

How you can avoid your credit contract being terminated, major penalties or losing your right to interest

By Paul Agnew of Mortgage Settlements Australia

If a lender breaches the Consumer Credit Code¹ and does not follow the steps outlined below, the probabilities are that the lender will be hit with a hefty penalty and have the Court vary or even set aside the credit contract.

Two Queensland cases show that if you take the initiative, the Courts are much more likely to allow you to enforce your credit contracts, despite the breaches. It is also likely you will receive a considerably smaller penalty.

AVCO Case

The first case is the AVCO Case². AVCO was worried that their documents and systems were not up-to-date and that they may have made breaches under the Credit Act³ which meant they may not have been able to recover credit charges (including interest) on a large number of loans and suffer a substantial penalty.

In order to establish its real position, AVCO engaged solicitors to conduct a due diligence review of a sample of its credit contracts.

The outcome of the due diligence review was that, out of approximately 1,000,000 fixed term loan contracts, there were approximately 225,000 which were likely to be in breach of the legislation. Some of the breaches were minor, but others were not. They included:

- failure to disclose the correct amount financed;
- failure to disclose the total amount of credit charges; and
- failure to correctly state the amount of instalments.

Some of the problems arose out of inadequate manuals and insufficient training.

AVCO faced substantial losses and fines which could be many millions of dollars, if its contracts were successfully challenged.

However, AVCO largely avoided this by applying to the Court and disclosing the breaches. The Queensland Supreme Court upheld the credit contracts and ordered AVCO pay \$443,500 into the Consumer Credit Fund, a relatively small penalty compared with the possible alternative.

It is clear from Justice Muir's comments that if AVCO had not taken the initiative, moved quickly to identify the breaches by having the due diligence review and applying to the Court, they would have been severely penalised.

Justice Muir said, "It is important, in order to encourage candour on the part of credit providers, that such conduct be given proper recognition in the determination of penalties. Similarly, co-operation with relevant authorities merits recognition."

Esanda Case

The Esanda Case⁴ involved an application by Esanda for a declaration in relation to contraventions of 'key requirements' of the Code under 107 credit contracts. The Chief Executive of the Queensland Department of Fair Trading ("Department") was alerted to the issue by Esanda and joined as a party to the application to the Court.

¹ Consumer Credit (Queensland) Code 1994 ("the Code")

² AVCO Financial Services Ltd v Department of Tourism, Racing and Fair Trading [2004] QSC 211 ("AVCO Case")

³ Credit Act 1987 (Qld) and the equivalent legislation in other States

⁴ Re Esanda Finance Corporation Limited [2004] QSC 257 ("Esanda Case")

The Court ordered a civil penalty of only \$10,700.00 pursuant to the Code and found that the breaches did not justify terminating the credit contracts. The Court ordered Esanda to notify the affected consumers and inform them of the current position of their contracts in light of the Code.

The Court approved of Esanda taking the initiative promptly to identify the breaches, informing the Department and making the application. This was a major factor in the favourable result which potentially could have led to penalties exceeding a million dollars and termination of the credit contracts or loss of credit charges (including interest).

The Lessons Learnt

These cases clearly show you the benefits of:

- having an external team carry out a due diligence review of your compliance, manuals, training and systems;
- continuously checking that your systems comply with the ever-changing legislation;
- making sure your manuals are kept up-to-date;
- ensuring your staff training programs are working properly;
- identifying problems early and making an application to the Court as quickly as possible to avoid or minimise the more unpleasant consequences of breaching the Code.

Knowing that such relief is available should be conveyed amongst your funders, originators and brokers so all parties can be vigilant and address issues early.

It is always best not to make a mistake, but if you have then this approach provides you a commercially realistic solution.

If you would like further information on any of these issues, including what is involved in a due diligence review or making an application, contact Paul Agnew from Mortgage Settlements Australia now on (07) 3223 5998 or by email at pagnew@settlements.net.au.



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