



# commonwealth regulation of credit

A summary prepared by Gadens Lawyers based on the drafts released on 27 April 2009

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This summary is organised under the following headings.

- changes to the UCCC
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## key points

The new legislation will be called the ***National Consumer Credit Protection Act*** and:

- contains the Uniform Consumer Credit Code (UCCC)
- extends regulation of consumer lending to include loans to individuals to purchase residential property for investment purposes
- provides for the regulation of credit providers, finance brokers, and other intermediaries
- requires lenders and intermediaries to be registered by 31 December 2009 and have applied for a licence by 30 June 2010
- makes membership of an external dispute resolution scheme compulsory
- establishes a new regime of disclosure to consumers for both credit providers and finance brokers.

## changes to the UCCC

The new UCCC is adopted largely from the existing state based code with the following key changes.

- regulated credit will include loans to individuals for the purchase of residential property for investment purposes. Residential property includes vacant land on which a residence will be built
- the current ***conclusive*** presumption that a loan is regulated if a business purpose declaration is obtained will be changed to be just a presumption. The business purpose declaration will therefore be ineffective if the lender knew that the loan was a regulated loan. A new form of business purpose declaration is prescribed

- mortgages over essential household property (except antiques) will be prohibited, unless made to finance the purchase of that property
- mortgages over goods used by the mortgagor for income by personal exertion will be prohibited (except goods with a value over a specified amount)
- lenders must advise the outcome of a hardship application within twenty-one days of the application being made
- section 70 (unjust transactions) will be extended to allow the initial interest rate applying to a loan to be reviewed if unjust
- if ASIC considers that it is in the public interest, ASIC may represent individuals or classes of individuals in respect of hardship applications, unjust transactions, challenge of early repayment fees, and changes to interest rates
- default (section 80) notices will need to disclose additional information
- the requirement for comparison rates in advertisements will continue, but Comparison Rate Schedules will be abolished
- a new direct debit default notice will be introduced
- the Borrower Information Statements and Guarantor Information Statements will be amended to refer to External Dispute Resolution (**EDR**) schemes

## registration and licensing regime

The licence will be called an **Australian Credit Licence (ACL)**.

An ACL is required if a business is involved in a **credit activity**, namely:

- credit contracts (ie being a lender or exercising the rights of a lender)
- credit service (ie providing credit assistance or acting as intermediary)
- consumer leases (ie being a lessor of a consumer lease or exercising the rights of a lessor)
- mortgages (ie being a mortgagee or exercising the rights of a mortgagee)
- guarantees (ie being a beneficiary of a guarantee or exercising the rights of a beneficiary under a guarantee)
- prescribed activities (none prescribed yet).

There are broadly two types of businesses:

- credit providers (lenders)
- credit service providers (arranges loans or acts an intermediary)

The timetable for registration for both credit providers and credit service providers is:

- 31 December 2009 – be registered (applications can be made from 1 November 2009). If a business is not registered by 31 December 2009, it will be prohibited from engaging in a credit activity until licensed. Registration is therefore a critical step for all lenders and intermediaries

- 1 January 2010 - 30 June 2010 – be registered and have applied for a licence by 30 June 2010. Obtaining a licence could be a lengthy process as it may be as complicated as obtaining an AFSL
- 30 June 2011 – must hold a licence.

There will be a streamlined licensing application process for WA finance brokers holding an 'A' class or 'B' class licence and for ADIs.

All employees and directors of an Australian Credit Licensee will be 'representatives' of the licensee and will not be required to hold their own Australian Credit Licence.

Licensees will be able to appoint '**credit representatives**'. Credit representatives are similar to 'authorised representatives' under the financial services regime. There are strict obligations imposed on licensees appointing 'credit representatives' and as a result this arrangement may not be widely used.

### **obligations on registered persons**

In order to obtain registration, a person must:

- act efficiently, honestly and fairly
- comply with the conditions of registration
- comply with the credit legislation
- take reasonable steps to ensure that its representatives comply
- be a member of an approved EDR scheme
- ensure clients are not disadvantaged by any conflict of interest.

### ***Obligations on Australian Credit Licensees***

In addition to the requirements imposed on a registered person, a licensed person must also:

- undertake continuing education to maintain competencies
- have an internal dispute resolution system
- have adequate compensation arrangements in place - PI insurance is to be required for both credit service providers and credit providers (unless the credit provider is an ADI)
- have systems and a written compliance plan
- have adequate financial and human resources and a risk management plan (unless the licensee is regulated by APRA).

Licence numbers must be shown on all prescribed documents, namely:

- the documents required by Chapter 3 (credit guides, notices of credit assessment, disclosure of commissions)
- advertisements
- UCCC prescribed notices
- credit contracts.

## responsible lending provisions

### *Credit Service Providers (ie brokers and intermediaries)*

Before providing assistance to a borrower to obtain a loan, a credit service provider must:

- (a) provide the borrower with a Credit Guide
- (b) provide the borrower with a quote for providing the credit assistance
- (c) undertake a preliminary assessment of unsuitability of a credit contract for that borrower.

When making the preliminary assessment as to whether or not the credit is unsuitable for a borrower, the credit service provider must:

- (a) enquire about the borrower's requirements and objectives
- (b) enquire about the borrower's financial situation
- (c) verify that financial situation.

### *credit providers*

Before making a loan to a borrower or agreeing to increase the credit limit on an existing loan, a credit provider must:

- (a) provide the borrower with a Credit Guide
- (b) make an assessment as to whether the loan or increase in credit limit is unsuitable for that borrower.

When making that assessment, the credit provider must:

- (a) enquire about the borrower's requirements and objectives
- (b) enquire about the borrower's financial situation
- (c) verify that financial situation.

### *unsuitability*

Credit will be unsuitable if it is likely that:

- (a) the borrower could not comply (and repay) without hardship
- (b) the credit does not meet the borrower's objectives.

## disclosure regime

### *Disclosure by credit providers*

A credit provider must give to a potential borrower a **Credit Guide** as soon as practicable when dealing with a potential borrower. The credit guide must specify:

- the credit provider's name and contact details
- the credit provider's licence number
- details of EDR scheme membership

- compensation arrangements
- information about the credit provider's obligation to make an assessment as to whether a credit contract will be unsuitable for the borrower and that if requested a copy of the assessment will be provided to the borrower (industry is lobbying that the requirement to furnish a copy of the assessment should be dropped as it requires significant system change and there are issues about the content of such a report).

In addition, credit providers must give notice of any commission any employees, directors, or credit representatives are likely to receive. Industry is lobbying for the removal of this requirement as the disclosure of payments to employees and directors is inappropriate, and commissions paid to others is disclosed in the credit contract. Duplication of this disclosure is undesirable, and any improvement to pre contractual disclosure should be left to be dealt with in Stage 2 of this initiative.

### ***disclosure by credit service providers***

A credit service provider must also give the borrower a **Credit Guide** as soon as practicable when dealing with a potential borrower. The credit guide must specify:

- the credit service provider's name and contact details
- the credit service provider's licence number
- fees payable by the borrower and how they are worked out
- panel credit providers (maximum of six)
- commissions the credit service provider will receive
- details of EDR scheme membership
- compensation arrangements
- information about the credit service provider's obligation to make a preliminary assessment as to whether a credit contract will be unsuitable for the borrower and that if requested a copy of the assessment will be provided to the borrower (industry is lobbying that the requirement to furnish a copy of the assessment should be dropped as it requires significant system change and there are issues about the content of such a report).

In addition, a credit service provider must provide borrowers with:

- (a) a written quote for providing the credit assistance
- (b) a credit proposal disclosure document setting out:
  - (i) fees payable by the borrower
  - (ii) commission to be received by the credit service provider, any employee, director, or credit representative
  - (iii) total fees payable to the credit service provider in connection with the application
  - (iv) total fees payable to third parties (eg valuers)
  - (v) the amount of credit available after making the payments described above.

The Act requires the credit proposal disclosure document and written quote to be in the form prescribed by the regulations (if any). At this stage no form has been prescribed. Industry would like the credit proposal disclosure document to be permitted to form part of the Credit Guide so that there is a single document.

### ***credit representatives and debt collectors***

Credit representatives and debt collectors will also be required to provide Credit Guides and conform to some other requirements. These provisions are an unnecessary duplication as the credit provider and credit service provider's credit guides must also be provided.

### **penalty provisions**

The Act contains some serious penalty provisions including:

- criminal penalties including imprisonment for up to five years for breach of the responsible lending requirements
- civil penalties which allow ASIC to seek court orders imposing fines of up to \$220,000 for individuals and \$1,100,000 for corporations any time in the six years following a breach of a civil penalty provision of the Act
- fines imposed by ASIC
- compensation to consumers for loss or damage suffered.

These penalties may be imposed on both credit providers and credit service providers. Industry is particularly concerned by the criminal penalties and large pecuniary penalties which may be imposed on credit providers who make a loan which is found to be 'unsuitable' for a borrower.

This summary deals only with the main changes and describes the initiatives in general terms only. Gadens Lawyers can provide more detailed advice on request. This document does not comprise legal advice.