

HARDSHIP VARIATION FACT SHEET

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If a debtor is unable to meet their obligations under a credit contract due to illness, unemployment or other reasonable cause, they may be able to apply for a hardship variation.

Regulation of hardship variations

The Consumer Credit Code protects consumers by giving them the right to apply for a variation of the terms of their contract on the basis of financial hardship. Firstly, the debtor should establish whether the Consumer Credit Code applies to their contract.

The Consumer Credit Code applies to credit used predominantly for personal or domestic use (not credit for investment or business purposes). It does not apply to credit provided without prior agreement or credit provided for 62 days or less (with some exceptions). To establish whether credit is regulated by the Consumer Credit Code, visit www.creditcode.gov.au; go to 'consumers' then click on 'credit covered' or 'credit not covered'.

Hardship threshold

To be eligible to apply for a hardship variation under the Consumer Credit Code, the amount borrowed must be under the monetary hardship threshold. This is a floating threshold linked to an Australian Bureau of Statistics (ABS) index of the cost of new houses in Sydney. The hardship threshold is equal to 110% of the average loan size for the purchase of new dwellings in New South Wales. To view the current threshold amount visit www.creditcode.gov.au

On what basis can a debtor apply for a hardship variation?

A person can seek a hardship variation if;

- They have **reasonable cause** to be unable to meet their obligations under a credit contract because of illness, unemployment or other reasonable cause, and
- They reasonably expect to be able to discharge their obligations under the contract if the contract were changed

There is no definition of 'reasonable cause' and it has been interpreted widely by the courts. In addition to the conventional reasons of unemployment and illness, the courts have considered the following to constitute 'reasonable cause';

- A short period in jail (*McNally v ANZ (2001) ASC 155-047*);
- Leaving employment for valid personal circumstances (*Ward-Miller v Perpetual Trustees (2001) ASC 115-046*);
- Financial commitments toward other family members and the family home (*Garner v Capital Finance Australia [2003] VCAT 1171*);
- A general deterioration in the debtor's financial circumstances (*Jones v ANZ [2004] NSWCTTT 381*).

Whatever the case may be, the credit provider needs information that clearly and frankly explains why a debtor is unable to meet their repayments obligations and why a hardship variation will assist them to discharge their contractual obligations.

If the hardship variation is simply going to delay enforcement and there is no real prospect of meeting contractual obligations under the varied contract, then a hardship variation is unlikely to be granted.

How can the contract be varied?

The Consumer Credit Code specifies that a contract can be changed in the following ways;

1. By extending the period of the contract and reducing the amount of each payment due under the contract accordingly.
2. By postponing during a specified period the dates on which the payments are due under the contract.
3. By extending the period of the contract and postponing during a specified period the dates on which payments are due under the contract.

There are no limits to how long a contract can be extended, however a credit provider is more likely to agree to a hardship variation if the requested time period is not too protracted. It is also worth noting that the total interest over the credit contract may increase if it is extended.

Often debtors will request a change to the interest rate - this can be done at the discretion of the creditor.

How to apply for a hardship variation

There is no single prescribed form to apply for a hardship variation and a simple letter is sufficient. Some banks and financial institutions have their own hardship application forms and a debtor should ask before proceeding.

The Consumer Credit Code does not prescribe that the application must be in writing but from a practical point of view a debtor should apply in writing and keep a copy of the letter.

The important things to include in an application are;

- Name, contact details and relevant account details identifying the debt.
- **Why** the debtor was/is unable to pay (reasonable cause) and detailing **how** they will be able to manage the debt in the future.
- The likelihood of the debtors ability to resume their contractual obligations when their circumstances improve and the variation expires
- It may also be necessary to document a debtor's income and expenses in order to demonstrate to the credit provider that they cannot service the debt during this particular period of time (or that they can service it if there was a reduction in monthly repayments).
- It may also be a good idea to inform the credit provider of any social or family circumstances that may be relevant to a debtor's financial situation (i.e. number of children, illness in the family, significant unexpected costs etc).
- The desired variation to the contract

For an example letter, please refer to [Hardship Application Letter](#).

It is also important that debtors continue to try and make repayments whilst the application is being processed.

Under section 66(1a) of the Consumer Credit Code, consumers are able to apply in writing to "a Government Consumer Agency" to assist in negotiating the change sought, where the consumer is experiencing genuine short-term hardship. Consumers can apply to the Department of Commerce (formally Employment and Consumer Protection) for this assistance.

If the credit provider agrees to the requested variation what should happen?

If the credit provider agrees to the proposed variation, the credit provider must provide the debtor (and any guarantor) with a written notice setting out details of the change to the credit contract within 30 days (Section 67 of the Consumer Credit Code).

If the debtor does not have a letter from the credit provider confirming the changes, it may be difficult to establish that they have a formal hardship variation. The debtor should not assume that the credit

provider has formally agreed to a hardship variation unless they have written confirmation. If the credit provider simply verbally acknowledges that a contract has changed, the debtor should request this in writing.

If the credit provider refuses the application

If the credit provider refuses to grant the hardship variation the debtor can apply to the State Administrative Tribunal (SAT) which can order that the credit provider vary the credit contract (section 68 of the Consumer Credit Code). Application forms can be accessed on the SAT website at www.sat.justice.wa.gov.au and completed through the SAT wizard.

The SAT will consider submissions from each party and make a decision as to whether the contract should be changed or not. The SAT may stay any enforcement proceedings under the credit contract until the application has been determined.

If the SAT does vary the contract or stay proceedings, the credit provider is entitled to appeal this decision for “an order varying or revoking the order” (section 69 of the Consumer Credit Code).

Other factors to consider when applying for a variation

When considering applying for a hardship variation, it is a good idea to consider the following – the credit provider is also likely to consider these factors when assessing the application.

- What is the past and present state of the account?
- Have enforcement proceedings commenced?
- What is at stake if the credit provider won't vary the contract? (i.e. could the debtor lose their home, car)?
- Has the debtor already tried to negotiate with the credit provider?
- Are there any other options available to the debtor? E.g. refinance, sell the property.

Future changes to the law

At present consumer credit is governed by the States under the Uniform Consumer Credit Code. However, the States have agreed to hand over the regulation of consumer credit to the Commonwealth from 1st January 2010 and from that time the Consumer Credit Code will be regulated by the Australian Securities & Investments Commission (ASIC) *so some administrative and regulatory changes will take place in WA during 2009 – 2010.*

Where else can I get help?

- For specialist legal advice contact Consumer Credit Legal Service WA (CCLS) on 9221 7066.
- For specific information on the Consumer Credit Code visit www.creditcode.gov.au .
- It may be appropriate to lodge a dispute with an External Dispute Resolution Scheme such as the Financial Ombudsman Service at www.fos.org.au or 1300 78 80 80 or the Credit Ombudsman Service www.creditombudsman.com.au or 1800 138 422. It is likely that the financial institution is a member of one of these schemes.
- For assistance with putting together a hardship application or budget, a financial counsellor may be able to help. To find the relevant service go to the Financial Counsellors Resource Project at www.fcrp.org.au and follow the link at 'locating a financial counsellor'. Or the Financial Counsellors Association of WA at www.financialcounselling.org .
- For updates on the National Consumer Credit Regulation go to www.treasury.gov.au; and follow the links from 'consumer policy' to 'consumer credit'.
- For general legal advice regard these and other matters refer to Legal Aid WA; 1300 650 579.

Last updated 1 September 2009