Pit falls for credit providers

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The Credit Contracts and Consumer Finance Act 2003

- The Act came into force 14 October 2003 in relation to Buy Back Transactions
- The Act came into full force 1 April 2005
- The Act is a revised version of the previous consumer credit legislation
- The Commerce Commission plays an important role including:
  - Monitoring credit markets
  - Taking prosecutions in relation to breaches
  - Taking civil proceedings
  - Ensuring that all appropriate information is available to the Public
  - Has the discretion to determine whether it will initiate an investigation or enforce action against the infringer

Recent statistics

- Commerce Commission as the regulatory body:
  - Obtained Court Order of fines of $159,000.00 awarded against non-compliant credit providers
  - Facilitated voluntary and Court ordered refunds in excess of $1,500,000.00 being returned to over 5,300 debtors
  - Received 245 complaints from consumers during the first six months of this year

Fair Trading Act 1986

- Section 9 of the Act provides:
  - "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

- The object of this legislation is to ensure that consumers are informed, receiving information about the products and services they purchase and are able to compare this information with other traders.

- Breaches of the CCCF Act can also often lead to potential breaches under the Fair Trading Act. Note limitation of 3 years to bring F T Act claim and false or misleading representations, in trade, as to the standard and quality of consumer credit offered and false or misleading representations as to the benefits therefrom constitute offences against the Act

- Therefore the Commerce Commission may take action against creditors using both the CCCF Act and FT Act and this may result in the non complying credit providers being convicted under both Acts.

Powers & Enforcement by Commerce Commission

- Objective is to ensure credit providers and the industry comply with the CCCA Act
- Other powers
  - It has powers to issue statutory notice requesting the provision of information and also powers to obtain search warrants
- Enforcement approach
  - **No further action** – If there is no breach or possible or likely breach of the Act
  - **Compliance notice** by way of issuing a compliance advice letter – If there is a possible or likely (but not serious) breach of the Act
  - **Warning Letter** – If there is a likely breach of the Act
  - **Settle with the creditor** – If there is a likely and serious breach that the creditor acknowledges
  - **Prosecute the creditor -** If there is a likely and serious breach of the Act.

Essential checklist points

- The credit provider must ensure that they are complying with both the CCCF Act and FT Act including the following issues:
  - Disclosure
  - Interest
  - Reasonable credit fees
  - Full repayment fees

Cases – Disclosure

- Senate Finance Limited
  - Facts – The company entered into consumer credit contracts with consumers purchasing vehicles and the finance documents contained small texts which became smaller and blurry when the parties tried to execute the documents by fax.
  - Issues – The company had failed to meet the disclosure standards under
    - s 36 of the CCCF Act – The disclosure must “express the required information clearly, concisely and in a manner likely to bring the information to any reasonable person.
    - S 17 of the CCCF Act – Failure to provide initial disclosure
  - Outcome – The company lost the rights to enforce the contract, enforcement of the right to recover property relating to the contract or enforce any security interest in the contracts.
    - The company was convicted of 17 charges under the CCCF Act and a further 8 charges under the FT Act. Fined $59,000 and also ordered to pay statutory damages of $13,7000 to affected debtors

- Dolbak Finance
  - Facts – The company provided finance to second hand car purchasers between 2005 to 2006. The company used outdated contracts and failed to change their contract under the new CCCF Act. The Commission had already issued warning notices twice
  - Issues – Failure to provide disclosure
  - Outcomes – The company was fined $100,000 and ordered to pay statutory damages of $46,600 for not providing disclosure to approximately 100 debtors
- Southland District Council
  - Facts – The council was warned that it has failed to meet the disclosure requirements under the CCCF Act. The council failed to provide appropriate information in relation to one particular option to extend a sewerage scheme
  - Issues – Failed to meet s 17 of the Act which included information regarding the initial unpaid balance, the total of all advances to be made, the annual interest rate, method of charging interest and details of the payments required.
  - Outcomes – The Commission took enforcement action against the council.

Cases – Interest

- Primus Financial Services
  - Facts – The debtors had been overcharged interest payments
  - Issues – No interest running once the full repayment is made
  - Outcome – The company refunded $49,000 to debtors
- Geneva Finance Limited
  - Facts – The company continued to charge interest and fees on the unpaid outstanding loan balance after the company had actually sold secured security and applied the sale proceeds that were repossessed from the defaulting debtors
  - Issues - S 35 of the Credit (Repossession) Act 1987 imposes a limitation on the creditor's right to recover from debtors in situations after possession of secured goods are taken from debtors.
  - Outcome –The company reversed or refunded in excess of $589,000.00 In 38 cases, the company refunded the overcharged fees and interest.

Cases – Reasonable credit fees

- Galistair Enterprises Limited
  - Facts – The company charged an establishment fee of between \$300~500 on each loan. The company charged the costs of processing unsuccessful application and these costs were incorporated into the establishment fees.
  - Issues – S 42 of the Act places limits on the recovery of costs in relation to the charging of the credit fee
  - Outcome – The Commission determined that this falls outside the limbs provided under this section.
- The Motor Centre
  - Facts - The company charged \$3~5 for checks of the Personal Properties Securities Register but chose not to do the check and did not refund the amount.
  - Issues – The Act emphasises that the costs recovered must relate to the actual costs incurred and/or reasonable estimate of loss.
  - Outcome – The Commission determined that the company did not experience any loss and did not expend any costs doing the searches.

Conclusion

- The credit provider must ensure that it:
  - Complies with the disclosure requirements – to ensure that the consumer makes an informed decision
  - Must disclose and specify an annual interest rate and must not charge in advance.
  - Charges reasonable credits fees – This must be based on costs