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1. **Concept of Responsible Lending**

   The National Consumer Credit Protection Act 2009 (Commonwealth) (the Act) has created a new and higher standard for those in the business of lending. For many years legislation regulating credit has made some provision for re-opening of credit contracts that were unfair. Section 24 of the Hire-Purchase Act 1959 (WA) allowed a court to re-open a hire-purchase transaction that was harsh or unconscionable. The most recent Act has introduced a new concept of requiring a lender in a consumer lending contract to make reasonable inquiries about the prospective borrower’s circumstances, to determine whether the proposed loan is unsuitable. If it is unsuitable, the prospective lender is prohibited from proceeding to make the loan. These provisions in the Act include consumer leases. For example there is a section of the Act - Part 3-4 of Chapter 3 - that makes detailed provision requiring prospective lessors in a consumer lease to make inquiries, and prepare an assessment as to whether the lease will be unsuitable. The licensee (prospective lessor) must give a copy of this assessment to the consumer if the consumer requests it (s. 155 Act).

2. **Who is Bound?**

   Chapter 3 of the Act makes separate provision for the regulation of the activities of a number of people or organizations that area part of the provision of credit services to consumers. The main categories are:

   2.1 **Credit Assistance Providers**

   A credit assistance provider is defined in section 8 of the Act as a person who suggests the consumer apply for a particular credit contract with a particular credit provider, or assists the consumer to apply for a particular credit contract with a particular credit provider.
2.2 **Credit Provider**

A credit provider is a lender, defined in section 204 of the National Credit Code as a person that provides credit of the sort to which the Code applies. This is in turn spelled out in section 5 of the Code. The essence of credit to which the Code applies is credit provided in the course of a business for largely personal, domestic or household purposes if a charge is made for providing the credit.

2.3 **Credit Assistance Providers Relating to Consumer Leases**

The Act has specific provisions binding credit assistance providers who provide credit assistance in relation to consumer leases. These requirements are spelled out in sections 138 to 143 of the Act, and impose similar duties in regard to responsible conduct as is the case with credit assistance providers and credit providers noted in 2.1 and 2.2 above.

2.4 **Lessors Under Consumer Leases**

A consumer lease is defined in section 169 of the National Credit Code as a contract for the hire of goods by a natural person or a strata corporation under which the lessee does not have a right or obligation to buy the goods. Section 170 of the Code provides that the Code applies to consumer leases if:

* the goods are hired wholly or predominantly for personal, domestic or household purposes; and

* a charge is made under the hiring contract which exceeds the cash price of the goods; and

* the lessor hires the goods to the consumer as part of a business carried on in this jurisdiction. As noted above, lessors in consumer leases are bound by the responsible lending provisions of the Act.
3. Separate Obligations of Lenders, Lessors and Credit Assistance Providers

The Act deals separately with each of the persons or organizations described in paragraphs 2.1, 2.2, 2.3 and 2.4 above, and makes it very clear that each of them has responsible lending obligations they must discharge. For example, in Part 3 - 3 of the Act persons providing credit assistance to a consumer in relation to a prospective consumer lease must make reasonable inquiries about the consumer. Section 140 of the Act spells this out. The credit assistance provider must:

* make reasonable inquiries about the consumer’s requirements and objectives in relation to the proposed lease; and

* make reasonable inquiries about the consumer’s financial situation; and

* take reasonable steps to verify the consumer’s financial situation (subsection 140 (1) (a) to (c) of the Act)

In laying out the responsible lending obligations of a lessor in regard to a proposed consumer lease, the Act requires in section 153 that the lessor must make the same inquiries as the credit assistance provider is required to do in relation to the same prospective consumer lease. That is, the pattern of the Act is to deal with the four categories of persons or organizations listed in paragraphs 2.1, 2.2, 2.3 and 2.4 above, and impose responsible lending requirements on each of them in very similar terms.

4. Judicial Commentary on Responsible Lending Requirements

In Australian Securities and Investments Commission v Cash Store Pty. Ltd. (in Liquidation) (2014) ASC 155 - 200 Davies J. examined the lending practices of The Cash Store Pty. Ltd. (in Liquidation) (TCS) and Assistance Finance Australia Pty. Ltd. (AFA). The arrangement was that AFA was the lender - credit provider - in loans arranged by TCS - the credit assistance provider. The court found that each company was required by the Act to make its own inquiries, and satisfy itself that a proposed loan was ‘not unsuitable’ for the consumer. This establishes an important principle: in a credit arrangement in which one party provides the funding, and another arranges
the transaction with consumers, neither can rely on the other to satisfy the requirements of the Act. Each must make its own inquiries, and satisfy itself, in regard to the responsible lending requirements.

5. What Do Lenders, Lessors and Credit Assistance Providers Need To Do?

While each of the four categories of persons or organizations mentioned in 2.1, 2.2, 2.3 and 2.4 has responsible lending responsibilities which they must discharge separately, the detail varies to some degree. For clarity, the framework of the responsibility of each is:

5.1 Credit Assistance Providers in Credit Contracts

Part 3.1 of the Act requires persons giving credit assistance in relation to credit contracts to:

* give a credit guide to the consumer which contains information about itself, and some of its obligations under the Act;

* give a quote setting out the maximum amount the consumer will be required to pay for its services;

* make a preliminary assessment whether the contract will be unsuitable for the consumers. This requires inquiries and verifications about the consumer’s requirements, objectives, and financial situation;

* give a copy of this assessment to the consumer if requested;

* disclose certain information, such as whether it will receive commission;

* refrain from giving credit assistance if the contract will be unsuitable; and

* there are specific provisions relating to short-term credit contracts and small amount credit contracts
5.2 Credit Providers and Credit Contracts

Part 3 - 2 of the Act requires credit providers (lenders) to:

* give a credit guide to the consumer which contains information about itself and some of its obligations under the Act;

* make an assessment whether the contract will be unsuitable. This requires inquiries and verifications about the consumer’s requirements, objectives and financial situation;

* give the consumer a copy of the assessment if required; and

* refrain from entering a contract or increasing a credit limit if that is unsuitable for the consumer

5.3 Credit Assistance Providers in Relation to Consumer Leases

Part 3 - 3 of the Act requires persons or organizations giving credit assistance in relation to a consumer lease to;

* give a credit guide to the consumer which contains information about itself and some of its obligations under the Act;

* give a quote before providing credit assistance to the consumer. This must set out the maximum amount the consumer will be required to pay for its services;

* make a preliminary assessment as to whether the lease will be unsuitable for the consumer. This requires inquiries and verifications about the consumer’s requirements, objectives and financial situation;

* give a copy of the assessment to the consumer if requested;
* give the consumer a document containing certain information, such as the commission the credit assistance provider is likely to receive; and

* refrain from providing credit assistance to the consumer if the lease will be unsuitable for the consumer.

5.4 Lessors Under Consumer Leases

Part 3 - 4 of the Act requires lessors under consumer leases to:

* give a credit guide to the consumer giving information about itself, and some of its obligations under the Act;

* make an assessment as to whether the lease will be unsuitable. This requires making inquiries and verifications about the consumer’s requirements, objectives and financial situation;

* give the consumer a copy of the assessment if requested; and

* refrain from entering a consumer lease that is unsuitable for the consumer.

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