CONSUMER CREDIT LAW REFORM AND UNIFORMITY

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A CREDIT PROVIDER'S VIEW

The topic upon which I have been asked to address you this morning is Consumer Credit Law Reform and Uniformity and, in particular, I have been asked to "provide an industry comment on the legislation generally with particular emphasis on problems of interstate operation."

Before embarking on this exercise there are several points to which, in the interests of "full and frank disclosure", I believe I should draw your attention.

The first of these is that I am not a lawyer. Apart from some basic commercial law topics as part of accountancy studies undertaken many years ago, I have received no formal legal training. Secondly – I am a theoretical credit provider, my practical experience in this field is extremely limited.

I have made only two loans in my entire life – both to members of my immediate family – and in both cases I have failed to recover my principal – let alone any interest. Hardly the record to qualify me as a successful credit provider!

The third and final disclosure which I must make is that the credit provider's views which I shall be presenting today are, of necessity, fairly narrow and limited.

Given the very wide embrace of the term "credit provider" as defined by the Credit Acts and thus the variety of the group of persons, corporations and financial institutions which fall within it, I am competent only to offer you the views of one relatively small section of that group, namely finance companies and, more particularly, those finance companies which are members of the Australian Finance Conference.

Having thus established my credentials – or lack thereof – and hopefully having avoided any subsequent charges of misrepresentation or misleading conduct, let me now return to my brief – or at least the first part of it and "provide an industry comment on the legislation generally."

Speaking generally it is perfectly truthful for me to say that the Australian Finance Conference and its members, welcomed the advent of the new Credit Acts in Victoria, NSW, Western Australia and the ACT earlier this year.

Heaven knows – we waited long enough for them!

Beside that of the Credit Laws – the gestation period of the elephant pales to insignificance.

Ever since the Standing Committee of the Commonwealth and States Attorneys-General resolved late in 1965 that a review of the laws relating to money lending and consumer credit should be undertaken with a view to producing UNIFORM CREDIT LAWS to be adopted by all States and Territories, the Australian Finance Conference, on behalf of its

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member companies has been involved in the preparation of submissions, the giving of evidence, the supply of information, and the critical analysis of reports, recommendations and Bills all aimed towards this eventual result.

Thus it is both natural and understandable that when these laws were proclaimed in February and March of this year — almost regardless of their form and content — we welcomed them with a sense of almost incredulous relief.

Being more specific now, the new laws have brought about a number of changes — the great majority of which we have either welcomed or can accept comfortably within our operating procedures.

Among these, and not necessarily in any specific order are: —

- The repeal of the archaic Money Lenders Acts many of the provisions of which have represented a marked competitive disadvantage to finance companies in comparison to other financial institutions participating in the consumer credit market. One specific example relates to advertising where the old legislation "severely curtails the freedom of a moneylender to advertise his business. There are a series of prohibitions directed at all advertising (by money lenders) followed by an authorisation which enables a moneylender to advertise within the very narrow limits which are set out. Contravention results in a fine or imprisonment and also a severe civil penalty." [1]
- The ability of credit providers to recover such government imposts as Stamp Duties and Financial Institutions Duty in all contracts.
- The ability of credit providers to vary rates to match market conditions for cost of funds during the currency of a contract by use of continuing credit contracts.
- The requirement for the uniform method of disclosure of rates, terms and conditions in contracts used by *all* participants in the consumer credit market. While this change is undoubtedly of great advantage to credit consumers it is also of advantage to finance companies as credit providers in competition with other consumer credit providers particularly banks. (However, I shall qualify this statement in my later remarks.)

A further change to previous law is the provision for property in goods purchased to pass to the purchaser at the time of sale and for the credit provider's security to be by way of charge or mortgage over the goods rather than by retention of title as was the case in Hire Purchase transactions. This may not seem to be so advantageous to credit providers but it does have the effect of relieving them of the primary obligations and liabilities of "suppliers" under Sale of Goods legislation.

The abolition, by the new legislation, of the time-honoured common law rule of *"Nemo dat quod non habet"*, allowing a bona fide purchaser of encumbered goods, for value and without notice to defeat any prior security interest and obtain good title was the cause of a certain amount of nervous dyspepsia among our members. However the apparent

1 C L Pannam, *The Law of Money Lenders in Australia and New Zealand,* Law Book Co, chapter 19.

intention of all affected States to follow Victoria in the establishment of computerised registers of security interests in that most mobile of all our secured chattels, the motor vehicle, has proved almost as calming as two teaspoons of sodium bicarbonate.

This change also brings with it the added advantage of depriving Willesee and other current affairs programmes of their regular heart-rending stories of innocent third parties suddenly finding their recently purchased family car seized by a heartless finance company exercising its rights under a pre-existing security!

Just in case you are beginning to think that all is "sweetness and light" and that the new laws are designed for the regulation "of the finance companies, by the finance companies, for the finance companies," let me hasten to point out that there are certain aspects of the Acts to which we strongly object.

Outstanding among these is the creation of the new concept of the "linked credit provider" and the "linked supplier" under which a credit provider who has a trade tie or commercial link with a supplier of goods becomes jointly and severally liable with the supplier for any misrepresentation, failure of consideration or breach of warranty, terms or conditions implied by the Sale of Goods Acts.

The Australian Finance Conference has been, is still – and evermore shall be totally philosophically opposed to the concept.

We cannot accept that we should have liability for the fitness, suitability and merchantable quality of goods which we have not made, have not sold, have not seen and in 99% of transactions, will never see.

(The remaining 1% of cases in which we do see the goods is usually after repossession, at which point in time it is rarely possible to assess the merchantable quality of the goods at the time of sale with any degree of accuracy!)

This view has been forcefully expressed to every committee, department and Government to which we have made submissions during the past 16 or so years with, however, very little avail.

The arguments for the concept, put by the various Committees in proposing it (Molomby, Crowther in the UK, and subsequently supported by Rogerson) are very cogent and have been accepted as an integral part of the policy of reform by the various State Governments – a part which they have regarded as non-negotiable.

These arguments hinge on the belief that there exists in the community a small number of questionable fly-by-night suppliers of goods and/or services who have no regard for consumers' rights and who are only out to make a quick profit. It is further argued that if it were not for the ready availability of credit to finance their transactions they could not operate. Therefore a credit provider who finances the operations of such a supplier (and profits himself therefrom) should share the liability of that supplier for any misrepresentations or breaches.

The morality of such arguments is hard to refute and if it were possible to define "questionable, fly-by-night suppliers" we should probably never have opposed the concept in the first place – regrettably it is not!

So, we are stuck with it.

However as a result of our many discussions and submissions the liability of linked credit providers is now limited by the legislation to the amount financed under the relevant credit contract and a number of defences to liability have been provided.

Among these is the possibility for the credit provider to prove that he had taken adequate steps to satisfy himself on enquiry that the supplier was of good reputation in respect of his financial standing and ethical standards of trading.

As a result of this it may be harder in the future for a person starting out in a business for the first time, and thus having no established track-record, to obtain financial backing for his enterprise and credit for his customers.

These, then, are some of the changes wrought by the new laws as perceived by finance companies.

And as the Elizabethan writer, Richard Hooker, observed:—

"Change is not made without inconvenience, even from worse to better."

Some of the changes we see as being from worse to better — others from better to worse — but all have brought with them varying degrees of inconvenience.

Inconvenience in the commercial world is largely synonymous with cost.

- The cost of drafting and printing new documentation;
- the cost of altering computer systems;
- the cost of training staff and educating dealers;
- and also the not inconsiderable cost of licence fees to operate under the legislation — fees calculated to, at least, recoup the considerable cost of administration of the legislation. In some States this takes the form of a turn-over tax on the amount of credit provided while in others it is a flat fee on every place of business — but whatever the form, in all States it is expensive.

This leads me to the second part of my brief, that is to comment "with particular emphasis on the problems of interstate operation" — a daunting task.

Having advised you at the outset that I have no legal training and having proved it beyond reasonable doubt by my subsequent comments, I have no intention of now proceeding to lecture a group of academic lawyers on such a complex subject as the conflict of laws.

This is a subject upon which the entire legal profession, practising, academic and judicial, can, and undoubtedly will, argue for years to come at great profit and enjoyment to themselves and at great expense to the community.

Mr Simon Begg will, I am sure, be able to set the argument rolling here this morning with considerable distinction and ability.

And for any of you who may seek further information or obfuscation I refer you to an excellent paper entitled "Conflicts of Law Problems involving Consumer contracts where more than one State is involved",

prepared and presented by Mr John Hambly of Mallesons to a Credit Laws seminar held in Melbourne late last year.

I shall confine my comments on the problems of interstate operation to practical, operational problems of a non-legal nature.

These can be divided into two broad categories.

The first are the problems created by the lack of uniformity in the fields covered by the Acts in those four jurisdictions which have adopted the legislation. Most of these are hopefully of a short term nature and can and probably will be overcome by amendments which have been foreshadowed.

To understand properly the AFC's concern in this area it is necessary to examine more closely the extent of the market which the Acts set out to regulate.

That is the consumer credit market.

As at December 31, 1984 the total net consumer credit receivables for Australia stood at $16.8 billion. Of that total, finance companies share was 26.7%, retailers had 0.4%, banks with Bankcard and personal loans had 53.9% and credit unions had 19%.

Since that time, as a result of amendments to relevant legislation in a number of States, Building Societies have entered the consumer credit field offering personal loans and chattel finance.

Presently the credit legislation of only one State, that is Western Australia, covers all participants in the market.

In NSW and the ACT, building societies and credit unions are exempt while in Victoria credit unions remain exempt.

As the prime policy of the legislation is to provide protection for the credit consumer by "Truth-in-Lending" type pre- and post-contractual disclosure, availability of relief in cases of financial difficulty and restriction of the ability of credit providers to exercise their security rights, it seems anomalous to us that these protections are available only to those consumers who borrow from certain financial institutions.

Take as an example a NSW consumer with a finance company loan for his car, a Bankcard debt, and a loan from a building society or credit union for household furniture – a not uncommon situation. He becomes unemployed and applies for a variation or relief under Section 74.

The Tribunal can make orders postponing his repayments on his finance company loan and his Bankcard – but he must maintain his full commitment to the building society or credit union.

Such a situation is not in the best interests of the consumer – but – even further it is not fair to the financial institutions.

In our increasingly de-regulated financial system it is essential that competitive neutrality be maintained between institutions operating in the same market.

The second category of problems arise from the failure of some States, as yet, to adopt uniform or at least similar legislation.

South Australia, we are assured, is moving rapidly towards uniformity but, to date, we have no such assurance from Queensland, Tasmania or the Northern Territory.

A perceived major advantage of the credit legislation to nationally operating companies is the enormous savings in cost to be achieved by the use of uniform documentation and uniform systems.

Additionally, operating and supervisory staff, regularly transferred from State to State, will be almost immediately effective without the necessity of having to learn a whole new set of ground rules and operational procedures.

However these advantages cannot be realised fully until *all* States and Territories are operating on the same basis.

In fact, from a practical point of view, our member companies are positively disadvantaged by this lack of uniformity.

Some of you may have noticed that in recent times a number of finance companies have moved into "plastic" credit — a line of credit established with a continuing credit contract and operated by a credit card.

At present, and for the immediately foreseeable future, because of the lack of uniformity, they are denied access to a significant proportion of the national market, namely Queensland and, to a lesser extent, Tasmania and the Northern Territory.

Similarly residents of those States are unable to obtain the benefits of this simpler form of credit.

I have attempted to touch on the major practical and operational problems being experienced by finance companies as a result of the new legislation — (or lack thereof).

Undoubtedly these will pale into insignificance alongside some of the conflicts of laws problems which will arise until all States and Territories have adopted similar legislation.

As a final industry comment may I observe that when, in 1973, the South Australian Consumer Credit and Consumer Transactions Acts came into force, there was some industry concern that the consumer credit market would collapse under the weight of regulation.

Similar mutterings were heard in respect of the 1984 Credit Acts in other States — particularly in view of their far greater complexity of drafting.

However, I am pleased to report that the consumer credit market is still extremely healthy, intensively competitive and even, at times, marginally profitable.

Thank you.