Penalising A Careless Credit Provider

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Introduction

The consumer credit field is one area where the legislature relies heavily on the use of civil penalty as a tool of consumer protection. The significance of this needs not be over-emphasised, as in the consumer credit field the credit provider is nearly always in the stronger position and the consumer needs a lot of protection, especially from those credit providers which engage in sharp practices. Civil penalty basically involves the loss of credit charges (interest) by credit providers which do not comply with certain key provisions of the Credit Act. What is not clear, however, is whether credit providers should be penalised for merely being careless as distinct from deliberate (or serious) breach of the legislation.

Last year the Commercial Tribunal of Western Australia handed down its decision in *CBFC Limited v Radalj & Ors.*[1] The case is of some significance in that it appears to be the first reported case in Western Australia involving the civil penalty provisions of the Credit Act 1984 (W.A.). Moreover, the approach taken by the Tribunal is interesting and raises the broader question as to what should be the appropriate standard or benchmark to use in cases where credit providers are found to have been in breach of the provisions of the Credit Act, not through some deceptive or misleading conduct, or some other serious omission or commission but rather through the lesser act of "carelessness".

The purpose of this article is to discuss the case of *CBFC Limited v. Radalj & Ors* and to look at the broader issue of applying the civil penalty provisions in the Credit Act to situations where credit providers have been less than careful. Posed another way, what price for carelessness? The issue will continue to be important to both credit providers and consumers of credit (and in fact the legislature), as the civil penalty provisions will be retained under the proposed uniform consumer credit legislation. Therefore, the article also takes a brief look at recent developments in the civil penalty area of consumer credit law.

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1 (1991) ASC #56-103 (p.57,078).

CBFC Limited v Radalj & Ors

The Facts

An internal audit conducted of the Western Australian division of CBFC on 8 August, 1988, discovered that six regulated loan contracts had been incorrectly documented as hire purchase contracts. This was brought to the attention of the finance company the following month, as a result of which, further audits were carried out. All contracts entered into between 1 April, 1985 and 30 June, 1989, approximately 9000 contracts, were manually scanned. It was discovered that another 33 contracts were "irregular".

In the months of October and November, 1988, various discussions were held between the Perth Office and the head office in Sydney concerning the implications of the irregularities and how best to tackle the whole matter. Correspondence between the two offices was also exchanged in the months following. On 12 September, 1989 - that is, some twelve months after the finance company became aware of the breaches of the provisions of the Credit Act - the company brought an application in the Tribunal pursuant to sections 85 and 86 of the Act. Earlier on 14 July, 1989, the company had for the first time made the debtors affected aware of the problem.

The Breaches of the Credit Act

Fortunately for the Tribunal it did not have to determine what breaches had occurred. This was because the applicant admitted that 38 of the contracts were in breach of the Act. Each of them was headed "CBFC Limited Hire Purchase Agreement" and completed as such, instead of as regulated loan contracts or credit sale contracts, for the purposes of Part III of the Credit Act. The consequence of using the wrong forms was various breaches of the Act. The applicant identified the following breaches:

"CREDIT ACT SECTION

Section 32(1): Failure to include prescribed notice.

Section 32(5): Failure to provide true copy before signature.

Section 33(1): Failure to provide notice of acceptance.

Section 34(1): Failure to provide prescribed statement.

Section 35(1)(c): This paragraph requires a statement of the amount financed in accordance with Schedule 2 to the Credit Act. It is possible that each agreement has not quoted the correct "cash price" as defined and perhaps that the financial information in the agreement is not set out strictly in accordance with the requirements and nomenclature of the Credit Act.

Section 35(1)(d): This paragraph requires a statement of the credit charge in accordance with Schedule 3. No statement is included to the effect that 'no part of the credit charge, other than the minimum credit charge (if any), becomes due and

payable unless it is an accrued credit charge'. Perhaps also the correct nomenclature is not used.

Section 35(1)(e): The statement of the rent in the agreement which would basically reflect the requirements of this paragraph, may be calculated on the wrong cash price. Perhaps also the correct nomenclature is not used.

Section 35(1)(f) and possibly section 38: The agreement fails to state whether or not a mortgage relating to it has been, or is agreed to be, entered into.

Section 92: Failure to provide copy of mortgage.

Section 151: Possible non-compliance with print and type requirements.

CREDIT REGULATIONS

Regulation 18: Failure to use prescribed terms."

The Tribunal's Decision

Having considered all the circumstances of the case and the authorities cited, the Tribunal decided that the appropriate sanction to impose on the finance company was a reduction of 20 per cent of the credit charges. In other words, CBFC got a reinstatement of 80 per cent of its credit charges and was penalised by 20 per cent. The Tribunal explained its decision:

In arriving at this conclusion the Tribunal has taken into account that whilst the Applicant has taken effective remedial action to prevent further conduct of the type complained of in these proceedings in the future, the conduct which has given rise to these proceedings is indicative of significant carelessness on behalf of the Applicant's officers. The failure to identify customer circumstances as giving rise to obligations under the Credit Act, that is in failing to complete the correct forms, the Applicant's officers have indicated a failure to implement significant features of the Credit Act. In addition the Applicant had failed in this Tribunal's view to implement a cohesive policy in relation to the Respondents' funds. Further, the funds which should have been repaid to some of the Respondents following discovery of the breaches of the Act had not at the time of these proceedings been refunded and there does not appear to have been any good reason why this should be so. In short the remedial action which has been taken by the Applicant has been directed at cleaning up its inhouse operations without in this Tribunal's opinion significant regard being had by the Applicant for the effects of the breaches on the Respondents/debtors.[2]

The Tribunal also made some consequential orders. CBFC was ordered to refund money due certain respondents with a 14 per cent interest per annum calculated from 9 September, 1988. Second, CBFC was to pay interest at the rate of 14 per cent as from 9 September, 1988 on any money held by it on behalf of respondents by reason of

2 At p.57,084.

the non-compliance with the Credit Act. And third, that the finance company pay the costs of the respondents.

To enable it to arrive at a decision, the Tribunal had identified the following "significant factors":[3]

(1) That the breach arose by reason of significant carelessness on behalf of the officers of the Applicant.

(2) That when the breach was discovered the Applicant took action to remedy the breach by notifying the Respondents, although it took some time in doing so.

(3) That the breach was discovered by the Applicant and was not the result of action by a debtor or Respondent.

(4) That there does not appear to be a significant detriment to the Respondents although the Applicant could have done more for the Respondents by refunding money forthwith and providing information as to the deposit of debtors' funds where credit charges were continuing to be paid.

(5) Notwithstanding that the Applicant discovered the breaches of the Credit Act by reason of using the wrong documents to implement loans, it did not take any action so far as this Tribunal is aware to comprehensively advise the Respondents of the difference between the documents which the Respondents should have signed and those Hire Purchase documents which were completed by the Respondents. The Applicant acknowledges that the Hire Purchase documents were deficient and this Tribunal considers that given that information and its disclosure is a significant policy aspect of the Credit Act, the Applicant could have provided additional disclosure and information to the Respondents.

(6) It appears that the conduct of the Applicant since the breaches were discovered has been in compliance with the Act.

The Broader Issues - What Price for Carelessness or Technical Breaches?

The case raises a number of important issues. At this juncture, it should be emphasised that, in this paper we are not concerned with situations where the credit provider has committed serious breaches or displayed some "blameworthy indifference"[4] to its obligations. It would seem that in those cases the imposition of penalties, even severe penalties, is beyond debate. For instance, the "cavalier attitude"[5] of some credit providers has long been visited with

3 At pp. 57,083 - 57,084.

4 *Mercantile Credits Limited v. Barber & Ors* (1990) ASC #55-988 (58,948).

5 See e.g., *In Encyclopaedia Britannica v. Director of Consumer Affairs & Ors*, (1988) ASC #55-636 [57,845], the Full Court of the Supreme Court

sanctions. In *Walter Pugh Pty Ltd v Commissioner for Consumer Affairs*[6] where some $1.18m in credit charges were at stake, the Supreme Court of New South Wales was highly critical of the finance company's breaches of section 36 of the Act. The Court noted that[7].

> the constant breaches were caused by the failure of the plaintiff's staff to perceive the omission, or to appreciate its significance. This in turn resulted from inadequate staff training as to the obligations imposed upon credit providers under the new legislation, and revealed a blatant disregard by the plaintiff of the importance of its obligations under the Act.

There is now a long list of cases, which to varying extents, have imposed civil penalties on credit providers for breaches of the legislation.[8]

On the other hand, the focus of this paper is on cases where it is alleged that the credit provider has done no more than being careless, or that the contravention is merely "a technical breach". Such "technical breaches" ought to be distinguished from conduct that is deliberate or wilful and causing loss or damage to borrowers.

Should a Penalty be imposed?

First, should any sanction be imposed at all once breaches of the Act have occurred, even if the breaches are stricto sensu technical and occasioning no loss or damage to anyone? In the CBFC case,

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of Victoria commented that the Credit Tribunal "was entitled to view the appellant company as a person which had disobeyed the cardinal provision of all - that of requiring a licence - and which had displayed a cavalier and careless attitude to the requirements of the statute law" (at 57,854); see also, *Encyclopaedia Britannica (Australia) Inc. v. The Director of Consumer Affairs* (1989) ASC #55-700, and the case of *Stan Cusack Finance Company Pty v. The Director of Consumer Affairs & Ors* (1989) ASC #55-715 (58,421 at 58,425), a case decided by the Credit Tribunal of the ACT.

6 (1988) ASC #55-659 (57,983).

7 At p.57,991.

8 E.g. *Mercantile Credits Limited v. Barber & Ors* (1990) ASC #55-988 (58,948); *Appliance and General Finance Co. Pty Ltd. v. Various Debtors* (1990) ASC #55,995 (55,995); *Australian Guarantee Corporation Limited v. Roberts & Ors* (1989) ASC #55-950 (58,653); *Australian Guarantee Corporation Limited v. Leed & Ors* (1987) ASC #55-593; *Australian Guarantee Corporation Ltd. v. Sargeant & Ors*, Unreported decision of the Credit Tribunal of Victoria, in which AGC lost some $3.7 million; *Australian Guarantee Corporation Limited v. Chivell & Ors* (1991) ASC #56-071; *Avco Financial Services Limited v. Various Debtors & Anor* (1991) ASC #56-072; *General Motors Acceptance Corporation Australia v. Hosking* (1986) ASC #55-514 (56,746); *Australian Guarantee Corporation Limited v. Standler & Anor* (1987) ASC #55-546 (57,146) and *Australian Guarantee Corporation Limited v. Leed & Ors* (1987) ASC #55-593 (57,524); *Australian Guarantee Corporation Ltd. v. Ogilvy & Ors* (1990) ASC #55-968 (58,834); *Australian Guarantee Corporation Ltd. v. Antone & Anor* (1990) ASC #55-969 (58,837); *Encyclopaedia Britannica (Australia) Inc. v. Contemplacion & Ors* (1990) ASC #55-989 (58,975).

counsel for the finance company had proceeded on the basis that, imposition of sanctions on the client was inevitable. Counsel had submitted that "it is now well established" that the Tribunal "should be mindful of imposing a sanction upon the offender rather than benefiting the debtor".[9] Counsel further submitted that "the task of the Tribunal under Section 85 of the Act is to impose an appropriate sanction, taking into account not only the past conduct of the Applicant but also, where appropriate, regard should be had to the efforts made for attempting to secure appropriate conduct on the part of the Credit Provider in the future".[10] Whilst the Commercial Tribunal of Western Australia did not make any comments directly on the submissions of counsel, it appeared to have accepted those submissions without question and proceeded on that basis.

But the primary question remains unanswered - should sanctions be imposed at all? Some consumer groups and advocates have taken the view that the answer should be in the affirmative. In Re Westpac Banking Corporation[11] counsel for the respondents had urged the Supreme Court to impose some sanction against Westpac to reflect the Court's disapproval of the bank's conduct. Shepherdson J. resisted that urging from counsel. He regarded the failures of Westpac as an "oversight", and one which was honest and which had occurred during the settling in period of the legislation. His Honour concluded on this point,

> In my opinion Westpac ought reasonably and fairly to be excused. The failure under s.38(1)(h) did not, to adopt Judge Boyce's words, display a cavalier and careless attitude to the statute law. The sub-section was not a cardinal provision of the Act.[12]

His Honour therefore decided that each of the debtors was liable to pay the whole of the credit charge under the contract. He reasoned as follows:

> It must I think be borne in mind that Westpac had before it a complex Act - an Act which covered areas of business formerly dealt with by legislation which the Act repealed or amended. The flaw in this case manifested itself during the settling period after the new legislation came into force. In my view Westpac acted honestly at all times. I am satisfied it did its best to ensure strict compliance with the Credit Act requirements. The present application is based on failure in one area - an area which it may be thought is not as important as say the need to comply with s.38(1)(e) which sub-section requires that a loan contract include "a statement of the annual percentage rate in

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9 At p.57,083.

10 At p.57,083.

11 (1991) ASC #56-068 (56,783). The case is discussed more fully below under "Recent Developments, in particular, notes 31 and 32 and accompanying text.

12 At p.56,798.

accordance with s.40". I find that Westpac went to considerable trouble deploying a significant number of its senior employees for a period of some six months in late 1984 in an endeavour to ensure compliance with the legislation in every respect.[13]

This case may be compared and contrasted with two other Queensland cases. In *Australian Guarantee Corporation Limited v Haughton & Anor*[14] a loan contract entered into on 21 July, 1989, failed to state the credit charge and incorrectly stated the total amount financed. This contravened section 38(1)(c) and (d) of the Act in Queensland and consequently, the debtors were not liable to pay the credit charge under the contract totalling some $60,156. Another officer discovered the problem on a review of files.

Robin J. in the Queensland District Court decided to increase the debtors' liability to the whole of the intended credit charge. This was notwithstanding His Honour's observation that, "Decisions upon sec. 86 or its equivalent in other jurisdictions show some tendency to penalise the credit provider by allowing only part of the credit charge so as to give the appearance of a fine being levied to the advantage of the debtor, an advantage the enjoyment of which is probably delayed for several years".[15] The District Court accepted that the contravention "occurred through inadvertence or, at the worst, stupidity; there was nothing deliberate about it".[16]

On the other hand, in *Australian Guarantee Corporation Limited v Lutje,*[17] Boyce J. also sitting in the Queensland District Court had taken a slightly different approach. The case concerned a loan contract entered into on 26 July, 1989 for the purchase of a motor vehicle. The contract made provision for stating the annual percentage rate but it was left blank in contravention of the Act. The explanation given to the District Court was that the borrower had signed an initial loan contract which had the annual percentage rate shown on the contract but a question arose as to his full name. For that reason another loan contract was prepared and the first one destroyed. A check-list had been ticked in the appropriate places by the officer concerned and "yes" had been placed against the question asking whether the annual percentage rate was disclosed in the document.

The evidence before the Court showed that the error arose through inadvertence and it occurred in a "settling-in period" and further that there was no evidence that the debtor had suffered any loss or damage. The Court also noted that the credit provider had

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13 At pp.56,794 - 56,795.
14 (1990) ASC #55-994 (59,991).
15 At pp. 58,992-58,993.
16 At p. 58,993.
17 (1990) ASC #55-993 (58,988).

made some determined effort to ensure that its loan officers observe the requirements of the Act. However, His Honour went on to state that,

> it must be borne in mind that the requirement to insert the annual percentage rate under a loan contract is a most important requirement of the legislation. Over many years, there was continued agitation by consumer representatives to the effect that documents used by credit providers were misleading in that they did not disclose to the consumer the true interest rate.[18]

The District Court therefore considered that, in all the circumstances the credit provider ought reasonably be excused. But it did not consider it appropriate to reinstate the whole of the credit charge. The debtors who did not take any part in the proceedings, were made liable to pay the credit charge less a sum of $500.

In the Westpac case, the Queensland Supreme Court decided not to follow the District Court's approach in the Lutje case. Shepherdson J. thought that reinstating the debtor's liability less the sum of $500 "in effect could be regarded as a fine for failure to insert into the loan contract 'a most important requirement of the legislation'."[19] Whilst agreeing generally with the comments of Boyce J. in the District Court, the Supreme Court took a different course. It expressed the view that the failure to comply with s.38(1)(h) is not as serious as say a failure to insert the annual percentage rate in a loan contract.

These Queensland cases may be compared to two New South Wales cases. In *Australian Guarantee Corporation v Altman & Anor*[20] a seasonal loan contract had been entered into between AGC and the debtors in respect of a harvester in October 1988. It was intended that the contract provide for five equal repayments of $14,999.86. AGC subsequently discovered that the amount mentioned in the statement of the last payment had been incorrectly stated to be $14,99.86. The liability became zero as the error breached section 36(1)(g)(i) of the Credit Act of New South Wales, which provides that where each instalment is the same amount the loan contract must include a statement of that amount. AGC applied to the Commercial Tribunal of New South Wales for restoration of the debtors' liability pursuant to section 85.

The Tribunal decided to increase the debtors liability to 100 per cent, with the result that AGC was able to recover credit charges to the tune of $22,499.30. The Tribunal took several factors into account. In the first place, it accepted the finance company's submission that the breach was "a clerical error". Secondly, the error was brought to

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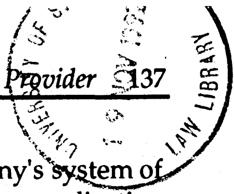
18 At p.58,990.
19 At p.56,798.
20 (1990) ASC #55-953.



the Tribunal's attention as a result of the finance company's system of review. In the third place, the debtors did not contest the application and as a matter of fact, chose not to attend the hearing. Finally, the Tribunal took into account the fact that the error was of a type that would not have misled the respondents in any significant way.

In *Australian Guarantee Corporation Ltd v Hawkins & Anor*[21] the respondents had attended at the premises of "Ken Sams Toyota, Chullora" to buy a new car. Finance was arranged by an employee of Ken Sams Toyota with the applicant and insurance was taken out. The finance company failed to include a statement of the amount financed in accordance with schedule 4. This was a breach of section 36(1)(b) and AGC applied for relief.

The Commercial Tribunal of New South Wales held as irrelevant allegations of misrepresentation made at the point of sale by an employee of the dealer concerning the particular kind of insurance. At any rate, the Tribunal found no evidence of such misrepresentation. Instead, the Tribunal regarded as "relevant circumstances" the following matters:

* there was no loss or damage to the respondents;
* the breach of section 36(1)(b) did not reveal any serious disregard for the requirements of the credit legislation. The error was not deliberately or wilfully made;
* the application was brought relatively shortly after its discovery and the applicant informed the respondents of the error and its effect in responding to the requests for advice as to the amount required to discharge the loan; and
* other contraventions of the Act, in this case, sections 33(1) and 92 were also relevant but the errors were inadvertent and isolated. In the result, the Tribunal decided to increase the debtor's liability to the full amount of the credit charges.

What Level of Penalty Should be Imposed?

The second broad issue raised by the CBFC case is that, once it is decided to impose a sanction, what standards or benchmark should be used?

An interesting set of facts presented themselves in *Australian Guarantee Corporation Limited v Chivell & Ors.*[22] In the case of Shane Chivell the finance company failed to complete the date of the offer by the debtor contrary to section 36(1)(a) of the Credit Act, and in the case of Parsons, the finance company failed to complete a

21 (1991) ASC #56-041 (56,666).
22 (1991) ASC #56-071 (56,816).

memorandum of acceptance of the offer contrary to section 33 of the Credit Act. The Credit Tribunal of Victoria had before it evidence showing the steps taken by the applicant to comply with the requirements of the Act. A Compliance Officer had been appointed in 1988 and all contracts had been audited for compliance with the Act. But the compliance checker failed to detect that there was no completion of the date of offer in respect of the Chivell contract. It was identified as irregular in May 1989 and an application was lodged with the Tribunal the following month to have the credit charges reinstated. In relation to Parsons' contract, no compliance checks had been conducted, though the contract was made prior to the appointment of the Compliance Officer. The irregularity came to light due to a refinancing request by the debtors. An application to the Tribunal was delayed by almost five months. Further, an amount of $1,746.07 in excess of the amount financed had been paid by the debtor.

The Credit Tribunal of Victoria decided to reinstate the credit charges to the full extent in respect of the Chivell contract. But in relation to Parsons' the credit charges were restored to 85 per cent. The Tribunal explained that on the evidence it was satisfied that the finance company had taken a responsible approach to endeavouring to comply with the myriad of technical and more substantial requirements of the Act. With respect to the Chivell contract, the time between the discovery of the error and the lodging of the application with the Tribunal was indicative of the applicant taking all steps expedient to bring the matter to the Tribunal. In the case of Parsons, the Tribunal explained that the increase of the credit charges would have been higher, possibly full, if the applicant had provided satisfactory evidence of compliance procedures prior to the appointment of its Compliance Officer, and not delayed its approach to the Tribunal by a period of almost five months. As well, the Tribunal would have taken into account any action taken by the credit provider to deal with the amount it held in excess of the amount financed upon discovery of the irregularity, for example, by coming to arrangements for payments into an interest bearing account pending the outcome of the proceedings.

A similar set of circumstances occurred in Re Australian Guarantee Corporation Limited.[23] Two individuals, Gray and Barclay, approached the finance company, seeking finance relating to the purchase, by each, of their own motor vehicle. The applicant refused approval of the applications but intimated that an application by the individual's employer, the Canberra Royals Rugby Football Club, with two guarantors would be acceptable. Both contracts were then expressed in the form of a hire purchase agreement. A motor car dealer, York Toyota, one of the major sponsors of the Club, re-

23 (1991) #56-078 (56,878).

submitted the applications in the name of the Club but with the individuals as co-borrowers. The original contracts signed were hire purchase contracts, not regulated by the Credit Act. This was done because the finance company believed that since the party to the contract was a body corporate, the Act would not apply to the loan. Gray subsequently defaulted on his contract and disappeared. Barclay's payment schedule was eventually renegotiated, in the course of which, the finance company became aware in May or June 1989 of the implications that both contracts may have been regulated by the Act because of the involvement of natural persons. It meant that a number of breaches of the Act and the Regulations had occurred.

The Credit Tribunal of the Australian Capital Territory restored the credit charges to the extent of 100 per cent in the Gray contract, but only to 90 per cent in the Barclay contract. It was noted that in the case of the Barclay contract, in May 1989, the original contract had been re-written solely in his name in a form intended to comply with the Act. At the hearing, it was accepted by counsel for AGC that it could not be in a better position as regards the application than it would be if the original agreement were still on foot.

The Tribunal found no evidence of either debtor suffering any loss or damage. The Tribunal accepted that AGC's contraventions were inadvertent. The Tribunal considered that the explanation furnished by AGC for overlooking the requirements of the Act as to the form of the particular documents is credible. The Tribunal also took into consideration that the contraventions were brought to notice by AGC and further, the Tribunal was satisfied that AGC had taken considerable steps with a view to its staff complying with the requirements of the Act.

The approach by the Tribunal to the reinstatement of the credit charges was indeed interesting. It explained: "Nevertheless, the contraventions by AGC were significant and the Tribunal had concluded that, putting aside for the moment the question of the conduct of debtors, the credit charges payable under each contract should be restored only to the extent of 90%"[24] The Tribunal accepted AGC's explanation for the considerable time lapse between the initiating of the application and bringing it on for a hearing. The reason being that AGC was waiting for the Tribunal to dispose of the case involving CBFC[25] then before the Tribunal.

After considering the conduct of Barclay, the Tribunal decided not to interfere with the initial restoration to 90 per cent.

With respect to Gray, the Tribunal found a different set of circumstances and so decided to restore the other ten per cent of the

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24 At p.56,884.
25 Infra note 29 and accompanying text.

credit charges, with the result that AGC got 100 per cent back. It explained:[26]

> As to Mr Gray, while the emphasis in previous decisions of the Tribunal under section 85 has been on imposition of an appropriate sanction on the credit provider designed to secure proper conduct in the future, the facts of the Gray transaction require some adjustment in this approach. It does not make sense that, where in respect of the one transaction the credit provider has inadvertently committed breaches of the Act and the debtor has deliberately breached his obligations under either the Act or the contract, if not the general criminal law, the credit provider should be penalised to benefit the debtor.

However, the Tribunal decided that AGC should bear its costs in respect of both contracts and "this in itself will represent a significant sanction".

Another important case is *Custom Credit Corporation Limited v Gray*[27] where the finance company had advanced a sum of money to the respondent to enable him to purchase a new motor vehicle in November 1985. The payment of the amount financed was secured by a mortgage over the vehicle. The borrower defaulted and the car was repossessed in September 1987 and then sold. As certain terms and conditions were absent from the respondent's copy of the loan contract it had no force and effect and therefore the debtor was not obliged to make any payments under the loan contract. The Tribunal ordered that any amounts paid pursuant to the loan contract and mortgage be paid into an interest-bearing account pending a final determination and also awarded compensation of $4,933.00 to the debtor. The finance company appealed to the Supreme Court.

On the question of civil penalty, the Supreme Court of Victoria concluded that section 42 operated, subject to section 85, to relieve Gray of liability to pay the credit charge, on the sole ground that the contract was not in writing. Nevertheless, the Supreme Court thought it "desirable" to set for the Tribunal "some guidance be given as to the principles to be applied". The Supreme Court emphasised that, "the Tribunal should constantly bear in mind that its objective is...to tailor that penalty to fit the particular case. The penalty to be imposed as a result of the exercise of its discretion should be duly proportionate to the relevant conduct of the credit provider and debtor and any consequent detriment sustained by the debtor".[28] The end result was that the Supreme Court set aside the orders of the Small Claims Tribunal.

In the CBFC case itself, the Commercial Tribunal of Western Australia was referred to another case heard in the Australian Capital

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26 At p.56,884.
27 (1991) ASC #56-096 (56,997).
28 At p.57,015.

Territory involving the same company.[29] In that other case, there were five credit sale contracts and the finance company admitted that it was in breach of the Act in a number of respects, particularly, sections 32 to 35, 92 and 245 as well as regulation 18 in that it failed to use prescribed terms. The breaches of section 35 resulted from the expression of the agreements as hire purchase contracts. The explanation given by the finance company was in essence that the transactions regulated by the Act represented a small proportion (5 to 8 per cent) of the total number of transactions entered into by it and again only a small proportion of the transactions (7 to 11 per cent) were expressed in terms amounting to a breach of the Act. The finance company's explanation was therefore "inadvertence by the individual officers involved".

The second mitigating factor put forward on behalf of the company was that the five contracts in question were identified by the company through an internal examination conducted by its officers and not as a result of complaints by customers. Third, the Tribunal heard evidence of the steps which the finance company had taken, before the Act came into being, to ensure that its staff were aware of the requirements of the legislation, including staff training at all levels, to revise instruction manuals, obtain detailed advice from its solicitors as to the requirements of the Act and to circulate bulletins from its solicitor explaining these requirements to its staff. The Tribunal was also told of the steps which the company had taken since the discovery of the breaches in the five contracts, to reduce the possibility of such breaches occurring in the future.

In a rather short decision, the Credit Tribunal of the Australian Capital Territory decided to restore the credit charges to the extent of 90 per cent. It noted that, the individual officers of the finance company responsible for the errors did not take sufficient care as to identifying the descriptions of the agreements in question and the requirements of the Act in that regard. The Tribunal also noted that, the finance company itself had not taken adequate steps to prevent the breaches in the five contracts. The Tribunal went on to point out: "However, there is no suggestion that the breaches were deliberate and it is significant that the breaches were brought to notice not by complaints, but by the applicant's own efforts".[30]

One cannot fail to notice the similarities between what occurred in the Australian Capital Territory and Western Australia involving the same company. In fact, counsel for the finance company had submitted to the Commercial Tribunal of Western Australia that "the facts as disclosed in these proceedings were no worse than those which were dealt with by the Australian Capital Territory Credit Tribunal". However, the Commercial Tribunal of Western Australia

29 Re CBFC Ltd (1991) ASC #56-063 (56,772).
30 At p.56,775.

was unable to satisfy itself that the circumstances were identical. Specifically, it observed that the other case was short on details especially in relation to the circumstances leading up to the application to the Tribunal and action taken by the finance company in the Australian Capital Territory following discovery of the breaches.

Recent Developments

Attempts at introducing a uniform national Credit Act will probably crystallise in 1992. The issue which has been on the agenda of the Standing Committee of Consumer Affairs Ministers (SCOCAM) for sometime resulted in the Draft Credit Bill 1991 being released for comment in September 1991.[31] It was expected that the final draft would be introduced into all State and Territory legislatures during the Autumn Session in 1992. Further negotiations have been going on and it is now expected that the Bill will be introduced towards the end of 1992. The Bill, if it does go ahead, would replace substantially uniform credit legislation in New South Wales, Victoria, Queensland, Western Australia and the Australian Capital Territory. South Australia has a different credit legislation and Tasmania and the Northern Territory have none.

Three States, namely, New South Wales, Victoria and Queensland have amended the civil penalty provisions of their legislation in the last year or so. The background to those amendments came to light in October 1990 when it was revealed that Westpac Banking Corporation had committed a number of breaches of the Credit Act. The problem was that from the introduction of the Act until about August 1990, the vast majority of Westpac's loan contracts failed to disclose that the bank was receiving a commission for insurance sold in conjunction with its loans. The Bank failed to disclose to its borrowers that a commission of 25 per cent of the premium for consumer credit insurance on their loans was paid by the insurance underwriter, Westpac General Insurance Limited, to the insurance broker, Westpac Brokers Limited. Both the broker and the underwriter are wholly owned subsidiaries of the bank.

Section 36 (section 38 in Queensland) prescribes in detail matters which must be included in a contract. It was sub-section (1)(h) in particular that Westpac breached. That sub-section requires that a loan must include, "if a commission is payable, a statement to that effect and, except in so far as the information is not known by the credit provider or is not readily available to the credit provider, a statement of the person to whom and the person by whom the commission charge is payable". The failure to disclose the commission breached the section in all Credit Act jurisdictions. Two types of breaches were identified. In about 52 per cent of the

31 (1991) CCH, *Consumer Sales and Credit Reporter*, 55,499.

contracts, it was found that the bank had in fact disclosed the required information relating to the insurance commission charges to its debtors. But instead of disclosing the information in the loan contract itself as required by section 36(1)(h), the bank had provided the information by way of an insurance certificate which was provided to the borrower at the time the contract was entered into. In the remaining 48 per cent of the Westpac contracts, there was no disclosure of the insurance commission charges either in the loan contract itself or in another document.

According to the Bank, of the 242,168 loan contracts entered into between 28 February, 1985 and 31 August, 1990 in the country, some 117,399 or 48 per cent had breached the legislation. But the seriousness of the breaches varied widely between the States. They ranged from in excess of 80 per cent in the Australian Capital Territory to only 0.2 per cent in Queensland, (that is 412). Through the operation of section 42(1)(b), the borrowers involved in the Westpac loans were relieved of all credit charges, estimated to total $1.4 billion.[32]

Westpac Banking Corporation notified all Premiers and Ministers of Consumer Affairs of its difficulties. It was eventually decided that amending the civil penalty provisions of the Act was the appropriate thing to do. New South Wales took the lead in amending the legislation. Its Credit (Amendment) Act 1990 came into force on 12 December of that year. Victoria followed with the Credit (Further Amendment) Act 1991 which came into effect on 26 June, 1991 and the Credit Amendment Act 1991 (Qld) commenced on 15 July, 1991. The amending Acts validate (with retrospective effect from the introduction of the legislation) the breaches committed by Westpac in 52 per cent of the contracts - those described as "technical" and are in the same category of cases as those which are the subject of this article. As far as Westpac is concerned, it had all the credit charges restored to it without going through the Tribunal process. It should be noted that the amending legislation does not make a specific reference to Westpac, though the Minister's second reading speech in the House does in all three States.

The "Westpac problem" provided an opportunity for reform of the civil penalty provisions. The objectives were stated as follows:

* to reduce the impact of the liability created by automatic loss of credit charges;

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32 Statement by Hon. Brian Mier, then Victoria's Minister for Consumer Affairs, entitled "Credit Act Amendments following Westpac Investigation" dated 16 October, 1990. See also, NSW. Minister for Consumer Affairs' Second Reading Speech on 20 November, 1990 reprinted in CCH, Consumer Sales and Credit Law Reporter #53-558 (54,604) and Second Reading Speech by Queensland Minister in 1991 in Ibid #53-577 (54,731).

* to facilitate dealing with a large number of contracts tainted by a common error or errors;
* to more quickly dispose of multiple applications concerning common errors which are unlikely to disadvantage debtors; and
* to clarify the Tribunal's (court's in Queensland) powers in making determinations under section 85 (section 86 in Queensland) of the Act.

The Draft Credit Bill that will introduce uniform consumer credit legislation retains substantially the changes already made in the civil penalty area by these three States (and more recently by the Australian Capital Territory). For example, under clause 42(3) of the Bill, where an application for reinstatement of interest charges is made, then until the application is determined, the civil penalty ("civil consequences" is the term used in the Bill) is suspended and, during the period of suspension, the creditor's contractual rights operate as if no contravention had occurred. Prior to the amendments in the three States, once the breaches were detected and the civil penalty became operational, it remained so until the Tribunal restored any part of it. In the unlikely event of the credit provider choosing to do nothing, the debtors were permanently relieved of all liability to pay credit charges.

However, some limitation is placed on credit providers during the period of suspension of the civil penalty. By virtue of sub-clause (3a) of clause 42, the Tribunal's consent is required, before the credit provider can take enforcement proceedings against the debtor, unless the proceedings are limited to recovery of capital. Similarly, the Tribunal's consent is required for entering into a refinancing contract replacing the contract affected by the breach. It should be noted that under section 42(b), when the application is eventually disposed of, an order made by the Tribunal may operate retrospectively. The effect of this is that the statutory suspension of civil penalty is entirely extinguished and the creditor's right to credit charges is restored to the level ordered by the Tribunal.

Another example of the major change made to the civil penalty area is provided by clause 42(4) of the Bill. It enables an application for reinstatement of interest charge to be made in respect of a class of credit contracts, in which case the Tribunal may, having regard to the number of contracts involved, (a) dispense with identification of each contract affected by the contravention; and (b) allow notice of the application to be served by publication of a notice, in a manner directed by the Tribunal. Readers of metropolitan newspapers would

have noticed recent advertisements placed by the State Bank of New South Wales.[33]

Conclusion

It is difficult to draw any definite conclusions from the cases discussed here. However, the following tentative conclusions suggest themselves:

(1) The automatic operation of the civil penalty provisions means that once breaches of the relevant provisions of the Act occur (or more accurately, upon discovery of the breaches), the debtors concerned will be relieved of all liability for credit charges under the "infected contracts".

However, in dealing with breaches involving no more than "inadvertence" or as was said in one case "at the worst, stupidity"34 the Court or Tribunal as the case may be, does not necessarily have to impose a sanction on the credit provider. It is therefore incorrect to presume that the Tribunal will impose a penalty. The Court or Tribunal has to consider all the circumstances of each case. In the CBFC case therefore, it would seem that counsel for the applicant may have erred in conceding that "it is now well established" that "the Tribunal should be mindful of imposing a sanction..." or that "the task of the Tribunal under Section 85 of the Act is to impose an appropriate sanction.."35

In the Westpac, Haughton, Altman and Hawkins cases, the Court and Tribunal respectively did not think it appropriate to impose any sanction for the technical breaches and so restored the liability of the debtors from zero to 100 per cent. On the other hand, in the Lutje case, the penalty amounted to $500. Although, the Queensland Supreme Court thought that could be regarded as a "fine", perhaps, it is more in the nature of a "token" penalty but yet sufficient to register the Court's disapproval of the nature of the breach involved.

(2) Where the Court or Tribunal decides to impose sanctions, the quantum has varied, but in the range of 80 per cent to 90 per cent of the reinstatement. That is to say, the credit provider loses between 10 and 20 per cent of the credit charges due it. In some cases, this could translate into a large sum of money.

(3) The nature of the "technical breach" seems to be of some critical importance. Thus a "clerical error" which does not prejudice the borrowers will be viewed more leniently than a failure to state

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33 E.g., "The Weekend Australian", 22-23 February, 1992, p.9 and "The Australian" 26 February, 1992, p.9

34 Supra note 16.

35 At p.57,083.

the annual percentage rate. The latter is crucial in allowing borrowers to know the rates available and so to "shop around". This is one of the main objectives behind the disclosure regime of the legislation.

(4) A lot of emphasis appears to be placed on what may be termed "the post-discovery conduct" of the credit provider. Where the credit provider acts swiftly or reasonably quickly in taking remedial action; and in bringing the matter to the notice of the debtor, and by making an application to the Court or Tribunal, this has been favourably looked upon. On the other hand, where the credit provider continues to indulge in its carelessness by being lethargic or uncertain what to do, that conduct has been strongly criticised.

(5) Despite the seemingly differing approaches, there is now general agreement that the principal aim of the civil penalty provisions of the Credit Act is to encourage compliance with the legislation rather than give direct benefit to the consumers. The leading authority on the subject is Encyclopaedia Britannica (Australia) Inc. v Director of Consumer Affairs & Ors.36 The Full Court of the Supreme Court of Victoria gave the rationale for the civil penalties as, "forfeiture against the offender, not the benefiting of the debtor... Any benefit to the debtor was the 'windfall', not any order relieving a provider".[37]

In that case, the appellant had sold encyclopaedias on credit in Victoria without a credit provider's licence. There were 1,058 sales contracts most of which involved amounts of less than $3,000 but collectively was in the order of $650,000. The finance company appealed the orders made by the Credit Tribunal. Fullagar J., with whose reasons the other members of the Court agreed, explained:[38]

> Although the statutes were doubtless enacted because it was thought that government regulation of the credit "industry" would benefit the consumers of the credit providers, and thus enacted with the intention of benefiting debtors, nevertheless the civil penalties, in the form of forfeiture of contractual rights against the debtors, were not intended directly to benefit debtors at all. To induce the credit providers to obtain registration, and to comply with the statutes generally, the penalty was stipulated of depriving the providers of their contractual rights against the debtors, but the fact that a debtor did not have to pay the capital or the interest was not intended to benefit the debtor; the direct benefit to the debtor was merely incidental. When one looks, therefore, to see whether there is, on the one hand, a determination which involves $650,000 or, on the other hand, 1,058 determinations, it is

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36 (1988) ASC #55-636 (57,845).

37 At p.56,797.

38 At pp.56,796 - 56,797.

> primarily to the applicant creditor that one looks rather than to each individual debtor who, entirely fortuitously and incidentally, has escaped altogether his contractual obligations subject to the condition subsequent of a Tribunal determination

It should be commented that credit providers are thus given strong incentives to comply with the legislation, especially the disclosure requirements. This is perhaps a contradiction in terms, in that "civil penalty" as the description indicates, is punitive in nature. However, it is designed to protect consumers of credit by encouraging compliance with the disclosure requirements built into the legislation which in turn should enable consumers to tell the actual cost of credit. The contradiction may be the rationale behind the dropping of the term "civil penalty" and adoption in its place "civil consequences" in the Draft Credit Bill. Similarly, the disclosure requirements are described as "key requirements" in the Bill.

The issues which we have discussed in this article will continue to be important whether or not the uniform national credit legislation comes into being. As at present, New South Wales, Victoria and Queensland have almost identical civil penalty provisions brought about as a result of the "Westpac problem". The Australian Capital Territory has recently joined the three states by passing the Credit (Amendment) Act 1991[39]. Western Australia remains the only jurisdiction still in the "old order". There is no denying the fact that the "old order" favours borrowers whilst the "new order" favours credit providers. It is not a pretty sight. One suspects that Western Australia is delaying amendments to its legislation in view of the imminent introduction of the uniform legislation. However, if for some reason the uniform legislation fell through or it is put on the shelf again, then Western Australia would have to amend its legislation quickly, particularly the civil penalty provisions, to bring them in line with the other Credit Act jurisdictions. There is a strong case for uniform interpretation of the legislation in all the Credit Act jurisdictions as was indicated by the *Supreme Court of Victoria in Custom Credit Corporation Limited v Lupi & Ors.*[40] If the uniform credit legislation comes into being, the case would be even stronger.

To conclude, the uniform consumer credit legislation will not abolish civil penalties. Rather, the proposed legislation will substantially continue what is currently in place in all the Credit Act jurisdictions with the exception of Western Australia. That civil penalty as tool of consumer protection will continue to be an

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39 (No.97) of 1991. Ss 1, 2 and 3 commenced on 24 December 1991. S.6 will commence on 28 February, 1985 and the remainder of the sections are taken to have commenced on 28 February, 1985. See ASC #90-020.

40 In particular per O'Bryan J. He was then referring to NSW. and Victoria. He stated: "Secondly, because uniform legislation dealing with consumer credit affecting two populous States in which the credit industry has a substantial role to play ought to be interpreted, whenever possible, uniformly". (1991) ASC #56-024 (56,531, 56,547).

important issue is perhaps best illustrated by the fact that the State Bank of New South Wales, as at June 1992, had applications before the Commercial Tribunal concerning more than 300,000 contracts involving $400 million in credit charges.[41]

41 See Second Reading Speech of Minister reprinted at ASC #53-606 (54,922).