

The Financier

THE FINANCIERS ASSOCIATION OF AUSTRALIA LIMITED NEWSLETTER

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Welcome to the Summer 2009 edition of The Financiers Association of Australia Limited newsletter.

As usual we try to keep up with any legislative changes in the credit code as well as inserting any interesting general business pieces gleaned from various sources.

A welcome is also extended to new members at this time.

EVERYTHING MUST CHANGE

1 July 2010 will be the first day of the new, national, consumer credit law.

From that day, ASIC will be your new regulator. The old State-based system we are all so familiar with will be gone, along with the (so-called Uniform) Consumer Credit Code.

This newsletter highlights some of the main features of the new law, the National Consumer Credit Protection Act 2009 (the *New Act*).

THERE IS A LOT TO DO BEFORE 1 JULY 2010.

Providing credit from 1 July 2010

The New Act will include (as Schedule 1) the new National Credit Code (the *New Code*).

The New Code is very similar to the old Consumer Credit Code, but isn't the same. Whenever you provide credit on or after 1 July 2010, you will be doing so under the new requirements of the New Code. You therefore need to change your systems over from 1 July 2010.

The Association has engaged Langes+ to prepare standard documents that meet the requirements of the New Code, including those relating to:

- loans for investment in residential property
- business purpose declarations and enquiries into loan purpose
- default notices and other standard form notices.

Members will be advised when these standard documents are available for purchase.

Responsible lending

The New Act also imposes obligations to lend responsibly. These obligations apply both to credit providers and to those who assist in the provision of credit. For credit providers, this means they must:

- give a "credit guide" to the consumer, which contains information about the credit provider and its obligations under the New Act
- make an assessment whether a credit contract will be unsuitable for a consumer, before entering, or increasing the credit limit of, a credit contract. To make the assessment, the credit provider must make reasonable enquiries about the consumer's requirements, objectives and financial situation and take reasonable steps to verify the consumer's financial situation.

The New Act specifies circumstances in which a credit contract will be unsuitable for a consumer, and prohibits entering into unsuitable contracts.

ASIC has issued consultation paper 115 on responsible lending, in an attempt to clarify just what enquiries and verification credit providers are expected to carry out. Consultation on this paper closed on 28 October. The requirements of the final version of this paper (the regulatory guide on responsible lending) will be critical to establishing compliant lending procedures under the New Act.

ADIs and registered finance companies have until 1 January 2011 to start complying with responsible lending. Everyone else (ie FAA members) must not provide unsuitable credit after 1 July 2010 (but has until 1 January 2011 to comply with the other responsible lending requirements).

Licensing

Credit providers (and intermediaries) will need an Australian Credit Licence (an *ACL* – issued by ASIC) to continue to do business under the New Act.

The first step towards getting your ACL is to register with ASIC between 1 April and 30 June 2010. Registration is a transitional authorisation to continue to provide credit and means the credit provider must do certain things, including provide credit efficiently, honestly and fairly and be a member of an approved external dispute resolution scheme. Note that FAA members are entitled to join COSL for free.

Having registered, you must apply to ASIC for your ACL between 1 July and 31 December 2010. Expect the application form (and ASIC's processing of it) to be long and complex, if the apparently similar AFSL process is any guide.

The fundamental point is, however, that having an ACL imposes many new obligations which will require a

commitment (ie time and money) to meet. Failure to meet these obligations could mean losing your ACL. ASIC has very wide powers to ensure ACL holders either met their obligations or cease operations.

Apart from the EDR and efficient, honest and fair obligations (that start on registration) , ACL holders must:

- maintain their own competence
- ensure their representatives are trained and competent
- have internal dispute resolution procedures that meet ASIC standards
- have compensation arrangements (for loss or damage as a result of breaches of obligations) that meet ASIC standards
- have appropriate compliance systems
- have adequate resources and risk management systems.

As well as the responsible lending consultation paper, ASIC has issued consultation papers on:

- general conduct obligations for credit licensees
- compensation and financial resources arrangements for credit licensees
- dispute resolution requirements for consumer credit and margin lending (among other submissions, Min-It Software and the FAA made a submission on this paper)
- competence and training for credit licensees.

Finalised versions of these papers will issue in due course. ASIC has also said it will issue:

- registration and transition guidance
- guidance on the scope of the licensing regime
- a licensing kit and application form.

Obviously, the sooner ASIC clarifies its position on all of these things, the better prepared we can all be for a very demanding 2010.

But wait..

As if the New Act and New Code aren't enough, members should be aware of the changes to the ASIC Act 2001. These changes will make "unfair" terms in standard form contracts with consumers void.

A term will be "unfair" if it causes a significant imbalance in the parties' rights and responsibilities and is not reasonably necessary to protect the legitimate interests of (in this case) the credit provider.

These provisions effectively apply Victorian law nationally, and no longer exclude regulated consumer credit contracts from their operation.

ASIC has been urged to issue guidelines on these new provisions asap (as they apply to financial services). However, it is not clear when these new provisions will commence. Until very recently, a start date of 1 January 2010 had been

expected. The Government has proposed deferral of the start date until 1st July 2010, as well as other changes which, in general, make the provisions slightly more business-friendly.

Members will need to monitor the start date and final form of the unfair terms provisions over the next few months.

Bankruptcy Amendment Bill introduced

The Attorney-General, Robert McClelland, has introduced the Bankruptcy Legislation Amendment Bill 2009 into Parliament.

The Bill introduces a number of reforms, including:

- increasing the minimum amount for which a creditor can petition for bankruptcy from \$2,000 to \$10,000;
- increasing the stay period from when a declaration of intent to file a debtor's petition is filed to when a creditor may commence action to recover debts from seven to 28 days;
- increasing the income, asset and debt thresholds to allow more people in financial distress to enter into voluntary debt agreements;
- introducing a more efficient and transparent process for fixing and reviewing trustee remuneration;
- strengthening the penalties for some offences, particularly those involving fraud; and enhancing powers for the Inspector-General in Bankruptcy to investigate possible offences.

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