30 August 2013

By email

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Australian Securities and Investments Commission
120 Collins St
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Dear Mr Gough and Ms Curtis

Discussion Paper: Credit Hardship Obligations—Outstanding Issues

The Consumer Action Law Centre, Consumer Credit Legal Centre NSW, and Financial Counselling Australia welcome the opportunity to comment on ASIC's discussion paper *Credit Hardship Obligations—Outstanding Issues*.

Briefly, this submission argues that:

- Regarding the transitional hardship arrangements:
  - we do not believe there is a justification for a simple arrangement regime, and the current arrangement—where lenders do not have to provide written notice for any arrangement of 90 days or less—is a disproportionate response to the concerns raised by industry;
  - however, we are willing to accept a simple arrangement regime if the 90 day threshold is reduced to 30 days and additional protections are provided.
- We do not support further definition of what constitutes 'hardship' or a hardship 'notice'. We believe that drawing hard distinctions around what constitutes 'notice' or 'hardship' is contrary to the intent behind the hardship provisions and indeed contrary to modern industry practice.
- We strongly oppose extending time periods for debt buyers to respond to hardship requests.
- Regarding the interaction between credit reporting and hardship:
  - where a hardship variation allows that a certain payment need no longer be made, the debtor's credit file should not indicate in any way that a payment was due and not made;
  - extra guidance should be provided to industry, consumers and community sector advice services on how the new credit reporting law interacts with hardship. Guidance could be jointly developed between ASIC and the OAIC.
- Lenders should not require consent from a joint debtor or co-borrower before deciding a hardship application. The guidance provided in Financial Ombudsman Service's document *The FOS approach: Dealing with Common Financial Difficulty Issues* is capable of dealing with the questions raised in the consultation paper.

Our comments are detailed more fully below.

Transitional arrangements—simple hardship arrangements

Lack of justification for a 'simple arrangement' regime
We are not convinced of the need for a 'simple arrangements' exemption.

The proposal seems to be at odds with the very intent of the credit law, as well as leading judicial authority on the importance of hardship obligations as a substantive legal right owed to consumers.

In the matter of *CBA v Wales*[1], a critical aspect of the Court's thinking in determining that default judgment for possession of the customer's home should be set aside, was on the basis of the lender's flawed hardship variation processes.[2] The court stated that:

> My principal reason for setting aside the default judgment was that the bank's conduct, combined with its failure to put Ms Wales on notice of its motion for default judgment, *deprived Ms Wales of the opportunity to avail herself of the remedies provided for in Division 3 of Part 4 of the Code.*[3]

The Court held at paragraph [45] that:

> the bank's approach to the resolution of the dispute duly lodged with the FOS by Ms Wales was calculated to *defeat the ameliorative objects of the hardship provisions in the Code*
>
> *[Emphasis added]*

It is within this context that we state, once again, that any changes to processes which affect substantive legal rights should be taken with considerable caution, as well as appropriate checks and balance.

As such, it is our view that all hardship variations should be accompanied by written notice that a variation has been agreed and the details of the variation (as currently required by sections 72, 73, 177B and 177C of the Code). Providing written notice of a variation of contract terms (or performance) should be a simple matter of good customer service, but takes on more importance for debtors in financial hardship, who are likely to be living with considerable anxiety. Having details of the arrangements made in writing offer certainty and relief. It also plays a crucial evidentiary role in any future dispute.

Paragraphs 19-20 of the discussion paper explain that the 'simple arrangement' process was introduced because lenders felt that the new hardship provisions (commencing 1 March 2013) did not allow sufficient flexibility to deal with 'straightforward or simple' matters without triggering a hardship process.

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[1] [2012] NSWSC 407
[2] See para [39] to [41]
[3] Para [33]

In discussions we have had with industry representatives, we have been told that the new hardship provisions have been broadened so far that they capture applications for minor, short term variations which are not driven by the debtor experiencing 'hardship'. In these cases, industry representatives explain, providing written notice is an unnecessary burden for lenders. Industry representatives advise that, prior to March 2013, these minor variations could be handled without providing written notice under section 71 of the National Credit Code.

We remain unconvinced by this argument. In our view, the cost to lenders in sending written notice to debtors is insignificant when balanced against the potential detriment from failing to send notice. We note that at least larger lenders would have systems that could automatically send either an email or paper letter to the debtor when the staff member entered details of the variation on their system.

Further, some of the angst on the part of industry appears to be driven not by the need to give notice, but by the perceived need to embark upon a document collection procedure which may be resource intensive every time they receive a hardship notice. We submit that many shorter term arrangements could be dealt with over the phone and without the need for any exchange of documents at all. The provision of notice confirming the arrangement is the least demanding part of the process and arguably the most important.

Written notice reduces uncertainty and so avoids disputes. Debtors rarely make file notes and may easily misunderstand or forget parts of the arrangement being made. This is reasonable given the stress and disruption that a debtor is likely to be facing when giving a hardship notice. The NSW Law and Justice Foundation evaluation of the CCLC and Legal Aid NSW Mortgage Hardship Service[4] found that 17.7 per cent of debtors cited family breakdown as at least one of the reasons for seeking hardship, and 28.6 per cent cited illness or injury.[5]

When the arrangement is made orally, there is a real chance that the parties have misunderstood the arrangement. It is not uncommon for debtors to seek assistance from our services citing misunderstandings such as:

- "I thought I was supposed to *x*, but now they say I was supposed to pay *y*"
- "I thought I could pay any time during the month, but now they say I'm late because I didn't pay by *x* date'
- "they told me I had three months off making repayments, but now they want me to pay off the arrears plus my usual repayment in one hit which I cannot afford"
- "I thought I had an arrangement but the banks says they never agreed to it".

Misunderstandings are all the more likely if the debtor speaks English as a second language. The Law and Justice Foundation report cited above suggests that just over one in three (36 per cent) clients were born in a non-English speaking country.[6]

Even where the arrangement is understood by the debtor, the credit provider may not make an agreement that is complete, for example, that the debtor will pay $500 by a certain date. This is not enough information to conclude the arrangement. For example, is there a higher repayment

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[4] Accessed from: http://www.lawfoundation.net.au/ljf/app/&id=A988378B45C49FB4CA25791000166960
[5] Page 25.
[6] Page 21.

next repayment? Does the amount agreed repay the arrears? What happens to the debtor's credit report? Is the debtor made aware that interest continues to accrue?

All of the points above demonstrate that there is significant value in providing written notice of the details of a hardship arrangement and that failure to provide notice can be expected to lead to disputes and consumer detriment. We believe the benefits of providing notice clearly outweigh any costs incurred by lenders (and passed onto consumers) related to sending out written confirmation.

Problems with the 90 day model

Even if ASIC considers that a simple arrangement exemption should be made permanent, the current arrangement—where lenders do not have to provide written notice for any arrangement of 90 days or less—is a disproportionate response to industry's concerns for a number of reasons.

A 90 day variation is not 'simple'

An arrangement that extends for 90 days is not simple—on the contrary it indicates fairly complex hardship problems. There is a significant difference between a 30 day variation (perhaps where a debtor skips one payment because they had other unexpected expenses, but catches up the next fortnight) and a 3 month arrangement (for example, due to unemployment, illness or injury). Both are variations on the grounds of hardship. But the three month variation is much more complex as it involves uncertainty about when the debtor will be able to meet their obligations again.

A misunderstanding will have serious consequences for the debtor

A misunderstanding between the parties about the details of the variation will have very serious consequences for the debtor if the misunderstanding continues for 90 days. By that point, the debtor may have failed to make three mortgage repayments and if so would probably be over $5000 in arrears.[7] If they have failed to make a payment in the belief that they did not need to make it, they may also have received a default notice, and a default can be listed 69 days after a payment is missed. This can have significant repercussions for the debtor including that the whole debt is accelerated, security property can be repossessed, and default listings on a debtor's credit report. Under the transitional arrangements, the debtor would then be in a very difficult situation as they would not have any real evidence to prove the oral agreement that was in place.

Such a misunderstanding may be caused if the debtor misinterprets the oral agreement, or if the lender's staff records the arrangement incorrectly. While this may only happen rarely, it will almost certainly happen to somebody. The serious consequences of such a mistake far outweigh the burden on lenders to send a written confirmation of the arrangement.

It is not sufficient protection that the lender keeps paper records or even recordings of phone conversations outlining the terms of the variation. Firstly, these will not prevent a borrower from misinterpreting the arrangement. It is far better to prevent misunderstandings before they occur by giving written notice. Secondly, a borrower may not be able to access these records in the

[7] The 2011 Census found that the median Australian monthly mortgage repayment was $1800. See http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/0

event of a dispute. It is not uncommon to see cases (more often involving debt collectors than lenders) where a debtor disputes an amount they are said to owe, but the party making the accusation simply refuses to produce documents to prove the debt. In the meantime, the debtor is placed under increasing pressure to pay, and may end up with a default judgement against them.

There may also be an ongoing impact on repayment history information on the debtor's credit report.

Setting the threshold at 90 days creates unwelcome incentives for lenders
The 90 day time limit creates further incentive for credit providers to agree to 90 day variations without considering the actual needs of the borrower. Whatever regulation is set up, credit providers will seek to make arrangements (even if unsuitable) to avoid having to confirm the arrangement in writing.

ASIC's 2009 report *Helping Home Borrowers in Financial Hardship*[8] found that lenders exhibited a bias to providing short term assistance (typically a three month moratorium on payments) at least partly because it allowed 'a less rigorous assessment process'[9]. The report warned that

> There is a danger, however, that responding to a request for assistance or relief by providing something that can be provided quickly and easily, rather than providing something that actually meets the needs of the individual seeking assistance, will result in poor outcomes for both borrowers and lenders.
>
> ...
>
> Problems created by providing short-term assistance to borrowers needing longer-term assistance may be exacerbated where the lender also has a policy of restricting the number of times that assistance will be provided, as a willingness to respond quickly to a request for assistance by providing short-term relief may operate as a bar to obtaining appropriate relief.[10]

Setting the threshold for the 'simple arrangement' at 90 days creates even more incentives for lenders to provide a standard, three month response regardless of whether it meets the needs of the debtor.

<u>What we recommend</u>
While we remain unconvinced that there is a real need for a 'simple arrangement' exemption, we are willing to accept such an exemption if the threshold is reduced to a more realistic period and added protections are provided.

We recommend that a 'simple arrangement' be defined as a variation of 30 days or less, with the result that credit providers do not have to meet the notice requirements in 72, 73, 177B and 177C.

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[8] Published May 2009. Accessed from http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP152_Helping%20home%20borrowers%20in%20financial%20hardship.pdf/$file/REP152_Helping%20home%20borrowers%20in%20financial%20hardship.pdf
[9] at p 27.
[10] at p 27

Many variations of 30 days or less will still be related to hardship and so it would be preferable to still provide notice. However, provision of notice for these variations is less critical because:

- if the problem can genuinely be addressed with a variation of under 30 days, it is by definition simple (whether it is hardship or not) and a rigorous process is probably not required. However, where need for variation extends beyond 30 days, it is almost certainly 'hardship', more complex and all notice requirements should be met;
- if there is confusion over what the arrangement is, there is less capacity to cause consumer detriment in a variation under 30 days. For example, triggers for default listings are not met; only one mortgage payment is missed rather than three; and
- a 30 day threshold creates fewer incentives to have a default hardship response (such as the typical three month payment moratorium) rather than match the arrangement to the debtor's circumstances.

However, additional protections are also required:

- written notice should be provided if it is requested by the debtor, regardless of the duration of the variation;
- hardship notice given by a debtor which leads to a simple arrangement should not be hardship notice for the purposes of 89A(1)(c) or 179F(1)(c) of the Code (regardless of whether notice has been given on request). Sections 89A and 179F prevent credit providers and lessors from taking enforcement action if a hardship notice has been given, and the credit provider has not yet responded. However, paragraph (1)(c) of each section allows commencement of enforcement action despite a hardship notice being given, if the debtor has in the past 4 months given hardship notice on materially similar grounds. Simple arrangements—which by implication are not related to 'hardship' and do not require the lender to extensively consider whether the variation is a lasting solution—should not be equated with a proper consideration of hardship;
- good practice would be for credit providers to contact debtors at the end of a simple arrangement and discuss the debtor's position and whether a further arrangement is required. If a further variation is entered, all notification requirements should be met regardless of the duration of the variation; and
- where there are co-borrowers, good practice would be to send written notice in recognition that the oral arrangement may only have been discussed with one borrower.

<u>Responses to questions in the consultation paper</u>

- *Do stakeholders consider the transitional arrangements adequately support consistent hardship compliance procedures for credit providers and lessors for credit contracts and leases entered into before and after 1 March 2013? In particular:*
    - *Is there a need to treat 'simple arrangements' differently?*

      Refer to the discussion above. In our view there is no justification to exempt lenders and lessors from notice requirements after granting hardship variations.

    - *What are the implications of responses not being confirmed by writing?*

Refer to the discussion above. Written confirmation has significant value for debtors in hardship. Failure to provide written confirmation has potential to cause detriment for debtors and disputes.

- *Is 90 days the right period for a simple arrangement?*

  No, 90 days is far too long. Thirty days is in our view more appropriate.

- *What are stakeholder views on the advantages and disadvantages of making the transitional provisions for hardship permanent, including any practical implications that we should be aware of?*

  AND

- *Are there any additional or different regulatory features that would better meet the objectives of the transitional arrangements?*

  We support making permanent provisions which make a variation of 30 days or less a simple arrangement, as long as the extra protections listed above are included.

Trigger requirements

We do not support further definition of what constitutes 'hardship' or a hardship 'notice'. Both terms should be interpreted flexibly, not technically and indeed this was the point of the amendments to the Code hardship provisions commencing in March 2013.

If exemptions were made to what constitutes 'hardship' or 'notice' or if those terms were narrowly defined it is likely that lenders would structure their processes to avoid triggering hardship processes. We note that ASIC's *Helping Home Borrowers in Financial Hardship* report found many lenders had processes which rejected hardship applications on the basis of narrow and arbitrary definitions of what a hardship application should look like[11].

Paragraphs 28-31 of the discussion paper relay concerns of some stakeholders that there may be uncertainty about whether notice has been given or not. The law (see for example *CBA v Wales*) and the industry has made genuine progress in recent years in recognising that a reasonable response to hardship should be flexible. The examples raised 29.1 to 29.5 could all be hardship notices depending on the time required to fix the problem or the extent of the problem. We agree that ASIC could develop regulatory guidance to help credit providers know when notice is provided. However, we also suggest that, where lenders are in doubt about whether the borrower has given notice of hardship, the lender could simply ask borrowers if they think they may not be able to meet their obligations.

[11] At pages 20-21

<u>Responses to questions in the consultation paper</u>

- *Are there relevant distinctions to be made to the circumstances in which a debtor believes they are unable to meet payment obligations (including when a 'notice' is considered to be given)?*

  We believe that drawing hard distinctions around what constitutes 'notice' or 'hardship' is contrary to the intent behind the hardship provisions and indeed contrary to modern industry practice.

- *How does this interact with the existing transitional arrangements?*

  We don't believe questions about definitions of 'hardship' or 'notice' significantly affect the transitional arrangements.

- *What, if any, regulatory guidance would assist in understanding when a consumer has provided relevant notification sufficient to "trigger" the hardship provisions?*

  – *How should the guidance be formulated?*

  ASIC could provide further guidance on what the law requires, but we do not think it would be useful to engage in legalistic discussions about what constitutes notice. Where there is doubt about whether hardship exists or notice has been given, lenders should raise the questions with their customers.

- *Is further regulatory change required to address the issues? If so, what would be an appropriate outcome?*

  We do not see the need for regulatory change.

Debt buyers

We strongly oppose extending time periods for debt buyers to respond to hardship requests.

Paragraphs 35-37 suggest that extended periods may be needed for a number of reasons, none of which are convincing. The arguments and our responses are set out below.

Argument	**Response**
Debt buyers may take longer to deal with hardship applications because they purchase a large number of contracts	Businesses do not deserve special treatment under the law simply because they are busy. If debt buyers are struggling to meet their obligations to debtors under the Code, they should either buy fewer debts or hire more staff.
Negotiations are of a 'sensitive nature'	All hardship negotiations are of a sensitive nature. This is not a situation unique to debt buyers.
Negotiations between debt purchasers and buyers would take 'a significantly longer period of time'.	We do not think this is necessarily true. This claim should be supported by data before it is accepted. Even if true, we believe the guidance in ASIC Information Sheet 105 (regarding processes which take longer than

	usual) provides a response to this problem.
There is no typical period of time for negotiations.	Again, this is not unique to debt buyers. All businesses entering hardship negotiations will have some cases which are longer and more complex than others. The law and ASIC Information Sheet 105 provide for flexibility in this situation. It is still necessary to have time limits to ensure these processes do not drag on indefinitely—not least because delay will ultimately cost a consumer as interest accrues.

As far as we are concerned, the law (along with Information Sheet 105) is flexible enough to handle situations where negotiations are more lengthy than usual. There is simply no justification on the arguments above for extending time limits in the Code hardship provisions. There is, in particular, no justification for giving special treatment to debt buyers.

It needs to be noted that extending the time that debt buyers have to respond to hardship requests (outside of reasonable delays due to bona fide negotiation) can create real detriment for debtors. Interest is accruing on the debt (meaning that delay could well work to the benefit of the debt buyer). In addition, the debtor is susceptible for a longer period to anxiety as they wait to hear the outcome of their application, and to pressure and harassment from the debt buyer. It is worth noting that debt buyers often buy accelerated debts, so the whole debt is owed and legal action or repossession of security can proceed without further notice. Consumer detriment is likely to be more imminent where a debt is with a debt buyer. It is critical that if this proposal is considered further that any suggested benefits to debt buyers are weighed against the costs to consumers in allowing extensions without their consent.

<u>Responses to questions in consultation paper</u>

- *Please describe the nature of the negotiations between a debt purchaser and a debtor.*

  AND

- *Does communication between a consumer and a debt purchaser about circumstances where the consumer is "unable to meet his or her obligations" under the contract amount to a hardship notice?*

  In many cases, by the time the debt reaches a debt buyer, it has been accelerated. This means that the debtor is faced with a demand for a lump sum amount. So any conversation between the debtor and the debt collector will necessarily be that they cannot pay the lump sum demanded because they are in hardship.

- *Is this issue sufficiently accommodated by the transitional arrangements and existing guidance provided by ASIC in Information Sheet 105?*

  Yes.

- *If time periods can be extended, should debt purchasers be granted an extension of time to address the issue? If so, what time period would be appropriate and in what circumstances?*

  AND

- *What are stakeholder views on the two options suggested by Treasury?*

  AND

- *How could debt purchasing arrangements be defined for the purposes of regulatory capture?*

  As we have said, we do not believe there is any case for extending time limits for debt buyers to respond to hardship requests. Any such proposal should consider and appropriately weigh the consumer detriment that extensions of time could cause.

Credit reporting considerations

Responses to questions in consultation paper

- *What are stakeholders' views on whether a missed payment should be listed in relation to a hardship agreement? What practical issues are faced in implementing the preferred outcome?*

  We approach this question with two key principles in mind. The first is that a hardship variation is an amendment to the credit contract. The second is that it is crucial that the credit reporting system should not operate in a way which creates disincentives for debtors to seek hardship variations.

  Where a hardship variation allows that a certain payment need no longer be made, the debtor's credit file should not indicate in any way that a payment was due and not made. A hardship variation is a variation to the contract. If a variation is made which eliminates an obligation that was there previously, it would be factually incorrect for the credit file to then suggest that such an obligation was not met. In addition to being incorrect, it would also discourage borrowers from applying for hardship in the first instance.

  This being so, where a variation allows that a payment need no longer be made:
  - the Repayment History Information on the debtor's credit file should list that the debtor's obligations have been met for that month (assuming no other payments in the same month were missed); and
  - the 'missed' payment should never form the basis of a default listing.

  There is a considerable difference between this kind of variation (that the contract no longer requires certain payments to be made) and an arrangement where the credit provider simply agrees to not take enforcement action if certain payments are missed. In the second scenario, the contract still requires the payments to be made.

  Whatever arrangement is struck, credit providers need to be absolutely clear at the time about the nature of the agreement and what if anything will be reflected on the debtor's credit file. It is not acceptable for a credit provider to give the impression that payments need not be made and then subsequently record on a debtor's credit file that a payment was missed.

- *Are there any additional disclosure requirements that may be appropriate to inform consumers about the impact a hardship agreement would have on their credit record?*

  Extra guidance is required not only for consumers but also for industry and community sector advice services. Proper disclosure to debtors is important, but it is more important that industry understands their obligations regarding credit reporting and hardship. The discussion in the consultation paper shows that there is wide range of views on how credit reporting and hardship interact. We suggest that a regulatory guide be developed for industry, perhaps jointly by ASIC and the Office of the Australian Information Commissioner. This guidance could include details on proper disclosure to debtors.

  Community sector advice services also need guidance and training on the new credit reporting system. Our financial counselling case workers report that clients are concerned about whether applying for hardship will affect their credit report and uncertainty about the impact of the new credit reporting law makes giving advice difficult.

- *Do existing record keeping requirements by licensees adequately evidence oral hardship notices or hardship agreements (where no written confirmation is required) in cases of dispute?*

  As we discussed above, it is not enough protection that lenders keep record of hardship agreements struck orally. This will not prevent disputes that may arise because the lender and borrower leave the conversation with a different understanding of what the arrangement is. At best, these records will support the lender's interpretation in any dispute leaving the borrower in a worse evidentiary position.

- *Is further regulatory clarity required to address these issues?*
  - *If yes, is this best achieved through the Privacy Act reforms or Credit reforms?*
  - *How should any regulatory change be formulated?*

  Further clarity is required on how credit providers disclose RHI when a hardship variation is in place, as there is a vast range of different interpretations on this point. This could be made clearer in the Credit Reporting Code. If it is clarified in the law, it should be through amendments to the Privacy Act, not the Credit Code.

  As discussed above, industry guidance could be developed jointly between ASIC and OAIC.

Joint debtors and guarantors

Lenders should not require consent from a joint debtor or co-borrower before deciding a hardship application. This is consistent with the wording of the Code, which allows 'a debtor' to seek a variation.

Joint debtors are jointly and severally liable for the debt, so it follows that a joint debtor should be able to make a hardship arrangement separately. We understand that debt collectors and credit providers regularly agree to repayment arrangements, and settlement offers with one debtor in a joint debtor arrangement.

In particular:

- there should not be a need to get the consent of the co-borrower or guarantor If there is no detriment to the co-borrower or guarantor (for example, where the hardship variation means interest isn't accruing, or equity eroding); and
- situations involving family breakdown or especially domestic violence require an empathetic and flexible response from lenders.

We note that this is consistent with FOS' approach as set out in *The FOS approach: Dealing with Common Financial Difficulty Issues*[12] (emphasis is ours):

> 14. In some cases, a contract variation may be requested by one joint borrower, and the co-borrower may not be willing to agree to any variation. This may happen, for example, where there has been a marriage breakdown.
>
> 15. **Under the National Credit Code (NCC), Code of Banking Practice and Mutual Banking Code of Practice, a request for financial difficulty assistance does not need to be a joint request from all borrowers to a loan.** For example, the NCC refers to 'a debtor' being able to apply for a change. 'A debtor' is defined as a person (other than a guarantor) who is liable to pay for (or to repay) credit, and includes a prospective debtor. **As each borrower is both jointly and severally liable to their obligations under a loan, each borrower is individually entitled to make a financial difficulty request to their FSP.**
>
> 16. We expect FSPs to work with an individual borrower who is requesting assistance, and to discuss options for resolving their financial difficulty. If one joint borrower can demonstrate that they would be able to meet ongoing repayments if assistance was provided, then the options should be fully explored even if the co-borrower is not involved.
>
> 17. If one joint borrower would not be able to meet repayments to a joint facility without the support of the co-borrower, an appropriate resolution may be for the FSP to agree to a short-term arrangement with one borrower only. This would allow the borrowers time to finalise their affairs and resolve any disagreement between themselves – for example, in the Family Court. We would not, however, expect an FSP to wait for an indefinite period without payments while a Family Court matter was resolved.
>
> 18. In some cases, FSPs have refused to consider a variation without first obtaining the consent of any guarantor, caveator or second mortgagee. This is despite most guarantee contracts allowing a variation to be covered by the guarantee, even without the prior consent of the guarantor, and a first mortgagee taking priority over caveats or second mortgagees.
>
> 19. **It is our view that the FSP should not insist on getting the consent of guarantors, caveators or second mortgagees as a condition of granting a contract variation. An FSP should also not delay in assessing a hardship request, or consider itself limited in the types of assistance it can offer, just because there are guarantors, caveators or second mortgagees involved in the contract.** If, however, there is a Deed of Priority in place with a second mortgagee, it may be appropriate to obtain their prior consent if required by the Deed.

We believe that guidance is required on this point from ASIC as debt collectors and credit providers often have widely divergent views.

<u>Responses to questions in the consultation paper</u>

- *In what circumstances would a credit provider expect that consent be obtained from a joint debtor or guarantor for a hardship notice or application?*

  AND

- *Is it appropriate to accommodate the obtaining of consent or approval of a co-borrower or guarantor for changes to a credit contract, in all circumstances?*

  AND

[12] See http://fos.org.au/public/download.jsp?id=31134, paragraphs 14-19.

- *Is the existing wording in Information Sheet 105 sufficient to address the issue of obtaining consent from co-borrowers and guarantors?*

  AND

- *What, if any, further guidance is required? If further guidance is required, what is the best way to formulate the guidance*?

  We believe the FOS guidance above (along with ASIC Information Sheet 105) provides a flexible and reasonable response to each of these questions. Further guidance would be useful as there are widely differing views across industry on this question. We suggest any guidance developed by ASIC be modelled on the FOS approach.

Other issues—credit providers seeking further information

The new hardship provisions appear to be having unintended consequences. Consumer advocates have never suggested that debtors should need to provide large amounts of documents to access arrangements in the grounds of hardship. Although the legislation says that the credit provider 'may' request information, many credit providers have taken this to mean they must. This is causing (ironically) hardship for consumers. Getting information and documents together is actually very difficult and time consuming. It has also led to the absurd situation where consumers are providing more documentation to get hardship than they did to get the loan in the first place.

A better system for hardship would be to get information over the phone in the initial hardship discussion which then allows the credit provider to make a decision. Guidelines should be specifically developed to encourage these options and explain what basic information would be sufficient. This would decrease the administrative burden on industry and assist consumers. Industry could adopt a risk management approach which matches the amount of information and evidence required to the length and monetary value of the arrangement and other relevant risks rather than a one-size fits all approach, effectively reducing the resources required and the burden on consumers (who may be facing other significant stresses).

We are happy to discuss any of these points further. Please contact David Leermakers (Senior Policy Officer, Consumer Action Law Centre) on 03 9670 5088 or at david@consumeraction.org.au at first instance if you have any questions about this submission.

Yours sincerely

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Appendix - About the Contributors

Consumer Action Law Centre

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Consumer Credit Legal Centre (NSW)

Consumer Credit Legal Centre (NSW) Inc ("CCLC") is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. We provide legal advice and representation, financial counselling, information and strategies, referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 20,000 calls for advice or assistance during the 2012/2013 financial year.

A significant part of CCLC's work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment

Financial Counselling Australia

Financial Counselling Australia is the peak body for financial counsellors in Australia. FCA's members are each of the State and Territory financial counselling associations.

Financial counsellors provide information, support and advocacy to consumers in financial difficulty. Their services are free, independent and confidential. Financial counsellors work in not-for-profit, community organisations.