27 May 2017

Melanie Drayton
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Office of the Australian Information Commissioner
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Dear Ms Drayton,

Re: Repayment history information reporting and informal payment arrangements

We refer to your letter dated 14 March 2017. We apologise for the delay in responding. It has taken some time to coordinate a response when we are very busy.

This response has been agreed between Financial Rights Legal Centre, Consumer Action Law Centre and Financial Counselling Australia. This response has been kept as simple as possible to identify issues for further discussion.

Counsel's advice

In your letter you confirm that the Office of the Australian Information Commissioner (**OAIC**) obtained advice from counsel on the meaning of "due and payable" in the *Privacy Act*. The advice has been obtained on narrow terms and has not considered the requirements under the *National Consumer Credit Protection Act 2009* (***Credit Act***).

As you know, it is a requirement under the *Privacy Act* that to list repayment history information (**RHI**) it is necessary to be a licensed credit provider under the *Credit Act*. Accordingly, the operation of the *Credit Act* is a key consideration in determining the meaning of "due and payable".

In our view, if an arrangement has been made under the *Credit Act* then an amount cannot be due and payable. It does not appear you have obtained advice on this point and we consider that it is critical that this point be covered in any view by the OAIC. As the Australian Securities and Investments Commission (**ASIC**) is the appropriate regulator for the *Credit Act* it would appear to be necessary that ASIC be involved in settling this issue.

The operation of the hardship provisions of the *Credit Act*

The hardship provisions of the National Credit Code (**NCC**) (being schedule 1 of the *Credit Act)* are contained in sections 72 to 75. Changes on the grounds of financial hardship is a key consumer protection for consumers in financial hardship. It is a key public policy (repeatedly endorsed by Government) that consumers have the ability to ask to vary their credit contract if they can show that they can reasonably repay the loan if the variation was granted.

There is no requirement or mention in the provisions that the hardship is required to be temporary. The requirement is that the consumer must be able to reasonably repay the loan.

The provisions are very straightforward and in summary they operate as follows:

1. The consumer gives notice that they are unable to pay (either orally or in writing) s.72(1)
2. Once the hardship notice is given there is a stay on enforcement (s.89A)

3. The Credit Provider (**CP**) can ask for further information and the consumer is required to supply that information (s.72(2) and (3))
4. The CP either agrees to the change and provides details of the agreed variation OR the CP refuses giving reasons and details of the relevant EDR (s.72(4) and s.73)

The OAIC view is inconsistent with the above legislation. The inconsistencies are:

1. There is no concept of a temporary repayment arrangement compared to a variation. There is only an agreed variation. An agreed variation can be of any length of time.
2. Postponement of enforcement is an agreed variation under the NCC. In fact in the previous Uniform Consumer Credit Code (s.68) a postponement of enforcement was a specified option.
3. The test of whether the CP could maintain enforcement action is necessarily affected by s.89A. In the vast majority of circumstances, once the debtor has given a hardship notice, RHI cannot be listed.

Simple Arrangements

Regulation 69A granted CPs relief from giving a debtor notice confirming an agreement to change the credit contract on grounds of hardship if the agreed arrangements reduce the debtor's obligations for a period of less than 90 days. The original relief was until March 2014. This has since been extended by ASIC Class Order CO14/41 to March 2018. This has no impact on the process above. It simply changes whether an agreement must be reflected in writing. It does not change the process or its legal effect in any other way.

The examples in the OAIC view

Two examples are given in the OAIC view.

First example a

As stated above, the reference to a temporary repayment arrangement is inconsistent with the *Credit Act*. The example should be reframed to focus on whether the debtor has given notice of hardship. A stay on enforcement would usually follow pursuant to s.89A. There would be no need to consider whether there was an equitable estoppel.

Second example b

Again, we note s.89A which means that for the most part representations are not relevant and the stay of enforcement occurs by operation of the *Credit Act*.

Even assuming that s.89A did not apply (as an exception in the section applied) we would contend that an agreed variation means that the contract is varied and a listing cannot be made. This is consistent with the reasoning in the FOS determination (422745).

We are very concerned that the second example will drive industry to work on an RHI "loophole" (sanctioned by the OAIC view) where the CP tells the consumer:

1. This is not hardship
2. There is no postponement of enforcement
3. RHI will continue to record

This type of approach would not comply with the *Credit Act* (or good public policy on hardship) and seek to setback a great deal of work and industry commitment to best practice hardship policies. This would be a profoundly disappointing outcome.

We look forward to participating in the consultation process referred to in your letter.

Regards

Yours faithfully,

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