

## **SPEED.VALUE.QUALITY.COMMITMENT**

January 2009 Newsletter

**Everyone at Jackson Lalic extends the readers of this newsletter,  
the very best wishes for 2009.**

### **>> CONSUMER CREDIT CODE**

#### **When Does A Loan Have The Protection Of The Consumer Credit Code?**

In the case of Carolyn Upston, the lender, Perpetual Custodians Limited, had a certificate signed by the borrower, Ms Upston, that the loan was for business purposes.

The Court said that it is not enough to simply have a certificate. You must look at what was actually done with the loan money to decide whether or not the loan should have the protection given under the Credit Code.

In the case of Ms Upston, the loan was used to pay out a mortgage on her home with St George Bank and to acquire her brother's interest in the property, thereby giving her a home for occupation by herself and, at that stage, her daughter. The loan was increased by \$84,000 so that she could buy a take-away business.

The Court said that because the loan was predominantly for personal, domestic or household purposes, having looked at what was done with the money, the Credit Code applied.

#### **In A Loan Where The Credit Code Applies, When Can A Borrower Seek Hardship Relief?**

A debtor can ask a lender to vary a credit contract if the debtor is unable reasonably, because of illness, unemployment or other reasonable cause, to make the payments under the contract.

The variations can be one of the following:

- a. extending the period of the contract and reducing the amount of each payment due under the contract accordingly (without a change being made in the annual percentage rate or rates);
- b. postponing during the specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates);
- c. extending the period of the contract and postponing during the specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates).

In the case of Ms Upston, the financier had served a 57(2)(b) Notice under the *Real Property Act* that empowered it to sell her property and had started Supreme Court proceedings to take possession of the property.

The finance company refused to grant her relief under the loan contract.

The Court said that just because proceedings had been commenced for possession, that did not mean that Ms Upston was denied the chance for hardship relief and they allowed her relief after being satisfied that she could make up the three payments that she had missed.

Thought should always be given to whether or not a loan is a loan which has the protections of the Consumer Credit Code and if so, whether relief can be sought for a variation of the loan because of hardship.

### **>> UNFAIR DISMISSAL RULES TO START 1 JULY 2009**

The Federal Government, as it promised in its election campaign, has introduced a new Industrial Relations System that will commence on the 1st January 2010. The rules in relation to unfair dismissal will however take effect from the 1st July 2009. All employees will be able to make a claim for unfair dismissal provided they have worked in their jobs for the qualifying period. In the case of a business with fewer than 15 employees the qualifying period is 12 months, in businesses with 14 or more employees the qualifying period is 6 months. Casual employees who have been employed on a regular basis are not excluded, as long as they have worked for the qualifying period.

Any claim for wrongful dismissal must be made to Fair Work Australia within 7 days of termination. This time period can be extended if Fair Work Australia is satisfied that there are exceptional circumstances.

Fair Work Australia can gather information about the claim by phone or in writing from the employer and the employee.

## >> VOLUNTARY ADMINISTRATION CHANGES IN THE CORPORATIONS ACT

### **The Corporations Act has been amended to reform procedures for Voluntary Administrations...**

The directors of companies sometimes decide to put their company into Voluntary Administration so that the situation with creditors can be reviewed and agreements reached so that, hopefully, the company can resume its business when the Administration is concluded.

Early in 2008 changes were made to the Corporations Act that affect Voluntary Administrations.

Before the changes there was very little time for the Administrator to obtain all the necessary details about the company and report those details to the creditors. For example, the first meeting of creditors – to consider the appointment of a committee of creditors and to appoint an Alternative Administrator, should the creditors wish to do so, was originally held five business days after the appointment of the Administrator. This gave creditors very little time to receive notice of the meeting or to exercise their right to seek an Alternative Administrator. The amendment provides that the meeting is now to be held eight business days after the start of the Administration. Hopefully this extra time will be enough to allow creditors to seek advice.

The second meeting of creditors was to deal with the future of the company. For example, should it continue in Administration or appoint a Liquidator, enter into some other arrangement or simply end the Administration.

Before the amendments this meeting was to be held a maximum of twenty seven days following the appointment of the Administrator, unless an extension was granted by the court.

This short time frame also caused problems for the creditors and difficulty for the Administrator. During the period the Administrator was to issue a detailed report to creditors advising of its belief as to the best options to creditors in order that such a meeting should meaningfully deal with the issues. The report was to be dispatched to creditors seven days prior to the meeting. This meant that the Administrator had twenty days within which to issue this report. This was often insufficient time for the Administrator to do his work and report.

The amendments require the second meeting be held within approximately thirty four days of the appointment of the Administrator. Hopefully the additional time will allow Administrators to complete their investigations and report properly.

Secured creditors are also affected by the changes. Under the old provisions they only had ten days within which to appoint a receiver to secured property to try to attempt to recover on the secured property. This is now extended to thirteen days.

Since it is becoming increasingly common that directors of companies seek to gain the protection of Voluntary Administration or are affected by Administrations it is important that everyone be aware of the changes and for them to consider how they will affect what action they might wish to take.

## >> UNFAIR DISMISSAL RULES TO START 1 JULY 2009

### **<< cont. from overleaf**

Where there is a complete disagreement Fair Work Australia must either hold an informal face to face conference or a hearing.

Legal representation will only be allowed if Fair Work Australia deems it appropriate that both parties can have non legal representation. The preferred remedy in a complaint is for the reinstatement of the worker. However, financial compensation can be ordered.

Businesses with less than 15 employees can avoid unfair dismissal claims by complying with the Small Business Fair Dismissal Code. If Fair Work Australia is satisfied that the business complies with the code it will not look any further. Non compliance will not automatically mean that the dismissal was unfair. Fair Work Australia will consider whether the dismissal was a harsh, unjust or unreasonable.

The articles contained in this newsletter are in the nature of general comment only. The articles are neither intended nor should be taken to be, advice in respect of any particular matter. Advice should be sought in relation to particular circumstances.