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National Consumer Credit Protection Act receives Royal Assent

On 15 December 2009, the National Consumer Credit Protection Act 2009 (Cth) (**Act**) received royal assent. The Act is part of a reform of Australia's consumer credit laws following the agreement reached in 2008 by the Council of Australian Governments that the Commonwealth should have responsibility for regulating the consumer credit industry. A practical consequence of that agreement will be that providers of consumer credit will need to be licensed by the Australian Securities & Investments Commission (**ASIC**) and will be governed by a new set of uniform national laws. The National Credit Code (**NCC**), which is found in Schedule 1 of the Act, will apply from 1 July 2010 and will replace the consumer credit codes of each State and Territory. ASIC will be responsible for the administration of the new uniform laws.

Registration and Licensing

Any person who engages in *credit activities* will need to register with ASIC between 1 April 2010 and 30 June 2010. A "*credit activity*" is defined in section 6 of the Act. The following are examples (not exhaustive) of where a person will be deemed to be engaging in a credit activity:

- (a) the person provides credit under a credit contract;
- (b) the person provides a credit service;
- (c) the person is a lessor under a consumer lease (i.e. a contract for the hire of goods under which the lessee does not have a right or obligation to purchase the goods);
- (d) the person is a mortgagee under a mortgage; or
- (e) the person is a beneficiary under a guarantee.

Registered persons will also be required to apply to ASIC for a credit licence between 1 July 2010 and 31 December 2010. This process is intended to allow persons who currently engage in credit activities to continue to do so provided that they are registered with ASIC by 1 July 2010 and have applied for a credit licence by no later than 31 December 2010. If a

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person proposes to engage in credit activities for the first time from 1 July 2010, then the person should apply for a credit licence and will not be required to register first.

If a person engages in credit activity as a representative or as a director or employee of an entity, only that entity is required to hold a credit licence. A licence holder will need to notify ASIC if they appoint any representatives within 15 business days of the licensee authorising a representative. The two broad categories of persons who will require a licence include providers of credit (e.g. lenders) and providers of credit services (e.g. suggesting or giving advice about obtaining credit or acting as an intermediary).

An application for a credit licence will be subject to an assessment process by ASIC that will take into account the capabilities and competence of the person or entity who or that is applying for the licence to be engaged in credit activities.

ASIC will have the power to suspend or cancel a licence or to ban a person from engaging in credit activities, if a person fails to comply with the Act or the conditions of a licence.

Duties of credit licence holders

A holder of a credit licence (**licensee**) will be under a number of general duties, including to:

- (a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly;
- (b) have in place adequate arrangements to ensure that clients of the licensee are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by the licensee or its representatives;
- (c) take reasonable steps to ensure that its representatives comply with the credit legislation;
- (d) maintain the competence to engage in the credit activities authorised by the licence;
- (e) ensure that its representatives are adequately trained and competent;
- (f) have a compliant internal dispute resolution procedure; and
- (g) have adequate compensation arrangements in place.

Responsible lending obligations

A licensee who gives *credit assistance* to a consumer in relation to a credit contract will need to give that consumer the licensee's credit guide. The Act defines "*credit assistance*" broadly. A person will provide credit assistance to a consumer if, by dealing directly with the consumer or the consumer's agent in the course of a business carried on in Australia, the person suggests that the consumer:

- (a) apply for a particular credit contract with a particular credit provider or assists the consumer to do so;
- (b) apply for an increase to the credit limit of a particular credit contract with a particular credit provider or assists the consumer to do so;

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- (c) remain in a particular credit contract with a particular credit provider;
- (d) apply for a particular consumer lease with a particular lessor or assists the consumer to do so; or
- (e) remain in a particular consumer lease with a particular lessor.

A credit guide must include details of all fees and commissions payable to the licensee and information about credit providers that the licensee does business with as well as other prescribed disclosures. The licensee must also provide a binding quote to the consumer for the licensee's charges for providing the credit assistance services before those services are provided.

A key obligation of a licensee will be the need to ensure that a credit contract, in respect of which the licensee is providing any credit assistance (including advice as referred to above), is suitable for a consumer. A credit contract will be unsuitable for a consumer if, at the time the licensee provides the credit assistance, it is likely that:

- the consumer will be unable to comply with the consumer's financial obligations under the contract or could only comply with substantial hardship; or
- the contract will not meet the consumer's requirements or objectives.

These responsible lending provisions increase the existing obligations on those in the business of advising on credit contracts in ensuring that the consumer receives full disclosure and obtains appropriate credit having regard to the consumer's financial position.

National Credit Code

The NCC largely replicates the existing uniform consumer credit code adopted by each State and Territory.

The NCC will only apply to credit that is:

- provided to a natural person or strata corporation;
- provided wholly or predominately for:
 - personal, household or domestic purposes; or
 - residential investment;
- charged for, or may be charged for, by the lender; and
- provided in the course of carrying on a business of providing credit in Australia or as part of, or incidental to, any other business carried on in Australia.

For the purposes of the NCC, "credit" is provided if under a contract:

- (a) payment of a debt owed by one person to another is deferred; or
- (b) one person incurs a deferred debt to another.

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Some of the important differences between the existing uniform credit code and the NCC are:

- (a) The NCC will extend the scope of credit contracts to include contracts where the credit is provided to purchase, renovate or improve a residential property for investment purposes.
- (b) The threshold maximum level of debt under which a debtor can request a change to certain terms of their credit contract on the grounds of hardship, has been increased to \$500,000 (or higher as specified in the regulations). In other words, a debtor may be able to request a change in the terms of a credit contract on the grounds of hardship, provided that, under that credit contract, the maximum amount of credit that is or may be provided is not more than \$500,000.
- (c) Taking security over essential household goods or certain property used by a mortgagor in earning income by personal exertion, will be prohibited.
- (d) A credit provider will need to comply with new default notice requirements before the credit provider can enforce a credit contract or a mortgage against a defaulting debtor or mortgagor.
- (e) A mortgagor will have additional rights against a credit provider who is seeking to recover enforcement expenses in circumstances where the credit provider is in breach of requirements that must be met before a credit contract or mortgage can be enforced.

ASIC has recently released Regulatory Guides 202 to 208 (inclusive) to provide guidance on the new requirements under the Act.

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