

HOW TO SUCCEED IN BUSINESS WITHOUT REALLY COMPLYING

Carolyn Bond, Manager
Consumer Credit Legal Service Inc (Vic)

1 Introduction

I have been dealing with consumer credit problems for over 20 years – other people’s problems that is!

The most frustrating thing is that despite heaps of legislation, and the best intentions of regulators and some in the industry, we continue to see many consumers who’ve been ripped off by lenders who are avoiding legislation - or at least skirting around it. In many cases there is little we can do to help the consumer.

So, I’ve decided to put my experience to good use – to share what I know so that you too can succeed in business without really complying!

Perhaps you’d like to enter the consumer credit industry – but who’s left to lend to? Although the banks continue to offer “pre-approved” credit limit increases to many low-income consumers, there may be some scope to further exploit this part of the market – aged, pensioners, low income. Or perhaps you already have a customer base, but want to ensure that you can keep up your volume of lending without having to worry too much about whether the sales people – car dealers, furniture stores, or even finance brokers – cut a few corners. Because we all know that if you’re not careful, these enthusiastic, commission driven people can cause you, the lender, problems later on.

Unfortunately, consumer credit legislation (and other consumer protection legislation) can be somewhat bothersome – especially if you are lending to vulnerable groups, or if you are relying on third parties, such as car dealers or brokers, to market your product.

So, what can be done to avoid having to comply? Well, the good news for you is it’s easy! – and even if you do get caught, it’s unlikely to be a major problem.

2 How to Avoid Consumer Legislation

2.1 The Business Purpose Declaration

Simply insert a clause in your credit contract which enables the consumer to sign that the loan is for business purposes. This will put the contract outside the Uniform Consumer Credit Code (UCCC)¹. The only risk you run is that the consumer could try to prove that you knew the credit was for personal use – But – that’s easy solved, just make sure that you.....

2.2 Lend through Brokers or Dealers

Tell brokers or dealers who send you business that you only lend for business purposes and require a Business Purposes Declaration to be signed. Even if the broker knows the loan is for consumer purposes, you have never met the borrower and you KNOW NOTHING!!. By the way, brokers and dealers can be the lenders best “protection”! If you really want to shore up your defences, have a dealer AND a broker between you and the consumer! You may even be able to avoid linked credit obligations for trader misbehaviour!

So, you can take advantage of lending to consumers even if they can’t afford the payments (just make sure you can mortgage their home}. You, the lender, were told it was for business purposes, so the UCCC doesn’t apply, and the consumer won’t be able to apply to have the unjust contract re-opened under the UCCC.

But, what if you’re a broker – aren’t you taking a risk? Doesn’t the broker contract fall under the finance brokers laws in Victoria²? No – if the loan isn’t covered by the UCCC, then the broker’s conduct isn’t covered – so as long as you got that Business Purpose Declaration signed, you’re in the clear!

Take one of our client’s Mavis. An aged pensioner living alone, she approached a finance broker for a loan to pay off some outstanding debts. The broker arranged an interest only loan from a solicitor mortgage practice secured by a first mortgage over her home. Mavis had no idea this was an interest only loan. She had no means of repaying the principal once the loan term expired, and did not realise one of the documents signed by her was a business purpose declaration. There was no direct contact between the lender or solicitor and the borrower.

The Consumer Credit Legal Service (CCLS) lodged an application at Victorian Civil and Administrative Tribunal (VCAT) seeking to have the contract reopened on the basis that it was unjust. CCLS argued that despite obtaining Mavis’ signature on the Business Purposes Declaration, the broker knew that the loan was not for business purposes. However, while VCAT found that the declaration was not in the required form, it found that it provided evidence supporting the lender’s argument that it had a

¹ If a declaration is made by the consumer, prior to entering into the credit, that the credit is for business purposes, credit is presumed not to be provided for personal, domestic or household purposes.

² Part 4a of the Consumer Credit (Victoria) Act

genuine belief that the loan was for business purposes. On that basis, VCAT found that the UCCC did not apply and the application was rejected. Mavis lost her home.

If you're still worried that a Business Purpose Declaration might not be enough to protect you as the lender, make sure that you arrange loans.....

2.3 Where the lender is an individual.

Some brokers and solicitors arrange loans where the lender is an individual investor. Despite the fact that the person arranging the loan does it as part of a business, the contract is not covered by the UCCC unless the lender provides the credit "in the course of a business of providing credit or...incidentally to any other business..." We do expect this loophole in the UCCC to be closed at some stage – so make the most of it while you can!

2.4 Consumer Leases

Consumer leases require less disclosure than other forms of consumer credit. High "interest rates" can be hidden, and it's harder for dealers to mess up the paper work. So, even if the consumer has no intention of leasing, convince them of the benefits of leasing – or simply offer them no alternative. Better still, encourage the trader to get the Business Purpose Declaration and the lease won't be covered by the UCCC at all!

2.5 Fringe Lending

We can learn much from the fringe lenders – those who lend at high rates to low income consumers. Firstly they simply charged fees, instead of interest – in some cases to avoid UCCC coverage (on the basis that they didn't charge interest!) and to escape the interest rate caps in some states³. Now one of those loopholes is being closed – fees will be converted to interest for purposes of UCCC coverage, but stating the cost as charges rather than interest can still avoid the interest rate cap. But this isn't only relevant to the fringe lenders. Mainstream lenders are jumping on the bandwagon – if you want to advertise low interest rates, simply consider "upping" the fees and charges on your mortgage loans or credit cards. Consumers can individually argue that fees are unconscionably high – but this will not provide any systemic solution for consumers.

Consumer advocates have been complaining about some lenders who take security over basic household goods. While the goods are of little value to the lender, the thought of losing everything, including the beds and fridge is horrific for the consumer, who will do anything to find the payments. Some people are even saying this is unconscionable conduct – but the lenders are only trying to make a living, and no-one's got in their way yet.

Another way to avoid the UCCC is to increase the cost of the goods and sell on interest free terms. Some car dealers are selling cars at a higher price than the

³ 48% in Victoria, and only 30% if there is a mortgage.

customer would expect to pay, and selling on “interest free” terms. It is very difficult to show that there is an interest component, and the consumer doesn’t get any of the rights under the UCCC such as proper disclosure on contracts, notice prior to repossession or the right to apply to have the credit contract reopened.

However, for ingenuity, one company takes the cake! They are trialling an innovative product. They’ve apparently found a way to lend to low income consumers, under threat of losing their furniture for non-payment – and they’ve managed to avoid some provisions of the UCCC as well! They simply purchase household goods and sell them back to the consumer on terms! They argue that although the consumers don’t own their furniture until the final payment, it is not a mortgage and they don’t have to comply with UCCC requirements to give notice prior to “repossession”. Ingenious!! So, if anyone ever tells you that the UCCC will protect vulnerable consumers – don’t believe them.

2.6 Confuse your customer.

Convince the consumer to sign up to refinance their mortgage – but add enough bells and whistles so that they think they’ll save thousands with this “magic” product. Make sure you stay in their home for some time – and whatever you do, don’t leave any notes or examples used during the presentation. (Mind you, if you are misleading consumers into believing that a mortgage product alone will save them heaps, make sure that it is a verbal representation made in the middle of a long spiel – don’t make the mistake that one bank did. They recently agreed to change their newspaper advertising for such a product when concerns were raised by ASIC.)

3. What About Consumer Rights?

Hardship variations can be a problem – the UCCC allows consumers to apply to VCAT if you don’t agree to a hardship variation. My advice is to ignore it as long as you can – some consumers will give up. If they don’t, be reasonable at the last minute when the consumer has had to seek advice and issue in VCAT – no skin off your nose - even the \$30 fee must be paid by the consumer!

Consumers have a right to obtain documents – but be reassured, although there are penalties for failure to provide them, there haven’t been any prosecutions. In any case, you may be able to put them off by asking for \$60 per hour to look for documents as one bank does.

So you’ve tried to follow my advice, but you’ve just done the wrong thing and someone’s found out. Don’t worry – relax.

Make sure that you settle individual matters – this may keep consumer advisors and regulators off your back. While there is always a desire to address systemic, unfair practices, their attention is more likely to be drawn to areas where consumers are complaining – hopefully they won’t get in your way in relation to your treatment of all the consumers who haven’t complained.

Even if prosecution or enforcement action is threatened, you'd be unlucky to get caught. Under the UCCC you can be prosecuted for many things – disclosure breaches, failing to give notice prior to repossession, unauthorised entry onto property, failing to provide documents when requested, and requiring insurance to be taken out with a particular insurer – Oh, and about 44 other things!!

However, while there have been a handful of civil penalty matters, we can't find records of even one prosecution under the UCCC in Australia.

4. How Can Consumer Rights Really Be Protected?

Now, putting my consumer hat back on - what can I suggest to government and regulators? There is no simple answer – avoidance or “skirting around” the laws is dollar driven. – and unlike abuse of the tax laws, there is little financial incentive for government to put in resources.

Government must be prepared to evaluate the practical effect of current legislation. This must be more than identifying the loopholes and closing them. Before simply changing legislations, questions must be asked:

- What is the extent of compliance?
- Are consumers enforcing their rights?
- Is it practical and worthwhile for consumers to do so?
- What are the barriers to regulators enforcing the legislation?
- Are we seeing the “honest” credit providers complying and others not bothering?
- Is there incentive for industry to resolve complaints and disputes early – or do they benefit from “dragging it out”?

I don't have all the answers to these questions, but we must ensure that:

- the legislation contains the appropriate protections;
- consumers can effectively enforce their rights; and
- enforcement action is taken where necessary.

Let's consider an example. Joe has had difficulty keeping up his car payments due to illness. He contacts the lender which threatens to repossess, but doesn't tell him he has the right to apply for a variation. Joe is advised of this right by a community organization, which helps him write a request for a variation, but this is immediately refused. Joe applies to VCAT for a variation with assistance from a community lawyer, and pays the \$30 fee. At this stage, the company agrees to the variation. This system encourages credit providers to ignore variation requests and dissuades consumers from applying for them.

Imagine that Joe had not applied for the variation and the company had repossessed. It is often the case that this is done with incorrect notice - or private property is entered in breach of the UCCC. There is little point in Joe going to VCAT. The UCCC doesn't provide a remedy for Joe – his car wouldn't be returned, and it is unlikely that his debt would be reduced. So Joe won't take any action – and despite a penalty for these breaches of the UCCC, if we consider the history of prosecutions, neither will the regulator.

Compare Joe's situation to the procedure under the electricity industry ombudsman schemes in Victoria and New South Wales. Prior to disconnection, the suppliers must take steps to negotiate a repayment plan with the customer. If disconnection is threatened and the customer complains to the Ombudsman, the Ombudsman will investigate whether this has been done – and if the matter is not resolved the Ombudsman's costs will be met by the electricity supplier. I'm not suggesting that this exact approach would suit the credit situation, however we must consider a range of options to make the UCCC work. We also need to examine ways of bringing the strengths of industry alternative dispute resolution (ADR) and VCAT together. VCAT is often quicker than industry ADR, but it can be more intimidating for consumers – and the industry funding of ADR provides an incentive for industry to address complaints adequately and resolve them quickly.

Enforcement is a crucial in creating greater compliance. We are pleased to see Consumer Affairs Victoria putting a strong emphasis on enforcement, and consumer agencies are keen to work with them.

I believe there is a need for more resources and a smarter approach to enforcement. Perhaps we need to clearly separate two types of breaches – breaches of prescriptive provisions that are easy to identify, and unfair conduct that may amount to unconscionability, misleading and deceptive conduct or similar proscribed behaviour.

Extended civil penalty provisions would make it easier for consumers to enforce the first type of breaches, freeing up regulators to take on more difficult matters – either where there is evasion of legislation or unfair conduct, as in some of the examples mentioned above.

Currently, most enforcement action requires one or more consumers to be prepared to give evidence against the credit provider – often at no benefit to the individual consumer – in fact, we are expecting consumers with their own problems to perform a public service. An extension of the use of civil penalties in legislation would ensure a benefit for the consumer or consumers taking the action. So, consumers could individually, or jointly, seek penalties from credit providers for a range of conduct where it is unnecessary to prove intent - including failure to provide documents when requested, illegal repossessions, and prescribed unfair debt collection practices. The procedure needs to be as simple as possible – basically an “on the spot fine” with an incentive to report.

If individual consumers, or their representatives, could easily take enforcement action on prescriptive provisions, regulators could concentrate on the tougher issues. Currently some of the worst abuses are going unpunished, as these tend to be the most difficult to pursue. Increased resources are needed for regulators to implement such an approach. However, commitment to such action may be the only way to deliver a strong message to credit providers who play “chicken” with the laws and regulators.

Carolyn Bond
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