The Financier

THE FINANCIERS ASSOCIATION OF AUSTRALIA LIMITED NEWSLETTER

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Welcome to the Spring 2010 edition of the Financiers Association of Australia 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.

Moving Along with National Consumer Credit

We are now several months into the new National Consumer Credit regime. There are a lot of changes happening. It's time to take stock.

The story so far

You've had to register with ASIC by 30 June, as a first step towards getting an Australian Credit Licence (**ACL**). You are now a "registered person".

From 1 July 2010 the new National Credit Code (**NCC**) replaced the Uniform Consumer Credit Code (**UCCC**). You should be using the new customer forms required by the NCC, including:

- Information Statement – "Things You Should Know About Your Proposed Credit Contract"; and
- default notices.

Also from 1 July 2010, financiers that are not registered financial corporations and brokers have had to comply with some of the new responsible lending requirements. For brokers, it basically means not assisting someone to get an unsuitable loan or credit increase; for lenders, it means not entering into an unsuitable loan, or giving an unsuitable credit increase. You should have processes in place right now to ensure that you are lending responsibly.

What should you be doing now?

If you haven't made your ACL application already, you will want to do so soon. You have until 31 December 2010 to lodge it, but don't leave it until the end of the year.

Remember that you need all your licence conditions in place from the date of commencement of your licence. You can nominate a licence commencement date up to 3 months ahead of when you lodge your licence application. However, your ACL must start by 1 July 2011 at the latest.

Responsible lending phase 2

You should also now be getting your procedures and documentation in order for the second phase of responsible lending.

From 1 January 2011, you will have to give the customer a credit guide, with information about you, your responsible lending obligations, and your dispute resolution processes.

If you are a broker you will also need to start providing a credit quote and a credit proposal disclosure document. These documents contain information about the costs that the customer will have to pay in connection with your services.

If requested by the customer, you will also need to provide a copy of the suitability assessment you made before deciding to offer a loan (or an increase). So you should be developing a form that you can provide on request, which sets out the basis on which you decided to offer the credit.

Short-term credit

The NCC is very similar to the UCCC, but there are some important differences. One of them that affects micro lenders in particular is the change to the exemption for short-term credit.

Under the UCCC, credit for not more than 62 days was not regulated unless the credit fees and charges were more than 5% of the amount of credit, or the maximum interest charges exceeded an amount equal to interest charges on a 24% APR. Under the NCC, the 24% APR rate cap remains, but the 5% fee cap now includes fees payable to third parties – such as fees payable by the customer to a broker or to a related company of the lender (like servicing fees).

Pawnbrokers

The exemption for pawnbroking has also changed.

The UCCC did not apply to credit provided on the security of pawned or pledged goods by a pawnbroker in the ordinary course of a lawfully conducted pawnbroker's business.

Under the NCC, there is a condition on this: as long as the pawnbroker's only recourse when the debtor is in default is against the goods provided as security.

As with the UCCC, exempt pawnbroking transactions under the NCC can still be reopened if they are unjust.

Maximum interest rates

Maximum interest rates legislation that exists in some states has been preserved, for the time being at least.

In New South Wales, however, the rate cap calculation has changed. The 48% cap is calculated including fees and charges, but the legislation now requires that fees and charges to third parties such as broker fees must be included, not just fees and charges payable to the credit provider.

Changes to jurisdiction

When you are enforcing a debt, you should be aware of the changes to court jurisdictions that have been brought about with the NCC. The NCC is Federal legislation, in contrast to the State-based UCCC. As a result, Federal courts now have jurisdiction, and some State and Territory courts and tribunals no longer deal with consumer credit matters.

Dispute resolution and collections practices

As a registered credit provider or credit assistance provider, you must have an internal dispute resolution (IDR) and you must also be a member of FOS or COSL, the two ASIC approved external dispute resolution (EDR) schemes. You can find further guidance in ASIC's updated Regulatory Guide 165 (RG 165) *Licensing: Internal and external dispute resolution* released on 7 May 2010. (While you are registered with ASIC but waiting on your ACL, your existing IDR procedures will be fine if they comply with the requirements set out in the May 2009 version of RG 165).

The IDR and EDR requirements will also affect the way you collect debts.

If you have a dispute with a customer relating to a default notice, while the dispute is being handled at IDR, and for a reasonable time after that (at least 14 days), you must not commence or continue legal proceedings or any other enforcement action, unless the statute of limitations is about to expire.

You must have a dedicated telephone number and where possible fax number, postal address and email address to accept and handle hardship applications.

Disputes involving hardship applications or postponement of enforcement proceedings must be treated as urgent matters.

Under the NCC, a credit provider has 21 days to consider a request for hardship relief or postponement of enforcement proceedings. Once these 21 days are up, the IDR stage ends and the customer should be referred to EDR if the matter has not been resolved. Similarly, if the credit provider reaches agreement with the disputant, under the NCC the credit provider is required to confirm this in writing within 30 days. There is no further time under the IDR process for a dispute about this, and the matter should be referred to EDR if it has not been resolved.

The right to go to EDR and the EDR's contact details must be included when the disputant is advised in writing of the outcome of the hardship or postponement request, or when the terms of approved hardship or postponement are confirmed in writing to the customer.
A disputant may lodge their dispute directly with the EDR where the dispute involves a default notice that has been issued after a request for hardship assistance or postponement of enforcement proceedings has been declined.

Each EDR scheme has rules which as a member you must observe when dealing with customer disputes.

Under the terms of reference of FOS, for example, if a customer files a dispute with FOS and legal proceedings are already underway, you must suspend the proceedings (except to the minimum extent necessary to protect your legal position), until the complaint is resolved by FOS. This only applies if the customer has not taken any further step in the proceedings beyond lodging a defence, or defence and counterclaim.

Is this taking away the power of the courts? No. The courts still have all their powers. What is different is that as a member of an EDR scheme, you have agreed to a rule that requires you to stop the court process while the matter is in EDR.

Brokers and referrers

If you are a credit provider getting business from brokers or referrers or both, you have to make sure they are properly authorised to be engaging in their activities.

Brokers need to be either registered persons or a licensee in their own right, or the appointed credit representatives of a registered person or licensee. Brokers cannot act as the credit representative of multiple licensees unless each licensee has consented.

If you deal with someone in your business who is doing broking but is not a registered person or a licensee, that's not just a problem for them – you are also committing an offence. So make sure that the brokers you deal with are registered or licensed.

Referrers are another matter. Regulations have been made to exempt referrers from registration and licensing. But there are conditions, and unless the referrer meets these, they may still need to get an ACL.

If the referrer's main business is referrals, then the exemption is very limited. A referral in that case will only be exempt if:

- The referrer informs the consumer that a licensee or registered person, or a representative of the licensee or registered person (the **provider**) is able to provide a particular credit activity or a class of credit activities.
- The referrer gives the consumer information about how the consumer may contact the provider. It may also make arrangements enabling the consumer to contact the provider by means of a link that can be accessed from a website provided by or for the referrer or an associate of the referrer. Any other credit activity beyond this narrow range would bring the referrer outside the exemption.

- At the same at the time, the referrer must disclose to the consumer any benefits (including commission) that the referrer (or an associate of the referrer) may receive in respect of the activity, or that is attributable to the activity.

- The benefits disclosure must be in the same form as the information given by the referrer about the provider. For example, if the referrer gives the information about the provider in writing, the benefits disclosure will also have to be in writing.

If the referrer's main business is not referrals, then other conditions have to be met if it wants to be exempt. This includes having a written agreement with the registered person or licensee, not charging any fee to the consumer for the referral, and the licensee keeping a register of referrers. There are also time limits on when the referrer must pass on customer details to the licensee and when the licensee must contact the customer. These arrangements must be in place by 1 October 2010.

Personal property securities, coming soon

The other big reform affecting financiers is the new national law for personal property securities (**PPS**), which is scheduled to commence in May 2011.

If you take security over motor vehicles or other goods, or company charges, the PPS law will change the way you register your security interests. Registration of all new security interests of this kind will be made on the new national Personal Property Securities Register. Registration fees are yet to be finalised, but at the time of writing the following are proposed (exclusive of GST):

- Register Financing Statement for an undefined duration: $130.
- Register Financing Statement where duration is 7 years or less: $7.40.
- Register Financing Statement where duration is more than 7 years but less than 25 years: $37.
- Search the online register by reference to the grantor's details, by serial number or by registration number: $3.70.
- Searches through the contact centre by phone will be charged at the same price as an online search.
- Searches through the contact centre by mail, email or fax, and requiring a printed search result will attract a higher fee of $29.50.

Privacy law reform on slow track

While there is good progress with National Consumer Credit and PPS, privacy law reform is moving slower.

In October 2009 the Federal Government announced its response to most of the recommendations for privacy law reform made by the Australian Law Reform Commission in its 2008 review of privacy law. The accepted recommendations included the introduction of "positive" credit reporting.

We were supposed to see draft legislation in early 2010, but to date all that has appeared has been some draft wording for the new privacy principles.

With positive reporting, credit reporting information held by a credit reporting agency (such as Veda Advantage) can include (in addition currently permitted content):

- type of credit account opened (for example, mortgage, personal loan, credit card);
- date on which credit account was opened;
- current limit of open credit account; and
- date on which credit account was closed.

Data from existing accounts can be listed when the amendments to the legislation take effect. As credit providers begin to start providing this information, it should improve the value of the credit report in the credit assessment process, and so assist in meeting responsible lending obligations.

The amended Privacy Act will also permit credit reporting information to include repayment performance history, indicating:

- whether over the prior 2 years the individual was meeting repayment obligations as at each point of relevant repayment cycle for a credit account; and, if not,
- the number of repayment cycles that the individual was in arrears.

Credit providers will be able to list repayment history information dating from April 2010, once the amendments have been enacted. Only minimal information in relation to repayment history will be able to be collected by credit reporting agencies and disclosed to credit providers, however. This information will not include information about account balances or specific repayment amounts. The Privacy Act will clearly set out when a 'missed repayment' will be deemed to occur.

Not all credit providers will be able to access the repayment history information: only credit providers subject to the responsible lending provisions of the National Consumer Credit Protection Act.

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