LexisNexis

[Hardship and default during a pandemic or crisis]

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The National Credit Code and hardship and default during a pandemic or crisis

As outlined in a separate guidance note, the *National Credit Code* (NCC) does not provide a definition of being "in default". The term is generally considered to mean the debtor (borrower) has failed to comply with an obligation set out in the credit contract. It is useful to remember that this is not limited to monetary default. See *Default under consumer credit contracts*.

Typically, a borrower will be in default under a credit contract if the borrower does not pay any amount payable under the contract in full on or before its due date. After being served a default notice and not having fully complied with the terms of the notice within the time set out in it, the credit provider can (in accordance with the terms of the contract) make all amounts the borrower owes under the contract immediately due for payment. Other consequences include the credit provider may enforce any security (characteristically this includes a mortgage) and commence proceedings to recover the amounts owed. It is therefore not surprising that, during a pandemic or crisis, economic uncertainty and market volatility will concern borrowers, especially if their household income (and hence their ability to make loan repayments when they fall due) may or will be impacted. See *Mortgage of land — the essentials*.

If a borrower is having financial difficulty, the borrower should promptly contact the credit provider and discuss any options that may be available. The NCC provides that a borrower may negotiate with a credit provider to vary obligations under a credit contract (as well as a mortgage or a guarantee) at any time, which of course includes in the time of a pandemic or crisis. There are two mechanisms whereby a debtor can formally apply to a credit provider and, if unsuccessful, to the court, to vary their obligations under a credit contract — by a hardship notice or a postponement request. See *Hardship and unjust transactions*.

Practice Tip: For considerations relating to negotiating with a credit provider for more manageable terms, including how to prepare to negotiate, and what to negotiate, see *Key issues when acting for a borrower during a pandemic or crisis*.

The Australian Financial Complaints Authority and hardship and default during a pandemic or crisis

If a credit provider refuses a borrower's hardship application, they must give reasons. If a borrower is not happy with the response, the borrower can complain directly to the credit provider or to the Australian Financial Complaints Authority (AFCA).

Practice Tip: AFCA has created a series of *AFCA Approach documents*. The "financial difficulty series" of documents are particularly useful when advising borrowers, or when dealing with AFCA on behalf of a borrower, during a pandemic or crisis.

AFCA documents in the "financial difficulty series" include:

- Financial difficulty series — our power to vary credit contracts.

- Financial difficulty series — principles, code and good practice.
- Financial difficulty series — working together to find solutions.
- Financial difficulty series — dealing with common financial difficulty issues.
- Financial difficulty series — early release of super.

With regards to the challenges posed by COVID-19, borrowers will be pleased to know that complaints about COVID-19 will be prioritised and fast-tracked by AFCA to ensure those impacted have their issues resolved as quickly as possible.

Practice Tip: AFCA has set up an online COVID-19 information hub that is regularly updated with information for consumers and small businesses (see *AFCA* website). This is a useful resource that legal practitioners can tap into when, among other things, advising borrowers on matters relating to hardship and default during the COVID-19 pandemic.

Practice Tip: It is also useful to note that AFCA's guidance is that, if a borrower is in financial difficulty, the type of assistance offered by a credit provider can include:

- delaying scheduled loan repayments;
- waiving fees and charges;
- interest free periods or no interest rate increases; and
- debt consolidation to help make repayments more manageable.

These are potential options a legal practitioner can explain to a borrower who may be at risk of defaulting and/or considering a hardship variation.

Practice Tip: With regards to delaying scheduled loan repayments (or a "repayment holiday"), generally, interest will continue to accrue and be charged, which will then be added to the loan balance where it will also accrue interest. It would be prudent to make borrowers aware of the consequences of receiving assistance of any kind from a credit provider, so borrowers can make informed choices.

ASIC's guidance on responding to borrowers experiencing financial difficulties

On 29 April 2020, ASIC reminded credit providers of their obligation that they must consider varying a borrower's credit contract if the borrower notifies them that they are or will be unable to meet their obligations. Legal practitioners should note that ASIC has clarified that responsible lending obligations apply to new lending (that is, new loans or an increase to a credit limit on an existing loan). These obligations do not apply and should not be considered by credit providers as a barrier to, making appropriate changes to the terms of existing loans in response to hardship situations.

ASIC has also reminded that credit providers must also do all things necessary to ensure that the credit activities authorised by their licence are engaged in efficiently, honestly and fairly.

In order to respond to borrowers' financial difficulties fairly, ASIC stated that credit providers should consider the following five points in their processes:

- Advise borrowers of different available options that may assist them.

- Ensure all communications with borrowers are clear and provide them with sufficient information to make an informed decision about the assistance available. This should include details of how different assistance options will affect the loan and repayments over the short and long term, including the effect of capitalising interest (where relevant).
- Be flexible and offer tailored solutions where a standardised approach may not meet the borrower's specific needs. For example, if a borrower has had their loan repayments deferred, a lender should ensure that how a consumer will catch up on missed repayments is manageable and offer alternatives.
- Have ongoing communications with borrowers throughout the period of assistance to ensure that any assistance offered remains appropriate and continues to meet their needs.
- Communicate with borrowers as their period of assistance comes to an end to understand their financial circumstances at that time, respond as appropriate and ensure they understand what will happen next.

Practice Tip: Credit providers who have concerns or questions about ASIC's expectations relating to hardship should contact ASIC using this dedicated email address — *ASICHardship@asic.gov.au*.

Government response

During a pandemic or crisis, it would be prudent to help ensure a borrower's financing arrangements can proceed or be preserved as much as possible. In addition to encouraging a borrower to engage in sensible dialogue with their credit provider as early as possible so mechanisms (such as a hardship variation) under the NCC can be utilised, practitioners should monitor the Government's economic response, and help borrowers identify any support they may be eligible to receive.

With regards to the challenges posed by COVID-19, in April and May 2020, the Government has taken action to support households and businesses by addressing the significant economic consequences of COVID-19. With regards to individuals and households, this is by providing financial assistance in the ways such as:

Increased and accelerated income support, including JobSeeker Payment

Summary:

A temporary expansion on the eligibility to income support payments and establishing a new, time-limited "Coronavirus supplement" to be paid at a rate of $550 per fortnight. This supplement will be paid to both existing and new recipients of the eligible payment categories. The changes are for a period of six months.

Eligible payment categories include JobSeeker Payment (which was renamed on 20 March 2020 from Newstart Allowance), Youth Allowance, Parenting Payment, Austudy, ABSTUDY, Farm Household Allowance, and Special Benefit recipients.

For more information:

The Treasury has released a fact sheet titled "Income support for individuals" which is updated from time to time — see the *Treasury* website.

JobKeeper Payment

On 9 April 2020, the Federal Treasurer made the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* to give effect to the JobKeeper Payment.

The JobKeeper Payment is a payment made to eligible businesses and not-for-profits affected by COVID-19 to support them in retaining employees. Eligible businesses that elect to participate will receive a payment of $1500 per fortnight per eligible employee to support the people they employed as at 1 March 2020 who are retained in employment.

For more information:

The Treasury has released a fact sheet titled “JobKeeper Payment — Frequently asked questions” which is updated from time to time — see *Treasury* website.

Accessing superannuation

Summary:

Eligible individuals who are financially affected by COVID-19 can access up to $10,000 of their superannuation early by applying online via myGov to access superannuation before 1 July 2020. They will also be able to access up to a further $10,000 from 1 July 2020 until 24 September 2020. There is no tax payable on superannuation released under this temporary arrangement.

For more information:

The Treasury has released a fact sheet titled “Early access to superannuation” which is updated from time to time — see *Treasury* website.

Extra payments for pensioners

Summary:

To be eligible for two separate $750 payments, individuals need to be currently receiving social security, veteran and other income support or are an eligible concession card holder. The first payment was made between 12 March 2020 and 13 April 2020 inclusive, and the second payment will be available to eligible recipients and concession card holders on 10 July 2020.

For more information:

The Treasury has released a fact sheet titled “Payments to support households” which is updated from time to time — see *Treasury* website.

Regulator responses

The Council of Financial Regulators (CFR) is the coordinating body for Australia's main financial regulatory agencies. The CFR is made up of the Australian Prudential Regulation Authority, the Australian Securities & Investments Commission, the Reserve Bank of Australia (RBA) and the Australian Treasury. Chaired by the RBA, these agencies work together for a coordinated approach to resolve matters relating to the stability of the Australian financial system. Further, the CFR provides advice to the Australian Government on the adequacy of Australia’s financial regulatory arrangements.

As one would expect, each of these financial regulatory agencies will respond to challenges pose by a pandemic or crisis. For a summary of regulators’ responses to COVID-19, see *The Council of Financial Regulators and other regulators’ responses to the COVID-19 pandemic*.