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MFAA Submissions on Enhancement Regulations

1. Hardship and postponement regimes – regulation to permit adopting new procedure

New hardship provisions change the processes for dealing with applications for hardship relief.

The Enhancement Bill provides that the new regime for hardship and postponement applies only in respect of credit contracts entered on and after 1 March 2013.

We request that a regulation is made permitting credit providers, at their option, to use the proposed new procedures for credit contracts entered prior to 1 March 2013,

This purpose of this submission is:

- to avoid unnecessary expense in maintaining two systems;
- to avoid unintentional breaches arising from adopting the wrong system;
- to avoid the need for maintaining two systems well into the future.

As the new regime is more favourable to consumers, we see no objection to providing this option.

2. Authorisation for deduction – Reg 28XXC

Regulation 28XXC prescribes a form for use in relation to deductions by employers. The form is set out in Schedule 9.

The regulation provides that the prescribed form is only required if the first deduction is to be made within one month after the debtor or lessee signs the instrument.

If the intention of the regulation is that the prescribed form is only required when a deduction is requested in respect of a loan which is in default, then we consider that the content does not achieve that objective because non-default payments may be due within one month.

If the intention is that the prescribed form is to be used in all cases of deduction from wages (irrespective of default), then we suggest that this objective is not achieved because often the first payment will be more than one month after the direction is given.

In any event, there will often be doubt as to the date on which these instruments are signed (as distinct from dated).

We suggest that the occasions when the prescribed form is required should be specified clearly and not by reference to dates. We do not understand how the draft regulations work.

3. Schedule 9 – Form of authority to employers

As this consent is being addressed to the employer, there is confusion as to who 'I' and 'you' are in the draft. Throughout the document 'you' is the employer (being the person to whom the notice is addressed), and then in the box there is a switch so that the debtor is 'you'.

We suggest that the box states 'I understand that I can cancel this deduction request directly with my employer at any time. If I cancel this deduction request, I will be in default if I do not make alternative arrangements to make repayments.'

4. Regulation 28S(2) – Consumers in respect of which SACCs should not be provided

Regulation 28S (draft) provides that if a borrower derives 50% or more of their income from Centrelink, then no more than 20% of their income can be required to meet their repayments under all SACCs.

We think that *'who are qualified for a pensioner concession card'* is unclear. Is the credit provider supposed to work out whether the individual is able to obtain the card? We submit that the test should be whether the consumer actually holds a pensioner concession card.

It is not appropriate that this test should be applied to people who are only temporarily on a card and are thus limited in their ability to borrow. The test should be that the consumer has been on the card for at least the last six months prior to making the application.

The Department of Human Services' web site states '*You will get a Pensioner Concession Card if you receive any of the following income-support payments:*

- *Age Pension*
- *Bereavement Allowance*
- *Carer Payment*
- *Disability Support Pension*
- *Newstart Allowance or Youth Allowance (job seeker) if you are single, caring for a dependent child, and looking for work*
- *Parenting Payment (single)'*

Is it appropriate that this broad range of people have their freedom to borrow limited in this way? Remember, it may deprive them of the ability to purchase essentials like washing machines, or to get repairs done. We have no detailed knowledge on how the pension concession card scheme operates, but this seems to cover an inordinately wide class of persons.

5. Regulation 28S(3) – Maximum repayments for Centrelink customers

Regulation 28S(3)(b)(ii) states:

> (ii) work out the average unpaid balance of the contract by dividing the unpaid balance by the number of days in the remaining period of the contract;

We suggest that (3)(b)(ii) is amended to read 'work out the average daily unpaid balance'.

We submit that conducting a calculation over a period of one year is too long because circumstances may change regularly. Consumers are best protected by having a calculation made with regard to their current circumstances, say for the last six months. Remember, it may be difficult for applicants to provide evidence for 12 months. Licensees should be able to make the calculation having regard to six months statement for the period ending not more than 30 days prior to the assessment (simply because figures up to the date of the assessment may not be readily available).

We have difficulties working out the proposed formula. The clarity of the clause would be helped by an example as follows:

Total income over six months	=$6,000
Daily income ($6,000 ÷ 365) ÷ 2	= $32.88

What day should be used as "the calculation day"? We suggest it should be the date on which the last payment is due under the contract, and the average daily repayment would then worked out taking into account all SACC repayments from the proposed loan date to that last payment date.

The regulation should specify whether the consumer's income is to be taken into account before or after income tax. We suggest it should be before tax because:

- the licensee may be unable to work out the after tax amount;
- these borrowers will be unlikely to pay material tax; and

6. Regulation 79AB – Fees paid to third parties

Fees paid for credit reports and direct debit fees should be excluded from the cap. These are reasonable costs associated with providing credit. Especially if positive credit reporting is introduced, lenders should be encouraged to participate in the system because reliable records of borrowings will help to avoid inappropriate loans being made.

7. Grounds on which credit provider need not agree to change contract

The note to the proposed subsection 72(3) refers to certain grounds on which a credit provider need not agree to change the credit contract. The note states:

> Note: The credit provider need not agree to change the credit contract, especially if the credit provider:
>
> (a) does not believe there is a reasonable cause (such as illness or unemployment) for the debtor's inability to meet his or her obligations; or

(b) reasonably believes the debtor would not be able to meet his or her obligations under the contract even if it were changed.

This note is located as a note to the subsection requiring a debtor to comply with a request for information that may be made by a credit provider under subsection (2).

It is unclear whether the note would also apply in circumstances where the credit provider does not request any information under subsection (2).

The regulations should make it clear that the note to subsection 72(2) would also apply where the credit provider does not request any information under subsection (2*).*

8. Checking ADI statements for last 90 days

Section 117(1A) and 130(1A) provide that the licensee must view 'account statements that cover at least the immediately preceding period of 90 days'. We read this to mean the 90 days immediately preceding the day of the assessment.

This could and most probably will result in a consumer needing to provide log in details and passwords to lenders and brokers to enable their statements to be accessed, since few (if any) borrowers will arrive with a bank statement taken up to the day before their loan interview. The disclosure of this information is undesirable for obvious reasons. We suggest the 90 day period should commence at any time not greater than 20 days prior to the date of the assessment. In this way it would allow the borrower to safely generate their statements online or use the last set of statements received from their bank without having to provide passwords or login details to third parties.

9. What constitutes a hardship notice?

The new section 72(1) provides 'If a debtor considers that he or she is or will be unable to meet his or her obligations under a credit contract, the debtor may give the credit provider notice (a ***hardship notice***), orally or in writing, of the debtor's inability to meet the obligations'.

Lenders will need to develop a policy (which will be acceptable to ASIC, EDRs, and the courts) of determining **when** a hardship notice is given considering that all a debtor has to do is to state that the debtor is unable to meet the obligations.

Read broadly, this provision could be a deterrent to lenders contacting a borrower in regard to a single non-payment for fear that the borrower says 'I am unable to pay at present' which could trigger the hardship provisions. This result would obviously be contrary to parliament's intentions and contrary to the interest of borrowers, because prompt contact by a lender after minor defaults can often help to sort matters out promptly before they escalate. Such contact is obviously prudent from both lenders' and borrowers' perspectives.

We believe it is clear from the context and from the consequences that flow from a 'hardship notice' that a 'hardship notice' is only given if the borrower indicates that there is likely to be a reasonably long period (say four months or more) during which the borrower will be unable to make their repayments or have great difficulty in doing so. An inability to pay one or even a couple of instalments on time is <u>not</u> a 'hardship notice'.

It is not uncommon for borrowers to occasionally miss payments for one relatively minor reason or another. A prompt follow-up by a lender is essential to ensure that:

- borrowers are not paying interest at the (new) default rate; and
- the missed payment or problem does not go unremedied for a significant period whereby a minor issue becomes a major problem.

Accordingly, we consider a lender can, acting within the law, adopt a policy which proceeds on the basis that the consumer will only have stated verbally that the debtor is unable to meet the obligations if the debtor states that the debtor:

- will be unable to make payment for three or more months; or
- is unable to make a lump sum or final payment due under the contract within that period.

It would provide clarity for both consumers and lenders if this interpretation could be reflected in the regulations.

It is important for securitisation purposes and confidence in our banking system that the certainty of the contract between the debtor and the lender is not too easily subjected to unilateral change through the making of a "hardship claim" by a borrower.

The industry is very concerned that a hardship or postponement claim which is referred to EDR could mean about six months (taken from the time of the hardship or postponement request) during which time the value of the security could be reducing, interest continues to accrue, and no repayments are being made. This will result in a significant weakening of the lenders' position and possible erosion or even extinguishment of the borrower's equity.

If investors become concerned about the trade-off between consumer protection and the certainty of contract, then consumers and lenders alike will be disadvantaged by a resultant increase in the cost of funds and even a possible shortage of capital. This is unfair because the vast majority, who properly perform their loan obligations, will be cross-subsidising those who don't, which of itself runs against the fair 'user pays' principle.

The clarification of the hardship provisions as suggested above will help alleviate concerns that are growing in the industry about the possible if not likely delay in enforcing loans.

10. Forms 11 and 12

These forms should be amended to amend the bolding and capitalisation of the paragraph commencing 'EXTERNAL DISPUTE RESOLUTION'. Other prescribed forms inform consumers of IDR and EDR with equal prominence – see for example Forms 5, 9, 10, 14, 15, 16, and 17. This emphasis is causing some consumers to go direct to EDR which in many cases incurs expense for industry, without even attempting to resolve the problem beforehand.

LEASE REGULATIONS

11. Information in statement of account – r 105A

A consumer lease is one under which the total rental exceeds the cash price of the goods. Accordingly, in the vast majority of cases (if not all cases) there will be a 'wink and nod' arrangement under which the lessee can buy the goods for the residual value at the end of the lease.

The bare statement suggested by r105A that 'the lessee will not own the goods at the end of the consumer lease' could be materially misleading to consumers who expect that upon the payment of the residual they will be able to buy the goods in accordance with this long standing commercial practice in Australia. This is implicitly recognised by proposed reg105C(e) and (f) and reg 105H.

We submit that no statement is required concerning the situation at the end of the lease.

If our submission is not accepted, we suggest the following words 'You do not have an option to purchase the goods at the end of lease, but the lessor may offer to sell them and you may offer to buy'.

12. Form 19 and 20 – notice re direct debit default

These forms should be amended to amend the bolding and capitalisation of the paragraph commencing 'EXTERNAL DISPUTE RESOLUTION'. Other prescribed forms inform consumers of IDR and EDR with equal prominence – see for example Forms 5, 9, 10, 14, 15, 16, and 17. This emphasis is causing some consumers to go direct to EDR which in many cases incurs expense for industry and confusion for consumers.

13. Form 21 – consent to enter premises

As this consent is addressed to the lessor, there is confusion as to who 'I' and 'you' are in the draft. Throughout the relevant part of the document 'you' is the lessor (being the person to whom the notice is addressed), and then in the box there is a switch so that the debtor is 'you'.

We suggest that the box states 'I understand that I have the right to refuse consent. If I do the lessor may go to court for permission to enter the premises. This may cause additional default and other costs that I may be required to pay later'.

It is important that the lessee is aware that additional costs may be incurred if the lessor has to obtain a court order to exercise its rights.

The consent should also authorise the lessor's agents or nominees to enter the premises, as it will often not be the lessor itself who repossess.