Chapter 2

Hardship variation and enforcement of credit contracts

2.1 The National Credit Code currently provides for borrowers to seek variations of credit contracts in circumstances of hardship.[1] Under the existing legislation, borrowers with credit contracts for less than $500 000 may apply for hardship variations if they are unable to meet their repayment obligations due to 'illness, unemployment or other reasonable cause'. There are only three kinds of variations available, namely:

- extending the period of the contract and reducing the amount of each payment due under the contract accordingly (without a change being made to the annual percentage rate or rates);
- postponing for a specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates); or
- extending the period of the contract and postponing for a specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates).

2.2 The borrower must include information that demonstrates that the borrower could meet the changed repayment obligations.

2.3 Within 21 days of receiving the application, the credit provider must send written notice to the borrower either agreeing to the proposed change or informing the borrower of the reasons why the application has been refused and providing the borrower details of an approved external dispute resolution scheme. Failure to do so is a strict liability offence with a penalty of 30 penalty units.[2]

2.4 Credit providers are not required to respond to hardship variation requests before commencing proceedings to enforce the debt.[3]

2.5 The Enhancements Bill would extend the circumstances in which hardship variations may be sought and reduce the procedural requirements on borrowers. As outlined in the Explanatory Memorandum, the following amendments are proposed.

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1 National Credit Code, s. 72.

2 Strict liability offences do not require proof of fault. That is, a person commits the offence if he or she carries out the prohibited conduct. It is irrelevant whether the person, for example, intended to commit the conduct. For further information see the *Criminal Code*, section 6.1. 'Penalty unit' is defined in section 4BB of the *Crimes Act 1914* as $110.

3 Explanatory Memorandum, Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, table: 'Comparison of key features of new and current law', p. 13.

- All borrowers may apply for hardship variations, regardless of the value of the credit contract.
- The hardship notice may be made orally or in writing.
- While called a 'hardship notice', the Bill does not expressly state that in order to apply for the contract to be varied the borrower's capacity to repay must be affected by hardship. The application therefore does not have to contain reasons why the borrower is unable to meet the repayment obligations.
- The Bill also does not impose limits to the form of hardship variation that the borrower may request.
- The borrower is not required to demonstrate that he or she could meet the changed repayment obligations.
- Within 21 days of receiving the notice a credit provider must either notify the borrower that they are prepared to negotiate a contract variation or are refusing the request. If refusing the request, the credit provider must provide reasons for the refusal and details of an approved dispute resolution scheme.[4]

2.6 The credit provider would commit an offence by failing to either notify the borrower within the 21 day timeframe that they are prepared to vary the contract as requested or by refusing the request to negotiate a contract variation. If providing notice of the credit provider's refusal to negotiate, the credit provider would still commit an offence if the notice does not provide reasons for refusing to negotiate, details of an approved external dispute resolution scheme of which the credit provider is a member and details of the borrower's rights under that scheme. The offence is a strict liability offence with a maximum penalty of 30 penalty units.

2.7 The Bill would also introduce clause 89A, which would alter the requirements for seeking to enforce credit contracts in response to borrower default. Under the revised regulatory framework, creditors would be required to respond to hardship notices before seeking to enforce the credit contract. If a hardship notice is given prior to or after the creditor has issued a default notice, the creditor must not commence enforcement proceedings until 14 days after responding to the hardship application. The credit provider would commit an offence if initiating enforcement proceedings in contravention of these restrictions. The offence would also be a strict liability offence and would expose the credit provider to a maximum penalty of 50 penalty units.

2.8 Proposed clause 94 would also provide borrowers the right to request or demand credit providers delay proposed enforcement proceedings for 14 days.

4 Explanatory Memorandum, Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, table: 'Comparison of key features of new and current law', p. 13.

2.9 The new lending environment would commence on 1 July 2012,[5] approximately two years since the National Credit Code, and the hardship variation provisions it currently contains, came into operation.[6] The Explanatory Memorandum clarifies the intention underlying the proposed amendment, stating that the reforms will 'make it easier for debtors to apply for hardship variations, by making the procedures more flexible.'[7]

2.10 Details of the background to, and the rational for, the proposed changes were provided in Treasury's July 2010 *Green Paper*. The paper explains that the existing provisions in the National Credit Code replicate the hardship provisions in state and territory consumer credit regulations but do not address issues with their operation. The paper argues that the Council of Australian Governments (COAG) envisioned that the issues would be the subject of further consultation and legislative proposals progressed under phase two of the national consumer credit reforms:

> As part of the transitional arrangements agreed between the Commonwealth, State and Territory Governments and industry, minimal changes were made in replicating the UCCC [Uniform Consumer Credit Code] as the National Credit Code on the basis that these issues would be given further consideration during Phase Two.[8]

2.11 The paper informs readers that the identified issues included whether further enhancements are required for the hardship variation provisions and the enforcement provisions.[9] The paper goes on to provide the following rationale for amending the framework for hardship variations and enforcement proceedings.

> The limited range of variations that can be requested on the basis of financial hardship may lack sufficient flexibility to enable the most mutually beneficial outcomes for both lenders and consumers. Furthermore, having a monetary threshold above which a consumer does not have a right to request a variation applies an arbitrary limitation. Neither of these restrictions are entrenched in the industry codes of conduct.
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> In most situations it is likely to be advantageous to both lenders and consumers to keep a credit contract out of default, provided that the consumer can reasonably be expected to meet their commitments following

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5 Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, clause 2.

6 *National Consumer Credit Protection Act 2009*, s. 2. The National Credit Code commenced on 1 April 2010.

7 Explanatory Memorandum, Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, paragraph 2.6.

8 Treasury, *National Credit Reform: Enhancing confidence and fairness in Australia's credit laws – Green paper*, July 2010, p. 81.

9 Treasury, *National Credit Reform: Enhancing confidence and fairness in Australia's credit laws – Green paper*, p. 81.

> a variation and the lender is able to receive repayment within a reasonable timeframe.[10]

2.12 The Regulation Impact Statement provides further insight into identified problems with the regulatory framework as it currently stands. The statement provides an overview of research conducted in 2009 by the Australian Securities and Investments Commission (ASIC) into the hardship practices of 15 major lenders. The ASIC research draws the following conclusions about the availability of hardship variations.

> One lender would only consider an application made in accordance with the statutory requirements, and that otherwise it would not offer any assistance. All the other lenders did not differentiate in their responses.
>
> Lenders preferred to provide a similar response irrespective of the borrower's situation; typically this was short term assistance such as a three month payment moratorium. This response did not require an assessment of the consumer's circumstances and needs and then varying the contract to match those needs.
>
> Lenders generally have a far wider range of options for responding to hardship than those set out in the Code, but in practice tend to provide a much narrower range of options.[11]

2.13 The statement draws on anecdotal evidence provided by the Financial Ombudsman Service and the Credit Ombudsman Service, as well as the ASIC research, to make the following conclusions about the utility of the hardship variation schemes established under the state and territory consumer credit legislation:

> ...borrowers only have a right to seek a variation to address short-term hardship on relatively narrow grounds, and where their request conforms to precise legal requirements. This creates a risk of two distinct problems for borrowers:
>
> - the lender may refuse to consider a variation of their contract because the borrower's request did not conform to the requirements under the Code; or
> - lenders may only provide a variation that is one of the three options set out in the Code, when a different response would more effectively address the borrower's situation.
>
> In both cases the consequence for the borrower is the same, namely that they may default under their credit contract and face enforcement action when, in some situations, this could have been avoided.
>
> There is evidence from a number of different sources that some lenders are not properly meeting the obligations in their voluntary code in relation to

10 Treasury, *National Credit Reform: Enhancing confidence and fairness in Australia's credit laws – Green paper*, p. 83.

11 Regulation Impact Statement, Explanatory Memorandum, Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, paragraph 9.140.

> hardship, and that they are only complying with the requirements in the Credit Act. They therefore have practices which mean they do not actively seek to resolve, in a broader way, the position of borrowers who are in financial hardship.[12]

Support for the new approach to hardship variations and enforcement of credit contracts

2.14 On the basis of evidence before the committee, it appeared that the Enhancements Bill generally addresses concerns of consumer advocates with the existing legislative provisions governing consumers' access to hardship variations.[13] The views of Anglicare Victoria seemed representative of the perspective of the consumer advocates who participated in the inquiry:

> Anglicare Victoria supports the provisions...that protect debtors in cases of hardship and make it easier to apply for hardship variations, by making procedures more flexible.[14]

2.15 Good Shepherd Youth and Family Services provided the following comments in support of the Bill:

> We support the changes which place greater onus on the credit provider to inform consumers of their rights when seeking hardship protections. Often people who seek these provisions need to ask for those explicitly when dealing directly with their credit provider. Without the intervention of a financial counsellor or other advocates, many people are not aware of hardship provisions or able to access them. Even in the instances where a financial counsellor is able to assist, the burden of proof can make accessing these provisions difficult if not impossible. Our financial counsellors often find it challenging to support people experiencing hardship, particularly when clients are maintaining their debt obligations at the expense of other needs.[15]

2.16 Good Shepherd Youth and Family Services also approved the proposed enforcement procedures, arguing that these address a deficiency in existing legislation and would therefore increase protection for vulnerable consumers:

> We understand there is a need to allow sufficient time for credit providers to assess claims and develop means of addressing these. However, that time in the interim can be critical to those being affected by hardship. We believe section 89A addresses these concerns by prohibiting credit

12 Regulation Impact Statement, Explanatory Memorandum, Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, paragraphs 9.136 - 138.

13 For example, Consumer Action Law Centre, *Submission 20*, p. 16; Consumer Credit Legal Centre (NSW), *Submission 47*, p. 12.

14 Anglicare Victoria, *Submission 39*, p. 2.

15 Good Shepherd Youth and Family Services, *Submission 23*, p. 3.

> providers from taking collection action while claims for hardship are being assessed.[16]

2.17 It appeared that the proposed changes have in-principle support from sectors within the credit provider industry. However, as the extract from the submission from the ANZ demonstrates, while there is support for the policy objective there were strong concerns with details of the proposal as drafted:

> We support the Government's intention to make it as easy as possible for customers to apply for hardship assistance. However, there are a number of practice issues with this section.[17]

Concerns with draft provisions relating to hardship variations

2.18 With the exception of the submission from the Mortgage and Finance Association of Australia, submissions received from industry were consistent in the view that the provisions as drafted will present substantial practical difficulties for credit providers.

2.19 The Mortgage and Finance Association of Australia argued that the provisions uphold the principle of supporting borrowers, which is a feature of the association's code of practice:

> MFAA has long supported the need to support borrowers in hardship. Our Code of Practice has included, for some years, hardship provisions. That being the case we support the new section 72(1) which allows borrowers to give lenders a 'hardship notice' orally or in writing, if unable to meet their obligations, without the need to specify the nature of the hardship in detail.[18]

2.20 In contrast, the committee's attention was repeatedly drawn to industry concerns that the revised hardship variation procedures would not be feasible for industry nor provide certainty for the borrower. Concerns were raised with the following aspects of the proposal.

- Removing the requirement for the borrower to demonstrate they could reasonably be expected to meet the revised repayment obligations.
- Allowing hardship variation notices to be given verbally.
- Extending the hardship variation regulations to apply to credit contracts valued over $500 000.

16 Good Shepherd Youth and Family Services, *Submission 23*, p. 4.

17 ANZ, *Submission 41*, p. 2.

18 Mortgage and Finance Association of Australia, *Submission 3*, p. 1.

No requirement for borrowers to demonstrate capacity to meet the varied repayment requirements

2.21 As noted, the amendments to subsection 72(1) contemplate that hardship applications would not be required to contain information that demonstrates that the borrower could meet the changed repayment obligations. Evidence before the committee indicated that the absence of this requirement is a serious concern to several key industry stakeholders. The Credit Ombudsman Service argued that:

> ...it would be extremely useful, if not critical, for the proposed new section 72(1) to retain in some way the implicit requirement in the existing section 72(1) that the credit contract should be varied where the borrower reasonably expected to meet their obligations under the contract if the contract was changed in a particular way.[19]

2.22 Concerns were also expressed in more emphatic terms, with the committee being advised that, in the absence of a requirement for borrowers to demonstrate ability to meet the revised repayment obligations, the hardship variation system would be 'unworkable'. As GE Capital argued:

> ...we do not believe that variation is warranted if there is no reasonable expectation that the proposed variation to the contract will enable a debtor to meet his or her obligations that the proposed variation to the contract will enable a debtor to meet his or her obligations under the credit contract. This is the key to whether a variation to the credit contract should be made. The loss of this...key component will render section 72 unworkable.[20]

2.23 GE Capital stressed that credit providers 'must be able to decline to vary a credit contract on hardship grounds where there is no reasonable expectation that the proposed variation to the contract will enable a debtor to meet his or her obligations under the credit contract.'[21]

2.24 Abacus – Australian Mutuals also considered the provisions to be unworkable. The committee was informed that the provisions as drafted will limit, rather than increase, borrowers' access to hardship variations in legitimate circumstances. It was argued that accordingly the provisions would increase the burden on borrowers and credit providers:

> The problem in practice with the procedure proposed in the Bill would be that, in many cases, the debtor—although prompted to do so by the credit provider—will not in fact provide the information needed, either at all or within a reasonable time, for an assessment of whether hardship relief can be offered to be made. In such cases the credit provider, in order not to breach the provision, will have little alternative but to refuse to negotiate a

19 Credit Ombudsman Service, *Submission 2*, p. 2.

20 GE Capital, *Submission 25*, p. 2.

21 GE Capital, *Submission 25*, p. 2.

> hardship change even if it would have been prepared to do so had it been in possession of the information needed to make an assessment.
>
> This appears to be a perverse and unintended outcome. We would emphasise, however, that it is not a merely theoretical one.[22]

2.25 ANZ also noted the potential for the provisions to increase the administrative burden on borrowers and credit providers:

> On a practical level, this will mean that debtors can notify credit providers of their inability to pay without there being any likelihood that they can discharge their repayment obligations in the short to medium term. It is ANZ's view that this will also substantially increase customer correspondence without deriving consumer benefit.[23]

2.26 The committee was further informed that the borrower's capacity to meet the varied repayment obligations is the threshold test currently applied by the court in determining credit contract variation disputes. As the Credit Ombudsman Service stated:

> [w]e whole-heartedly support the changes proposed to be made by Part 1 (Protection of debtor in cases of hardship), but urge the Committee to recommend a change to the proposed new section 72(1)...There would otherwise be little or no guidance for a Court or an EDR scheme to determine if a credit contract should be varied.[24]

2.27 Having recommended the inclusion of a requirement for borrowers to demonstrate capacity to repay under the amended contract, submitters also recommended further procedural requirements to remove any uncertainty. First Stop Money submitted that borrowers should be required to provide 'documentary evidence within 30 days of requesting hardship.'[25]

2.28 An alternative approach was recommended by the Australian Bankers' Association and Abacus – Australian Mutuals, which submitted that the 21 day timeframe should not commence before the credit provider receives sufficient information to assess the application.[26] As Abacus – Australian Mutuals stated:

> ...the 21 day period that the credit provider has to give the debtor a notice in response to a hardship notice in s72(2) would only commence from the day the debtor has provided the credit provider with the financial information it reasonably requests in order to assess the debtor's financial position.[27]

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22 Abacus – Australian Mutuals, *Submission 38*, p. 2.

23 ANZ, *Submission 41*, p. 2.

24 Credit Ombudsman Service, *Submission 2*, p. 2.

25 First Stop Money, *Submission 17*, p. 4.

26 Mr Ian Gilbert, Policy Director, Australian Bankers' Association, *Committee Hansard*, 24 October 2011, p. 13; Abacus – Australian Mutuals, *Submission 38*, p. 3.

27 Abacus – Australian Mutuals, *Submission 38*, p. 3.

2.29 ANZ supported this proposal, stating that this was of particular importance in the context of a breakdown in the relationship of joint borrowers:

> The trigger of the 21 day response time commencing immediately upon verbal notification from a customer, rather than once sufficient information has been provided to enable an assessment to be made, is of particular concern in the context of a joint mortgage and where there has been a breakdown in the relationship between the borrowers. In order to make an assessment of whether to negotiate, a credit provider will need information for all parties to the loan. In the case of a joint loan, the refusal of one party to provide information can impede our ability to assess both or one of the borrowers for hardship assistance. If a credit provider simply declined to negotiate a change on the basis of not having sufficient information, it is likely to result in increased complaints to external dispute resolution schemes.[28]

2.30 The Australian Finance Conference, whose comments in general also referred to the hardship variations proposed to apply to credit contracts under Schedule 3 of the Enhancements Bill, argued that this measure would be consistent with ASIC advice regarding the existing hardship provisions under the National Credit Code:

> We also note the compliance difficulty the wording of s. 72 currently raises for lenders and the ASIC response (October 2010) to assist. In short, to address concerns expressed by lenders in relation to the timeframe for decision where insufficient information has been provided by the borrower, ASIC clarified its position in *Information Sheet 105: Dealing with Consumers & Credit*. In ASIC's view the 21 day period commences only after the borrower makes an application with sufficient information to allow the credit provider to make a final decision. Where insufficient, the credit provider will need to identify what further information is required and advise the borrower as soon as practicable. Until that information is provided, ASIC will not regard an application as having been made and the 21 days will not have commenced.[29]

2.31 An additional step was also proposed to promote best-practice by credit providers. Abacus – Australian Mutuals submitted that the Bill 'might also be amended to oblige the credit provider to seek any financial information it requires as soon as possible after receiving the hardship notice.'[30]

Removing the requirement for hardship notices to be provided in writing

2.32 It was a view expressed across industry submissions that informal, that is, verbal applications would lead to misunderstandings between the credit provider and the borrower. It was further argued that this would therefore thwart the intention to increase borrowers' access to hardship variations. As the ANZ stated:

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28 ANZ, *Submission 41*, p. 3.

29 Australian Finance Conference, *Supplementary Submission 29a*, p. 4.

30 Abacus – Australian Mutuals, *Submission 38*, p. 3.

> The fact that a debtor is only required to give a hardship 'notice' rather than make an 'application' is too vague and uncertain and potentially triggers the need to issue formal correspondence in too many cases.
>
> In practice, this would make it difficult for credit providers to ascertain whether their obligations under s. 72 have been triggered. For example, there may be instances where a debtor says that they 'notified' branch staff or a call centre operator of difficulty in making repayments, but this may have been expressed in such a way or interpreted as something other than notification, for example, a complaint.[31]

2.33 The ANZ also submitted that verbal notifications will remove existing flexibility to address borrowers' needs:

> The proposed amendments remove flexibility in the way ANZ can offer temporary repayment arrangements to assist customers to deal with short term financial instability.
>
> ANZ will often offer very short term relief arrangements for customers who are experiencing a temporary difficulty in meeting repayments. This difficulty may be due to an unexpected expense incurred by the customer that, while causing some financial instability in the very short term (meaning the customer may miss one or two repayments to their loan), is not indicative of financial hardship. In these cases, once the cause of the short-term difficulty is explained by the customer and ANZ is comfortable the issue is temporary, ANZ will often be able to offer an arrangement over the telephone, with a minimum of 'red tape' for the consumer.
>
> However under the current proposed amendments, these scenarios will need to be treated in the same way as a financial hardship situation, requiring the issue of formal correspondence within 21 days, without any added perceived consumer benefit. We expect the added administrative burden in this area of our customer assistance team (mainly involving the preparation and dispatch of confirmation letters) will cause delays in responding to customers seeking short-term informal relief arrangements.[32]

2.34 This view was shared by the Australian Bankers' Association, which outlined the following scenario:

> ...a customer may advise the credit provider of their inability to meet one of their credit card repayments on the due date or make their monthly home loan repayment on time but will do so in two weeks' time and could request an extension of time to make the repayment. Under the current law, such a notification could be solved immediately through an agreed arrangement between the credit provider and customer without a formal process being needed.
>
> Notwithstanding the flexibility of the current law, the Bill proposes that such a notification would trigger the formal hardship process, thereby

31 ANZ, *Submission 41*, p. 2.

32 ANZ, *Submission 41*, p. 2.

> increasing the number of hardship notifications received by credit providers and an associated increase in the resourcing requirements of credit providers. A credit provider would have to issue a section 72(2)(a) notice agreeing to negotiate and then a section 73 notice setting out a change to the contract if it is agreed to. This would delay the commencement of the arrangement to the detriment of the customer.
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> In these situations this prescriptive process would be completely unnecessary and confusing for the customer.[33]

2.35 Noting that failing to respond within the 21 day timeframe is an offence, the Australian Bankers' Association argued that verbal applications would entail significant risks for industry:

> ...if someone rings up and is unclear about what it is they are actually seeking then the whole process of getting a better understanding of it is very awkward. It could be just a chance comment in a branch or it could be a chance comment over a telephone that someone does not recognise is someone saying, 'I don't think I'm going to meet my obligations under the credit contract.' If that is not acted upon, inadvertently that triggers a 21-day notice, with a criminal penalty at the end of it if you do not comply.[34]

2.36 The Australian Finance Conference also noted the offence provision, arguing that it should be removed:

> The proposed reforms are designed to facilitate flexibility by the consumer with the process of soliciting variation on the basis of hardship. Again, the AFC supports this. However, for it to be a mutually beneficial outcome in line with the Government's objective, similar flexibility needs to be adopted for the compliance obligations of the lender. In particular, AFC recommends that strict timeframes should be replaced with concepts like "within a reasonable time;" and offence provisions should be removed.
>
> This would have the benefit of allowing lenders to minimise regulatory risk while working with customers on a specific or targeted basis with the primary aim of assisting the customer to overcome their short-term financial difficulty while continuing to meet their contractual obligations.[35]

2.37 The committee heard that, to promote best-practice, the option for hardship applications to be made verbally should be removed.[36]

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33 Australian Bankers' Association, *Submission 43*, p. 5.

34 Mr Ian Gilbert, Australian Bankers' Association, *Committee Hansard*, 24 October 2011, pp 12–13.

35 Australian Finance Conference, *Supplementary Submission 29a*, p. 3.

36 Australian Finance Conference, *Supplementary Submission 29a*, p. 3; Mr Ian Gilbert, Australian Bankers' Association, *Committee Hansard*, 24 October 2011, p. 13.

Extending the hardship variation regulations to apply to credit contracts valued over $500 000

2.38 Aussie submitted that hardship variations are unnecessary for loans over $500 000:

> It is important that lenders have commercial certainty on large investment loans. Borrowers already have sufficient protection under new laws in any event without the need to provide defaulting borrowers with additional mechanisms to further delay the recovery process.[37]

2.39 Accordingly, Aussie recommended the $500 000 cap be retained, or, as an alternative, be only available for loans over $500 000 that are secured by the borrower's principle place of residence rather than residential investment property.[38]

Concerns with provisions relating to enforcement of credit contracts

2.40 Concerns were raised with clauses 89A and 94, which would alter the requirements for seeking to enforce credit contracts in response to borrower default and give borrowers the right to request or demand a 14 day delay in the commencement of enforcement proceedings. The Australian Bankers' Association argued that the clause was unduly complex, and could be used by the borrower to stall enforcement proceedings.[39] The Association recommended the Bill be amended to make it clear that a borrower may only seek to delay enforcement proceedings once under clause 94:

> If this provision is retained, it is necessary for the Bill to clarify that a customer can only delay the enforcement proceedings once on this ground. This will ensure that an abuse of process does not take place on the part of the customer.[40]

2.41 Aussie also questioned whether the postponement could delay dispute resolution procedures, noting that any delay in dispute resolution once the matter has been referred to an approved dispute resolution provider could entail significant costs for both the borrower and credit provider.[41]

2.42 The Australian Finance Conference did not support the introduction of clause 89A, arguing that it was unnecessary:

> ...the current postponement provisions and financiers' practices of trying to proactively manage customers who are in difficulty mean there is ample

37 Aussie, *Submission 10*, p. 1.

38 Aussie, *Submission 10*, p. 1.

39 Australian Bankers' Association, *Submission 43*, pp 8–9.

40 Australian Bankers' Association, *Submission 43*, p. 9.

41 Aussie, *Submission 10*, p. 2.

> opportunity for customers to seek assistance before proceedings are commenced...
>
> We are advised by our Members that it would be operationally extremely difficult to implement a process to comply with its requirements. They also submit that the customer may be disadvantaged through the process; an outcome that should be avoided.[42]

Committee view

2.43 The committee endorses the intention to establish a hardship variation scheme that provides appropriate support to vulnerable consumers while providing commercial certainty. Hardship variations are an essential part of an effective credit market, ensuring consumers can continue to participate despite unanticipated financial distress. The provisions also allow industry to retain clients despite unforseen changes in the clients' financial circumstances. This in turn can build client loyalty.

2.44 However, the committee considers that impractical procedures would undermine the intention to strengthen vulnerable consumers' access to hardship variations. The committee notes industry concerns that the hardship scheme proposed may not be practical due to the absence of a requirement on borrowers to provide all necessary documentation regarding the kind of hardship variation they are seeking and their capacity to repay. This appeared to be a particular concern in relation to verbal applications.

2.45 The committee considers that the proposal to allow hardship applications to be made verbally tips the balance too far in the direction of the consumer. It is not at all clear to the committee that the proposal is practical and it would most likely reduce the flexibility that is currently in the system which allows providers to vary contracts in the face of short term financial need on behalf of the consumers.

2.46 Evidence that the revised scheme may not be practical for industry is all the more concerning as the offence for failing to respond to the consumer's application in one of the two required way is an offence of strict liability. It is therefore all the more essential for the requirements on credit providers to be clear and practical to implement.

2.47 For this reason, the committee recommends that clause 72 be amended to require borrowers to provide reasonable information to assist credit providers to assess their hardship application. The clause should be further amended to provide credit providers reasonable opportunity to request this information where it is not initially provided.

2.48 The committee notes the concerns raised by Good Shepherd Youth and Family Services that the threshold to demonstrate hardship and capacity to repay currently applied by credit providers can be too high. The committee draws this

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42 Australian Finance Conference, *Supplementary Submission*, pp 6–7.

concern to the Government's and industry's attention, and encourages industry to consider how Codes of Conduct can practically respond to the challenges that borrowers may face in providing documentation and other evidence required to establish hardship and the borrower's capacity to repay.

2.49 The committee considers that the hardship variation scheme would be strengthened through greater consumer awareness and understanding of the availability of hardship variations and their associated rights and obligations. To this end, the committee recommends Government work with industry to develop a plain English, user-friendly information pack outlining the application of the hardship variation scheme and the steps which borrowers can take to vary their repayment obligations. To further assist vulnerable consumers, the information pack could provide a link to the details of financial counselling services as provided on ASIC's MoneySmart website.

2.50 The committee also notes concerns with the operation of clause 89A and clause 94, particularly the Australian Bankers' Association's view that the clauses may result in a cycle of default notices and postponement applications that would prevent credit providers from enforcing the credit contract. On the basis of information provided to the committee it is not clear that the provisions as drafted would allow for this scenario. However, the committee brings to Government's attention the concerns with the effect of the provisions as drafted.

Recommendation 2

2.51 The committee recommends that clause 72 be amended to require borrowers to provide reasonable information to assist credit providers to assess their application and to give credit providers reasonable opportunity to seek this information from the borrower where it is not initially provided.

Recommendation 3

2.52 The committee recommends that 'orally' be removed from subclause 72(1), to require hardship applications to be made in writing.

Recommendation 4

2.53 The committee recommends that Government work with industry stakeholders to develop a plain English, user-friendly information pack about borrowers' rights and obligations in relation to hardship variations. The Government and industry should consider including a link to the information on the MoneySmart website about financial counselling assistance. Industry should be required to provide a copy of this information pack on their websites and at customer service centres.