



Consumer Credit and Banking

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Introduction

This chapter provides an overview of the laws affecting consumer lending, credit rating and reporting (including privacy provisions) and the relationships between customers and banks.

Law in these areas can be very complex. Legal Aid Queensland has a specialist unit (consumer protection unit) providing advice on credit and debt, and its solicitors are able to support other lawyers helping clients struggling with loans. Caxton Legal Centre Inc. also has lawyers who practise in this area of law.

Loans Regulated by the National Credit Code

Traditionally, borrowers have little bargaining power in negotiating loans.

The National Credit Code (Credit Code) regulates all consumer lending, including new loans for residential investment property by non-corporate borrowers (individuals). The Credit Code is a schedule to the *National Consumer Credit Protection Act 2009* (Cth) (NCCP Act).

This law applies to all continuing loans that were entered prior to 1 July 2010 and that were regulated by the previous state law (the Consumer Credit Code).

Some of the new protections introduced by the NCCP Act had staggered commencement dates, and some new protections only apply to new loans or loans varied after 1 July 2010.

Section 5 of the Credit Code details the loans that are regulated. These are loans:

- primarily for personal purposes or
- provided to purchase, renovate, improve or refinance a residential investment property (i.e. not for business or investment purposes)

And

- that provide for interest or charges (the money you pay back exceeds the cash price of the goods or amount borrowed)
- provided by the lender as part of a business
- where the contract date is after 1 November 1996.

The Credit Code has special requirements for mortgages, guarantees, consumer leases and small- and medium amount loans.

Some types of lending are not covered. Some or all of the Credit Code (s 6(1)) does not apply to:

- some short-term loans
- loans made to a company
- loans primarily for investment purposes (except loans made after 1 July 2010 for residential investment)
- loans without prior agreement (e.g. when an account is overdrawn)
- bill of exchange discounting facilities

- insurance premiums paid by instalments
- pawnbroking (see narrow exemptions s 6(9))
- loans to beneficiaries by trustees of estates
- staff loans where the terms are more favourable than those to the public.

Application of the Credit Code

The Credit Code is presumed to apply to consumer credit, and it is up to the lender to show a court why the Credit Code should not apply to a particular loan (s 13).

When a borrower signs a Business Purposes Declaration saying that the loan is for business purposes, the presumption will not apply. However, if a lender knows the loan is not for business purposes and asks a borrower to sign a declaration, then the presumption does apply as the lender is attempting to avoid the application and therefore the consumer protection provisions of the Credit Code.

Rights and Obligations of Credit Providers

The NCCP Act introduces a licensing regime for any party providing credit assistance; this includes acting as a lender, intermediary, broker, mortgage manager, loan referrer, debt collector or lawyer. However, exemptions do apply (e.g. the point of sale exemption for car yards and retail stores selling cars and goods on credit) under the *National Consumer Credit Protection Regulations 2010* (Cth) (the NCCP Regulations).

Credit assistance includes recommending a loan, assisting with a loan application or recommending that a borrower stay with an existing lending product.

The Credit Code provides for certain requirements specific to:

- lenders relating to arrangements before and after a contract is entered including:
 - giving the borrower loan information before the loan is made (pre-contract disclosure)
 - responsible lending obligations contained in ch 3 of the NCCP Act to assess if the borrower can afford the loan inclusion of certain information in loans (s 17)
 - giving the borrower statements and other documents during the term of the loan (ss 33–34)
- mortgages and guarantees (e.g. requiring written mortgage or special disclosure)
- consumer leases
- reverse mortgages commenced 18 September 2012
- small-amount and medium amount loans including different interest rate caps for such loans commenced 1 July 2013
- the review by a court of the terms of a loan including a borrower's rights to ask the court to:
 - vary the terms of a contract if they are experiencing hardship (s 72)
 - re-examine and change the terms of unjust contracts (s 76)

- review changes to interest rate and unconscionable fees and charges (s 78), and procedures for the lender to follow when enforcing contracts or repossessing property or goods.

The following section will canvass some of these rights and obligations in the context of the borrower experiencing difficulty.

Licensing

The main obligations attached to holding a licence under the NCCP Act are:

- to hold compulsory membership of the Australian Financial Complaints Authority (AFCA)
- to fulfill general conduct obligations to engage efficiently, honestly and fairly (s 47)
- to lend responsibly (ch 3)
- to demonstrate compliance with the law and the NCCP Act.

Responsible lending (leases)

According to the NCCP Act, all licensees and credit assistance providers are obliged to:

- give additional disclosure documents (e.g. a credit guide or quote)
- make reasonable enquiries about the borrower's requirements for the loan and their objectives (what is reasonable will depend on the type of product and the amount lent) (s 153(1)(a))
- take reasonable steps to verify the borrower's financial information (s 153(1)(b) and (c))
- assess if the credit contract or lease is unsuitable (ss 151–153). It will be unsuitable if the borrower has to sell their home to make repayments (s 154(3)), if repaying will cause substantial hardship (s 156(2)(a)), if the loan, lease or credit card offered does not meet the consumer's requirements and objectives (e.g. a lease is being sold when the consumer wanted to buy the goods) (s 156(2)(b)), or if a credit card limit increase is beyond the consumer's ability to repay within a designated period (s 118(3AA)).

Remedies for unsuitable leases are:

- declaring part or all of contract void
- varying the contract
- terms unenforceable
- refund or return of property
- compensation for loss or damage.

Pre-loan documents

Before a consumer signs a credit agreement under the NCCP Act, the following has to be supplied by the credit provider:

- a credit guide (s 113)

- a credit quote (s 114)
- a preliminary assessment whether the loan is suitable within 90 days of providing the credit assistance (s 116)
- a credit proposal disclosure document (discloses fees) (s 121)
- a copy of the credit assessment if requested (s 132)
- a pre-contractual statement (s 16(a) Credit Code)
- an information statement (s 16(b) Credit Code)
- a signed copy of the contract within 14 days of signing a credit contract (s 20 Credit Code).

The credit contract

Section 16 of the Credit Code lists the requirements for pre-contractual disclosure for certain types of credit contracts. Pre-contractual disclosure is designed to ensure that a potential borrower is aware of their rights and obligations before entering into a loan contract.

The Credit Code requires that written contracts (s 14) must contain certain information (s 17) including:

- the name of the lender
- the amount of the loan or the credit limit available
- the annual interest rate
- the way interest is calculated
- the total amount of interest payable
- details about repayments
- details of credit fees and charges
- a statement by the lender that they can change credit fees, charges and interest rates, and how they will notify the borrower of such changes
- how often the lender will provide statements of account
- the interest rate when the borrower is in default
- a statement that the lender may charge enforcement expenses if the borrower is in default
- information about whether a mortgage or guarantee is part of the contract and a description of any property affected
- a statement by the lender if they have paid any commission to a third party and, if so, to whom and the amount of commission paid
- details of any insurance financed by the loan
- other matters required by regulation to be included in the credit contract.

Non-compliance with the Credit Code means that the lender could be liable to pay damages to the borrower, or a fine or penalty to the government. The regulator for credit is the Australian Securities and Investments Commission, which can prosecute lenders for non-compliance with the NCCP Act or the Credit Code.

The lender's failure to deliver information could be used in a case to end the contract on the basis of misrepresentation or to show that the particular loan arrangement was unjust.

Documents required after a loan is made

The lender must give the borrower a copy of the loan contract.

A borrower is entitled to receive certain documents during the period of the loan. According to the Credit Code, the documents must include:

- a copy of the loan contract within 14 days of the agreement (if the use of a credit card is deemed acceptance of the contract, within 14 days of the use of the card) (s 20)
- extra copies of documents requested by the borrower. These must be supplied within 14 days of request when the contract is less than 12 months old, and 30 days if the contract is older. The lender can charge a reasonable fee for this (s 33)
- regular statements of the account for some loan contracts (e.g. credit cards) and by request for other loan contracts (the information to be provided in the account is specified in the Credit Code) (s 33)
- a statement about the amount required to pay out the loan within seven days of the request (s 83)
- a notice of rights the first time a direct debit repayment fails (s 87).

Inducing a Borrower to Take out a Loan

Sometimes a seller of goods makes promises about finance. Section 128 of the Credit Code provides that lenders will be liable for the misrepresentations made by a seller when that seller has referred the borrower to that particular lender (linked credit provider).

For example, if a car salesman refers a potential buyer to a lender and also makes certain false statements about the finance provided, the lender will be liable for any loss that the borrower suffers as a result of relying on those false statements.

Lenders are liable for the misrepresentations of their staff. If a loans officer makes misrepresentations to the borrower in the course of processing the loan, the lender may be held accountable for those misrepresentations. However, it should be noted that lenders may not be responsible for the actions of independent finance brokers. Finance brokers are seen as representing borrowers rather than lenders, but they have obligations under the NCCP Act. They must also be licensed and be members of AFCA, where complaints about their conduct may be made.

Interest Rates, Fees and Charges

Non-bank lenders who are not providing small-amount credit contracts or bridging finance must not charge more than 48% per annum inclusive of fees and charges (s 32A Credit Code). The cost of credit may include interest, and fees and charges.

If the contract provides for it, the lender can on a 30-day notice make variations to interest rates, repayments, credit fees and charges by newspaper advertisement or individual notice. A borrower can apply to the court to review unconscionable changes to interest and charges.

Medium loans

Loans between \$2001 and \$5000, and repayable within two years are medium amount credit contracts under the Credit Code (s 32A(1)) and, in addition to the 48% interest rate cap, lenders can charge an establishment fee of \$400.

Small loans (including payday loans)

There are special rules to protect people borrowing less than \$2000 and where the contract is for 15 days or more. This type of loan is called a small-amount credit contract (SACC). Loans under \$2000 that must be repaid within 15 days are prohibited. Lenders can charge an establishment fee (no more than 20% of the loan amount) and a monthly fee (no more than 4% of the loan amount).

Before making a small-amount credit contract, the lender must ask the following questions:

Is the borrower already in default in an existing SACC, or have they had two or more SACCs in the last 90 days? (ss 118(3A), 123(3A), 131(3A), 133(3A) NCCP Act)

A loan will be presumed unsuitable for the borrower, and the lender will be in breach of their obligations if they lend the money unless they can prove that the loan was suitable.

Where does the borrower's income come from?

Section 133CC of the NCCP Act and regs 28S(2) and 28S(3) of the NCCP Regulations prohibit SACCs for borrowers who receive more than 50% of their income from payments under the *Social Security Act 1991* (Cth) and where the repayments would exceed 20% of that borrowers gross income.

Lenders must look at prospective borrowers' bank statements for the previous 90 days (ss 117(1A), 130(1A) NCCP Act).

Credit contracts must contain certain information including:

- the amount of money to be lent
- who the money must be repaid to
- annual percentage rate/s
- calculation of interest charges
- repayments to be made
- credit fees and charges

- changes affecting interest, and the credit fees and charges payable
- frequency of statements of account
- default rate payable (if applicable) and enforcement expenses
- if a mortgage is to be taken out over property, a description of the property
- details of commission payable.

If the lender does not provide the above information, they can be penalised and consumers can seek compensation.

Requirements Specific to Consumer Leases

Leases are not regulated by the Credit Code if:

- the consumer has a right to buy the goods and the contract will be regulated as a hire-purchase (credit contract) (s 9)
- goods are hired by an employee in connection with the employee's remuneration or other employment benefits (s 171(2))
- they are for four months or less, or for an indefinite period (s 171(1))

Otherwise, there is a rebuttable presumption that the lease is regulated (s 172).

There is not currently an equivalent section to s 50 of the Credit Code (prohibited securities) stopping a lease back of consumer goods owned by the consumer (blackmail securities).

The lease proposal disclosure document must disclose commissions and contain the following (s 144(2) NCCP Act):

- the total amount of any fees or charges that the consumer is liable to pay to the licensee in relation to the consumer lease and the method used for working out that amount
- a reasonable estimate of the total amount of any commissions that the licensee, or an employee, director or credit representative of the licensee, is likely to receive in relation to the consumer lease and the method used for working out that amount
- a reasonable estimate of the total amount of any fees or charges that the consumer is likely to be liable to pay to the licensee in relation to applying for the consumer lease
- a reasonable estimate of the total amount of any fees or charges that the consumer is likely to be liable to pay to another person in relation to applying for the consumer lease.

The licensee may not profit from third party charges, that means a licensee must not request or demand payment of an amount, as reimbursement for the third party amount, that exceeds the third party amount (s 145 NCCP Act).

The NCCP Act also provides for the prohibition of licensees suggesting or assisting the consumer with (s 146), or pressuring the consumer to remain in (s 147), unsuitable leases.

Various sections of the NCCP Act (ss 136-138, 143-144(1), 150-151, 169) and the Credit Code (ss 173-175) deal with the specific requirements of consumer leases and the date after which the requirements apply.

Requirements Specific to Mortgages

Often loans are secured by a mortgage. A mortgage gives the lender the right to seize and sell goods or land when a borrower defaults. Default is defined in the contract but can include failure to make a loan repayment when due. The Credit Code prohibits mortgages over household goods unless the accompanying loan is used to purchase the goods.

The consequences of defaulting are dealt with on the pages *Repossession of Goods When Unable to Make Loan Repayments* and *Repossession of Property When Unable to Make Loan Repayments*.

Unfair mortgages

Unfair mortgages are prohibited under the Credit Code. This means that:

- mortgages cannot be applied to continuing credit (credit cards) unless goods are specified
- a mortgage cannot attempt to secure all property or property purchased in the future (ss 44–45)
- all accounts (i.e. every account with that bank) mortgages cannot be enforced (s 47)
- the mortgage is unenforceable if the mortgagor is not the same person as the debtor (s 48)
- essential household property and personal property protected in bankruptcy (s 116(2)(b)(i) *Bankruptcy Act 1966* (Cth)) cannot be mortgaged unless a particular good is purchased on credit (e.g. if a consumer buys a fridge from a retailer on credit, this can be used as security for the loan). However, a creditor cannot lend generally against a fridge and other essential household goods the consumer currently owns.

Generally, goods and land that are mortgaged cannot be sold without the permission of the lender who has the mortgage. If goods are sold without permission, the borrower may have acted fraudulently and could be charged with a criminal offence.

A security interest (i.e. a mortgage over goods such as a car) is searchable with the Personal Property Securities Register. The *Personal Property Securities Act 2009* (Cth) established the register for goods except personal and household goods under \$5000, unless security was taken to purchase those specific goods on credit. These goods are given a unique identifying serial number and can be searched on the Personal Property Securities Register. AFCA is the federal government agency that hosts this register.

Requirements Specific to Guarantees

Guarantees are binding agreements that involve three parties: the lender, the borrower and the guarantor.

Guarantees are sometimes required by lenders before they agree to lend money, for example when the lender suspects that the borrower is in a category of consumers at a higher risk of being unable to repay the loan.

A person becoming a guarantor promises to repay the loan if the borrower will not or cannot do so. Guarantors are responsible for loan repayments, once the borrower stops making repayments, which can cause serious financial hardship to the guarantor. Helping out a friend or relative who needs money or wants to buy goods on credit can put the guarantor's home, income and assets at risk.

The Credit Code contains special provisions in relation to loan contracts secured by a guarantee. A guarantee is unenforceable unless:

- it is in writing and signed by the guarantor (the person giving the security)
- the guarantor receives a copy of the loan contract before signing the guarantee (s 57)
- the guarantee does not secure more than the loan (i.e. it cannot be for all monies lent).

Liability of a guarantor

The guarantor is liable for the total amount of the borrower's liability and for the reasonable costs of enforcing the guarantee. Under the Credit Code, once a borrower is in default, a lender can sue:

- the borrower first
- both the guarantor and borrower together
- the guarantor alone. This can only be done if the:
 - borrower has already been sued, a judgment has been obtained (s 90) either with or without the guarantor, and they have failed to pay within 30 days after a written demand has been made
 - the borrower is insolvent
 - the lender unsuccessfully searched for the borrower and gives notice to the guarantor that they intend to sue
 - the court says that the borrower is unlikely to pay any part of the loan
 - the borrower is a minor.

Guarantees of minors

A minor is a person under 18 years of age. A guarantor is not liable for the minor's debt unless the guarantee had a prominent statement (above or below the place for the signature) that if the guarantor pays the loan they might not be able to recover any money paid on the minor's behalf because the minor has no legal liability to repay.

Rights of a guarantor

The guarantee must be entered before the lender gives the loan to the borrower, unless the guarantee document is a deed (a document that contains the words 'signed sealed and delivered'). Otherwise, the guarantee is unenforceable as it is not given in exchange for a loan.

A guarantor can ask a court to set aside the guarantee if it was unfair (see Unjust Contracts below).

Cancelling a guarantee

A person who agrees to guarantee a loan can, by written notice to the lender, withdraw from the agreement at any time prior to the provision of credit to the borrower.

A guarantor may also withdraw from the guarantee after the provision of the credit if the loan contract is materially different to the proposed loan contract given to the guarantor before they signed the guarantee (s 58 Credit Code).

The guarantee of a continuing credit contract is cancelled as at the date when written notice is given to the lender, and the guarantor does not have any obligations for future liabilities. The guarantee remains valid for existing obligations (s 55(4) Credit Code).

The guarantor pays the debt

The guarantor is entitled to recover monies paid from the borrower, if that is possible. The guarantor is also entitled to any security over the borrower's property held by the lender.

Unable to Make Loan Repayments

A borrower may default for a number of reasons including:

- financial over-commitment
- changes in circumstances (e.g. job loss)
- the unfairness of terms of the credit contract.

Many of the possible options for defaulting borrowers below are not available to unregulated loans (loans not covered by the Credit Code).

Default deadlines

Once a borrower is in default (e.g. behind in their repayments or has not comprehensively insured a security), the lender must deliver a default notice to the borrower describing the default and give the borrower 30 days to fix the default (e.g. paying the arrears amount or insuring the security).

The lender cannot enforce the contract (including taking repossession) until the notice is given and 30 days have passed (s 88 Credit Code). If the lender cannot find the borrower or the secured goods are no longer at the nominated address, then the lender can enforce the contract without giving notice.

Default notice

The lender is unable to take action to repossess goods or take legal action to repossess goods or property until 30 days have passed since they sent or delivered a default notice that specified the loan default, unless the lender:

- believes on reasonable grounds that there was fraud on the part of the borrower in making the contract
- cannot locate the borrower despite reasonable attempts
- believes on reasonable grounds that the goods are likely to be removed or damaged.

The lender can send a default notice if the borrower is one day overdue with their payment.

Delay repossession

If the lender refuses to postpone enforcement proceedings, the borrower can ask a court for a variation of the loan. A complaint to AFCA can halt the repossession while a hardship variation proposal is considered.

Repossession of Goods when Unable to Make Loan Repayments

Money restriction on repossession

Repossession cannot take place without a court order if less than 25% of the initial debt or \$10 000 (whichever is the lesser) remains owing. For example, if the original debt was \$10 000 and the borrower now only owes \$1500, the credit provider would need to obtain a court order before it could repossess the goods. If more than \$2500 was owing of that debt, the lender can move to repossess the goods 30 days after delivery of the default notice.

Goods to be seized

Lenders or their agents cannot enter residential premises (a person's home) without a court order or written consent of the occupier of the property. This means that repossession cannot take place from a person's home without this consent or a court order even if the lender has served the notice.

What happens after repossession?

The lender must give a notice within 14 days of repossession detailing the amount outstanding. The goods can be sold after 21 days from the date of this notice. The borrower can recover the goods if they pay the lender's reasonable enforcement expenses and the arrears.

If the borrower does not retrieve the goods, the goods must then be sold as soon as reasonably practicable and for the best price obtainable. The borrower will be responsible for any shortfall in the amount payable.

If a lender or agent does not repossess in compliance with the Credit Code, the borrower can apply for a court order for the return of the goods (s 108) and for compensation (s 106).

Repossession of Property when Unable to Make Loan Repayments

The legal process is as follows:

- If the borrower does not pay within the default notice period (30 days after the Section 88 Notice), the lender can commence legal action. A claim must be served on the borrower, and the borrower has 28 days to defend the action.
- If no defence is filed, then the lender can seek a default judgment.
- If the lender is successful, they need to serve a copy of the default judgment on the borrower.

- If, within seven days of service, the vacant possession is not obtained (the borrower does not leave), the lender will need to apply for an enforcement warrant.
- The enforcement warrant will be served on the borrower by the bailiff, who will tell the borrower the latest date they must leave the property. This is the date that is ordered by the court on the enforcement warrant.
- If the borrower still refuses to vacate the property by the advised date, the bailiff will return with the police to evict the borrower, the locks will be changed and the lender will have obtained vacant possession.

After repossession

If the borrower has not taken all of their belongings when they are evicted, the lender will organise for a removalist to collect and store the goods. The borrower must pay the removalist and storage costs before they can collect their belongings. These costs are substantial. If they do not collect the belongings, the storage company will sell the goods to recoup their costs.

The lender must sell the property within a reasonable amount of time and for the market value of the property. Any surplus after the debt is repaid and the costs of selling are deducted is returned to the borrower. The borrower is responsible for any shortfall if the sale of the property does not satisfy the debt.

Remedies —Dealing with Debts

Bringing payments up to date

If the current payments (including any due since the default notice was sent) are paid, then the lender cannot take further action (s 89 Credit Code).

Disputing liability

If a borrower gives notice and then takes legal action alleging a mistake in an account statement, the lender is unable to enforce the contract until the matter is resolved (s 38 Credit Code). Differing time limits (as little as 14 days) for disputing an account apply depending on the nature of the contract and when an account statement is received.

Insurance claim

The borrower may make a claim on unemployment, accident or sickness insurance if insured. Many insured borrowers are unaware that they are insured. Borrowers should check their contracts.

Refinance

The borrower may be able to get better terms and conditions by shopping around and refinancing the loan. Refinancing may increase the cost of the loan.

Selling secured asset

It is possible to introduce a buyer for the borrower's secured goods. If the lender refuses the sale of the secured goods to the introduced buyer and they later repossess and sell the goods at a lower price,

then the borrower has a right to recover the difference between the original sale price offered and the eventual sale price from the lender.

Surrender any secured goods

Borrowers can arrange to give up possession of the car, house or goods secured by the loan so that the lender can sell the goods and recoup some of the loan. A financial counsellor or lawyer can advise if this is the best option and give tips on what to do (e.g. taking photographs of the goods to confirm their condition before surrender).

Irrevocable authority

The borrower undertakes to assign the benefit of an anticipated lump sum (e.g. a compensation payment) to the lender in return for a postponement of enforcement action or suspension of periodic payments. The lender is not obligated to accept such an arrangement.

Bankruptcy

If the equity in a car loan does not exceed \$7900 (this amount is updated each year) it may be possible to keep repaying the car loan but file for bankruptcy covering other debts. Similarly, a housing loan with negative or little equity might be quarantined. Legal assistance should be sought before a borrower considers such an option.

Irresponsible lending

AFCA can consider redress for loans not made responsibly.

The lender may have failed to assess whether the credit contract or increase in credit limit was suitable by failing to ask about the borrower's requirements and objectives, financial situation and failing to assess capacity to repay or failing to provide a preliminary assessment on request and verify the information provided (s 120(1) NCCP Act).

Section 131 of the NCCP Act provides that 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
- the contract will not meet the consumer's requirements or objectives
- the NCCP Regulations provide circumstances in which a credit contract is unsuitable.

The NCCP Regulations provide that a credit contract will be unsuitable:

- if the lender offers two or more loans rather than one loan for the amount of money that the borrower requires
- if the interest charged under the combination of the contracts is higher than the maximum that could be charged under a single credit contract.
- for credit cards initiated after 1 January 2019 or for credit card limit increases after that date where the new credit limit is beyond the consumer's ability to repay within a designated time

period (as set out by the Australian Securities and Investments Commission) (s 118(3AA) NCCP Act).

The NCCP Regulations give an example for an unsuitable credit contract.

More information on what happens if the lender does not meet the responsible lending obligations and time limits for taking action can be found in the *Regulatory Guide 209 Credit Licensing: Responsible Lending Conduct* published by the Australian Securities and Investments Commission, the AFCA Approaches published by AFCA.

Unjust contracts

The borrower, guarantor or mortgagor has two years from the contract's end to apply to the court to re-open a contract on the basis that it is harsh, unconscionable or oppressive.

If the contract is declared unjust, the court can make an order setting aside the agreement or relieving the borrower, guarantor or mortgagor of some or all of the payments. It is not easy to prove that the terms of a contract are unjust.

Section 76(2) of the Credit Code provides a list of factors that the court considers in determining if the contract is unjust for example:

- the consequences of compliance or noncompliance with the contract
- the relative bargaining position of the parties to the contract
- whether the provisions of the contract were the subject of negotiation when the contract was entered into
- whether it was possible for the person loaning the money to negotiate to alter or reject any of the terms in the contract
- whether any provisions of the contract were unreasonable
- the impact of the age, or physical or mental condition of the borrower
- whether the contract was in a form and using language that was able to be understood
- whether independent legal advice was obtained by the borrower
- whether the provisions of the contract were accurately explained to the borrower and whether the credit provider took measures to ensure that the borrower understood the contract
- whether undue pressure or influence was used by the lender or any of their agents
- whether reasonable measures were taken to ensure that the borrower understood the terms of the contract
- whether the lender knew or should have known that the borrower was already experiencing financial hardship before entering the loan contract
- whether any legal advice was sought by the borrower.

While any one factor might be enough to show that a contract was unfair and should be set aside, contracts that include all the factors in s 76 of the Credit Code might be of insufficient severity for a finding that the contract was unjust. Specific legal advice should be obtained by anyone who alleges that a credit contract is unjust, as unsuccessful legal action may result not only in the confirmation of the contract but also significant legal costs. If a contract is found to be unjust it might be set aside in its entirety or the terms of the contract changed.

In addition, a term of the contract may be unfair under the unfair terms protection in the *Australian Securities and Investments Commission Act 2001* (Cth). If a term of the contract is deemed unfair, the term is not applied, however, the contract otherwise remains enforceable.

In either case, the consumer can complain to AFCA.

Unconscionable interest and other charges

A court can also set aside unconscionable interest rate changes during the term of the loan or other specified credit charges (s 78 Credit Code).

If a break cost (ending a mortgage early) does not reflect the lender's loss, it may be challengeable (see *RG 220 Early termination fees for residential loans: Unconscionable fees and unfair contract terms*). There is a limit on the amount and calculation of break costs or mortgage exit fees that can be charged.

Application must be made within two years of the interest rate change or other charge taking effect, or of the contract ending (s 80(2) Credit Code). Note that s 78 is not available if the borrower alleges that the interest rate at the start of the contract was unconscionable; only interest rate changes during the term of the loan are reviewable under this section.

Variation of credit contract due to hardship

Borrowers experiencing short-term financial difficulties ('short term' meaning with the lender's help they will be able to get the loan back on track) can ask the lender in writing to reduce, extend or postpone loan repayments. Borrowers can refer their case for free to dispute resolution with the AFCA, which has the capacity to stop legal proceedings and to substitute a lender's decision. In addition, the borrower can apply to the court for an order varying the terms of the loan and stopping further enforcement of the loan (s 74 Credit Code). Applications to court are limited to:

- cases where the original loan was made after 1 March 2013
- loans for less than \$500 000 that were made between 1 July 2010 and 1 March 2013
- loans made before 1 July 2010 and the amount lent was less than a certain threshold (see the Australian Securities and Investments Commission's Moneysmart publication for more information).

Borrowers with loans above the threshold will still have rights for hardship relief if the lender has signed an industry code, but they may not have a right to enforce hardship relief in court.

Application for hardship relief

A six-step guide to apply for hardship relief:

1. See a free financial counsellor if there is time.
2. Prepare a proposal to get back on track (i.e. reduced payments and extended loan).
3. Write a hardship request to the lender with the cause of hardship and details of the proposal. The lender must respond within 21 days to the proposal (s 72 Credit Code).
4. If the lender takes the case to court, sends out a Section 88 Notice, refuses the hardship variation or fails to respond, then the borrower should immediately lodge a dispute with AFCA (free of charge).
5. Seek free legal advice from a community legal centre or Legal Aid Queensland.
6. Comply with the procedures of the dispute resolution service or take an application for hardship relief to the Federal Circuit Court of Australia after obtaining legal advice.

In making an application to the Federal Circuit Court of Australia, the borrower can seek an order that the contract be changed by:

- extending the period of the contract and reducing the amount of each repayment
- postponing during a set period the dates on which repayments are due
- extending the period of the contract and postponing during a set period the dates on which repayments are due.

The variation request could include postponing or reducing payments for a set period to allow the borrower time to sell the property.

Superannuation and mortgage relief

Accessing superannuation—compassionate grounds mortgage assistance

Consumers can ask their superannuation fund to release some of their money if they are facing repossession of a home by a lender or local council (as well as on other grounds outlined below).

The application for early release of super is made to the federal Department of Human Services.

Superannuation is protected in bankruptcy but not if it is accessed early. Taxation consequences also apply to early release of super. Check with the Australian Taxation Office how much of the early release will go towards the mortgage repayments. If you are in receipt of family tax benefits, then you need to assess the impact of early withdrawal of Super. Centrelink will treat Super as income for the financial year in which it was received when calculating entitlement to family tax benefit, or will retrospectively impose a debt for overpayment.

If home repossession or bankruptcy is unavoidable despite accessing superannuation money, then it may not be in the best long-term interests to make this application.

Accessing superannuation—severe financial hardship or compassionate grounds

There are different criteria for accessing superannuation early for severe financial hardship or for specific compassionate grounds such as medical expenses, unemployment, illness or terminal illness.

The maximum that can be accessed is \$10 000 per 12-month period for severe financial hardship (if the fund permits it and there are sufficient funds in the superannuation account). A consumer can only access their super on severe financial hardship grounds if they have been on government benefits for 26 weeks continuously. If the application is for specific compassionate grounds, the criteria are different.

Total and permanent disability/life insurance under superannuation

If the consumer is unable to work due to illness, accident or injury, they may have rights additional to the right to a personal injuries claim. Their superannuation (there may be more than one fund) may have insurance which they can access (contact the super fund to discuss this).

Seek legal advice about personal injuries in a superannuation claim. Some law firms will check if a claim is worth your while for free. Consumers would need to be clear about the consequences of this type of claim on government benefits, liability for taxation and legal costs before proceeding.

Industry Codes of Practice for Lenders

As well as obligations to help borrowers in hardship under the Credit Code, most lenders are signed up to an industry code that helps consumers and small business borrowers including:

- Code of Banking Practice—for financial hardship (s 28.2 from 1 Feb 2014) and responding to disputes (ss 37, 38 from 1 Feb 2014; code and membership list (banks)). It covers small business and some investment lending by individuals. A new code commences operation on 1 July 2019
- Customer Owned Banking Association Code of Practice—for financial difficulties and responding to disputes (paragraphs 24, 27; code and membership list (credit unions and building societies))
- Mortgage and Finance Association of Australia Code of Practice—for hardship applications (s 13) and responding to complaints (s 11; code and membership list (non-bank credit providers, mortgage managers)); it covers some small business and investment lending.

Credit Rating and Credit Reporting

Credit reports contain identifying and other credit-related information about people and businesses. The information can be obtained by a third party when a person applies for credit, while a person has credit obligations and when a credit provider is collecting overdue payments.

In Australia, private companies maintain credit reports. The major credit reporting bodies are:

- Equifax
- Illion
- Experian.

Credit and utility providers must first obtain your consent in order to obtain information contained in a credit. They must also comply with the law regulating credit reporting.

Consumers need to make separate requests to each credit reporting agency to obtain information, and they can access a free copy of their report once every year.

The law that regulates credit reporting

Credit reporting bodies collect information from lenders and other sources to create and maintain a consumer credit report. The law governing credit reporting is found in pt IIIA of the *Privacy Act 1988* (Cth) (Privacy Act) and the *Privacy Regulations 2013* (Cth), and the *Australian Privacy Principles* are found in sch 1 of the Privacy Act.

The Privacy (Credit Reporting) Code 2014 (Privacy Credit Reporting Code) applies to credit reporting agencies and those using credit reports.

For more information on these laws see the Office of the Australian Information Commissioner, the Australian Securities Investment Commission or creditsmart.org.au, a website created by the association of credit reporting agencies.

Information kept on the credit report

A credit report can contain a person or business name, current and previous addresses, the employer and driver licence number. It also records credit applications including when enquires have been made by credit providers, whether the report was accessed, the type and amount of credit sought in an application, credit limits, the date accounts are opened and closed, current utility contracts and default information.. The report can also contain repayment history information showing missed or late payments for some types of credit.

The Office of the Australian Information Commissioner publishes a factsheet that summarises how long information is recorded on a credit report.

Default information

Default information includes business credit information, bankruptcy and court judgments, overdue payments and unpaid credit. A default must be overdue by 60 days or more and must be for an amount greater than \$150. Defaults of under \$150 cannot be listed.

In order for a default to be listed, the consumer must be sent:

- a Section 6Q Notice (Privacy Act) informing that a payment is overdue. This could be combined with a Section 88 Notice advising a default (overdue payment) under the National Credit Code
- a Section 21D Notice (Privacy Act) advising that you are going to be default listed and informing how much has been outstanding for more than 60 days.

A listing can then be made 14 days after the Section 21D Notice has been sent, but not later than three months from that notice.

Further notices and listings can be made for the same loan if further amounts become overdue by 60 days and are more than \$150. If the loan is accelerated, the entire balance can be used for notices and subsequent listing.

Paying a debt listed on the credit report will only result in an update that the debt is now paid. It will not result in the listing being deleted. A listing will only be deleted if it should not have been made in the first place or the information is automatically deleted because of the passage of time.

If a hardship request is underway

Unless the consumer has made the same request in the last four months, if they make a hardship request they cannot be default listed until 14 days have elapsed from notification of a hardship variation refusal (s 9.1 Credit Reporting Code). The consumer cannot be default listed while a dispute is with AFCA.

Cannot list twice

The consumer cannot be default listed in relation to the total debt more than twice (once by lender) and otherwise by way of notification of court proceedings. The listing can be updated to reflect current amounts due (taking into account increase in the amount due or reduction because of payments).

Credit repair

Paying a debt will not remove a credit default, but it will be amended free of charge to show that it is paid. It is unnecessary to employ a lawyer or a credit repair company. Before agreeing to pay a credit repair company find out more about credit repair companies as they may be expensive and not be able to do what they claim.

Fixing mistakes on your credit report

A consumer can make a correction request to the lender. The consumer is entitled to have the information amended or corrected and have this confirmed by the credit reporting agency.

The consumer is entitled to a copy of the information a lender has been given about the consumer's credit report and the corrections (within 10 days).

The lender refers the request to the credit reporting agency, which must respond within a reasonable period of time and correct information within 30 days of the request or explain why it will not do so.

Free help is available from financial counsellors, Legal Aid Queensland and community legal centres.

Identity fraud

A credit reporting body can put a ban on the use or disclosure of your credit reporting information for 21 days from the request and you can ask for it to be extended.

Options of what to do if you think that someone has used your identity information are provided by Legal Aid Queensland.

Complaining about a credit provider

Consumers can complain about a credit provider and credit reporting bodies to the following ombudsman services:

- AFCA—provide free financial industry dispute resolution for customers of members; considers disputes about financial planning, loans, leases, credit cards, banking, insurance, finance brokers
- Telecommunications Ombudsman Service—provides dispute resolution for telecommunications including assisting with hardship relief for consumers
- Energy and Water Ombudsman Service—considers disputes about electricity, gas and water accounts including failure by providers to offer hardship relief.

Bank/Customer Relationship

The relationship between a bank and its customers is contractual. A contract is an agreement that is legally binding and enforceable by law (see chapter on *Consumers and Contracts*).

Some of the terms of the contract between a customer and their bank are written. Other terms of the contract are implied, that is the courts have over the years said that certain obligations exist between the customer and their bank that are not written down.

The *Code of Banking Practice* (Banking Code), developed by the Australian Banking Association sets out the bank's key commitments and its responsibilities to its customers. It forms part of the written contract between the customer and their bank. Only banks that have adopted the Banking Code are bound by it. The ombudsman and courts have increasingly found that the obligations form part of a contract between the bank and its customer and, even for non-signatories, the code represents good banking practice

The Importance of the Banking Code

The Banking Code sets out all the important rights customers have in their dealings with banks. Credit unions and building societies have their own code with similar (or better) provisions referred to above under the industry codes of practice. The rights in the Banking Code are greater in most cases than the rights the law would give to customers. Matters covered by the Banking Code are:

- disclosure of fees and charges, and other terms and conditions
- changes to terms and conditions, and fees and charges
- disclosure of general information about banking services
- procedures and protocols to protect an individual's privacy
- provision of statements of account
- provision of copies of documents
- cancellation of direct debits
- charge-backs on credit cards

- debt collection procedures and protocols
- procedures to handle complaints.

The Banking Code also gives guarantors more information about borrowers and other rights. More information can also be obtained from the Customer Owned Banking Code of Practice, which is the code of practice for credit unions and customer-owned banks, and the Mortgage and Finance Brokers Code of Practice, which is the code for mortgage brokers.

Ownership of Money in a Bank Account

When the account is a deposit account (e.g. a savings account, cheque account or term deposit), the customer owns the money. The bank has the right to deal with the money in accordance with the contract they have with their customer. Part of the agreement will deal with how the bank should repay the money to the customer.

Bank Cheques

A bank cheque is a cheque drawn by a bank. When the cheque is presented, the funds are taken from the bank's account and not from a customer's account. Banks usually do not issue bank cheques unless they have first received the equivalent in cash from the customer.

Like a personal cheque, a bank cheque shows the amount of the cheque and the name of the payee on the front of the cheque. The words 'bank cheque' also appear on bank cheques issued by most Australian banks.

Sellers in the past readily accepted bank cheques as a virtual guarantee that funds are available to meet the purchase price of property.

A person doubtful about the credit rating of a person with whom they are dealing with may wish to be paid by direct debit or failing that, bank cheque.

Will the bank always pay a bank cheque?

Banks will not always pay on a bank cheque. Payment will not be made if the cheque has been:

- lost
- stolen
- forged
- materially altered (e.g. alterations to the name of the payee and the amount of the cheque)
- subject to a court order prohibiting the bank from paying out on the bank cheque.

What this means is that a bank cheque is not the same as cash. A bank cheque is marked 'Not Negotiable', which means that, unlike cash, if a person steals the cheque and gives it to someone else in exchange for something of value, the person who receives the cheque is not entitled to keep the proceeds of the cheque even when they are unaware that the cheque was stolen.

Problems with cheques

If a customer has a problem with a cheque, they should contact their bank. If the bank does not resolve the problem, they can complain to AFCA.

Unauthorised Transactions, Online Banking and Use of Credit Cards

If the account holder believes an unauthorised transaction was made on their account, they should complain to their financial institution as soon as they become aware of the transaction.

If the reason for the loss occurring was the fault of a third party (e.g. merchant), the financial institution cannot ask the cardholder to complain to the third party to rectify the problem. The financial institution is obliged to act.

The ePayments Code sets out how various problems will be solved for financial institutions who have signed up to this code.

Some obligations will also be covered in the Banking Code.

If the complaint remains unresolved, cardholders can ring AFCA and lodge a complaint.

Complaints about Financial Institutions

All credit providers are required to provide free independent dispute resolution to consumers. All complaints are directed to AFCA.

Role of the Australian Financial Complaints Authority

The Australian Financial Complaints Authority (AFCA) has replaced all other external dispute resolution schemes, and all Australian financial services licensees, Australian credit licensees, authorised credit representatives and superannuation trustees are required to be a member of AFCA.

Consumers can lodge disputes with AFCA free of charge. The consumer will not have to pay the lender's cost of responding to the dispute even if they are unsuccessful.

AFCA will review the dispute and make a decision based on the law, industry codes of practice, best industry practice, its rules (terms of reference) and what is fair and reasonable in all the circumstances. Resolving the complaint may happen by negotiation, conciliation, recommendation or a determination made by AFCA.

AFCA is free, and its decision making is regulated by the law and independent of its lender members.

AFCA has jurisdictional limits, and the first assessment when a dispute is lodged is to establish if the case can be considered by it under its rules or terms of reference.

While the dispute is being considered by AFCA, the lender must not proceed with legal proceedings.

If the consumer does not agree with the decision of AFCA, they are free to take the case to court, however, the lender is contractually bound to accept the AFCA's decision.

In most cases it is too late to lodge a dispute after a court judgment is obtained, but the consumer can lodge a dispute if they have been served with a statement of claim and have not yet filed a defence.

Legal Notices

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