THE STATUTORY RIGHT TO SEEK A CREDIT CONTRACT VARIATION ON THE GROUNDS OF HARDSHIP: A HISTORY AND ANALYSIS

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ABSTRACT

In this article, we focus on one of the most important statutory protections for Australian consumers in financial hardship: the right to seek a variation of a credit contract contained in s 72 of the National Credit Code. We provide a comprehensive history of this right, which has been part of Australian consumer credit law since the 1970s. Over the years, it has evolved from a very limited right to seek an extension of time to pay a debt on grounds of illness and unemployment, to a broader provision that requires credit providers to comply with a prescribed process before they can commence enforcement action against a consumer who has sought a variation to their payment arrangements. We also undertake an analysis of the evolution of this right to demonstrate that despite improved understandings of the causes of financial hardship, it continues to envisage a middle-class subject with a strong awareness of their rights, and excludes some particularly vulnerable consumers. This right is also representative of a regulatory approach that envisages a limited role for consumer credit law, and does not sufficiently address the imbalance of bargaining power between the consumer and the credit provider. We argue for the imposition of an obligation to provide a minimum range of hardship assistance directly upon credit providers, as a means of addressing this imbalance and ensuring more meaningful protection for consumers in financial hardship.

I INTRODUCTION

Since the earliest attempts to establish a regulatory framework for consumer credit in Australia, policymakers have struggled to formulate an appropriate response to the problem of financial hardship. In the context of consumer credit, the term 'financial hardship' refers to a specific situation where a consumer takes on obligations under a

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credit contract, but then becomes unable to meet them when they fall due.¹ Much of the time, this occurs because of some sudden misfortune that leaves the consumer facing unforeseen expenses, or a reduction in their household income – for example, loss of employment, illness, or a relationship breakdown. Such events can cause payment difficulties for even those consumers who fall within the broad category of the ‘middle class’,² showing that financial hardship is neither synonymous nor necessarily associated with the problem of poverty. And yet it is also clear that being at increased risk of financial hardship and poverty very frequently go hand in hand. People on a low, fixed or irregular income – many of whom also belong to socio-economically disadvantaged groups such as single parents, migrants from a non-English speaking background and people with an ongoing physical or mental illness or disability – are recognised as being at particular risk of living below the poverty line,³ and also experiencing both temporary and ongoing difficulties with debt. There is no one way of measuring the incidence of financial hardship, particularly in the credit sector, where there is no framework for reporting on the number of consumers who default on their contracts and have enforcement proceedings brought against them. However, figures published by the Australian Bureau of Statistics showed levels of household debt in Australia reaching a 25-year high in May 2014.⁴ In the same year, Dun & Bradstreet attributed rising consumer financial stress levels to increases in the number of consumers with an adverse credit history, and those with a greater likelihood of being in default of their obligations under a credit contract.⁵ These figures confirm that financial hardship is becoming a major problem in what is undoubtedly a credit society.

¹ This is the general definition employed in Australia in the context of consumer credit: see, eg, Australian Bankers' Association ('ABA'), 'Industry Guideline: Promoting Understanding About Banks' Financial Hardship Programs' (March 2015) 1–2. In other jurisdictions, different terms – for example, 'financial difficulty', 'debt entanglement' and 'overindebtedness' – are used more commonly than 'hardship', and demonstrate that there are many ways of conceptualising this phenomenon. Overindebtedness – the preferred term in the United Kingdom – is defined as 'debt which has become a major burden for the borrower', or circumstances where the consumer cannot meet their existing credit obligations without 'reducing other expenditure below normal minimum levels': Department of Trade and Industry and Department for Work and Pensions (UK), 'Tackling Over-Indebtedness: Action Plan 2004' (Report, Ministerial Group on Over-Indebtedness, 2004) 9.

² The difficulty of defining the 'middle class' in Australia is acknowledged in Ian Ramsay and Cameron Sim, 'Personal Insolvency in Australia: An Increasingly Middle Class Phenomenon' (2010) 38 *Federal Law Review* 283, 284, 291–3. They define the 'middle class' by reference to characteristics such as property ownership; being in a higher status profession; and having a higher household and personal income.

³ The Australian Council of Social Service defines poverty by looking at the proportion of the Australian population that is living below a 'poverty line' of 50 per cent of the median household income. This is an internationally recognised measure of poverty that is used by the Organisation for Economic Co-operation and Development. In 2012, the proportion of Australians living in poverty reached 13.9 per cent: Australian Council of Social Service, 'Poverty in Australia 2014' (Report, 2014) 7, 8, 12.

⁴ Australian Bureau of Statistics, *Australian Social Trends* (6 May 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/lookup/4102.0main+features202014>>.

⁵ Dun & Bradstreet, 'Consumer Financial Stress Index: Stress Forecast to Rise' (Media Release, 22 September 2014) <http://dnb.com.au/article-confidex-financial-stress-forecast-to-rise.html#.VYz89_mqpHx>.

In the consumer credit sector, the most significant response to this problem is contained in s 72 of the National Credit Code ('NCC'). The NCC is scheduled to the *National Consumer Credit Protection Act 2009* (Cth) ('NCCP Act') – a landmark piece of legislation that establishes Australia's first uniform national framework for the regulation of consumer credit. Section 72 of the NCC gives consumers in financial hardship the right to seek a variation of their payment arrangements – for example, a moratorium on repayments, or a temporary reduction in repayment amounts combined with an extension in the term of a loan – from their credit provider. The consumer can exercise this right by giving the credit provider notice (referred to as a 'hardship notice'), orally or in writing, that they may not be able to meet a scheduled payment under the contract.⁶ This sets off a statutory process that must be completed before the credit provider can commence enforcement proceedings against the consumer, even if the consumer has already been given a default notice in accordance with s 88 of the NCC.⁷ The credit provider must respond to the hardship notice within time frames prescribed in the legislation by giving the consumer notice of whether or not they agree to a variation,⁸ confirming particulars of any agreement reached,⁹ and, if refusing to vary the contract, stating the reasons for this.¹⁰ Importantly, s 72 does not set out any circumstances in which the credit provider might be required to grant a hardship variation, expressly stating instead that 'the credit provider need not agree to change the credit contract.'¹¹

If the credit provider refuses to grant a hardship variation under s 72, the NCC provides the consumer with two avenues for seeking review of the credit provider's decision: either through the courts,¹² or, more realistically, through the external dispute resolution scheme of which the credit provider is a member.¹³ As mentioned previously, the legal framework does not require credit providers to report on the number of hardship applications they receive, let alone refuse, each year. However, the importance of the right contained in s 72 is evidenced by the high volume of financial hardship disputes received by the Financial Ombudsman Service ('FOS') and the Credit and Investments Ombudsman ('CIO').¹⁴ For example, in 2013–14, FOS received 4,705 disputes relating to financial hardship, out of a total caseload of 31,680 disputes.¹⁵ Out of the financial hardship disputes, 34 per cent were in relation to a credit provider declining a request for assistance under s 72, and 33 per cent involved a credit provider

⁶ *National Consumer Credit Protection Act 2009* (Cth) sch 1 cl 72(1) ('NCC').

⁷ NCC s 89A(1).

⁸ Ibid s 72(4)–(5).

⁹ Ibid s 73.

¹⁰ Ibid s 72(4).

¹¹ See note to ibid s 72(3).

¹² Ibid s 74(1).

¹³ Membership of an external dispute resolution scheme approved by the Australian Securities and Investments Commission ('ASIC') is compulsory under s 47(1) of the *National Consumer Credit Protection Act 2009* (Cth) ('NCCP Act'). If a credit provider refuses an application for a hardship variation under s 72, they are required to notify the consumer of the name and contact details of the external dispute resolution scheme of which they are a member, and outline the consumer's rights under that scheme: NCC s 72(4)(b).

¹⁴ Until November 2014, the Credit and Investments Ombudsman ('CIO') was known as the Credit Ombudsman Service Limited.

¹⁵ Financial Ombudsman Service ('FOS'), 'Annual Review 2013–14' (Annual Report, 2014) 44, 79.

failing to respond to such a request.¹⁶ These figures, while significant, actually represent a decline from the four years following the global financial crisis, when the number of financial hardship disputes received by both FOS and CIO increased dramatically.¹⁷ These figures also do not include the presumably larger number of cases where the credit provider and the consumer did agree to a variation under s 72, or where the application was refused, but the consumer, for whatever reason, did not escalate the matter to FOS or CIO.

At least in Australia, the right to seek a hardship variation is not a new concept in consumer credit law. Such a right has been part of the legal frameworks governing consumer credit since the 1970s, although unlike many other consumer protections introduced since that time, it has not been the subject of extensive legal scholarship. In this article, we therefore have two aims, both of which seek to put the focus on this important provision. Our first aim is to provide the first comprehensive history of the right contained in s 72, focusing on the changing objectives, policy debates and other developments both in Australia and overseas that brought the various versions of this provision into being. In Part II of this article, we document how a limited right to seek an extension on the grounds of illness or unemployment was first proposed in the early 1970s amidst efforts to establish Australia's first state-based frameworks for the regulation of all types of consumer credit transactions. In Part III, we examine in detail the first statutory versions of this right that were incorporated into the credit legislation introduced by South Australia in 1972, and the semi-uniform Credit Acts enacted by the other state and territory governments in the 1980s. In Part IV, we detail the process by which these frameworks were replaced in 1994 with a more consistent but also state-based set of consumer protections contained in the Uniform Consumer Credit Code. Finally, in Part V, we document the transfer of responsibility for the regulation of consumer credit from the states to the federal government with the enactment of the *NCCP Act* in 2009, and summarise the impact of the more recent amendments to the scope and application of s 72 of the NCC.

Our second aim in this article is to apply influential critical perspectives on consumer credit law to the historical and current versions of the right contained in s 72. In Part VI of this article, we structure our analysis of the evolution of this right around two issues emerging from the literature. The first of these issues concerns the subject of consumer credit law — which has, throughout the second half of the twentieth century, been generally envisaged as male, able-bodied and middle class. Since the earliest attempts to articulate a right to seek a hardship variation, this legal subject has been juxtaposed against the figure of the dishonest or irresponsible debtor, who served to warn policymakers against the dangers of giving too much leeway to consumers experiencing payment difficulties. This figure has now been discredited by empirical research finding that the majority of consumers in financial hardship would prefer to pay their debts, but

¹⁶ Ibid 79–80.

¹⁷ The number of financial hardship or 'financial difficulty' disputes received by FOS rose by 130 per cent to 6,102 between 2009–10 and 2010–11, before increasing by a further 42 per cent to 8,659 in 2011–12: FOS, '2010–2011 Annual Review' (Annual Report, 2011) 48; FOS, 'Building Service Excellence: 2011–2012 Annual Review' (Annual Report, 2012) 51. Similarly, financial hardship disputes received by the CIO more than doubled between 2009–10 and 2010–11 and rose substantially again in 2011–12: Credit Ombudsman Service Limited, 'Annual Report on Operations 2011' (Annual Report, 2011) 23; Credit Ombudsman Service Limited, 'Annual Report on Operations 2012' (Annual Report, 2012) 26.

lack the resources to do so. In Part VI, we examine the ways in which the subject of the right to seek a hardship variation has expanded over time, at least partially in response to these findings, allowing consumers in a broader range of circumstances to make use of s 72. We also demonstrate, however, that consumers who are experiencing ongoing financial hardship — often as a result of being on a low, fixed or irregular income, or having a long-term illness or disability — continue to face significant barriers to making effective use of this provision. This suggests that the provision remains geared towards a middle class consumer who has a strong awareness of their rights and who requires no more than a short reprieve from their credit provider to improve their financial position.

The second issue that we analyse in Part VI concerns the tension between two approaches to the regulation of consumer credit. Both of these approaches claim to prioritise what R M Goode described as a major objective of consumer credit law: addressing an inequality of bargaining power between the consumer and the credit provider.¹⁸ The first approach draws substantially upon the neo-liberal preference for minimum regulatory intervention, assuming that information — usually in the form of pre-contractual disclosure — will of itself improve the bargaining position of consumers by enabling them to make rational choices in a competitive market. The other approach envisages a more extensive role for consumer credit law, particularly in relation to protecting vulnerable consumers who are least able to benefit from competition. We show that in Australia, policymakers have generally favoured the first approach to credit regulation, despite widespread recognition of its limitations in the literature. While there have been recent efforts to place greater responsibility on credit providers with respect to consumers in financial hardship — both in the form of amendments to s 72 and self-regulatory initiatives by the credit sector — such responsibility has only extended to responding to a hardship application in accordance with a prescribed process. It has not shifted the responsibility for actually assisting consumers who are unable to keep up with their agreed repayment arrangements. We refer to Iain Ramsay's call for a more distributional role for consumer credit law to argue that in the context of financial hardship, improving the bargaining position of consumers requires a more significant redistribution of rights and responsibilities between the consumer and the credit provider.¹⁹ In light of the crucial role that access to credit has come to play in modern Australian society, we argue that this objective requires the imposition of an obligation to provide some minimal forms of hardship assistance directly upon the credit provider. While the assumption of additional responsibilities towards consumers in financial hardship through self-regulation is a positive step, statutory change would be a stronger driver of consistent practice on the part of credit providers. It would also go further towards embedding the abovementioned objective of consumer credit law within the framework of protections for consumers in financial hardship.

¹⁸ R M Goode, 'A Perspective of Consumer Credit' in R M Goode (ed), *Consumer Credit* (A W Sijthoff, 1978) 3, 3–4; see also Iain Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1992) 15 *Oxford Journal of Legal Studies* 177, 181.

¹⁹ See Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State', above n 18.

II EMERGENCE OF THE RIGHT TO SEEK A HARDSHIP VARIATION IN AUSTRALIAN CONSUMER CREDIT LAW

The right to seek a hardship variation was incorporated into Australian credit law in the context of two important shifts. The first of these took place between the 1960s and the mid-1980s, when Australia underwent a transition from what has been described as an *ad hoc* approach to consumer credit regulation towards an increasingly integrated legal framework covering all types of consumer credit transactions.²⁰ Around the same time, a second transition towards greater uniformity between states and territories was also under way. In this part of the article, we provide an outline of these shifts alongside concurrent developments in consumer credit law reform overseas. We also introduce and critically examine the first proposals for a right to seek a hardship variation that were made during this period.

A The Rogerson and Molomby Committees

Consumer credit is commonly defined as money loaned to an individual consumer under a contract for personal, domestic or household purposes.²¹ The regulation of consumer credit as a unified body of law is a relatively recent development, both in Australia and in other jurisdictions. Until the 1970s, Australia's approach to consumer credit regulation mirrored that of the United Kingdom. Throughout the first half of the twentieth century, a multitude of separate statutes were introduced to cover specific forms of credit transactions – such as hire-purchase or moneylending – or particular types of credit providers.²² In Australia, an additional layer of complexity stemmed from the fact that these statutes were not consistent between states and territories. In the decades following the Second World War, however, a significant expansion in consumer credit as an industry led to calls for the replacement of this increasingly outdated system with a more streamlined regulatory framework.²³

The first steps in this direction were taken between 1959 and 1961, when state and territory governments introduced substantially uniform hire-purchase legislation.²⁴ Soon afterwards, the newly established Standing Committee of State and Commonwealth Attorneys-General appointed a committee of the Adelaide Law School chaired by Arthur Rogerson ('the Rogerson Committee') to report on the prospect of introducing uniform legislation in the area of moneylending as well. But the Rogerson Committee's 1969 report went beyond this original proposal, calling for the replacement of all existing hire-purchase and moneylending legislation with new laws premised

²⁰ See Stephen W Cavanagh and Shenagh Barnes, *Consumer Credit Law in Australia: a Commentary on the New Credit Legislation* (Butterworths, 1988) 1–2.

²¹ See Department of Parliamentary Services, *Bills Digest*, No 30 of 2009–10, 15 September 2009, 2; R M Goode, 'The Scope and Structure of Consumer Credit Legislation' in R M Goode (ed), *Consumer Credit* (A W Sijthoff, 1978) 26, 29.

²² These statutes are described in detail in Cavanagh and Barnes, above n 20, 7–12.

²³ J O Llewellyn, 'Consumer Protection – Challenges of Change' in R Baxt and A C Cullen (eds), *Consumer Credit: The Challenges of Change* (CCH Australia, 1972) 27, 30–2; William J Tearle, 'Consumers in Debt: The Reform of Debt Recovery Procedures in Australia' in Iain Ramsay (ed), *Debtors and Creditors: A Socio-Legal Perspective* (Professional Books Limited, 1986) 241, 241.

²⁴ The hire-purchase legislation was based upon the *Hire-Purchase Agreements Act 1941* (NSW). See Cavanagh and Barnes, above n 20, 11; Anthony Duggan and Elizabeth Lanyon, *Consumer Credit Law* (Butterworths, 1999) 9, 18.

upon a simpler classification — and a shift towards national regulation — of consumer credit transactions.²⁵ In advocating for these changes, the Rogerson Report drew heavily upon the reform proposals and policy concerns that were emerging at the same time in the context of other reviews of credit law in Canada, New Zealand, the United Kingdom and the United States.²⁶ Of particular influence were the United States Consumer Credit Protection Act ('*Truth in Lending Act*')²⁷ and the United States Uniform Consumer Credit Code, both of which were enacted in 1968.²⁸ The Rogerson Report referred extensively to these initiatives in making its recommendations for a licensing regime for credit providers, prescribed contents for credit contracts, and disclosure requirements for the cost of credit.²⁹

Not long after the release of the Rogerson Report, the Victorian Attorney-General called upon a committee of the Law Council of Australia chaired by Tom Molomby ('the Molomby Committee') to undertake a feasibility study of adopting the Rogerson Committee's recommendations in Victoria. Like the Rogerson Committee, the Molomby Committee was strongly influenced by the developments taking place in the United States.³⁰ Yet at least equally influential was the Crowther Committee's review of consumer credit law in the United Kingdom, which was concluded in 1971.³¹ The Crowther Committee identified seven major deficiencies in the law relating to consumer credit transactions that, in the view of the Molomby Committee, applied equally to Australia.³² Topping this list of deficiencies was the regulation of transactions 'according to their form instead of according to their substance and function'.³³ The Crowther Committee's recommendations were taken up by the Parliament of the United Kingdom

²⁵ The Rogerson Committee proposed that the existing distinctions between different types of credit transactions be replaced by two types of transaction — a 'consumer credit sale', where credit was provided by the retailer of goods, and a 'consumer loan', where credit was obtained from a third party. See The Law School, University of Adelaide, Submission to the Standing Committee of State and Commonwealth Attorneys-General, *Report to the Standing Committee of State and Commonwealth Attorneys-General on the Law Relating to Consumer Credit and Moneylending* (1969) 12–14 ('Rogerson Report').

²⁶ *Ibid* 7.

²⁷ *Ibid* 7, 26–7.

²⁸ *Ibid* 7, 14, 20, 26, 28–9, 31, 42, 52, 61, 72. Drafted over five years by the National Conference of Commissioners on Uniform State Laws, the Uniform Consumer Credit Code of 1968 was an attempt to unify the multiplicity of state laws on consumer credit in the United States. The attempt was unsuccessful; the Code and its 1974 revised version were in the end adopted by just twelve states. See Carl Felsenfeld, 'The United States' in R M Goode (ed), *Consumer Credit* (A W Sijthoff, 1978) 313, 330–1; Paul R Moo, 'Legislative Control of Consumer Credit Transactions' in Clark C Havighurst (ed), *Consumer Credit Reform* (Oceana Publications, 1970) 18, 24–5.

²⁹ *Rogerson Report*, above n 25, 20, 25–30, 70–1.

³⁰ Law Council of Australia, Submission to the Attorney-General for the State of Victoria, *Report to the Attorney-General for the State of Victoria on Fair Consumer Credit Laws* (1972) [1.1.3] ('Molomby Report').

³¹ *Ibid* [1.1.3].

³² United Kingdom, *Report of the Committee on Consumer Credit*, Cmnd 4596 (1971) [4.2.1]–[4.2.16] ('Crowther Report'); Molomby Report, above n 30, [1.1.4]–[1.1.5].

³³ *Crowther Report*, above n 32, [4.2.1].

and eventually led to the replacement of a much-criticised 'legal tangle'³⁴ with a single law that would regulate most types of consumer credit transactions.³⁵

Yet while the Crowther Committee gave much consideration to the issue of consumer protection — particularly in its proposals for the education of consumers in credit matters and the disclosure of the cost of credit³⁶ — it had little to say on the subject of consumers who were unable to meet their credit obligations.³⁷ It was the Rogerson Committee that first proposed an obligation on credit providers to offer a reprieve from making repayments to consumers who were unable to work as a result of illness, and who could provide proof — for example, a doctor's certificate — of their incapacity and consequent inability to pay.³⁸ The Rogerson Committee envisaged that such a reprieve would be limited to a maximum of three months, acknowledging that this would be insufficient in cases of serious illness.³⁹ This proposal was then taken up and expanded upon by the Molomby Committee,⁴⁰ becoming the first attempt to articulate a statutory right to seek a hardship variation, either in Australia or in the other jurisdictions that were so influential during this period of consumer credit law reform.

B Right to Seek an Extension on Grounds of Hardship: Unpacking the Molomby Committee's Proposal

A close examination of the Molomby Committee's 1972 report reveals that what was originally envisaged was in fact quite a limited right. The subject of the Committee's proposal was the consumer who had taken on credit obligations 'within the capacity of his earnings', and later experienced a loss of earnings due to one of two legitimate causes — either illness or unemployment. The Committee's view was that such a consumer should be given the right to apply to their credit provider for an extension and, if an extension were not granted, to seek review of the credit provider's decision through a two-step process involving the Commissioner of Consumer Affairs and a Consumer Credit Tribunal.⁴¹ However, seeking to reassure lenders that they would not be 'compelled to grant an extension'⁴² — particularly to the 'malingerer or dishonest consumer' described in submissions from the consumer credit industry — the

³⁴ United Kingdom, *Parliamentary Debates*, House of Lords, 28 June 1972, vol 332, col 960 (Earl Pery).

³⁵ This was the *Consumer Credit Act 1974* (UK). It reduced the two statutes proposed by the Crowther Committee to a single law: see *Crowther Report*, above n 32, [1.3.10], [5.2.19]; United Kingdom, *Parliamentary Debates*, House of Commons, 14 November 1973, vol 864, col 538 (Mr Darling).

³⁶ *Crowther Report*, above n 32, [3.8.3], [6.5.16], [9.2.3]–[9.2.14], [9.4.2].

³⁷ The Crowther Committee's consideration of what could be done to assist consumers experiencing financial difficulty was limited to the role played by credit unions; the need for local bureaux and advice centres; and access to legal aid: *ibid* [9.3].

³⁸ *Rogerson Report*, above n 25, 50.

³⁹ *Ibid*.

⁴⁰ *Molomby Report*, above n 30, [1.5.63], [5.7.13].

⁴¹ First, a consumer who was refused an extension by their credit provider would be able to apply to the Commissioner of Consumer Affairs. Even if the grounds for an extension were made out, the Commissioner would only be able to negotiate with the credit provider and, if the latter persisted in refusing an extension, refer the matter to a Consumer Credit Tribunal. See *ibid* [3.2], [3.4], [5.7.13].

⁴² *Ibid*.

Committee confined this right to a very precise set of circumstances.⁴³ The right would only apply to contracts where the debt was secured,⁴⁴ and where the consumer's financial difficulty was of a very short term nature. The consumer would have to demonstrate a reasonable prospect of discharging their payment obligations if an extension was granted, and the length of the extension would be limited to three months, or six months in 'exceptional circumstances'.⁴⁵

As already cited in Part I of this article, one of the major objectives of consumer credit law — as identified by Goode and also by others — is to address the inequality of bargaining power between the consumer and the credit provider.⁴⁶ The right proposed by the Molomby Committee was arguably tailored to favour the interests of industry to such an extent that it would do little to achieve this aim. In addition to the abovementioned limitations on the scope of this right, it also did not give the consumer any protection from enforcement action until they gave notice of their application to the Tribunal — which the Committee did not expect to happen very frequently.⁴⁷ Weighing up two potentially competing considerations — the prevention of enforcement action against a responsible consumer whose inability to pay could be addressed by way of a short reprieve from repayments — and the protection of the credit provider's ability to enforce their rights without delay — the Molomby Committee ostensibly proposed a solution to the former while in reality being far more concerned with the latter.

III FIRST STATUTORY ARTICULATIONS OF THE RIGHT TO SEEK A HARDSHIP VARIATION AT STATE LEVEL

While the Molomby Committee reiterated the Rogerson Committee's recommendation for greater cross-jurisdictional co-operation in modernising Australia's consumer credit laws,⁴⁸ uniformity between the states and territories was still many years away. Months after the presentation of the Molomby Report in 1972, South Australia opted to act unilaterally in enacting consumer credit legislation based on the proposals contained in the Rogerson Report.⁴⁹ The other states and territories took until the mid-1980s to establish what became Australia's first semi-uniform scheme for the regulation of consumer credit. In this part of the article, we outline these reforms, focusing in particular on the introduction of a statutory right to seek a hardship variation in some, but not all, Australian jurisdictions.

A The South Australian Consumer Transactions Act

It was the legislative package passed in South Australia that contained Australia's first statutory right to seek a variation of a credit contract on the grounds of hardship.

⁴³ Ibid [5.7.13].

⁴⁴ Ibid. The Molomby Committee's decision to confine the proposed right to secured debt was influenced by submissions from the Australian Finance Conference and the Retail Traders Association: see Llewellyn, above n 23, 57–8.

⁴⁵ *Molomby Report*, above n 30, [5.7.13].

⁴⁶ Goode, 'A Perspective of Consumer Credit', above n 18, 3; Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State', above n 18, 181.

⁴⁷ *Molomby Report*, above n 30, [5.7.13].

⁴⁸ Ibid [9.1.1], [12.1.1]–[12.1.2].

⁴⁹ This was the *Consumer Credit Act 1972 (SA)* and the *Consumer Transactions Act 1972 (SA)*. See South Australia, *Parliamentary Debates*, House of Assembly, 31 October 1972, 2562 (C J King); see also Llewellyn, above n 23, 32–3; Cavanagh and Barnes, above n 20, 13–14.

Contained in s 38 of the *Consumer Transactions Act 1972* (SA), this right enabled consumers who were temporarily unable to discharge their obligations — by reason of any circumstances that were ‘not reasonably foreseeable’ at the time of entering into the contract — to apply to the Commissioner for Consumer Affairs for ‘relief against the consequences of breach’.⁵⁰ If satisfied that the application was made upon proper grounds, the Commissioner would negotiate with the credit provider to obtain a contract variation.⁵¹ If negotiation was not successful, the Commissioner could refer the matter to the Tribunal, which could ‘extend the time for payment of any instalment or other amount under the contract’, or, where there has been a breach of the contract by the consumer, ‘order that the consumer be re-instated in the contract ... in all respects as if no breach had occurred.’⁵²

This right was substantially broader in scope than the provision originally envisaged by the Molomby Committee. It did not confine the types of variation for which a consumer could apply to an extension of time, and also did not specify any maximum duration for an alternative repayment arrangement sought under this provision. The provision was also not limited to secured debt. The major limitation on this right was, perhaps, the requirement that the consumer’s circumstances not be ‘reasonably foreseeable’⁵³ — as it would exclude consumers who experienced ongoing or sporadic financial difficulty due to long-term or chronic illness (whether physical or mental) or disability. However, a Commission of Inquiry into Poverty established under Liberal Prime Minister William McMahon and expanded by the Whitlam Government expressed approval for the South Australian reforms in its 1975 report, recommending that a similar provision be adopted in other states.⁵⁴

B The Semi-Uniform Credit Acts

It was nearly a decade before the other states and territories followed with their own consumer credit legislation. Victoria and New South Wales enacted their own consumer credit laws in 1981, before finally agreeing upon the text of a substantially uniform Credit Act in 1984.⁵⁵ Western Australia,⁵⁶ the Australian Capital Territory and Queensland joined the resulting scheme in 1984, 1985 and 1987 respectively.⁵⁷ Tasmania

⁵⁰ *Consumer Transactions Act 1972* (SA) s 38(1), (3).

⁵¹ *Ibid* s 38(4).

⁵² *Ibid* s 38(5), (7).

⁵³ This requirement was later described as difficult to interpret and unnecessarily restrictive: see Law Reform Commission, *Insolvency: The Regular Payment of Debts*, Report No 6 (1977) 8 [15].

⁵⁴ Commission of Inquiry into Poverty, *Law and Poverty in Australia*, Second Main Report (1975) 118.

⁵⁵ See Cavanagh and Barnes, above n 20, 15; Victoria, *Parliamentary Debates*, Legislative Assembly, 22 March 1984, 3402–4 (Peter Spyker); New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 May 1984, 171–2 (George Paciullo).

⁵⁶ Western Australia had already introduced a far more limited right to seek relief from the consequences of breach into its existing hire-purchase legislation. This provision was expressly confined to cases of temporary inability to pay caused by illness or unemployment that was ‘not reasonably foreseeable’ at the time of entering the contract. See *Hire-Purchase Act 1959* (WA) s 36A; introduced by the *Hire-Purchase Amendment Act 1973* (WA) s 25.

⁵⁷ The resulting scheme comprised the *Credit Act 1984* (Vic); *Credit Act 1984* (NSW); *Credit Act 1984* (WA); *Credit Act 1985* (ACT); and *Credit Act 1987* (Qld). The reform package in Victoria and New South Wales also included other legislation that was not uniform: see *Credit*

and the Northern Territory did not join the scheme, while South Australia retained its 1972 legislation. The aim of these legislative schemes was to establish a more consistent framework for the regulation of credit transactions by substance instead of form; a licensing scheme for credit providers; requirements for the pre-contractual disclosure of the cost of credit; and other consumer protections.⁵⁸

The Credit Act introduced in Victoria in 1981 contained the statutory right that would, with minor modifications,⁵⁹ be later reproduced in s 74 of the semi-uniform Credit Acts (though not in all jurisdictions).⁶⁰ The scope of the right contained in s 74 was wider than the provision proposed in the Molomby Report, but narrower than the South Australian provision – and its structure bore greater similarity to what would become s 72 of the NCC. Section 74 gave consumers who were ‘unable reasonably’ to discharge their obligations under a credit contract the right to apply directly to their credit provider for a variation, as long as two threshold requirements were satisfied. First, the consumer had to demonstrate a reasonable prospect of discharging their payment obligations if one of three types of variation was granted: an extension in the period of the contract combined with a reduction in the amount of each payment due; an extension of time to make payments; or an extension in the period of the contract with an extension of time to make payments.⁶¹ The other threshold requirement – inability to pay resulting from illness, unemployment ‘or other reasonable cause’⁶² – was phrased so as to permit applications to be made in a broader, and potentially longer-term, set of circumstances.⁶³ If a request for a variation under s 74 was refused by the credit provider, the consumer could apply to the Director for assistance in negotiating a variation.⁶⁴ Then, if the Director sought to reach agreement with the credit provider but an agreement could not be reached, the Director could refer the application to the Tribunal.⁶⁵ As with the provision proposed by the Molomby Committee, a protection against enforcement action would only apply when an application was referred to the

(Administration) Act 1984 (Vic); Credit (Administration) Act 1984 (NSW); Credit (Finance Brokers) Act 1984 (NSW); Credit (Home Finance) Contracts Act 1984 (NSW); Commercial Tribunal Act 1984 (NSW).

⁵⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 March 1984, 3404 (Peter Spyker); New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 May 1984, 171–7 (George Paciullo); Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1987, 948–51 (P J Clauson); Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 November 1984, 3643–6 (Arthur Tonkin).

⁵⁹ In Victoria, the major modification to the 1981 provision was that it would now apply to continuing credit contracts: Victoria, *Parliamentary Debates*, Legislative Assembly, 22 March 1984, 3406 (Peter Spyker).

⁶⁰ *Credit Act 1981* (Vic) s 79. This provision was not included in the Queensland Credit Act.

⁶¹ *Credit Act 1984* (Vic) s 74(1). It should be noted that if a variation was refused and the application is referred to the Tribunal under s 74(3), the Tribunal would not be limited to these two types of variations: *Wicks v Wicks* [1987] ASC 55–547.

⁶² *Credit Act 1984* (Vic) s 74(1).

⁶³ See Duggan and Lanyon, above n 24, 204.

⁶⁴ *Credit Act 1984* (Vic) s 74(2).

⁶⁵ *Ibid* s 74(3). In Victoria, this was the Victorian Civil and Administrative Tribunal. A similar process was prescribed in the South Australian legislation: see *Consumer Transactions Act 1972* (SA) ss 38(3)–(7).

Tribunal for review (and not while the application was still being assessed by the credit provider).⁶⁶

Although the Credit Acts were hailed by the legislators as 'a significant step towards uniformity of legislation in Australia',⁶⁷ it did not take long for them to become the subject of criticism. Over the following decade, commentators identified multiple deficiencies in the semi-uniform scheme, including the 'obscure' and 'convoluted' drafting of the Credit Acts, which made them difficult to interpret and administer,⁶⁸ as well as their limited coverage, which excluded many types of transactions (particularly home loans) and some credit providers (for example, building societies and credit unions) from the regulatory framework.⁶⁹ The Credit Acts were also criticised for their prescriptiveness – which was said to inhibit the development of new credit products⁷⁰ – and for the severity of the penalties imposed for even technical non-compliance with their contractual disclosure requirements.⁷¹ Finally, an additional incentive for further reform was provided by the fact that the regulatory framework fell short of uniformity between jurisdictions – for example, in terms of the maximum loan threshold to which the statutes would apply, and the types of licencing scheme established in different states.⁷²

IV MOVING TOWARDS UNIFORMITY: THE RIGHT TO SEEK A HARDSHIP VARIATION UNDER THE UNIFORM CONSUMER CREDIT CODE

The next stage in the history of Australia's consumer credit laws began in 1993, when the state and territory governments adopted the Australian Uniform Credit Laws Agreement. This agreement sought to establish regulatory uniformity across

⁶⁶ *Credit Act 1984* (Vic) s 74(7).

⁶⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 March 1984, 3407 (Peter Spyker); see also Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1987, 949 (P J Clauson); Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 November 1984, 3644 (Arthur Tonkin).

⁶⁸ See the second reading speech for the introduction of the Consumer Credit (Queensland) Bill 1994 (Qld) at Queensland, *Parliamentary Debates*, Legislative Assembly, 4 August 1994, 8828 (T J Burns). An attempt to address the drafting issue was made in 1989, with the proposal of a plain English draft Credit Bill by the Victorian Law Reform Commission. This initiative, however, was rejected by industry and consumer groups as an inadequate response to the need for reform: see Duggan and Lanyon, above n 24, 22.

⁶⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 4 August 1994, 8828 (T J Burns); Victoria, *Parliamentary Debates*, Legislative Council, 30 May 1995, 920 (Haddon Storey); Robert Troedson (Publications and Resources Section, Queensland Parliamentary Library), *Legislation Bulletin*, No 8 of 1996, 7 August 1996, 3–4; Duggan and Lanyon, above n 24, 22.

⁷⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 4 August 1994, 8828 (T J Burns); Explanatory Memorandum, Consumer Credit Bill 1995 (ACT) 2.

⁷¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 4 August 1994, 8828 (T J Burns); Duggan and Lanyon, above n 24, 22.

⁷² In all participating jurisdictions other than Queensland, the Credit Acts applied to loans valued up to \$20 000, while in Queensland, the *Credit Act 1987* (Qld) had a maximum loan threshold of up to \$40 000. Queensland also had a 'negative licensing scheme' whereby only credit providers found to have engaged in unjust conduct were placed under supervision. See Troedson, above n 69, 3; Duggan and Lanyon, above n 24, 20–2.

jurisdictions on the basis of template legislation enacted in Queensland.⁷³ After several attempts at drafting, the *Consumer Credit (Queensland) Act 1994* (Qld) was passed by the Queensland Parliament, and was subsequently enacted in other states as well.⁷⁴ This legislation applied the Uniform Consumer Credit Code ('UCCC') – contained in an appendix to the Act – as a law in each participating jurisdiction.⁷⁵ The resulting framework had the objective of keeping apace with a deregulated – and increasingly national – credit industry, in which 'minimum intervention in the market' was considered appropriate.⁷⁶ The UCCC was also expected to expand the application of consumer protections contained in the previous regulatory framework, and introduce restrictions on certain types of credit products and practices.⁷⁷ In this part of the article, we compare the right to seek a hardship variation contained in s 66 of the UCCC with its predecessor – s 74 of the Credit Acts. We also outline the criticisms of the UCCC that paved the way for the 2009 reforms and the implementation of a national framework for the regulation of consumer credit.

A Comparing s 74 of the Credit Acts with s 66 of the UCCC: Similar Rights within Different Frameworks

Section 66 of the UCCC essentially replicated the key features of s 74 of the Credit Acts. The types of variation for which a consumer could apply under s 66 of the UCCC were the same three types of variation that were available under s 74.⁷⁸ Like s 74, s 66 applied only when the consumer's inability to pay was by reason of illness, unemployment or other 'reasonable cause',⁷⁹ and when the consumer could demonstrate that they had the reasonable expectation of being able to discharge their obligations if the contract was changed in one of the ways prescribed by the provision. The UCCC also did not provide consumers in financial hardship with protection from enforcement action,⁸⁰ unless the consumer and the credit provider agreed to a postponement of enforcement proceedings,⁸¹ or unless a stay of enforcement proceedings was ordered by a court.⁸²

Yet there were also several differences between the two provisions. First, although s 66 of the UCCC also stopped short of requiring a credit provider to actually grant a

⁷³ See Ministerial Council on Consumer Affairs, *Australian Uniform Credit Laws Agreement* (1993) recitals A–C; see also Troedson, above n 69, 4–5.

⁷⁴ See *Consumer Credit (New South Wales) Act 1995* (NSW); *Consumer Credit Act 1995* (ACT); *Consumer Credit (Northern Territory) Act 1995* (NT); *Consumer Credit (South Australia) Act 1995* (SA); *Consumer Credit (Tasmania) Act 1996* (Tas); *Consumer Credit (Victoria) Act 1995* (Vic); *Consumer Credit (Western Australia) 1996* (WA).

⁷⁵ See, eg, *Consumer Credit (Queensland) Act 1994* (Qld) s 4.

⁷⁶ Explanatory Memorandum, *Consumer Credit Bill 1995* (ACT) 3; see also Explanatory Notes, *Consumer Credit (Queensland) Bill 1994* (Qld) [1]; New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 1994, 4821, 4936 (Wendy Machin).

⁷⁷ Malcolm M Quirey, 'The Consumer Credit Code: A New Era of Consumer Regulation' (1995) 25 *Queensland Law Society Journal* 165, 167–72, 182.

⁷⁸ *Consumer Credit (Queensland) Act 1994* (Qld) appendix s 66(1), (2) ('UCCC'). See also *Permanent Custodians Ltd v Upston* [2007] NSWSC 223, [161].

⁷⁹ UCCC s 66(1).

⁸⁰ Before they could begin enforcement proceedings in relation to a default under a credit contract, the credit provider did need to give the consumer a default notice, followed by a 30 day period to remedy the default: UCCC s 80.

⁸¹ *Ibid* s 86.

⁸² *Ibid* s 68(3).

variation in any circumstances, it was accompanied by a provision requiring credit providers to give the consumer and any guarantors notice and particulars of any agreement reached under the provision.⁸³ Additionally, the UCCC abandoned the monetary limits on the credit contracts to which most of its provisions would apply, meaning that home loans were no longer excluded from the legal framework. However, there was still a limit on the loan amount with respect to which a consumer could make an application for a hardship variation, as ss 66 to 69 only applied to contracts valued below \$125 000.⁸⁴ Lastly, the review mechanisms had evolved. Section 68 of the UCCC also gave consumers the right to apply to the court for a variation if their hardship application was refused by the credit provider (although, because this provision required individuals to take legal action, it was little tested in the courts⁸⁵). Some consumers also had the option of seeking review of a credit provider's decision through an external dispute resolution scheme – such as that provided by the Banking and Financial Services Ombudsman or the Credit Ombudsman Service Limited. Membership of such schemes was only a requirement for credit providers that also offered non-credit financial services, and that were licensed by the Australian Securities and Investments Commission ('ASIC'). However, some providers of credit-only financial services also joined the schemes on a voluntary basis.⁸⁶

B Criticisms of the UCCC and Subsequent Developments

The framework established under the Australian Uniform Credit Laws Agreement soon drew criticism for again failing to establish a fully uniform regime for the regulation of consumer credit. Not only had Western Australia enacted its own 'equivalent' legislation instead of the UCCC,⁸⁷ but the Agreement allowed for non-uniformity between the other states and territories in relation to a range of issues, including interest rate caps and licensing schemes for credit providers.⁸⁸ At the same time, developments both in Australia and overseas were drawing significant media attention to the need for stronger regulation of the rapidly expanding mortgage broking sector,⁸⁹ which had not

⁸³ Ibid s 67.

⁸⁴ Ibid s 66(3). In 2004–5, this was amended to become a floating threshold linked to 110 per cent of the average loan size for the purchase of new owner occupied dwellings in New South Wales: Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (NSW) [9.171].

⁸⁵ Genevieve Sheehan, Therese Wilson and Nicola Howell, 'Coming to Grips with Credit Contracts: Steps to Protect Vulnerable Borrowers' (Report, Brotherhood of St Laurence and Griffith University, November 2008) 4.

⁸⁶ House of Representatives Standing Committee on Economics, Finance and Public Administration, Parliament of Australia, *Inquiry into Home Loan Lending Practices and Processes* (2007) 36–7.

⁸⁷ This was the *Consumer Credit (Western Australia) Act 1996* (WA).

⁸⁸ Ministerial Council on Consumer Affairs, *Australian Uniform Credit Laws Agreement* (1993) 6. Under the UCCC, Queensland continued with its 'negative licensing' scheme, with similar approaches adopted in New South Wales, South Australia and the Northern Territory. Victoria and the Australian Capital Territory also had negative licensing schemes in place, but required the registration of credit providers, while Tasmania did not have any licensing or registration system in place at all: Duggan and Lanyon, above n 24, 450–1.

⁸⁹ See, eg, Annabel Stafford and Marc Moncrieff, 'Rein in Brokers – Or Else', *Sydney Morning Herald* (online), 19 August 2007 <<http://www.smh.com.au/small-business/rein-in-brokers-or-else-20070819-cnvq>>; 'Victims of Finance Brokers Get Payout', *The Age* (online), 16 July

2008, the state and territory governments reached an agreement to implement these recommendations through a two-phase reform process.⁹⁶

V THE RIGHT TO SEEK A HARDSHIP VARIATION TODAY: THE NCCP ACT AND THE NCC

The first phase of the reforms commenced with the passing of the reform package that contained the *NCCP Act* on 15 December 2009.⁹⁷ The *NCCP Act* established a national licensing regime for credit providers administered by ASIC; responsible lending obligations for license holders; stronger sanctions and enforcement powers for ASIC; and a requirement for all credit providers to be members of the ASIC-approved external dispute resolution schemes provided by FOS and CIO.⁹⁸ The Act also extended the regulatory regime to apply to a broader range of service providers, including mortgage brokers and other intermediaries, who had not been covered under the previous framework.⁹⁹ Scheduled to the *NCCP Act* was the NCC, which replicated the consumer protections contained in the UCCC, but applied them to a broader range of credit contracts, including contracts where credit was provided for the purpose of purchasing, renovating or improving a residential investment property.¹⁰⁰ The right to seek a hardship variation in s 72 of the NCC was also applied to a higher loan threshold of \$500 000, as the previous threshold was insufficient to cover the rising value of home mortgages.¹⁰¹

The second phase of the reforms consisted of amendments to the *NCCP Act* and the NCC. First, in July 2011, the *National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Act 2011* (Cth) and Regulations were enacted to provide for more targeted disclosure of the cost of credit to consumers; limit the circumstances in which credit providers could issue invitations for credit limit increases; and require credit providers to give individualised warnings about the risks of making only minimum repayments on a credit card.¹⁰² Then, in 2012, the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) was introduced to improve the regulation of potentially risky fringe credit products – such as payday loans, consumer leases and reverse mortgages under the *NCCP Act* and the NCC.¹⁰³ In this part of the article, we discuss the impact of the 2012 amendments on the scope and application of s 72. We also identify

⁹⁶ COAG had already agreed ‘in principle’ to the transfer of regulatory responsibility for consumer credit to the federal government at a meeting on 26 March 2008.

⁹⁷ Also included in the reform package were the *National Consumer Credit Protection (Fees) Act 2009* (Cth) and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth).

⁹⁸ Revised Explanatory Memorandum, National Consumer Credit Protection Bill 2009 (Cth).

⁹⁹ Ibid [2.4]–[2.14]; see also the list of credit activities regulated by the Act in *NCCP Act* s 6(1).

¹⁰⁰ See NCC ss 4–6.

¹⁰¹ The Treasury, National Credit Reform: Enhancing Confidence and Fairness in Australia’s Credit Law, Green Paper (July 2010) 81.

¹⁰² Revised Explanatory Memorandum, National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011 (Cth). For more detail on the impact of the 2011 amendments, see Paul Ali, Cosima McRae and Ian Ramsay, ‘Consumer Credit Reform and Behavioural Economics: Regulating Australia’s Credit Card Industry’ (2012) 40 *Australian Business Law Review* 126, 131–3.

¹⁰³ For more detail, see Paul Ali et al, ‘Consumer Leases and Consumer Protection: Regulatory Arbitrage and Consumer Harm’ (2013) 41 *Australian Business Law Review* 240, 241, 255–6.

the ways in which these amendments further expanded the hardship provisions contained in the NCC, particularly by requiring credit providers to respond to a hardship application under s 72 in accordance with a prescribed process.

A Expanding the Scope of the Right to Seek a Hardship Variation

The 2012 amendments further broadened the application of the right contained in s 72 by altogether removing the \$500 000 threshold on loans with respect to which a hardship application could be made; and also removing the two threshold requirements for making a hardship application – being reasonably unable to perform obligations under the credit contract due to illness, unemployment or other ‘reasonable cause’, and having a reasonable expectation of being able to perform obligations under the contract if a variation was granted.¹⁰⁴ Another important change was the removal of the limitation on the types of variation that a consumer could seek under this provision.¹⁰⁵ The latter change was in response to concerns that some credit providers were refusing hardship applications under s 72 because they did not precisely conform to technical legal requirements (for example, because the consumer had asked for a type of variation that was not prescribed in the NCC, or had not specified a type of variation at all).¹⁰⁶ There were also concerns that in some situations, a type of variation that was not prescribed in the NCC might be more appropriate to the circumstances of a particular consumer.¹⁰⁷ These concerns applied particularly to credit providers who were not already party to a self-regulatory code of practice that required them to provide a range of options to consumers experiencing payment difficulties.¹⁰⁸

B Prescribing a Process for Seeking Help

An equally important expansion in the hardship provisions contained in the NCC involved additions to the prescribed process through which a hardship variation could be sought, and a reprieve from enforcement action obtained, by the consumer. In response to the criticism that s 66 of the UCCC did not oblige the credit provider to consider and respond to a request for a hardship variation,¹⁰⁹ the 2012 amendments introduced a requirement for credit providers to finalise consideration of a hardship application before they could commence enforcement proceedings against the consumer.¹¹⁰ This requirement obliges the credit provider to comply with the prescribed

¹⁰⁴ While this is no longer a threshold requirement, it is stipulated in the note to s 72(3) that a credit provider may be especially entitled to refuse a hardship application if these circumstances are not made out.

¹⁰⁵ The original version of s 72 of the NCC allowed a consumer to seek the same three types of variation that had previously been available under s 74 of the Credit Acts and s 66 of the UCCC.

¹⁰⁶ Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) [9.136], [9.140]. For examples of cases where this was an issue, see *Westpac Banking Corporation v Tesoro* [2012] VSC 182, [57].

¹⁰⁷ Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) [9.136].

¹⁰⁸ *Ibid* [9.161]. The self-regulatory codes did not limit the types of variation that a consumer could seek from the credit provider: see The Treasury, above n 101, 83–4.

¹⁰⁹ House of Representatives Standing Committee on Economics, Finance and Public Administration, above n 86, 35.

¹¹⁰ NCC s 89A(2); Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Cth) [9.225]–[9.237].

process outlined in Part I of this article.¹¹¹ Like s 66 of the UCCC – and as emphasised in Part I – s 72 stops short of requiring credit providers to agree to a variation. If a variation is refused, s 74(1) gives the consumer the right to seek a hardship variation in court. However, there are limitations on the types of variation that a court can order: courts are not able to make an order that reduces the amount of debt payable by the consumer.¹¹² Ultimately, the lack of litigation testing the most recent version of s 72 indicates that s 74 does not provide a particularly accessible avenue for the exercise of the right to seek a hardship variation in the courts.¹¹³ Instead, the dispute resolution schemes operated by FOS and CIO have served as the primary forum for the resolution of disputes concerning the failure to respond to an application under s 72, or the refusal of a variation of the credit contract.

VI ANALYSIS

As shown above, the current version of the right to seek a hardship variation gives consumers a broader and stronger set of protections than the far more limited right envisaged by the Molomby Committee in 1972. In this part of the article, we undertake a detailed analysis of the current and historical versions of this provision with a focus on two issues emerging from the literature. The first of these issues involves a shift away from a subject of consumer credit law that was for a long time envisaged as male, able-bodied and middle class. This legal subject was, in the early phases of consumer credit law reform in Australia, juxtaposed against the figure of the dishonest or irresponsible debtor, which was relied upon by the credit industry to justify inflexible approaches to default and enforcement. We document how improved understandings of the many reasons why consumers experience financial hardship have led to this figure becoming less prominent in the discourses on consumer protection. We also show, however, that the gradual expansion in the subject of the right to seek a hardship variation has not done away with some limitations on the types of consumer who are most likely to successfully make use of s 72.

The second issue that we focus on in this part of the article is the tension between two approaches to the regulation of consumer credit. By emphasising minimal regulatory intervention in a competitive market, the first approach assumes that the role of consumer credit law in the context of financial hardship should be limited to informing consumers of their rights, and providing mechanisms for them to seek an alternative payment arrangement from their credit provider. The other approach, which has not been the dominant one in Australia, envisages a more extensive – and potentially distributional – role for consumer credit law. We document how, over time, there has been some recognition of the limitations of the first approach and initiatives to impose further – if only procedural – obligations on credit providers in their dealings

¹¹¹ NCC ss 72(2)–(5). The 2009 version of the NCC already contained a requirement for the lender to respond within 21 days; however, this process now had to be completed before enforcement could commence: Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2009, 7147 (Chris Bowen).

¹¹² NCC s 74(2)(a); see, eg, *Schafer v RHG Mortgage Corporation Ltd* [2015] WASCA 11, [18].

¹¹³ This is even though requests for a hardship variation under ss 72 and 74 are eligible for streamlined small claims court proceedings, and there is a presumption that an adverse costs order will not be made against an applicant in such a proceeding: Revised Explanatory Memorandum, National Consumer Credit Protection Bill 2009 (Cth) [4.172], [4.180]–[4.184].

with consumers facing payment difficulties or making an application under s 72. Yet we also refer to critical perspectives on consumer credit law to argue for the imposition, for the first time, of an obligation to provide some minimum forms of assistance in certain circumstances onto credit providers themselves, as a way of providing more meaningful protection to consumers in financial hardship.

A The Changing Subject of the Right to Seek a Hardship Variation

Much has been written on the process through which the discourse of the law envisages and constructs its subject.¹¹⁴ This subject is both historically contingent and perpetually in transition; in the United Kingdom after the Second World War, for example, the subject of consumer law and policy was increasingly a male 'rational chooser' – a member of the professional middle class – and no longer 'the historical figure of an impulsive and irrational female shopper.'¹¹⁵ In the consumer credit sector in particular, the gendered nature of this subject was enforced by direct discrimination on the part of credit providers, even after the major statutory restraints on women's financial participation were removed.¹¹⁶ As late as the 1980s, women in Australia had difficulty obtaining a loan in their own right without a signature from a male guarantor, even when they were the sole income earner in their household.¹¹⁷ In this context, it is not surprising that the legal subject envisaged by the Rogerson and Molomby Committees in 1969 and 1972 was an able-bodied, male head of household engaged in permanent paid employment. This is evident in the Committees' confinement of their proposed hardship protections to consumers experiencing a temporary and 'unforeseen' disruption in their earnings and employment patterns.¹¹⁸ These proposed protections excluded a very broad group of consumers – including women engaged in unpaid care work on a full-time basis, and consumers experiencing ongoing financial disadvantage caused by factors such as a long-term illness or disability, or a low or irregular income.

Juxtaposed against the model consumer envisaged by the Committees was the spectre of the 'malingerer' or the unscrupulous, irresponsible debtor who would, if treated with any lenience, continue to incur debt after debt.¹¹⁹ The Rogerson and

¹¹⁴ See the discussion on Michel Foucault and other perspectives on the subject of the law in Sheila Duncan, 'The Mirror Tells its Tale: Constructions of Gender in Criminal Law' in Anne Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish Publishing, 1996) 173, 176–7. In the context of credit and finance, Libby Assassi also traces the evolution of the gendered subject of credit and property laws from the sixteenth century onwards: see especially Libby Assassi, *The Gendering of Global Finance* (Palgrave MacMillan, 2009) 74–5, 92–6.

¹¹⁵ Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Hart Publishing, 3rd ed, 2012) 20; see also Matthew Hilton, 'Consumer Politics in Post-War Britain', in Martin J Daunton and Matthew Hilton (eds), *Politics of Consumption: Material Culture and Citizenship in Europe and America* (Berg Publishers, 2001) 242, 256.

¹¹⁶ Assassi, above n 114, 92.

¹¹⁷ Supriya Singh and Anuja Cabraal, 'Women, Money and the Bank' (Paper presented at the Financial Literacy, Banking and Identity Conference, RMIT University, Melbourne, 25–26 October 2006) 5; Assassi, above n 114, 135.

¹¹⁸ *Rogerson Report*, above n 25, 8, 50; *Molomby Report*, above n 30, [5.7.13].

¹¹⁹ *Rogerson Report*, above n 25, 50; *Molomby Report*, above n 30, [1.2.7], [5.7.13]. See also Llewellyn, above n 23, 58; Iain Ramsay, '"Wannabe WAGS" and "Credit Binges": The Construction of Overindebtedness in the UK' in Johanna Niemi, Iain Ramsay and William C Whitford (eds), *Consumer Credit, Debt and Bankruptcy* (Hart Publishing, 2009) 75, 83.

Molomby Committees, and later the Commission of Inquiry into Poverty, were all concerned about ensuring that any proposed right to seek an extension of time on the grounds of hardship was not taken advantage of by consumers whose inability to pay was not legitimate – for example, the supposedly ‘work-shy’¹²⁰ – or by those who did not have the ‘good faith intention’¹²¹ of meeting their obligations. These figures had their origin in ‘recurring historical social anxieties about credit and debt’, and were drawn upon to justify an inflexible approach to default and enforcement.¹²²

Writing in 1986, Iain Ramsay argued that:

[a]ny system of debt recovery will reflect assumptions about the motives and characteristics of those involved and the social role of credit in society... A traditional view was that an individual with debt problems was “feckless” and possibly immoral or inadequate... It is only recently that such typifications have been subjected to the scrutiny of systematic social and empirical research.¹²³

Ramsay was referring to ground-breaking studies indicating that the debtor who finds themselves unable to pay a debt on time is less often the ‘malingerer or dishonest consumer’ described in industry submissions to the Molomby Committee,¹²⁴ and more often the victim of circumstances causing a sudden drop in income, or an ongoing dependence on inadequate social security payments.¹²⁵ This has since been confirmed by empirical research debunking the myth that debt problems are mostly a result of extravagance, or an intentional avoidance of financial obligations by the consumer.¹²⁶ Such research indicates that while most consumers would prefer to pay their debts on time, they lack the financial resources to do so¹²⁷ – usually as a result of an event causing a direct or indirect financial shock, such as loss of employment, an illness or injury, the failure of a business, or a relationship breakdown.¹²⁸ As Ian Ramsay and Cameron Sim point out, these events can affect even those who are ostensibly ‘middle class’;¹²⁹ unsurprisingly, however, particular groups are more likely to experience longer-term financial stress, and are thus especially vulnerable, particularly in the

¹²⁰ Rogerson Report, above n 25, 50.

¹²¹ Commission of Inquiry into Poverty, above n 54, 118.

¹²² Ramsay, “Wannabe WAGS” and “Credit Binges”, above n 119, 83.

¹²³ Iain Ramsay, *Debtors and Creditors: A Socio-Legal Perspective* (Butterworths Law, 1986) 2–3.

¹²⁴ Molomby Report, above n 30, [5.7.13].

¹²⁵ Ramsay, *Debtors and Creditors*, above n 123, 3–4. See, eg, David Caplovitz, *Consumers in Trouble: A Study of Debtors in Default* (The Free Press, 1974) 57–64; M Adler and E Wozniak, ‘The Origins and Consequences of Default – An Examination of the Impact of Diligence’ (Research Report No 5, Department of Social Administration, University of Edinburgh, 1980).
¹²⁶ See, eg, Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (Oxford University Press, 1989) 8–9; Nicola Dominy and Elaine Kempson, ‘Can’t Pay or Won’t Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills’ (Research Report, No 4/03, Department for Constitutional Affairs, March 2003).

¹²⁷ Dominy and Kempson, above n 126, v, vi, 5.

¹²⁸ Lauren Levin and Fiona Guthrie, ‘Hardship Policies in Practice: A Comparative Study’ (Report, Financial Counselling Australia and Australian Communications Consumer Action Network, 2014) 14; Thomas Wilhelmsson, *Critical Studies in Private Law* (Kluwer, 1992) 181–2.

¹²⁹ Ramsay and Sim, above n 2, 293–8.

context of a recognised rise in the cost of living.¹³⁰ These groups include people on low, fixed or irregular incomes;¹³¹ single parents;¹³² recent migrants from a non-English speaking background;¹³³ and people with an ongoing or chronic physical or mental illness or a disability.¹³⁴

Particularly in the media, these findings have not done away with moral judgments about the lifestyle choices of those who default on their debt obligations.¹³⁵ They may, however, have contributed to a gradual broadening in the circumstances in which a consumer will qualify to seek (though not necessarily receive) protection from consumer law. As detailed in Part III of this article, all of the earliest statutory versions of the right to seek a hardship variation expanded the circumstances in which the right could be invoked beyond illness and unemployment. Over the years, in those jurisdictions that permitted an application to be made where there was 'reasonable cause', a broad range of circumstances were recognised by the courts as satisfying this threshold requirement.¹³⁶ They included a short term of imprisonment followed by the birth of a child;¹³⁷ illness and unemployment combined with the financial commitments and family responsibilities of a single parent;¹³⁸ and a general deterioration in a consumer's financial position following the failure of their business.¹³⁹ Today, it seems that the range of circumstances in which a consumer could theoretically seek a hardship variation is wider still. Since the 2012 amendments to the NCC, 'reasonable cause' is no longer a threshold requirement to making an application under s 72, while the websites of major banks and self-regulatory codes of practice developed by the consumer credit

¹³⁰ The cost of living increased by 34 per cent between 2000 and 2011 when measured by the Consumer Price Index: Australian Council of Social Service, 'Indicators of Inequality Factsheet' (Factsheet, April 2011) 4.

¹³¹ Managing Justice, 'Long Term Financial Hardship' (Discussion Paper, November 2013) 8, 14; Levin and Guthrie, above n 128, 14–16.

¹³² Levin and Guthrie, above n 128, 14–15; Benno Engels, Rivkah Nissim and Kathy Landvogt, 'Under Pressure: Costs of Living, Financial Hardship and Emergency Relief in Victoria' (Report, Victorian Council of Social Service and ER Victoria, May 2009) 13–14; Jude Lobo, 'The Wesley Report – Financial Stress – The Human Cost' (Report No 5, The Wesley Mission, 2009) 47–53; Australian Council of Social Service, above n 3, 20.

¹³³ Victoria Johnson, Said Dileri and Naw Eh Ywa, 'Financial Life in a New Setting: Experiences of Afghan and Burmese (Chin and Karen) Communities in Melbourne, Australia' (Report, Brotherhood of St Laurence, 2012) 26; Australian Council of Social Service, above n 3, 23–4.

¹³⁴ Nigel Balmer, Pascoe Pleasence, Alexy Buck and Heather C. Walker, 'Worried Sick: The Experience of Debt Problems and their Relationship with Health, Illness and Disability' (2006) 5 *Social Policy & Society* 39; Managing Justice, above n 131, 8, 14; Martin Ryan, Beverley Kliger and Bill Healy, 'Smiling for the First Time: Bankruptcy for People with a Mental Illness. What Happens When Credit Code Remedies Fail?' (Report, Good Shepherd Youth and Family Service, September 2010) 29–35.

¹³⁵ Ramsay, "'Wannabe WAGS and Credit Binges'", above n 119, 80, 83.

¹³⁶ Recent case law has indicated that these words are to be interpreted broadly, in accordance with their ordinary meaning. See *Permanent Custodians Ltd v Upston* [2007] NSWSC 223 (16 March 2007), [156].

¹³⁷ *McNally v Australia and New Zealand Banking Group Ltd* (2001) ASC, 155–047.

¹³⁸ *Garner v Capital Finance Australia Ltd* [2003] VCAT 1171 (12 June 2003), [28].

¹³⁹ *Permanent Custodians Ltd v Upston* [2007] NSWSC 223 (16 March 2007), [152], [156]–[158].

assumed to follow the rational actor model in her decision making'.¹⁵⁴ This approach relies upon the implementation of requirements for the pre-contractual disclosure of information that would, theoretically, enable consumers to utilise a rational cost-benefit analysis to decide between different products and providers, and thus promote competition.¹⁵⁵ By contrast, the other approach has the aim of 'ensuring fair and secure contracts' that protect all consumers, particularly those who are vulnerable and who are least likely to benefit from generic information published in brochures and on the websites of credit providers.¹⁵⁶ This approach envisages a far more extensive role for consumer credit law, encompassing 'the regulation of both the procedure for granting of the consumer credit and the content of the resulting contracts'.¹⁵⁷ It assumes that the objective of addressing the imbalance in bargaining power between the credit provider and the consumer will require not only information and the promotion of competition. As Iain Ramsay suggested in 1992, it may also require consumer credit law to assume a 'distributional' role by actively redistributing rights and responsibilities between the consumer and the credit provider.¹⁵⁸

Throughout the periods of reform outlined in Parts II to V of this article, consumer credit law in Australia sought to provide consumer protections primarily through the first of the abovementioned approaches, by providing consumers with information and regulating the contents of contractual documents.¹⁵⁹ The recommendations made by the early reviews of consumer credit law were tinged with caution about the idea of making credit providers bear too much responsibility for disadvantaged consumers for whom information-based protection measures would not suffice. Yet these reviews failed to identify where, exactly, this responsibility should fall, particularly with regard to the problem of consumers defaulting on their obligations because of hardship. It was suggested that requiring credit providers to bear any greater share of the risk associated with default would affect competition and potentially lead to financial exclusion for people on low incomes.¹⁶⁰ As an alternative, the Rogerson Committee and the Commission of Inquiry into Poverty explored and rejected the possibility of making individual consumers – particularly those on low incomes – responsible for taking out credit insurance to protect against a loss of income that could interfere with their ability to make repayments.¹⁶¹ The Molomby Committee also explored this option, and was in

¹⁵⁴ Johanna Niemi, Iain Ramsay and William C Whitford, 'Introduction' in Johanna Niemi, Iain Ramsay and William C Whitford (eds), *Consumer Credit, Debt and Bankruptcy* (Hart Publishing, 2009) 1, 3–4.

¹⁵⁵ Nicola Howell, 'Developing a Consumer Policy for the 21st Century' (2008) 33 *Alternative Law Journal* 80, 81–2; see also Gail Pearson, 'Risk and the Consumer in Australian Financial Services Reform' (2006) 28 *Sydney Law Review* 99, 119.

¹⁵⁶ Niemi, Ramsay and Whitford, above n 154, 3–4. See also Howell, above n 155, 82–3; Sheehan, Wilson and Howell, above n 85, 17.

¹⁵⁷ Niemi, Ramsay and Whitford, above n 154, 3–4.

¹⁵⁸ Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State', above n 18, 178.

¹⁵⁹ See, eg, Pearson, above n 155, 99.

¹⁶⁰ See, eg, *Rogerson Report*, above n 25, 8; *Molomby Report*, above n 30, [5.7.13]; Commission of Inquiry into Poverty, above n 54, 104. This particular view is explored in more detail in Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State', above n 18, 182–3.

¹⁶¹ *Rogerson Report*, above n 25, 50; Commission of Inquiry into Poverty, above n 54, 118–19. The proposal was seen as having potential to increase the costs of borrowing.

favour of the idea.¹⁶² Ultimately, however, the Rogerson and Molomby Committees concluded that financial hardship spanning more than three to six months was a problem best dealt with by government departments of social services.¹⁶³

These conclusions evidenced the view that consumer credit law could only achieve so much when it came to protecting consumers who were experiencing longer-term socio-economic disadvantage by reason of being on a low income, having a physical or mental illness or disability, or other factors. Writing in 1978, as the state and territory governments deliberated on how best to implement the Rogerson and Molomby Committees' recommendations, Goode stated that consumer credit law 'is in truth neither designed or equipped for the special needs of the low-income consumer ... [R]esolution of the problems of consumer credit and consumer debt lies largely outside the law's sphere of influence.'¹⁶⁴ Rather, these problems 'need to be tackled at source, by the raising of living standards, the improvement of education and the provision of advisory services and instruction on household management.'¹⁶⁵ While this view appears to recognise that broader structural inequalities shape the context in which consumers enter agreements with credit providers, it also rejects the idea that consumer law (as opposed to, say, social security law) should have any distributional function in addressing these inequalities.¹⁶⁶ According to Goode, all the law could do was provide consumers with sufficient information to make rational choices in a competitive market – and, in the case of financial hardship, accessible mechanisms to enable them to make alternative repayment arrangements with their credit provider.¹⁶⁷

At least in the literature, the limitations of this approach to consumer credit regulation are by no means unacknowledged. As pointed out by Nicola Howell, the effectiveness of competition as a mechanism for consumer protection is significantly reduced when it comes to essential goods or services, as the consumer is in a poor bargaining position by comparison to the provider.¹⁶⁸ In Australia, which was acknowledged to be a credit society even in the 1980s,¹⁶⁹ it would not be an exaggeration to describe credit as an essential service.¹⁷⁰ With consumers relying on credit to pay not only for 'symbolic expressions of status'¹⁷¹ but also basic necessities such as housing, health and education, it is unsurprising that household debt – and also consumer financial stress – are at relatively high levels.¹⁷² For this reason, lack of access to 'a

¹⁶² *Molomby Report*, above n 30, [5.7.13].

¹⁶³ *Rogerson Report*, above n 25, 50; *Molomby Report*, above n 30, [5.7.13].

¹⁶⁴ Goode, above n 18, 98–100.

¹⁶⁵ *Ibid.*

¹⁶⁶ See Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State', above n 18, 178.

¹⁶⁷ Goode, above n 18, 99.

¹⁶⁸ Howell, above n 155, 80; see also Therese Wilson, 'Banks Behaving Badly' (2004) 29 *Alternative Law Journal* 294, 295.

¹⁶⁹ See, eg, Parliament of Victoria, Credit Bill 1984 (Peter Spyker) 22 March 1984, 3402–3.

¹⁷⁰ Wilson, above n 168, 294.

¹⁷¹ Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State', above n 18, 181.

¹⁷² Australian Bureau of Statistics, 'Trends in Household Debt', *Australian Social Trends* (6 May 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/lookup/4102.0main+features202014>>; Dun & Bradstreet, 'Consumer Financial Stress Index: Stress Forecast to Rise' (Media Release, 22 September 2014) <http://dnb.com.au/article-confidex-financial-stress-forecast-to-rise.html#.VYz89_mqpHx>.

moderate amount of credit' is one of the key components of the definition of financial exclusion used by the Centre for Social Impact.¹⁷³ Consumers who are excluded from mainstream credit markets may find themselves facing barriers to full participation in the society in which they live,¹⁷⁴ and may be forced to rely on fringe lenders to pay for both emergency expenses and everyday living costs such as utility bills.¹⁷⁵ This context makes it untenable to regard financial hardship as an extreme occurrence or anomaly experienced only by the most unfortunate or irresponsible of consumers. Rather, as Udo Reifner argues, debt default is 'an integral part of the credit society. It mirrors the effect that unequal distribution of labour and other income resources has on individuals and families who, with or without fault, are victims of market discrimination.'¹⁷⁶ The key question, then, is whether it is time for credit providers to bear greater responsibility for this problem – and linked to that is the question of whether consumer credit law is the appropriate mechanism through which to achieve such a redistribution of responsibilities.

The limitations of the first approach to regulation have recently seen some acknowledgment in the policy debates driving the evolution of Australian consumer credit law. As Fiona Burns argues, the 2012 amendments evidenced recognition of the need for legislative intervention in the context of credit products recognised as risky¹⁷⁷ – particularly reverse mortgages.¹⁷⁸ According to Burns, these amendments went beyond the minimal level of regulation necessary to facilitate the market for these products,¹⁷⁹ extending to the terms and substance of transactions to protect an especially vulnerable clientele – seniors – for whom disclosure may have limited utility.¹⁸⁰ Yet Paul Ali, Cosima McRae and Ian Ramsay document how political pressure from the payday lending industry – which mobilised the language of freedom of consumer choice, financial inclusion and industry viability to argue against protective measures such as a cap on fees and interest rates on payday loans, and a prohibition on multiple loans and refinancing – came to undermine this consumer protection goal.¹⁸¹ In the context of financial hardship, moves to regulate the recovery of debt by credit providers from vulnerable consumers have been even more limited. Debates preceding the 2009 reforms and the 2012 amendments only went as far as acknowledging the need to compel credit providers to engage with a consumer in financial hardship and give

¹⁷³ Chris Connolly, 'Measuring Financial Exclusion in Australia' (Report, Centre for Social Impact, 2014) 8.

¹⁷⁴ Therese Wilson, 'Consumer Credit Regulation and Rights-Based Social Justice: Addressing Financial Exclusion and Meeting the Credit Needs of Low-Income Australians' (2012) 35 *University of New South Wales Law Journal* 501, 506–7.

¹⁷⁵ Marcus Banks et al, 'Caught Short: Exploring the Role of Small, Short-Term Loans in the Lives of Australians' (Final Report, Social Policy Unit, The University of Queensland, 2012) vi, 32–4; Wilson, above n 168, 294; Paul Ali, Cosima McRae and Ian Ramsay, 'The Politics of Payday Lending Regulation in Australia' (2013) 39 *Monash University Law Review* 411, 420.

¹⁷⁶ Udo Reifner, 'Regulation of Consumer Lending' in Johanna Niemi, Iain Ramsay and William C Whitford (eds), *Consumer Credit, Debt and Bankruptcy* (Hart Publishing, 2009) 105, 107.

¹⁷⁷ Fiona Burns, 'The Evolving Statutory Regulation of Reverse Mortgages in Australia's "Risk Society"' (2013) 39 *Monash University Law Review* 612.

¹⁷⁸ The risks associated with reverse mortgages are summarised at *ibid* 614.

¹⁷⁹ *Ibid* 615.

¹⁸⁰ *Ibid* 648.

¹⁸¹ Ali, McRae and Ramsay, above n 175, 428–32, 434–7, 439–43, 450–1.

reasons for their decision.¹⁸² The need for procedural requirements — and for provisions encouraging compliance with such requirements — was evidenced by figures from FOS indicating that many credit providers were not responding to hardship applications made by consumers under s 72.¹⁸³ But the prescription of a statutory process for seeking a hardship variation does not of itself shift responsibility for the problem of financial hardship onto credit providers, who are not required to grant a hardship variation in any circumstances. Rather, credit providers may comply with the procedural requirements before proceeding to bring enforcement action against a consumer whose predicament must then be alleviated by other means — for example, emergency relief from charity organisations.

Proponents of the first approach to consumer credit regulation have argued that in cases where competition fails to provide an adequate level of consumer protection, the focus should be not on expanding the statutory obligations on credit providers, but on encouraging voluntary self-regulation initiatives that take ownership of this problem from within the industry itself.¹⁸⁴ It is true that recently, the banking and finance sectors have taken on further responsibilities towards consumers in hardship by incorporating additional provisions into their self-regulatory codes of practice. In fact, in her comparison of the provisions of the Australian Bankers' Association ('ABA') Code of Banking Practice with those of the *NCCP Act* and the *NCC*, Howell finds that in the area of financial hardship, it is currently the self-regulatory instrument that provides the higher or more detailed standard of consumer protection.¹⁸⁵ The ABA Code of Banking Practice expands on the procedural requirements contained in the *NCC* by requiring signatories to invest in processes to proactively identify customers experiencing payment difficulties (that is, without the onus necessarily being on the customer to first make a formal hardship application); and to ensure that their staff are adequately trained to deal with customers in hardship.¹⁸⁶ Self-regulatory codes of practice also arguably expand the number of options that may be available to consumers who are unable to keep up with their repayments,¹⁸⁷ particularly in combination with other voluntary initiatives in the consumer credit sector.¹⁸⁸ Over time, it has been recognised that in cases

¹⁸² See, eg, Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth) [2.6], [2.11].

¹⁸³ See, eg, FOS, 'Building Service Excellence: 2011–2012 Annual Review', above n 17, 51.

¹⁸⁴ Howell, above n 155, 81; see, eg, Productivity Commission, above n 95, 85.

¹⁸⁵ Nicola J Howell, 'Revisiting the Australian Code of Banking Practice: Is Self-Regulation Still Relevant for Improving Consumer Protection Standards?' (2015) 38 *University of New South Wales Law Journal* 544, 557.

¹⁸⁶ ABA, *Code of Banking Practice* (at 31 January 2013) cls 28.4, 28.11; see also Paul Ali, Evgenia Bourova and Ian Ramsay, 'Responding to Consumers' Financial Hardship: An Evaluation of the Legal Frameworks and Company Policies' (2015) 23 *Competition and Consumer Law Journal* 29, 34.

¹⁸⁷ See, eg, ABA, *Code of Banking Practice* (at 31 January 2013) cl 28; Mortgage and Finance Association of Australia, *MFAA Code of Practice* (at 12 March 2014) cl 13; Customer Owned Banking Association, *Customer Owned Banking Code of Practice* (at 1 January 2014) cl 24; Insurance Council of Australia, *General Insurance Code of Practice* (at 2012) cls 3.8, 3.12. See also ABA, above n 1, 2, 5.

¹⁸⁸ For example, principles adopted by Australia's four major banks in 2009 as part of an agreement with the federal government required the banks to offer a range of other options to customers in hardship. These options could include a postponement of mortgage repayments for up to 12 months; interest-only repayments on a loan; loan freezes; and the

of long-term financial hardship, options such as a 'settle for less' arrangement or debt waiver may be more appropriate than arrangements altering only the timing of repayments.¹⁸⁹ Most importantly, however, these self-regulatory codes of practice incorporate broad commitments to assist debtors experiencing payment difficulties.¹⁹⁰ Such commitments — most notably, cl 28 of the ABA Code of Banking Practice — could be interpreted as indicating that signatories should consider themselves under an obligation to provide some sort of assistance or alternative repayment arrangement if a consumer identifies themselves, or is identified, as being unable to pay on time.

Yet there is a question how much importance should be given to the idea of self-regulation leading the way in terms of providing protections for vulnerable consumers. On the one hand, Howell argues that it is the relationship between self-regulation and legislation that has, over the years, contributed to an improvement in the standard of protection for consumers in financial hardship.¹⁹¹ Howell describes this relationship as a 'regulatory dance' whereby statutory hardship provisions were incorporated into the UCCC and the NCC, and in both cases, the 2003 and 2013 versions of the ABA Code of Banking Practice subsequently built on and went beyond the obligations contained in those statutory provisions.¹⁹² On the other hand, while voluntary self-regulation may provide an opportunity for testing approaches to financial hardship — and influencing legislative developments — it is less effective for ensuring compliance and providing mechanisms for enforcement.¹⁹³ A statutory framework imposing sanctions for non-compliance and enforced by a proactive regulator can act as a significant incentive to improve awareness of what the law requires — and avoid negative publicity and reputational damage.¹⁹⁴ Furthermore, statutory regulations have potential to affect public opinion about the nature and causes of debt default, and also the distribution of rights and responsibilities between the consumer and the credit provider. These perspectives are not so much a comparison of self-regulation versus statutory regulation, as an assertion that the former is strengthened by the latter¹⁹⁵ — and that a benchmark level of consumer protection should not be left to the discretion of individual companies or even industry associations.

A potential point of comparison in terms of regulatory approaches to hardship protection is provided by the energy and water sectors. The legal frameworks for consumer protection governing these sectors give express recognition to the principle that these services are essential to life, and that the disconnection of consumers by reason

waiver of fees. See The Hon Wayne Swan MP, 'Relieving Mortgage Stress — The Principles: A Common Approach for Assisting Borrowers Facing Financial Hardship' (Media Release, 5 April 2009); ASIC, *Helping Home Borrowers in Financial Hardship*, Report No 152 (2009) 26.

¹⁸⁹ See Managing Justice, above n 131, 11–15; ABA, above n 1, 5–6.

¹⁹⁰ ABA, *Code of Banking Practice* (at 31 January 2013) cl 28.2; Mortgage and Finance Association of Australia, *MFAA Code of Practice* (at 12 March 2014) cl 13.1; Customer Owned Banking Association, *Customer Owned Banking Code of Practice* (at 1 January 2014) cl 24.1.

¹⁹¹ Howell, above n 185, 572–4.

¹⁹² *Ibid* 573.

¹⁹³ *Ibid* 574, 578–82.

¹⁹⁴ Levin and Guthrie, above n 128, 26–7.

¹⁹⁵ See also Howell, above n 155, 81.

of inability to pay for these services should be a last resort.¹⁹⁶ These legal frameworks impose an obligation directly upon the service provider to identify consumers in financial hardship, and to provide them with a minimum degree of flexibility and assistance.¹⁹⁷ For example, under the national framework for energy regulation that was first adopted in South Australia and then applied in the Australian Capital Territory, New South Wales, Tasmania and Queensland, energy retailers are required to implement a hardship policy providing consumers experiencing payment difficulties and financial hardship with a flexible payment arrangement that takes into account the consumer's capacity to pay and also their consumption needs.¹⁹⁸ The usual requirement is that the consumer be offered an extension of time to pay a bill, or a payment plan allowing them to make repayments in instalments. In the water sector, too, such a requirement is in place in most states and territories.¹⁹⁹ Importantly, in both the energy and water sectors, a protection from enforcement action applies whilst a hardship arrangement is being discussed or is in place.²⁰⁰

The structure of the hardship provisions that apply to the energy and water sectors – while arguably moving in the direction of the second regulatory approach discussed in this part of the article – do not of themselves eliminate the imbalance of bargaining power between the service provider and the consumer. The research in this area indicates that energy and water retailers vary in their efforts to proactively identify consumers in hardship,²⁰¹ meaning that in practice, consumers still bear the onus of seeking out information about hardship assistance, and overcoming the various practical and psychological barriers to making use of it.²⁰² Recent media coverage on the rise in the rates of disconnection of energy customers in hardship in Victoria also indicates that energy retailers are not always complying with the obligation to provide

¹⁹⁶ See, eg, *National Energy Retail Law (South Australia) Act 2011* (SA) sch 1 cls 45, 47; *Electricity Industry Act 2000* (Vic) s 45; *Gas Industry Act 2001* (Vic) s 48I; Economic Regulation Authority (WA), *Financial Hardship Guidelines: Electricity and Gas Licenses* (at October 2013) 3.

¹⁹⁷ For a full comparative outline of all these frameworks in different Australian jurisdictions, see Ali, Bourova and Ramsay, above n 186, 34–40.

¹⁹⁸ *National Energy Retail Law (South Australia) Act 2011* (SA) sch 1 cls 44(c), 50(1); *National Energy Retail Rules* r 72(1). Similar provisions are in place in Victoria, which is in the process of a gradual transition to the national framework for energy regulation: see *Electricity Industry Act 2000* (Vic) ss 43, 46A(1); *Gas Industry Act 2001* (Vic) ss 48G, 48K. In Western Australia, which will not be adopting the national framework, there is an equivalent provision, as well as an additional obligation to give reasonable consideration to a request to reduce fees, charges or the total debt of a consumer in hardship: 'Code of Conduct for the Supply of Electricity to Small Use Customers 2012' in Western Australia, *Western Australian Government Gazette*, No 205, 9 November 2012, cls 6.1, 6.3, 6.4, 6.10; Economic Regulation Authority (WA), *Schedule 2 of the Compendium of Gas Customer License Obligations*, 1 January 2013, cls 6.1, 6.3, 6.4, 6.10.

¹⁹⁹ See *Water Services Code of Conduct (Customer Service Standards) 2013* (WA); *Tasmanian Water and Sewerage Industry Customer Service Code* (Tas) cls 6.2–6.4; *Customer Service Code – Urban Water Businesses 2013* (Vic) cl 5.4; Department for Communities and Social Inclusion (SA), *Hardship Policy for Residential Customers of Major Water Industry Retailers*, February 2013, cls 13, 26–30.

²⁰⁰ See, eg, *National Energy Retail Law (South Australia) Act 2011* (SA) sch 1 cl 51.

²⁰¹ Australian Energy Regulator, 'Review of Energy Retailers' Customer Hardship Policies and Practices' (Report, January 2015) 11–12; Financial and Consumer Rights Council, *Rank the Energy Retailer*, Report (2014) 16.

²⁰² Levin and Guthrie, above n 128, 23; Australian Energy Regulator, above n 201, 11.

consumer's capacity to meet their contractual obligations. Such an assessment could be based on information provided by the consumer regarding the circumstances causing their inability to pay — as well as their living expenses. It should also take into account any information provided by a third party such as a financial counsellor or community worker. If the assessment indicates that the consumer does not have capacity to pay, it is our view that the credit provider should be required to offer a minimum range of options that altered the timing of repayments under the credit contract — for example, the three types of variation formerly prescribed in s 72 of the NCC.

The incorporation of such an obligation into the NCC would not of itself do away with other questions regarding how best to address the problem of financial hardship. One of these is the question of whether credit providers could be obliged, in any circumstances, to offer a type of variation that effectively reduced the amount of a consumer's debt. Another is the question of how to ensure that credit providers make a good faith assessment of capacity to pay, and provide consumers with alternative payment arrangements that take that capacity into account. The latter question can, to some extent, be addressed by providing consumers with accessible options for seeking review of a credit provider's refusal to give assistance — for example, if they are wrongly assessed as ineligible for a hardship variation. Ultimately, imposing such an obligation upon credit providers would establish that there are some circumstances in which the credit sector itself should bear responsibility for assisting consumers to avoid the negative impacts of enforcement action. It would therefore, in our view, provide more meaningful protection to the broad group of Australians affected by financial hardship.

VII CONCLUSION

The right to seek a hardship variation contained in s 72 of the NCC has not previously been the subject of detailed scholarly analysis, despite providing the primary statutory mechanism for consumers to seek flexibility from their credit provider if some circumstance — usually a sudden expense or an event causing a loss of income — leaves them unable to meet their payment obligations when they fall due. Our analysis of this provision demonstrates that over time, there has been an increased recognition on the part of policymakers that there is a range of reasons why consumers may find themselves willing, but unable, to comply with these obligations — and that protecting those consumers may at times justify a postponement of the credit provider's enforcement rights. The first proposals for such a provision by the Rogerson and Molomby Committees envisaged only a very limited right to seek an extension of time in circumstances confined to short-term illness and unemployment. Responding to — as the research indicates — exaggerated concerns that this right would be misused by dishonest or irresponsible debtors, these proposals did little to address the imbalance of bargaining power between the consumer and the credit provider. Over time, however, the statutory versions of this right were expanded in scope and application, and accompanied by provisions requiring credit providers to comply with a prescribed process that brought this right closer to its original goal of enabling consumers to avoid the negative impacts of peremptory enforcement action.

While it is tempting to view this history simply through the lens of progress towards a stronger set of consumer protections in the credit sector, we have argued for a more nuanced view. Our analysis of the evolution of the right to seek a hardship variation from the 1970s until today focuses on two issues emerging from the literature. The first of these is the evolution of the subject of consumer credit law — which, in the context of

with strong incentives to improve their practice. The fact that general obligations to assist consumers facing payment difficulties have already been incorporated into self-regulatory codes of practice in the credit sector only serves to show that this would not be an unrealistic burden for credit providers. It would also be a step towards addressing what continues to be an imbalance of power between credit providers and consumers, and thus furthering one of the fundamental objectives of consumer law.