

National Consumer Credit Protection Act 2009 (Cth)

National Credit Code

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Overview of presentation

- What's new? New purpose, licences, responsible lending obligations, remedies
- The Code: old favourites with a little extra, including hardship variations
- Dispute resolutions: EDR, Courts



Other considerations

- What is your client's financial position?
- Is it in your client's best interests to pay?
- Do they have assets/income at risk?



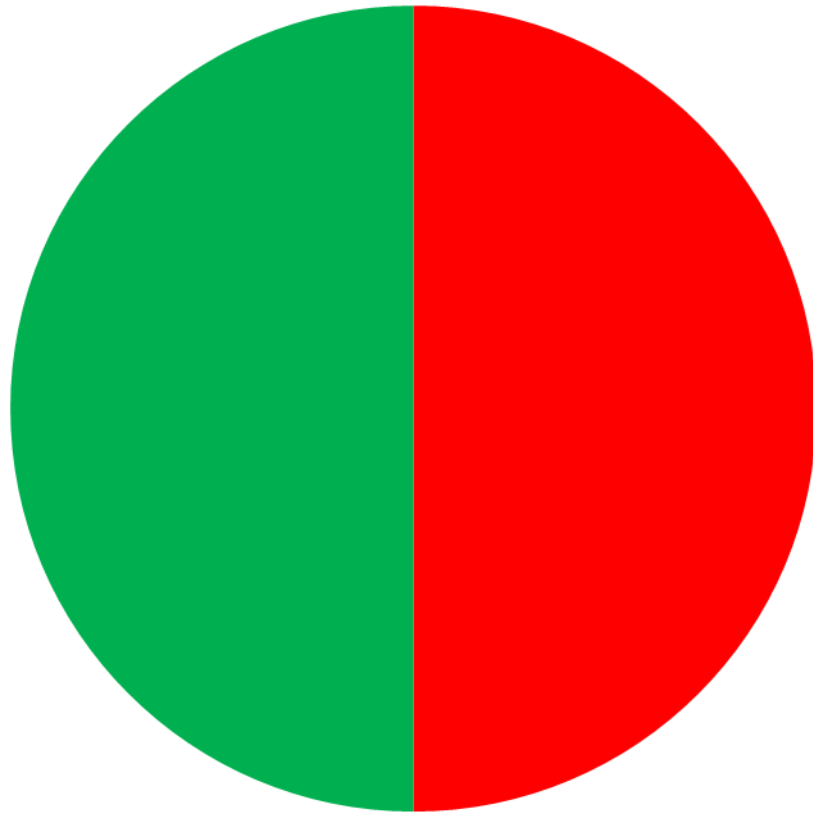
Relevant legislation

- National Consumer Credit Protection Act 2009 (Cth) – NCCP Act
 - Including the National Credit Code – New Code
- National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009
- National Consumer Credit Protection Regulations 2010 – NCCP Regs
- Consumer Credit (Victoria) Act 1995
- Consumer Credit (Victoria) Code – Old Code

What's new?

- Licensing
- EDR membership for all
- Credit Guides
- Responsible lending obligations
- New finance broking laws
- Goodbye VCAT, hello Court
- Amended Credit Code

The new purpose test



■ Business and MOST investment

■ Consumer AND investment in residential property

The new purpose test

5 Provision of credit to which this Code applies

(1) This Code applies to the provision of credit ... if when the credit contract is entered into or (in the case of precontractual obligations) is proposed to be entered into:

- (a) the debtor is a natural person or a strata corporation; and
- (b) the credit is provided or intended to be provided wholly or predominantly:
 - (i) for personal, domestic or household purposes; or
 - (ii) to purchase, renovate or improve residential property for

investment purposes; or

- (iii) to refinance credit that has been provided wholly or predominantly

to purchase, renovate or improve residential property for investment purposes; and

- (c) a charge is or may be made for providing the credit; and
- (d) the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.

The new purpose test

- Note certain exclusions: e.g short term credit, pawn broking (unjust contracts included: s 7 Old Code/ s 6 New Code)
- Express inclusion of certain sales of goods by instalments: s 10, 10A – 10C UCCC/ s 9 – 12 NCC (e.g. vendor terms, Motor Finance Wizard model)

Business Purpose Declarations

- Presumption the Code applies:
- Business Purpose Declarations (BPDs) no longer conclusive: s 13 New Code/contras s 11 Old Code
- BPD ineffective if not in prescribed form:
- BPD ineffective if credit provider or **prescribed person** knew or *ought to have known* (my summary) that the declaration shouldn't have been given: s 13 New Code, s 67 NCCP Regs/ significantly strengthened compared with s 11 Old Code, sch 1 Old Code



Australian Credit Licences

- The NCCP Act seeks to regulate 'credit activity' – credit providers, lessors, those engaged in 'credit assistance' (incl finance brokers), intermediaries, assignees of regulated debts
- Generally, if a business is engaged in credit activity it must hold a licence and comply with the obligations in the NCCP Act.

Australian Credit Licences

- For our purposes, check if the person engaged in credit activities is:
 - **registered** or holding a **licence** after 1 July 2010;
 - holding a **licence** after 30 June 2011.
- Registration can be checked at:
<http://www.search.asic.gov.au/credit/hlb.html>

Responsible Lending Obligations - Generally

- Chapter 3 of the NCCP Act sets out new responsible lending obligations which are based on:
 - disclosure of information: credit guide, quote for work.
 - assessment of suitability.
- Each type of licensee (lender, lessor, broker, etc...) has slightly different obligations

Responsible Lending Obligations - Generally

- Suitability obligations:
generally commence 1 January
2011- for some obligations
commence 1 July 2010)
- Disclosure requirements -
credit guides etc: commences
1 January 2011



Remedies under the NCCP Act

- A consumer may apply for compensation, and other specified orders, caused by a breach of a civil penalty provision of the NCCP Act: s 178 and 179 NCCC Act
- Criminal penalties may also apply.

Responsible lending obligations – Credit Providers

- A lender must assess whether the credit contract will be unsuitable for the consumer: s 128 NCCP Act
- In making an assessment a credit provider must:
 - Inquire about a consumer's requirements and objectives in relation to a credit contract;
 - Inquire about a consumer's financial situation;
 - verify the consumer's financial situation: s 130 NCCP ACT

'Unsuitable'

Credit will be unsuitable where:

- it is likely that the consumer will be unable to comply with their financial obligations under the contract, or not without substantial hardship; or
- the contract will not meet the consumer's requirements or objectives: s 131 NCCP Act



‘Unsuitable’

**Asset-based lending
over a home is
presumed to be
substantial
hardship: s 131 (3)**



Finance broking

- Finance broking falls under the category 'credit assistance'
- Must hold an Australian Credit Licence
- Compulsory EDR membership



Finance broking - credit guide

The credit guide must disclose:

- fees and commissions
- the credit providers with whom the broker conducts business
- EDR contact details: s 113 NCCP Act



Finance broking - quote

- Maximum amount of fees payable
- a breakdown of the fees
- Whether or not the fees are payable if a credit contract is not entered into: s 113 NCCP Act



Finance broking

NO

CAVEATS:

S 114 (6) NCCP Act



Finance broking – credit proposal

The credit proposal must disclose:

- broker fees
- broker commissions
- credit provider fees
- net credit available to the borrower after fees are paid: s 121 NCCCP Act



Finance broking

**Brokers have
responsible
lending
obligations too:**

s 115 NCCP Act

Key protections offered by the Code

- Hardship
Variations: s 66
Old Code/ s 72
New Code
- Unjust
Transactions: s
70 Old Code/ s
76 New Code
- Disclosure
- Linked Credit
provisions
- Termination &
Default

National Credit Code - new

- No more mortgages over household property (blackmail securities): s 50
- Hardship variation threshold increased to \$500k (loans entered into after 1 July 2010)
- Credit provider must respond to variation request within 21 days: 72(3)

National Credit Code

- More detailed default notices: s 88
- Special direct debit default notices: s 87
- Right to get your repo'd goods back, even if you're still in default: 96

New Code and Old Code – transitional considerations

- Generally, the New National Code will apply under the new NCCCP Act if the contract was entered into on or after 1 July 2010.
- Generally, the Old Code will effectively apply under the NCCCP Act if it was entered into prior to 1 July 2010.
- *See: National Consumer Credit Protection (Transitional and Consequential Provisions) Act*



Hardship variations

- Attempt to negotiate with the creditor for reduction in the amount owed
- Hardship Variations
 - S66 of the Old Code/ s76 New Code allow a Court to amend a contract on where there has been hardship
 - Different thresholds for New Code/Old Code
 - CI 25.2 of the Banking Code of Practice
 - CI 65 ff of MFAA Code of Practice
- FOS/COSL

Dispute Resolution

- **A credit licensee must be a member of an EDR scheme**
 - **FOS or COSL**

Dispute Resolution

For all contracts:

- Before 1 July 2010: VCAT
- VCAT proceedings commenced prior to 1 July 2010 may continue in VCAT: Credit (Commonwealth Powers) Act 2010 (Vic)
- On or after 1 July 2010: State and Federal Courts
- Debtor can elect a to have a small claims procedure for certain claims: e.g. unjust contracts (contract <\$40k), unjust fees (contract <\$40k), hardship variation



Dispute Resolution

- Complain to ASIC



Phase II

Includes review of:

- Interest rate cap - campaign for 48% real cap
- Point of sale credit
- Reverse mortgages
- Comparison rates

Commencement

- 1 Jan 10: compulsory licensing/registration
- 1 Jul 10: National Credit Code
- 1 Jul 10: unsuitable credit prohibition (small fry)
- 1 Jan 11: unsuitable credit prohibition (big boys)
- 1 Jan 11: other responsible lending obligations



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