

**USEFUL**

**CREDIT CODE NUMBERS**

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# USEFUL CREDIT CODE NUMBERS

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## 1. Introduction

In this paper I would like to look at particular sections in the National Credit Code which are useful in day-to-day advocacy for clients, and also some sections in other sources of authority such as the AFCA Rules and the Banking Code of Practice which are of practical usefulness. First I would like to see how we came to have this particular collection of acts and rules governing lending.

## 2. How Did We Get Here?

During the last century governments across Australia have enacted a number of measures to control lending, sometimes between businesses and consumers, and at other times between big business and small business.

### 2.1 Hire Purchase

An early attempt to control lending, and to correct some practices of lenders was the Hire-Purchase Agreements Act 1931 (WA). This was replaced by the Hire-Purchase Act 1959 (WA). It was part of a move across Australia to harmonize laws of the various states and territories on this subject. It covered any contract where there was a letting of goods, with an option to buy. It included all types of hirers, private and business, and had no monetary limits. One notable feature was a special protection for farmers' machinery. It was the main protection for private and small business consumers of credit up to the introduction of the Credit Act.

### 2.2 The Credit Act

The Credit Act 1984 (WA) regulated most lending by businesses to consumers if the amount of the credit did not exceed \$20,000. It also covered contracts relating to commercial vehicles and farm machinery even if the amount lent exceeded \$20,000. It did not cover home loans or bank term loans. It operated until it was replaced by the Uniform Consumer Credit Code.

### 2.3 The Uniform Consumer Credit Code.

The Consumer Credit Code came into operation on 1 November 1996. It was enacted in Western Australia by legislation which was based on a Queensland template act, which each state and territory adopted. Accordingly, the law was almost exactly the same across Australia after that date. A major development from the previous acts relating to credit was that it covered home loans. A borrower could make application

to vary a home loan on the grounds of hardship, provided that the loan did not exceed \$125,000. This ceiling was later raised, then removed. This Code also introduced regulation of consumer leases. However, this Code was narrower in its application than the previous acts mentioned above, in that it did not cover lending to businesses of any sort, other than a strata corporation.

### 3. The National Credit Code.

The National Credit Code came into operation on 1 July 2010. It is a schedule to the National Consumer Credit Protection Act 2009. It is a Commonwealth Act of Parliament and it applies equally in all states and territories. I will refer to this Act as 'the Act', and the National Credit Code as 'the Code'.

#### 3.1 Coverage of the Code.

Like the Consumer Credit Code, the Code regulates lending by businesses to individuals - persons - and strata corporations for personal, domestic or household purposes: - (Code s. 5). It does not apply to lending to companies other than strata companies" (Code s. 5 (1)). It does not apply to business lending other than by natural persons buying or renovating residential real estate for investment purposes. (Code s. 5 (1) (b) (ii) and (iii).

#### 3.2 The Enhanced Code.

A number of important changes were made to the Code by legislation (1) which affects contracts entered into on and after 1 March 2013. Because that is now well in the past, it is not necessary to detail the differences between the Code as originally introduced in 2010 and the Enhanced Code. Most contracts involving modest sums and shorter terms from the earlier era will be finished now. However, there is the possible argument that a longer term contract like a reverse mortgage which was entered into before 1 March 2013 is governed by the earlier version of the Code, which lacked some of the helpful features of the Enhanced Code. This would become significant in a legal dispute concerning a reverse mortgage, however for most practical purposes lenders will normally follow the (Enhanced) Code provisions because it is much simpler for lenders to base their staff training on the current law. As noted below, most disputes are deal with using IDR and EDR, with some reference to the Code, but also referring to other standards of conduct which as the Banking Code of Practice.

#### 4. National Consumer Credit Protection Act 2009

##### 4.1 - s.3 The National Credit Code

The Code is schedule 1 to the Act. Section 3 of the Act provides that Schedule 1 has effect as a law of the Commonwealth.

##### 4.2 - s. 5 The Dictionary

Section 5 of the Act is a dictionary defining the main terms used in the Act.

##### 4.3 - s. 6 Credit Activity Defined

Section 6 of the Act defines credit activity.

##### 4.4 - s. 7 Credit Service

Section 7 of the Act defines credit service as providing credit assistance to a person, or acting as an intermediary.

##### 4.5 - s. 8 Credit Assistance

Section 8 of the Act defines credit assistance as a person dealing directly with a consumer and suggesting they apply for a particular credit contract or consumer lease with a particular lender. It is essentially assisting a consumer to get into a particular contract (as opposed to lending).

##### 4.6 - s.10 Assignees of Credit Providers etc.

This section is important, in that it provides that a company to which a lender has assigned its rights under a credit contract becomes the lender, with all the rights **and obligations** under the contract. The assignee cannot plead ignorance, or refer questions back to the original lender.

##### 4.7 - s.29 Licensing - Credit Activities

Section 29 of the Act forbids a person engaging in credit activities if they do not hold a licence.

##### 4.8 - s. 47 Basis of EDR and IDR

Section 47 of the Act lays down the general conduct obligations of persons holding credit licences. These include the licensee must have an internal

dispute resolution procedure which complies with ASIC requirements (s. 47 (1) (h), and must be a member of the AFCA scheme (s. 47 (1) (i).

#### 4.9 Responsible Lending - Credit Assistance Providers

4.9.1 Sections 113 to 120 set out the responsible lending obligations of credit assistance providers, including making an assessment of the prospective borrower, and giving a copy of the assessment to the borrower.

#### 5. Short-term and Small Amount Credit Contracts

5.1 Short-term credit contracts are prohibited.

Section 124A of the Act prohibits providing credit assistance in relation to short-term credit contracts. A short-term credit contract is:

- \* a contract which is not a continuing credit contract (such as a credit card);
- \* the lender is not a bank;
- \* the credit limit is \$2,000 or less; and
- \* the term of the contract is 15 days or less (Code s. 5). The purpose of these provisions is to ban some types of pay-day loans.

#### 5.2 Small Amount Credit Contracts.

Section 5 of the Act defines a small amount credit contract as:

- \* a contract which is not a continuing credit contract;
- \* the lender is not a bank;
- \* the credit limit is \$2,000 or less; and
- \* the term of the contract is at least 16 days but not longer than one year; and
- \* the borrower's obligations under the contract are not secured.

### 5.2.1 Special Rules for Responsible Lending in Small Amount Credit Contracts - Credit Assistance Providers.

Sections 115 to 120 of the Act provide extra safeguards binding credit assistance providers (brokers or intermediaries) dealing with consumers considering a small amount credit contract. Section 123 and 124 create offences relating to credit assistance providers suggesting consumers enter, or remain in, unsuitable contracts. Subsection 123 (3A) creates a presumption that a consumer could only comply with the contract with substantial hardship if the consumer is already in default in another small amount credit contract, **OR** the consumer has been in two or more small amount credit contracts in the last ninety days. Section 124 B provides an organization offering to provide credit assistance in relation to small amount credit contracts must have a printed warning in the form of Schedule 7 (of the National Consumer Credit Protection Regulations 2010) with the prominent heading “Do you really need a loan today?”

### 5.2.2. Responsible Lending Requirements for Lenders - Special Provision for Small Amount Credit Contracts.

Sections 126 to 133 of the Act set out the requirements for **lenders** to ensure the lending is responsible. As well as the general requirement that lenders must make reasonable inquiries about the prospective borrower’s means and objectives, subsection 130 (1A) provides that if the proposed contract is a small amount credit contract, and the prospective borrower has a bank account into which their income is paid, the lender must obtain and consider bank statements covering the most recent ninety days.

Subsection 131 (3A) of the Act creates a presumption at the time of the assessment that the consumer can only comply with their obligations with substantial hardship if they are already in default under another small amount credit contract, or if they have been in two or more small amount credit contracts in the last ninety days. Subsection 133 (3A) makes a similar provision relating to a person entering or increasing the credit limit of a small amount credit contract.

## 6. Cap on Costs of credit - National Credit Code - Small Amount Credit Contracts.

Section 23A of the Code provides that a small amount credit contract cannot impose:

- \* an interest charge, including a default rate of interest;
- \* a fee or charge prohibited by the Code;
- \* a fee or charge exceeding the amount limited by the Code;

Section 31A permits the following fees and charges on a small amount credit contract:

- \* a permitted establishment fee;

- \* a permitted monthly fee;
- \* a default fee or charge;
- \* a government fee or duty.

The **permitted establishment fee** is no more than 20% of the adjusted credit amount;

The **permitted monthly fee** cannot exceed 4% of the adjusted credit amount.

#### 7. Cap on Costs of Credit - Medium Amount Credit Contract.

Section 204 of the Code defines a medium amount credit contract as one which:

- \* is not a continuing credit contract (eg - a credit card)
- \* the lender is not a bank;
- \* the credit limit is at least \$2,001 but no more than \$5,000;
- \* the term of the contract is at least 16 days but no longer than two years.

In a medium amount credit contract the borrower can only be charged a one-off fee of \$400 (Code s. 32B) and a maximum annual interest rate of 48% (Code s. 32A).

#### 8. General Cap on Annual Cost Rate.

Lenders which are not banks, building societies or credit unions, and contracts which are not small amount credit contracts or bridging finance contracts, are limited to an annual costs rate of 48% (Code s. 32AA).

#### 9. Limit on Amount Recoverable on a Small Amount Credit Contract

Section 39 B of the Code provides that the maximum amount that may be recovered if there is a default under a small amount credit contract is twice the adjusted credit amount under the contract. **Adjusted credit amount** is defined in section 204 of the Code as the first amount of credit to be provided under a small amount credit contract.

## 10. National Credit Code.

### 10.1 Statements of Account

Section 33 of the Code sets out if and when a lender needs to give a borrower statements of account.

### 10.2 Statement of Amount Owing

Section 36 of the Code provides that a lender must provide a statement showing the following information, if asked by the borrower:

- \* the current balance;
- \* amounts credited or debited in the period specified in the request;
- \* any amount currently overdue, and the dates they became due; and
- \* any amount currently payable and the date it becomes due.

If the information requested relates to the year preceding the request, the statements must be supplied within 14 days. If the information is from an earlier time it must be supplied within 30 days. The information can be given orally if the request is made orally, but if the request is in writing the information must be provided in writing.

## 11. Form of Mortgage

Section 42 of the Code provides that a mortgage must be in the form of a written mortgage document signed by the mortgagor (borrower). It can be part of another document, such as a credit contract. This must be read in the light of the Electronic Transactions Act 1999 (Commonwealth).

## 12. Limitations on Mortgages

Sections 44 to 47 limit the coverage of mortgages to prevent mortgages over **all** of the property of the mortgagor (borrower); future property of the mortgagor except property to be bought with the loan, property bought with a credit card, and “all accounts” mortgages, unless the mortgagor signs for extension of the mortgage. Section 48 of the Code prohibits third party mortgages: a person can only be a mortgagor if they are also a borrower under the contract.

### 12.1 Maximum Amount Which May Be Secured.

Section 49 of the Code provides that a mortgage is void to the extent that it secures more than the total of the liabilities of the borrower under the credit contract to which it relates, and reasonable enforcement expenses.

### 12.2 Prohibited Securities in Mortgages

Section 50 of the Code prevents a mortgage being created over:

- \* an employee's pay or superannuation;
- \* essential household property of the borrower (mortgagor) unless the property was supplied to the borrower by the lender (mortgagee). Essential household property means the type of property protected in bankruptcy.
- \* good used by the borrower (mortgagor) for earning income by personal exertion. This provision is limited to the figure protected in bankruptcy, which is currently \$3,800.

### 12.3 Assignment or Disposal of Mortgaged Property

Section 51 of the Code provides that a mortgagor (borrower) cannot assign or dispose of property that is subject to a mortgage without the lender's consent, or by order of a court. This is very important in particular in relation to vehicles, including the wreckage of a damaged vehicle. In the past some lenders have used the threat of prosecution under this section to press a borrower to keep paying, despite the fact the goods secured by the mortgage are gone. A borrower must be advised to get the lender's permission in writing, and until that is obtained to leave the vehicle wherever it is, in whatever condition it is in.

### 13. Guarantees.

Section 55 of the Code provides that a guarantee of a credit contract regulated by the Code must be in writing, signed by the guarantor. Section 56 provides that a guarantee cannot be extended unless the lender gives the guarantor a copy of the future contract relating to that extended liability, and the guarantor gives a written acceptance of the extension of the guarantee. Section 60 of the Code limits the liability of the guarantor to the amount owing by the borrower under the credit contract, and reasonable enforcement expenses.

#### 14. Hardship.

Sections 72 to 75 of the Code deal with changes to contracts on the basis of hardship. Unlike earlier versions of the Code, there is no requirement for the debtor to fit the change they want in the contract into one of three specified types of changes. The borrower simply advises they will be unable to meet their obligations under the contract. This can be done orally or in writing. The lender can then give the borrower notice, again orally or in writing, requiring them to give detail sufficient for the lender to see whether the borrower can meet their obligations, and how the contract would need to be changed. The borrower is then required to give this information. The Code goes on, in section 74, to provide that the borrower can apply to a court to change the contract. In practice, this happened rarely, due to the cost involved. In practice, borrowers in difficulty normally apply to the lender's internal dispute resolution section, and go on to AFCA if this does not prove fruitful.

#### 15. Unjust Contracts

Sections 76 to 81 of the Code set out provisions relating to unjust contracts. Subsection 76 (2) sets out sixteen factors that may be considered in deciding whether a contract is just. Again, the Code envisages the borrower would make an application to the court, but in practice borrowers usually use IDR and EDR. In putting together an application about an unjust contract, it may be useful to look through the factors in subsection 76 (2) to describe the difficulties the borrower has experienced.

#### 16. Statement of Payout Figure.

Section 83 of the Code provides the lender must give the borrower a written statement of the payout figure of a contract if the borrower makes a written request.

#### 17. Reverse Mortgage Ended by Lender Receiving Market Value

Section 86A provides that in relation to reverse mortgages entered into under the Enhanced Code, that is on or after 1 March 2013, the reverse mortgage is discharged when the lender receives the market value of the property.

#### 18. Default Notices.

Section 88 of the Code sets out the requirements before a lender can enforce a credit contract or mortgage. Normally the lender must give a default notice complying with this section.

19. Hardship Notices and Enforcement.

Section 89A of the Code provides that a lender must take certain steps if a borrower has given a hardship notice, and the lender wishes to give a default notice. In practice, borrowers now use IDR and EDR to halt enforcement.

20. Repossession and the 25% Rule.

Section 91 of the Code prevents a lender repossessing goods without permission of the court if the amount owing is less than 25% **of the amount borrowed** or \$10,000, whichever is the lesser. It is important to note that this is 25% of the original amount of the loan, and not of the total owing which includes interest and other charges. This restriction does not apply if the lender reasonably believes the borrower has, or intends to, remove or dispose of the goods.

21. Postponement of Enforcement Proceedings.

Section 94 of the Code provides that a borrower who has been given a default notice can give the lender a postponement request orally or in writing. This requires the lender to reply within 21 days giving its reply. In practice, borrowers now use IDR and EDR.

22. Location of Mortgaged Goods.

Section 98 of the Code requires a borrower to give information about the location of mortgaged goods. It is an offence for a borrower to contravene such a notice from a lender. Section 99 limits the right of a lender to enter a residential property to repossess goods.

23. Consumer Leases.

Sections 169 to 175J of the Code make general provisions for consumer leases. Section 117B to 117K provide for consumer leases to be changed on the basis of hardship, or unjust contracts. The effect of these provisions is that consumer leases are now dealt with in a way much more similar to credit contracts than was the case with previous versions of the Code.

24. Legibility and Language.

Section 184 of the Code provides that a credit contract, mortgage, guarantee or notice given by a lender under the Code must be legible and clearly expressed.

## 25. Copies of Contracts and Other Documents.

Section 185 of the Code requires a lender to give a copy of a credit contract, mortgage, guarantee or a notice given under the Code on the written request of the debtor, mortgagor or guarantor. If the original came into existence in the past year the copy must be provided within 14 days. If the original came into existence more than one year ago, the copy must be supplied within 30 days.

## 26. Signing of Documents and Electronic Transactions.

Section 186 of the Code makes provisions for signing documents, and section 187 provides that documents may be made electronically.

## 27. Dictionary

Section 204 of the Code gives the principal definitions of words used in the Code.

## 28. **AFCA RULES**

The Australian Financial Complaints Authority is usually referred to AFCA. It is governed by a set of rules called the AFCA Rules, and has been the sole provider of external dispute resolution in Australia since 1 November 2018. It provides a forum free to consumers to pursue complaints about financial services licensees, credit licensees, authorized credit representatives and superannuation trustees. It deals with complaints relating to business and consumer lending, insurance, superannuation and some debt collectors.

### 28.1 Exclusions.

The most important exclusion from matters AFCA will deal with is set out in Rule C 1.2 (d), which is a complaint which has already been dealt with by a court, dispute resolution tribunal, or a predecessor scheme (eg: FOS or CIO). The most important consideration in day to day use of AFCA is that a client who has been threatened with legal proceedings should ensure they lodge a complaint with AFCA before the lender enters a court judgment against them. If a default judgment has been entered, the borrower can ask the lender for a stay of execution of the judgment on the basis of financial difficulty, and if the lender refuses, the borrower can complain to AFCA. The basis of the complaint may be the borrower needs more time to re-locate.

### 28.2 Framing A Complaint

In putting together a complaint to AFCA, it is necessary to identify clearly what the lender wishes to complain about, and what outcome they want. If the client is in financial hardship, and believes they can get the contract back on track, the essence

of their complaint may be to obtain a postponement of enforcement action. If the client believes the contract is unjust, they can consider the criteria mentioned earlier in this paper under the heading Unjust Contracts. If the complaint relates to responsible lending, it is useful to consider the requirements of lenders set out in the Act under the heading - Responsible Lending.

### 28.3 Small Business Can Complain

As well as assisting consumers, AFCA can deal with a complaint from a small business. This is defined in section E of the AFCA Rules as a primary producer or other business with fewer than 100 employees at the time the complaint arose.

### 29. Banking Code of Practice.

The Banking Code of Practice came into operation on 1 July 2019. It replaced the Code of Banking Practice. It binds its 22 member banks, which include the main banks operating in Australia. The Banking Code provides a basis for assisting consumers and small businesses. It repeats many of the principles and protections of the National Credit Act and Code, for example Chapter 17 of the Banking Code relates to responsible lending, and Chapter 37 gives a right to copies of certain documents. One particularly useful provision is paragraphs 135 to 137 relating to cancelling a direct debit from a deposit account or a credit card account. The bank is required to process the cancellation request promptly, and **not** to advise the customer that they should first raise the cancellation with the organization receiving money under the direct debit.

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