

Consumer Credit Reform

– snapshot on compliance

By Carlos Jaramillo, Solicitor Director, William Roberts Lawyers and Accredited Specialist in Commercial Litigation (NSW and Victoria).

The assistance of Natale Ilardo, Solicitor, William Roberts Lawyers in the preparation of this article is acknowledged.



Carlos Jaramillo



Natale Ilardo

Reform of Australian Consumer Credit Laws by Federal Parliament in 2009 resulted in sweeping changes to the Australia consumer credit landscape, heralding the introduction of a harmonised and uniform regulatory framework where there previously existed only an ostensibly uniform Consumer Credit Code under the auspices of which operated State and Territory based codes.

The statutory progeny of the *Consumer Credit Code*, the *National Consumer Credit Protection Act 2009* (Cth) (the “Act”) mirrors much of the previous regime and indeed subsumes the *National Credit Code* (the “Code”) into Schedule 1 of the Act.

However, since the regulation of consumer credit and finance broking was assumed by the Australian Securities and Investments Commission (ASIC) on 1 July 2010, there are a number of core respects in which the present regime differs.

Significantly, the reforms have culminated in more rigorous obligations upon those lenders and intermediaries who propose to engage in credit activities, including:

- a licensing regime for providers of consumer credit and services;
- responsible lending conduct requirements;
- mandatory membership of an external disputes resolution body; and
- sanctions and ASIC’s enforcement powers as regulator of the regime.

Regulated Credit

Under the current consumer credit regime, only credit that comes within the Code is regulated under the Act. The Code, which forms Schedule 1 of the

Act, applies to the provision of credit or proposed provision of credit:

- to a natural person or strata corporation; and
- wholly or predominantly:
 - ◆ for personal, domestic or household purposes, or
 - ◆ to purchase, renovate or improve residential property for investment purposes, or
 - ◆ refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and
- where a charge is or may be made for providing the credit; and
- where the credit is provided in the course of a carrying on a business of providing credit in Australia or as part of, or incidentally to, any other business carried on in Australia.

For the purpose of the Code, the predominant purpose for which credit is provided is the purpose for which more than half of the credit is intended to be used; or if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used. Accordingly, if more than half of the credit is not for a personal, domestic or household purpose, the credit will not be regulated under the Act.

Engaging in credit activities – licensing

The national consumer credit law, specifically Chapter 2 of the Act, requires that in general a person cannot engage in a credit activity if the person does not hold an Australian credit licence. Alternatively, a person may be

an employee or a director of one of the licence holder or one of its related bodies corporate, authorised as a credit representative, exempt from holding a licence, or granted relief by ASIC from the requirement to hold a credit licence.

For the purpose of the Act, section 6 stipulates that a person is engaged in a 'credit activity' if they:

- are a credit provider under a regulated credit contract or consumer lease; or
- provide credit assistance in relation to a credit contract or consumer lease; or
- act as an intermediary between a lender and a consumer, or lessor and consumer; or
- are a lessor under a regulated consumer lease; or
- are a mortgagee under a regulated mortgage or benefit from a regulated guarantee; or
- provide other prescribed credit activities.

The national consumer credit law ... requires that in general a person cannot engage in a credit activity if the person does not hold an Australian credit licence.

Section 47 of the Act prescribes the general conduct obligations of all licensee, and include:

- do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly;
- ensure that its representatives comply with the credit legislation and are adequately trained and competent to engage in the credit activities;
- have an internal dispute resolution

procedure that complies with ASIC approved standards;

- be a member of an approved external dispute resolution scheme; and
- have compensation arrangements in accordance with section 48.

Credit licensees or applicants can refer to *ASIC Regulatory Guide 205 Credit licensing: General conduct obligations*, which outline key compliance concepts that apply to all of the general conduct obligations for further information. ➤



“Before we do business, I should point out my company is about to go into liquidation”



Decide with Confidence

If only businesses were this upfront. Fortunately, there's Dun & Bradstreet. No matter how big or small your customer or prospect is, we'll give you the complete view of their risk profile with a comprehensive credit check. To see how we can help you visit our website www.dnb.com.au or call **13 23 33**.



• 165 million company records • Australia's largest business database

Responsible lending obligations

The current consumer credit regime provides a considerable degree of protection to consumers by imposing upon credit providers a number of conditions intended to minimise the instances of unfair, prejudicial or inappropriate loans being granted to consumers. These obligations are set out in Chapter 3 of the Act and in the *National Consumer Credit Protection Regulations 2010*, as amended by the *National Consumer Credit Protection (Amendment) Regulations 2011* (No. 4) (the "Regulations").

The premise of these obligations is that credit licensees must not enter into a credit contract with a consumer, suggest a credit contract to a consumer or assist a consumer to apply for a credit contract if it is or would be unsuitable for the consumer.

In order to meet the responsible lending obligations, a credit provider must make reasonable inquiries about the consumer's financial circumstances, take reasonable steps to verify the consumer's financial situation, and make a preliminary assessment (if providing credit assistance) or final assessment (if a credit provider) about whether the credit contract is suitable for the consumer.

The obligations are, in effect, to supply certain documents to consumers to assist consumers in understanding the credit activities that are being offered by the credit provider. Such documents include:

- a credit guide that provides preliminary information about the credit provider to the consumer, and is to be provided before engaging in credit activities.
- a quote that provides an estimated cost to the consumer of utilising the services if a fee is charged, and must generally be provided before credit is provided.
- proposal documents setting out the cost to the consumer of utilising the credit provider's services; and
- a written assessment (being a preliminary or final written assessment) that a credit contract or consumer lease is not unsuitable for the consumer.

Credit licencees and representatives that fail to comply with the disclosure obligations may face significant criminal and civil penalties.

Whilst there are some exemptions to these requirements, for the most part the documents must be given to consumers to ensure that consumers have access to information that will assist them in making decisions about dealing with the credit provider, and understanding their rights and the contracts that are being offered. The time at which the documents will need to be supplied to consumers depends on what type of entity the credit provider is and what credit activities are engaged in by the credit provider, but will invariably need to be furnished before the credit provider engages in credit activities with the consumer.

It should be noted that these obligations commenced on 2 October 2011, and will apply to most credit licencees and credit representatives including but not limited to credit providers and lessors (including assignees), credit assistance providers such as mortgage and finance brokers, credit representatives, including some franchisees, and debt collectors. The obligation to provide pre-contractual disclosure to a consumer under section 16 of the Code is unchanged and continues to apply.

Credit licencees and representatives that fail to comply with the disclosure obligations may face significant criminal and civil penalties. ASIC may also take administrative action by suspending, cancelling or imposing conditions on the credit provider's credit licence or issue an infringement notice.

Dispute Resolution Procedures

A further significant requirement under the current regime is the requirement that credit providers have suitable and sufficient dispute resolution procedures in place. The national consumer credit law requires that creditors must have in


place internal dispute resolution (IDR) procedures and membership of an ASIC-approved external dispute resolution (EDR) schemes, being:

- Financial Ombudsman Service Limited (FOS); or
- Credit Ombudsmen Service Limited (COSL).

It is crucial that credit providers have appropriate links between their IDR and EDR procedures. Whilst recourse to IDR is intended to be the first forum for consumers to resolve disputes with credit providers, it is often circumvented and complaints pursued through EDR schemes in the first instance.

As there may be a cost to licensees in circumstances where complaints are first made to an EDR scheme and later referred to its IDR, it is important that licensees provide clear, comprehensive and accessible information to consumers on the procedures for making complaints. In this regard, creditors should consult *Regulatory Guide 165 Licensing: internal and external dispute resolution*.

Conclusion

In view of the above, credit providers should gain both a clear understanding of what 'credit' is regulated under the current regime, the obligations which are imposed under the regime, and decide how to address the implications of the foregoing requirements so as to avoid being subject to the numerous civil and criminal penalties and sanctions. 

Carlos Jaramillo, Solicitor Director,
William Roberts Lawyers.
Level 22, 66 Goulburn Street, Sydney NSW 2000.
Ph: (02) 9552 2111, Fax: (02) 9552 1911
Email: carlos.jaramillo@williamroberts.com.au