cross vesting scheme has yet commenced.

Another uncertainty is the scope of section 101(2). That is, must an application for an order by a debtor relate to that particular debtor's contract or can it relate to a number of contracts with a common error?

There are three possible approaches.[14] The narrow view is that debtors and guarantors can only make applications in respect of their own contracts. Section 102(1) provides that:

> "The Court must, on an application being made, by order declare whether or not the credit provider has contravened a key requirement in connection with the credit contract or contracts concerned."

The argument focuses on the link between "on application being made" and "in connection with" but it is not very persuasive. The argument is strengthened by the list of factors in section 102(4) including (a) "the conduct of the credit provider and debtor before and after the credit contract was entered into."

The broad view is that section 102 should be taken on its face and allows any debtor or guarantor to seek civil penalties for a contravention in which they are only theoretically interested.

The "intermediate" view is that debtors and guarantors may initiate civil penalty actions under section 101 in respect of a common error but that their own rights of recovery are limited to section 103.

Irrespective of the jurisdiction conferred by section 101, it may be open to a debtor or guarantor to commence a representative action relying on rules of court such as the Supreme Court Rules 1970 (New South Wales) Part 8 rule 13(1) especially after *Carnie's* case.[15] There, the High Court held that the question was not the scope of rule to enable proceedings to be brought but the discretion of the court to permit the representative action in those circumstances.[16]

Other Civil Penalties

Section 114 provides as follows:

(1) If a credit provider contravenes a requirement of or made under this Code (other than one for which a civil effect is specifically provided by Division 1 or by any other provision of this Code), the court may order the credit provider to make restitution or pay compensation to any person affected by the contravention and, in that event, may make any consequential order it considers appropriate in the circumstances.

(2) An application for the exercise of the court's powers under this section may be made by the Government Consumer Agency or by any person affected by the contravention.

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13 See Cavanagh, op cit and McDougall, op cit.

14 Drawn from McDougall, op cit, 16.

15 See *Carnie v Esanda Finance Corporation Ltd* 69 ALR 206.

16 See also Part IVA of Federal Court of Australia Act 1976 (Cth); Supreme Court Act 1986 (Vic) section 35; Supreme Court rules (SA) r 34.

The ambit of this section is unknown. It has potentially far reaching consequences for credit providers and it does not contain any caps.[17]

LESSONS FROM THE PAST

The aims underpinning the civil penalties regime of the Credit Act were two fold:

- to deter contraventions of the Credit Act;
- to compensate debtors for loss suffered as a consequence of the contravention.[18]

There are two opposing views about how successful the civil penalties regime was in meeting these aims.

John Owens, in a paper presented at the 4th Annual Credit Conference, said that the Credit Act placed an enormous burden on credit providers with little or no corresponding benefit to consumers. In his view,

> "[t]he Credit Act's apparent preoccupation with trivial matters, coupled with rather extreme penalties for non-compliance, perhaps made it inevitable that protracted and costly litigation would follow the Credit Act's commencement."

In a robust reply to Mr Owens at the same conference, Mr Stephen Cavanagh, Chairman of the Commercial Tribunal of New South Wales, asked why compliance with requirements viewed as trivial could not be attained.

Considering large scale systemic errors, Mr Cavanagh commented:

> "The genesis for this level of non-compliance and the associated costs is not the Act but, generally speaking, the failure of the credit provider (and the extent of that failure) in adequately appreciating and addressing the responsibilities imposed on it by the legislature ...The true reason for what has been an alarming and regrettable level of non-compliance with the disclosure requirements of the Act by a range of credit providers may never be known. It may be that the absence of any measured enforcement of moneylending and hire purchase legislation, prior to the introduction of the Act, to which Mr Owens refers, is a cause (although not an excuse) in that it fostered a climate of non-compliance. It may be that for those credit providers, like banks, who were not subject to moneylending and hire purchase legislation, the lack of familiarity with regulation of that type or practical experience with transactions of the type the subject of regulation, is a cause ... Whatever the cause, I find it difficult to accept that it lies in any difficulty in understanding the disclosure requirements of the Act or with any question of expense associated with compliance with those requirements."

Perhaps the truth lies somewhere in between. It has become clear that the disclosure provisions of the Act (sections 35 and 36) are rigid and proscriptive.. It has not always been possible to predict in advance how a court will construe the statutory requirements. Indeed, courts in different jurisdictions have taken different approaches. In addition, the fact that the civil penalty is automatic may cause "contagious invalidity". That is, a refinancing contract itself will contravene the Act if the stated payout figure for the earlier contract includes credit charges which are not lawfully payable under section 42. Systemic breaches can affect thousands of contracts with

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17 For a detailed discussion of section 114, see McDougall, op cit; J Stoljar, "A class action provision? - section 114 of the Consumer Credit Code" (1995) 10 *Butterworths Consumer Credit Bulletin*, para 139.

18 See Committee of the Law Council of Australia, *Report to the Attorney-General for the State of Victoria on Fair Consumer Credit Laws* (1972), para 10.3.2, the "Molomby Report".

potentially catastrophic results for the credit provider's balance sheet and prudential standing. There was a systemic contraventions award of $30 million in New South Wales alone in the *State Bank of NSW* case. The nature of the penalty also inhibits securitisation plans and other assignments. Staying enforcement for lengthy periods while applications are conducted may create large debt delinquency in the interim. Some problems have been rectified by legislative or judicial action: the adoption of "minor errors" legislation in some jurisdictions and the formulation of the principles on which the court or tribunals will exercise their discretion to reinstate. However, it does seem that tribunals, particularly in Victoria, have conducted wide ranging inquires into a credit provider's operations akin to a Royal Commission.[19] The administrative and legal costs of making applications has run into hundreds of thousands of dollars. More importantly, credit providers have committed large resources to on-going compliance programmes. It is arguable that this is a mis-allocation of resources which would be better spent on customer and staff education or in reduced rates.

It needs to be said, however, that the reported cases show that in many instances credit providers committed elementary errors, had woefully inadequate management and reporting systems, failed to seek or follow legal advice and failed to ensure computing and marketing initiatives fitted with legal requirements. Senior management was also sometimes ignorant, dilatory, lethargic, or uninterested (until the proverbial fan went into action). The case study attached to this paper caricatures some of the mistakes of the past under the Credit Act.

The new civil penalties regime as outlined above removes many of the problems encountered with the antecedent legislation. In any event, the relevant provisions of section 15 are less prescriptive than sections 35 and 36. Costs of application will be reduced by the "one stop shop" approach. Nevertheless, credit providers who make elementary mistakes or have inadequate management practices are liable to make serious mistakes which will attract civil penalties which are not insignificant. They will also attract damaging publicity and afford poor customer service.

Examples of deficiencies of credit provider operations in the past are as follows:

- Not realising that the Credit Act applied to the credit provider's operations or ignoring altogether the requirements of the Act;[20]
- Inadequate planning for the commencement of the Act;[21]
- Not obtaining legal advice or giving legal advisers incomplete or inadequate instructions;[22]
- Receiving legal advice as to compliance with the Act and ignoring it;[23]
- Failure to resolve conflicting legal advice;[24]

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19 *Avco Financial Services Ltd v Abschinski* [1994] 2 VR 659 at 691.

20 *Encyclopaedia Britannica (Australia) Inc v The Director of Consumer Affairs and Ors* (1988) ASC 55-636; *Oamast Pty Ltd v Various Respondents* (1994) ASC 56-269; *Colonial Financial Management Ltd v Various Debtors* (1995) ASC 56-299.

21 *State Bank of NSW v Various Respondents* (1995) ASC 56-307.

22 *Bing Lee Finance Pty Ltd v Various Debtors* (1994) ASC 56-267; *AGC v Various Respondents* (1995) ASC 56-301; *State Bank of NSW v Various Respondents* (1995) ASC 56-307; *Advance Bank v Various Debtors* (1996) ASC 56-332.

23 *Stan Cusack Finance Co Pty Ltd v The Director for Consumer Affairs* (1989) ASC 55-715; *State Bank of NSW v Various Respondents* (1995) ASC 56-307.

24 Eg *Westpac v Various Respondents* (1992) ASC 56-187; *Westpac v Various Debtors* (1993) ASC 56-239.

- Writing regulated credit on non-regulated documentation;[25]
- Failure to adopt compliance procedures eg by audit;[26]
- Using manual procedures to complete loan documentation with high error rate;[27]
- Failing to complete documents properly eg by leaving blanks incomplete or by failing to choose one of two alternatives;[28]
- Failure to monitor changes to contracts to take into account the requirements of the Act;[29]
- Inadequate training of data checking staff and supervising staff;[30]
- Failure to update training;[31]
- Manuals inconsistent with documentation; not used for training;[32]
- Manuals not updated;[33]
- Appointment of staff to key positions who were not sufficiently conversant with Credit Act requirements;[34]
- Computer programming errors combined with inadequate testing; computer programmers no knowledge of Act;[35]
- In large organisations, failure to obtain complete details of contractual arrangements between the organisation and other parties especially subsidiaries;[36]

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25 *Re CBFC Ltd* (1991) ASC 56-063; *Re AGC* (1991) ASC 56-078; *CBFC Ltd v Radalj* (1991) ASC 56-103.

26 *AGC v Chivell and Ors* (1991) ASC 56-071; *Esanda v Sheridan* (1992) ASC 56-120; *Westpac v Various Respondents* (1992) ASC 56-187; *State Bank of NSW v Various Respondents* (1995) ASC 56-307; *State Bank of NSW v Various Respondents* (1995) ASC 56-307.

27 *Avco Financial Services Ltd v Various Debtors (No 1)* ASC 56-072; *Bing Lee Finance Pty Ltd v Various Debtors* (1994) ASC 56-267.

28 *AGC v Haughton* (1990) ASC 55-994; *AGC v Various Debtors* (1995) ASC 56-319; *Re ANZ Bank* (1995) ASC 56-311.

29 *NAB v Various Respondents* (1995) ASC 56-324.

30 *Esanda v Sheridan* (1992) ASC 56-120; *Westpac v Various Respondents* (1992) ASC 56-187; *Shortland Finance Pty Ltd v Various Debtors* (1994) ASC 56-291; *GIO Finance Ltd v Various Debtors* (1994) ASC 56-292; *State Bank of NSW v Various Respondents* (1995) ASC 56-307; *State Bank of NSW v Various Respondents* (1995) ASC 56-307.

31 *Custom Credit Corp in liq* (1995) ASC 56-316.

32 *Bing Lee Finance Pty Ltd v Various Debtors* (1994) ASC 56-267; *State Bank of NSW v Various Respondents* (1995) ASC 56-307.

33 *State Bank of NSW v Various Respondents* (1995) ASC 56-307; *Custom Credit Corp in liq* (1995) ASC 56-316.

34 *Avco v Abschinski* (1994) 56-256; *Bing Lee Finance Pty Ltd v Various Debtors* (1994) ASC 56-267; *Shortland Finance Pty Ltd v Various Debtors* (1994) ASC 56-291; *GIO Finance Ltd v Various Debtors* (1994) ASC 56-292; *State Bank of NSW v Various Respondents* (1995) ASC 56-307.

35 *Avco v Abschinski* (1994) 56-256; *State Bank of NSW v Various Respondents* (1995) ASC 56-307.

36 Eg *Westpac v Various Respondents* (1992) ASC 56-187.

- Misleading and ambiguous instructions in training manuals;[37]
- Lethargic response to complaints of non-compliance.[38]

LOOKING TO THE FUTURE

A good deal has been written about compliance programs and planning for the introduction of the Code.[39] In this part, I consider some of the important steps form the perspective of the legal adviser.

Implementation

Unfortunately, anecdotal evidence suggests that while major financiers have poured millions of dollars already into compliance programs and implementation, many smaller institutions and businesses have adopted a "wait and see" approach. This means that when the Code comes into effect, there is likely to be a last minute scramble. This is only slightly alleviated by the one month "slip rule" in the transitional regulations. Therefore, a key role legal advisers can play is a pro-active one. They can inform senior management now of the likely effect the Code will have on their transactions and help them plan for implementation.

One looming danger is also the "turn off" factor. That is, clients may hear the words "Consumer Credit Code" and immediately think it can have no relevance to them. Many have not heard of the abolition of the monetary ceiling. Businesses with hybrid products may not understand how those products will come within the Code.

In summary clients need to:

- undertake an appropriate review of all existing and proposed products and contractual arrangements;
- check the match of systems to products;
- check the match of Code requirements to the existing arrangements;
- determine any modifications;
- finalise and thoroughly test procedures and documentation.

It is very important that senior management and the managing director supervise and "own" Code implementation. Project managers or a project officer must receive the support of and direction from senior management and report to them. Implementation should be a full time responsibility. The project manager must deal not only with staff directly concerned with writing business but also with systems, advertising, collections, and personnel.

Legal advisers are only one small part of the team. Nonetheless, it is important that if they are advising, that they get the "whole story". Often in the past, legal advisers have not fully

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37 *Westpac v Various Respondents* (1992) ASC 56-187; *Bing Lee Finance Pty Ltd v Various Debtors* (1994) ASC 56-267.

38 *Westpac v Various Respondents* (1992) ASC 56-187; *Avco v Abschinski* (1994) 56-256; *State Bank of NSW v Various Respondents* (1995) ASC 56-307.

39 Two of the best are A Smith and A Beatty, "Making the Code Work: A Guide to Compliance" in *Butterworths Australian Consumer Credit Law*, Vol 1, and R Dennings, "The Immediate Impact on Credit Providers" in *New Consumer Credit Laws. A practical guide.* (BLEC 1995).

understood a product or a computer system. They may have seen the contract document but not the covering letters. All aspects of the transaction needs to be vetted for legal compliance. Modifications need to be checked: many times mistakes have been made in the printing.

Compliance Systems

Each organisation needs to develop compliance systems which may contain the following elements:

- staff training;
- positive encouragement and support for compliance on an on-going basis;
- compliance manuals used on a daily basis, regularly updated;
- unambiguous and accurate documentation;
- computer supported documentation generation;
- clear and accurate product delivery and settlement processes;
- post contract reporting to customer/notices;
- post contract checking and review;
- dispute resolution procedures;
- up line reporting of disputes.

It is useful to establish a corporate compliance unit which reports to senior management and also informs and receives advice and reports from the grass roots. There needs to be legal and management review of industry practice and legal developments so there can be timely modification of systems and documents. Responsibilities should be specific and clearly allocated, both internally and to external advisers such as lawyers. Relationships with insurers, suppliers agents and collections agents need to be monitored. It is particularly important that new products go through the same careful checking and implementation process as will occur in 1996.

Compliance Culture

Perhaps the most important feature of compliance systems is the culture which supports it. Compliance must be a mind set from the board to the most junior employee based on a sense of commitment to and responsibility to the customer.

Ongoing Commitment

Any effective compliance system must be subject to continual review and improvement. Legal advisers have a responsibility to keep clients informed of significant changes to the Code, either legislative or through judicial interpretation.

CASE STUDY

Dollars 'R Us Ltd has a thriving loan finance business based in Surfers' Paradise. In May 1996, Dollars hastily contacts its solicitors, Swift, Smart and Lovable, to draw up new loan contracts and vet its existing security documentation. SS and L live up to their name and Dollars gets a rush print job done in time for August. SS and L also put together a compliance manual. Unfortunately it is a bit technical and hard to read. Ms Sterling, who joined Dollars in 1995 after working overseas in a merchant bank, attends the Banking Law Conference on the Code. She trains the in-house staff in July. The Code comes in and everyone at Dollars and SS and L breathes a deep sigh of relief.

Time passes. Ms Sterling has left the company to pursue her acting career at Movie World. There is no regular in-house training program and no one uses the manual. Some staff are using forms and old security documents from pre-1996. Several new products have been introduced by the marketing people. Staff involved in documenting the new products have adapted the 1996 forms.

Wendy Whistleblower joins Dollars after working for a major Australian financier for many years. When she looks over some contracts, she decides they breach section 15. Mr Goldfinger, the Company Secretary, tells her "look, they are probably just computer errors, not real mistakes." He asks her to "monitor the situation" and report back if and when necessary. She also sees something about a decision of Justice Allwise that seems to mean that Dollars' existing practice is wrong. SS and L advise her that no change is required. But Wendy persists. She rings other panel solicitors, Even Bigger and Better, who take the opposite view. Wendy alerts Mr Goldfinger, but he puts her report in the "too hard basket".