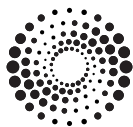


The Law Handbook

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15th EDITION



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Credit

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CONSUMER CREDIT AND THE PROTECTIONS AVAILABLE

Consumer credit protections

[13.10] Overview of the national credit law

Since 1 July 2010, Australia has had national regulation of consumer credit. The national regime is found in the *National Consumer Credit Protection Act 2009* (Cth) (*NCCP Act*) and the *National Credit Code* (NCC), Sch 1 of the *NCCP Act*. Together they are referred to as “the credit law”. The Australian Securities and Investments Commission (ASIC) is the sole regulator of this law.

The credit law adds to the existing protections for consumers accessing financial products available under the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*), remedies for unjust contracts found in the *Contracts Review Act 1980* (NSW) (CRA), and standards set out in industry Codes of Practice and the Australian Financial Complaints Authority (AFCA) rules and operational guidelines.

If you have a dispute

1. For specific information about what you can do if you have a dispute about credit, see [13.340]. If a default notice or Statement of Claim has been served, you need to act urgently.
2. Always consider using AFCA. All those involved in the business of credit under the credit law must be a member of AFCA. From 1 November 2018, AFCA replaced the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT) and became a one-stop shop for consumers with complaints about a financial product or service. All collections and enforcement action must stop once a complaint is made to AFCA.

For more information on AFCA, see [13.340] and [13.650].

Types of contracts covered by the National Consumer Credit Protection Act 2009

The credit law applies to a wide range of consumer credit products. Primarily, it applies to credit contracts (where a debt from one person to another is deferred, or a person incurs a deferred debt) if, when the contract is entered into or proposed to be entered into:

- the debtor is a natural person or strata corporation; and
- the credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes, or to purchase, renovate or improve residential investment property after 1 July 2010; and
- a charge is made for providing credit; and
- the credit is provided in the ordinary course of a credit provider’s business (NCC, s 5).

The definition of contract includes a series or combination of contracts or arrangements (s 204). The credit law also applies to guarantees (see [13.280]) and mortgages (see [13.270]) that secure obligations under a credit contract (see ss 7–12 for definitions).

Consumer leases are the other type of contract regulated by the credit law. Consumer leases are contracts for the hire of goods by a natural person or strata corporation where the person or corporation does not have a right or obligation to own the goods. Consumer leases are regulated by the credit law if:

- the goods are hired primarily for a personal, domestic or household purpose;
- a charge is made for the hire that exceeds the cash price of the goods; and
- the lessor who hires out the goods does so in the course of a business of hiring goods, or

incidental to any other business carried on by the lessor (NCC, s 170).

These credit contracts, consumer leases, mortgages and guarantees are referred to collectively as “regulated contracts”.

The credit law is presumed to apply to a contract (s 13). This means that if a party asserts that the credit law does not apply, the burden is on that party to prove their assertion.

As the *NCCP Act* came into operation on 1 July 2010, it applies to contracts signed on or after that date. Contracts entered into in NSW prior to 1 July 2010 were regulated by the more limited state-based Uniform Consumer Credit Code which can be enforced via the credit law through complex transitional arrangements. Legal advice may be required for disputes relating to these contracts.

Types of credit not covered by credit law

The national credit law does not apply to the following types of credit:

- business loans;
- investment loans for investments other than residential real property (eg, shares, commercial property);
- short-term credit of less than 62 days, but only where maximum fees and charges do not exceed 5% of the loan amount *and* the interest rate does not exceed 24% per annum (NCC, s 6(1));
- credit provided without prior arrangement (eg, an overdrawn cheque account where there is no agreed overdraft facility) (s 6(4));
- credit for which only the account charge is payable (s 6(5));
- joint credit and debit facilities (s 6(6));
- insurance premiums paid by instalments (s 6(8));
- pawnbrokers (except for the unjust transaction provisions of the *NCCP Act*) (s 6(9));
- trustees of estates, where the trustee advances money to a beneficiary or prospective beneficiary (except for the unjust transaction provisions) (s 6(10));
- employee loans, unless the employer provides credit as part of its business, and the loan to

the employee is *not* on more favourable terms than the employer’s ordinary terms to non-employees (s 6(11));

- margin loans (s 6(12));
- consumer leases that are for less than four months or an indefinite period (s 171(1));
- consumer leases that are employment related such as car loans as a fringe benefit (s 171(2)).

Further, the *National Consumer Credit Protection Regulations 2010* (Cth) (*NCCP Regulations*) to the *NCCP Act* may exclude the provision of certain other types of credit from the NCC (s 6(13)). Other protections may still be available even if the credit law does not apply.

Banned credit

Since 1 March 2013, short-term credit contracts have been prohibited (*NCCP Act*, s 133CA). Short-term credit contracts are contracts where the credit provider under the contract is not an authorised deposit-taking institution (ADI), the credit limit of the contract is \$2,000 (or such other amount as is prescribed by the *NCCP Regulations*) or less, the term of the contract is 15 days or less, the contract is not a continuing credit contract and meets any other requirements prescribed by the *NCCP Regulations*.

[13.20] Overview of other consumer credit protections

ASIC Act 2001

In addition to the credit law, the key piece of legislation regulating financial products and services is the *ASIC Act* (see *ASIC Act*, ss 12BAA, 12BAB for the formal definitions of financial product and service). The *ASIC Act* is less restrictive than the credit law in terms of the type of credit that is regulated. This means that if a contract entered by the consumer is not regulated by the credit law, the consumer may still be protected by the *ASIC Act*. Key protections in the *ASIC Act* are that, when engaging in trade or commerce in relation to financial services, a person must not:

- engage in unconscionable conduct (*ASIC Act*, s 12CA);

- engage in conduct that is misleading or deceptive or is likely to mislead or deceive (s 12DA);
- engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quality of any financial services (s 12DF);
- make false or misleading representations (ss 12DB, 12DC), including representations:
 - that services are of a particular standard, quality, value or grade;
 - about the need for particular services;
 - about the price of any particular services.

The *ASIC Act* also provides protection against unfair terms in standard form contracts entered on or after 1 July 2010 where the consumer is a natural person and the financial services are wholly or predominantly for domestic, personal or household use (*ASIC Act*, s 12BF). A term of these contracts will be void if it is found to be unfair. A term will be unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on (*ASIC Act*, s 12BG(1)).

Contracts Review Act 1980

The state-based CRA also provides an avenue for a consumer to apply for compensation or to have their contract varied or set aside if the contract is unjust – meaning that it is harsh, oppressive or unconscionable. A consumer cannot apply for relief under the CRA if the contract was entered for the purpose of a trade, business or profession carried on, or proposed to be carried on by the person unless it is an NSW farming undertaking. More details about unjust contracts at [13.260].

Licensing requirements

[13.30] A person who engages in credit activity must hold an Australian Credit Licence (ACL) issued by ASIC. A person engages in a “credit activity” if, among other things, they are a credit provider, lessor or broker of a contract that is

Industry Codes of Practice and AFCA rules and operational guidelines

Many credit providers have agreed to be bound by industry Codes of Practice. These can provide additional rights for consumers in addition to the operation of the credit law.

The Codes of Practice include:

- Code of Banking Practice (for banks);
- Customer-Owned Banking Code of Practice (for credit unions and building societies);
- Mortgage and Finance Association of Australia Code of Practice (mortgage managers, non-bank lenders and finance brokers).

The Codes of Practice outline the commitments of industry in relation to a range of matters including the provision of documents, dealing with vulnerable consumers and the operation of direct debts and chargebacks. You can obtain a copy from the industry association websites (see [13.650]).

AFCA takes the Codes of Practice into consideration when determining whether a credit provider has complied with good industry practice. AFCA's Code Compliance and Monitoring team is a separately operated and funded business unit of AFCA that monitors compliance with Codes of Practice. AFCA also has its own set of rules and operational guidelines with which it expects its' members to comply as a condition of their membership.

Common law

The common law of contract also applies to activity regulated under the credit law. For example, a consumer may have a right to claim damages or rescind a contract where misrepresentations have been made in relation to it, where there is fraud or mistake, or where there was some unfair conduct or undue influence when the contract was entered into.

regulated by the credit law (see *NCCP Act*, s 6 for the formal definitions). This means that credit providers, brokers (known as credit assistance providers), household rental companies and their intermediaries must all be licensed with ASIC

or have been appointed as “authorised credit representatives” (*NCCP Act*, s 64) by a licensee. It is an offence to engage in credit activity without a credit licence (*NCCP Act*, s 29) and criminal penalties can be imposed.

Credit representatives are people who are authorised to engage in specified credit activities on behalf of the licensee. This appointment must be in writing and registered with ASIC. There are certain limitations on these appointments (*Act*, ss 64, 65). Credit representatives are not required to hold their own ACL.

You can search online registers on ASIC’s website for companies that hold an ACL or are a registered credit representative of an ACL holder.

Credit assistance

Traditionally, finance brokers have helped consumers who are trying to arrange credit. The credit law does not refer to “finance brokers” or “finance broking”; instead, it uses the terms “credit assistance providers” and “intermediaries”.

Credit assistance is where a person suggests that the consumer apply for a credit contract or consumer lease, or increase their credit limit on a credit contract and/or assists the consumer to do this, including suggesting that they remain in a particular credit contract or consumer lease. Those engaging in credit assistance are also required to hold an ACL.

Credit assistance or authorised credit representative?

A credit assistance provider is someone who arranges credit or suggests a certain product, which is ultimately approved and accepted by a credit provider, whereas an authorised credit representative acts on behalf of a credit provider such that they can be authorised to enter into contracts on their behalf. The scope of work for a credit assistance provider or authorised representative can make them look very similar. Search ASIC’s online registers for licensees and credit representatives if you want to find out. The

search will outline the limits of their licence as a “credit provider” or “other than a credit provider”.

Exemptions from holding an Australian Credit Licence

There are a number of exemptions to the requirement to hold an Australian Credit Licence (ACL) in Pt 2.4 of the *NCCP Regulations*.

One important exemption is for certain “point of sale” credit assistance providers (see *NCCP Regulations*, regs 23, 23A). An example is where a store clerk provides a customer with information about a loan on behalf of the credit provider for the purpose of purchasing goods in the store. In point of sale settings, the credit provider is still bound by the *NCCP Act*, including requirements regarding disclosure and responsible lending; however, the retailer and store clerk will not be required to be a credit representative or credit assistance provider.

Financial counsellors, who provide counselling and advocacy services predominantly for the purpose of assisting individuals who are in financial difficulty to resolve their problems, are also exempt from the requirement to hold an ACL (*NCCP Regulations*, reg 20).

Conditions that must be followed under an Australian Credit Licence

Credit licensees must follow the licensing requirements set out in s 47 of the *NCCP Act*. Significantly for consumers, licensees must among other things:

- have internal dispute-resolution procedures that comply with conditions made or approved by ASIC;
- be a member of the AFCA scheme (see [13.350]);
- comply with the credit laws and any conditions of their ACL; and
- act in a way that is efficient, honest and fair.

The internal dispute-resolution procedures created by ASIC are set out in the ASIC Regulatory Guide 165. This includes details of the systems a licensee must have in place and how quickly an internal dispute-resolution complaint should be handled.

Disclosure obligations

[13.40] This section deals with the precontractual disclosure requirements under the

credit law for credit contracts and consumer leases. It also deals with what must be in the contract

itself. For disclosure requirements for mortgages and guarantees, see [13.270] and [13.280].

Prior to entering a credit contract, the consumer must be provided with:

- a Credit Guide;
- an information statement as required by the *NCCP Regulations* about the debtor's statutory rights and obligations (NCC, s 16(1));
- a pre-contractual statement setting out the matters required to be included in a contract under s 17 of the NCC. This pre-contractual statement may be the proposed contract document (NCC, s 16(5));
- a quote for credit assistance, where a credit assistance provider is involved (*NCCP Act*, s 137);
- credit cards, and in certain circumstances standard home loans, a Key Facts Sheet.

Consumers can seek compensation for a loss suffered as a result of the failure of the credit provider or credit assistance provider to comply with its key disclosure requirements. In some cases, ASIC or the consumer can also seek civil or criminal penalties through the courts.

[13.50] Credit Guide

Credit contracts and consumer leases

As soon as it becomes apparent to a credit provider that it is likely to enter a credit contract with a consumer, it must as soon as practicable provide a Credit Guide to that consumer (*NCCP Act*, s 126(1)).

This Credit Guide must in writing specify the licensee's name and contact details, their Australian Credit Licence number, certain information about the credit provider's internal dispute-resolution procedures, the AFCA scheme, and their responsible lending obligations to advise the consumer of the prohibition on the credit provider entering into, or increasing the credit limit of, unsuitable credit contracts and their obligations to provide a copy of their assessment if requested (s 126(2)).

Consumer lease providers must provide a Credit Guide in similar terms as soon as practicable after it becomes apparent that the consumer lease provider is likely to enter a lease with the consumer (NCC, s 149).

Credit assistance providers

Credit assistance providers must also provide consumers with a Credit Guide as soon as it becomes apparent that it is likely they will provide credit assistance to a consumer in relation to a credit contract (*NCCP Act*, s 113(1)).

Credit Guide must in writing specify the licensee's name, contact details, and their ACL number. It must also set out information about any fees, commissions or charges payable by the consumer and the method by which they are worked out. It must also contain the names of the six credit providers that they conduct the most business with (or if fewer than six, then just those names), and information about the credit assistance provider's internal and external dispute-resolution procedures. It must advise the consumer about the prohibition on suggesting or assisting with unsuitable credit contracts and secondly about obligations to provide a copy of their preliminary assessment if requested (s 113(2)).

[13.60] Information statement

Before signing a credit contract, or before the consumer offers to enter into a contract, whichever occurs first, the credit provider must give the consumer a statement informing the borrower of their statutory rights and obligations in accordance with the *NCCP Regulations* (NCC, s 16). The statement appears as the Prescribed Form No. 5 in Sch 1 of the *NCCP Regulations*. A particular form applies for reverse mortgages (*NCCP Regulations*, Sch 5A) (refer to [13.250] for the definition of reverse mortgages).

A similar statement must be provided in relation to consumer leases; however, the provider has 14 days from the date the contract was entered into to provide the statement to the consumer (NCC, s 175(1)). The statement appears as the Prescribed Form 17 in Sch 1 of the *NCCP Regulations*.

[13.70] Pre-contractual statement for credit contracts

A pre-contractual statement must also be provided before the contract is signed or before the consumer offers to enter into a contract, whichever occurs first (NCC, s 16).

The statement must disclose at least the information required by s 17 of the NCC (see [13.110]).

The consequence of failing to disclose information will vary depending on what is not disclosed. Some of the required disclosures are called key requirements. In all cases, the consumer can claim any loss caused by the lack of disclosure, but a civil penalty can only be imposed if there is a failure to disclose a key requirement. The maximum penalty that can be imposed for breach of a key requirement is usually all interest charges under the contract and any other loss (NCC, s 114).

For credit contracts, key requirements are those set out in ss 17(3)–17(6) and 17(8) (though under s 17(8) only for retained credit fees and charges and not for failing to disclose the total amount of fees and charges payable), ss 17(9), 17(11), 17(15)(a) and 17(15)(b), and s 23(1) which prohibits certain fees and charges (all references are to the NCC); see above for descriptions of these subsections.

For continuing credit contracts, key requirements are those set out in the following NCC sections: ss 17(3)(b), 17(4), 17(5) and 17(8) (again for s 17(8) only for retained credit fees and charges and not for failing to disclose the total amount of fees and charges payable), ss 17(9) and 23(1) which prohibit certain fees and charges, s 34(6) which requires statements of account to include certain interest charge information and s 35 which requires that the opening balance must not exceed the closing balance of the previous statement.

There are different key requirements for consumer leases (see [13.50]).

[13.80] Quote for credit assistance providers

Where a credit assistance provider is involved, they must first provide a quote before providing credit assistance (*NCCP Act*, s 114(1)).

The quote must in writing specify the services that it covers and the maximum amount that will be payable including the maximum amount of fees and charges payable to others and must state what will be payable if the credit contract is not entered or the credit limit is not increased. It must be signed and dated or otherwise there must be some indication of the consumer's acceptance

of it and the date of the consumer's acceptance of it which is allowable under the credit law. Finally, the consumer has to be given a copy of the accepted quote.

[13.90] Key Facts Sheet

A Key Facts Sheet must be provided in certain circumstances for standard home loans (see *NCCP Act*, ss 133AA–133AF). Standard home loans are most home loans used to purchase residential property, or to refinance a loan that was wholly or predominantly used to purchase residential property. The Key Facts Sheet must be provided either where the consumer requests one or where the credit provider has a website that can be used by the consumer to apply for, or make an enquiry about, a standard home loan; the website must inform the consumer about both the existence of the Key Facts Sheet and how to generate it.

A model Key Facts Sheet is provided in Pt 1 of Sch 5 of the *NCCP Regulations*. It is a single-sheet document and summarises the key facts about the home loan, which will usually include the interest rate, a personalised comparison rate, the total cost of the home loan and particular product features and fees.

From 1 July 2012, credit providers have also been required to provide a Key Facts Sheet as part of the application for a credit card. The relevant provisions for Key Facts Sheets for credit cards are set out in ss 133BB–133BD. Model Key Facts Sheets are found at Sch 6 of the *NCCP Regulations*.

[13.100] Mandatory warning for small-amount credit contracts

In the case of small-amount credit contracts, traditionally known as payday loans, there are additional requirements and protections. A small-amount credit contract is defined in s 5(1) of the *NCCP Act* as a credit contract where:

- the credit is not continuing (eg, a credit card);
- the credit provider is not an authorised deposit-taking institution (eg, a bank);
- the credit provided is \$2,000 or less;
- the term of the contract is between 16 days and one year;
- the loan is unsecured.

Licencees who offer these contracts must display a warning “*Do you really need a loan today?*” in the form prescribed at Sch 7–9 of the *NCCP Regulations*. It applies to lending in store, over the phone and online. The warning includes mandatory text which advises borrowers to consider other borrowing options, including asking utility providers about payment plans, getting a loan from Centrelink or seeking financial counselling services.

[13.110] What must be in the contract itself

Credit contracts

The contract must be in writing, signed by the credit provider and either signed by the debtor or shown to be accepted through some specified conduct such as withdrawing the money (NCC, s 14).

The contract must also contain all the matters in s 17 of the NCC listed below.

The consequence of failing to disclose information will vary depending on what is not disclosed. In all cases, the consumer can claim any loss caused by the lack of disclosure. A civil penalty is imposed if there is a failure to disclose a key requirement where the maximum penalty is usually all interest charges under the contract plus any other loss (NCC, s 114). Key disclosure requirements include the following in s 17 of the NCC:

- the credit provider’s name (s 17(2));
- the amount of credit (s 17(3));
- the annual percentage rate or rates of interest (s 17(4));
- the method of calculation of interest (s 17(5));
- the total amount of interest charges payable (s 17(6));
- repayments and instalment details (s 17(7));
- credit fees and charges (s 17(8));
- changes affecting interest and credit fees and charges (s 17(9));
- how often statements of account are to be provided to the debtor (s 17(10));
- how and when any default interest is to be applied (s 17(11));

- a statement that enforcement expenses may become payable in the event of a breach (s 17(12));
- if a mortgage or guarantee is to be or has been taken, a statement to that effect, and in the case of a mortgage, a description of the property (s 17(13));
- certain details about commissions (s 17(14));
- certain details of credit-related insurance if that is being financed under the credit contract (s 17(15)).

There are further key requirements for a continuing credit contract.

The NCC recognises that electronic banking may lead to changes in the way that contracts are made and authorises such other methods (NCC, s 187).

Consumer leases

A consumer lease must also be in writing and contain all the matters outlined in s 174 of the NCC including:

- a description of the goods hired (s 174(1)(a));
- the amount of any other charges not included in the rental payable under the lease, and a description of those charges (s 174(1)(d));
- the amount of each rental payment (s 174(1)(e));
- the date on which the first rental payment is due and the frequency (s 174(1)(e));
- the number of rental payments to be made and the total amount of rental payable (s 174(1)(f));
- the amount to be paid prior to delivery (s 174(1)(b));
- the amount of stamp duty or other charges payable (s 174(1)(c));
- a statement of the conditions on which the lessee may terminate and any liability for doing so (s 174(1)(g), 174(1)(h)).

Within 14 days of entering into a lease, a copy of the lease must be provided to the lessee unless this has been previously provided together with the required information statement explaining the consumer’s rights and obligations (NCC, s 175). See Form 17, Sch 1 of the *NCCP Regulations*.

Responsible lending

[13.120] Responsible lending requirements in the *NCCP Act* became fully operational on 1 January 2011 with some limited application between 1 July 2010 and 31 December 2010, which is outlined below. The responsible lending protections are designed to better inform consumers and prevent credit providers from offering unsuitable credit contracts and consumer leases.

These assessment requirements apply to all credit providers from 1 January 2011; for some credit providers, which can essentially be described as *not* being banks, building societies, credit unions or registered finance companies, this requirement commenced on 1 July 2010.

[13.130] What credit providers and consumer lessors must do

Before providing credit or increasing a credit limit, a credit provider must firstly make reasonable inquiries and verifications about the consumer (*NCCP Act*, s 130) and then assess whether that credit is unsuitable (*NCCP Act*, s 129).

In order to assess unsuitability, s 130 requires the credit provider to:

- make reasonable inquiries about the consumer's requirements and objectives for obtaining credit;
- make reasonable enquiries about the consumer's financial situation;
- take reasonable steps to verify the consumer's financial situation.

A loan must be found to be unsuitable if the reasons set out in s 131 of the *NCCP Act* are likely. These include where the credit does not meet the consumer's requirements and objectives, or if it can only be paid with substantial hardship. Having to sell your home to meet payments is regarded as substantial hardship, unless the contrary is proved (*NCCP Act*, ss 118(3), 119(3)).

The assessment must be done within the 90-day period before the credit is provided. Where the loan is for the purchase of a residential investment property the period is 120 days (*NCCP Regulations*, reg 28J). On request, the credit provider must give the consumer a copy of the assessment, either before entering the credit contract or otherwise

within seven years of the credit being provided. If the credit is not provided, there is no obligation to supply the assessment.

There are also slightly different requirements for credit representatives (see *NCCP Act*, ss 158–164).

A civil penalty applies if the credit provider fails to do any of the above. This can only be imposed through ASIC or through the courts. Consumers can also seek compensation if they suffer a loss. The same protections apply to consumer leases. These requirements are set out in the ss 134–156 of the *NCCP Act*.

ASIC and AFCA have provided additional and more detailed guidance on what compliance with responsible lending looks like. For more information, refer to ASIC's Regulatory Guide 209: Credit licensing: Responsible lending conduct.

[13.140] Special provisions for small-amount credit contracts and reverse mortgages

Small-amount credit contracts

There is a presumption that the loan is unsuitable if in the 90-day period prior to the loan application the consumer has already had two other small-amount credit contracts (*NCCP Act*, s 123(3A)(b)), unless the credit provider can prove that the contract is not unsuitable in the circumstances. The loan will also be presumed to be unsuitable if the consumer is already in default on another small-amount credit contract at the time of the loan application (s 123(3A)(a)).

If more than 50% of the consumer's income is from Centrelink, the credit provider is prohibited from entering into a small-amount credit contract if the repayments under the contract (and all other small-amount credit contracts) will exceed 20% of the consumer's gross income (*NCCP Act*, s 133CC) entered into during the period.

The credit provider must obtain bank account statements from the consumer for the 90-day period preceding the loan when verifying the consumer's financial situation (*NCCP Act*, ss 117(1A), 130(1A)).

Reverse mortgages

A reverse mortgage (see [13.250]) is presumed to be unsuitable if the loan-to-value ratio meets certain requirements (*NCCP Regulations*, reg 28LC). Different ratios apply depending on the age of the borrowers.

[13.150] What credit assistance providers must do

Where a credit assistance provider is involved in the transaction, they too are required to comply with responsible lending provisions. In these circumstances, they must make a preliminary

assessment as to whether the credit sought, including whether to remain in a contract, is unsuitable (*NCCP Act*, s 116). The same factors are to be taken into account and are set out in ss 116–120 of the *NCCP Act*.

A civil penalty applies if the credit assistance provider fails to do any of the above, and it can only be imposed through ASIC or through the courts. Consumers can also seek compensation or other orders if they suffer a loss. A wide range of orders are available. Essentially it will be about trying to put the consumer back in the position that they would have been in if they had not been provided with unsuitable credit.

Fees and interest

[13.160] There is no fixed limit on the amount of fees and charges that can be applied generally to credit contracts and consumer leases. However, there are some specific fees for specific contracts that are regulated which are dealt with below. It is also possible to argue that a fee is unconscionable under s 78 of the *NCC* or an unfair term under s 12BF of the *ASIC Act*.

Fees for early termination of home loans

Credit providers cannot charge consumers early termination fees in relation to secured home loans entered into after 1 July 2011 (*NCCP Regulations*, reg 79A). However, not all “exit” fees are prohibited. Regulation 79A(2) makes it clear that credit providers can charge:

- a break fee in relation to a fixed rate loan; and
- a discharge fee that reimburses the credit provider for the reasonable administrative cost of terminating the credit contract.

Changes to fees and charges

A credit provider must give a consumer no less than 20 days’ written notice of changes to credit fees and charges including the imposition of new fees and charges (*NCC*, s 66). This does not apply to a change that reduces the obligations of the debtor, or extends the time for payment under the credit contract (*NCC*, s 66(3)).

Maximum interest rates

From 1 July 2010, a maximum annual percentage rate of 48% inclusive of all ascertainable credit fees

and charges applies to credit contracts governed by the *NCCP Act*. The credit law sets out the method of calculating interest charged by a credit provider (*NCC*, ss 27–29). It does not apply to consumer leases as interest is not charged on these contracts.

The maximum annual percentage rate is essentially an adoption of the maximum annual percentage rate that applied in NSW before 1 July 2010 by virtue of Sch 3 of the *Credit (Commonwealth Powers) Act 2010* (NSW).

Any provision in a credit contract that imposes a higher rate of interest is void to the extent that it does so, and the borrower is entitled to recover as a debt any money they have paid under the contract above the maximum rate. It is also an offence for a credit provider to enter into such a contract.

Default interest rates can only be imposed where payments are overdue under the credit contract and then may only be imposed in respect of the amount in default, not the whole of the debt (*NCC*, s 30).

Changes to interest rates

A credit provider must give notice no later than the day that an increased rate or rates of interest is to take effect, unless the change to the interest rate or referable interest rate is otherwise ascertainable from the contract, or where a new reference rate of interest is to be applied to the credit contract (*NCC*, s 64(1)). The section is effectively satisfied by the credit provider publishing changes to the relevant reference rate or rates of interest in a

newspaper that circulates throughout each state and territory (s 64(2)).

A credit provider must give a consumer no less than 20 days' notice of a change to the manner in which interest is calculated or applied where that would increase the liability of the consumer (ss 64(4), 64(5)).

Unconscionable interest and other fees in credit contracts

Even where a charge is not specifically prohibited, it could be found to be unconscionable under s 78 of the NCC. This may apply to charges on credit contracts such as:

- an establishment fee;
- a fee payable on early termination of a credit contract;
- a fee for a prepayment of an amount under a credit contract;
- a change to an annual percentage interest rate.

If the charge is found to be unconscionable, a court may make orders to annul, reduce or otherwise change the fee (s 78(1)). An application can be made by a debtor or guarantor.

When determining whether an establishment fee is unconscionable, the court has to look at the credit provider's reasonable costs for determining the application for credit and providing the credit and also their average reasonable costs for doing this in these types of contracts (s 78(3)).

With a fee payable either on early termination of a credit contract or for a prepayment of an amount under a credit contract, the court can only find the fee or charge unconscionable if it is more than the reasonably estimated loss that the credit provider would incur where there was early termination or prepayment, respectively. This estimated loss includes the credit provider's reasonable administrative costs (s 78(4)).

With a change in interest rates the court can only find this unconscionable if either:

- the change is unreasonable bearing in mind particularly what was advertised or represented before or at the time the contract was entered, and how much time has gone by; or
- where the change discriminates against the consumer unjustifiably when compared to other consumers with similar contracts (s 78(2)).

Special provisions for small- and medium-amount credit contracts

There are specific limits on the amount that can be charged on small- and medium-amount credit contracts. A definition of a small-amount credit contract can be found in s 5 of the *NCCP Act*. The only charges that can be applied to a small-amount credit contract are as follows:

- a maximum establishment fee of 20% of the amount of credit a borrower receives in the hand;
- a maximum monthly fee of 4% of the amount of credit a borrower receives in the hand;
- default fees or charges; and
- any government fee, charge or duty payable (NCC, s 31A).

This means that interest cannot be charged.

The maximum that can be recovered when a small-amount credit contract is in default is twice the amount the consumer received in the hand.

In relation to a medium-amount credit contract, the maximum that can be charged is 48% interest per annum plus an establishment fee of 20%. A medium-amount credit contract is like a small-amount credit contract; however, the loan amount is between \$2,001 and \$5,000, for a term of 16 days to two years and the obligations can be secured.

During the contract: protections

[13.170] Early payments or termination

Consumers have the right to terminate a credit contract where no credit has been obtained or where the credit facility (such as a credit card) has not been used. There is also a provision for early

termination relating to supply of goods under a linked contract (NCC, s 134) (see [13.240]).

A consumer has the right to have early payments credited to their account unless it is expressly prohibited under the credit contract. Early payments must be credited to the consumer's account as soon as practicable (NCC,

s 26). A consumer or guarantor also has the right to pay out a credit contract at any time (NCC, s 82).

A consumer can terminate a consumer lease at any time before the end of the term if they return the goods and pay the amount outstanding under the lease (NCC, s 179).

[13.180] Right to statement of account

Credit contracts

The credit law places strict obligations on credit providers to give consumers periodic statements of account.

The period between statements must be set out in the credit contract. The opening balance on a statement of account must not exceed the closing balance on the previous statement (NCC, s 35).

Account statements must include the following information:

- the date range the statement relates to;
- the opening and closing balances on the opening and closing dates;
- particulars of the credit provided;
- identifying information about the goods or credit charged to the debtor during the period of the statement;
- the amount of interest charged to the consumer during the statement period, the annual rate of interest charged and whether the interest rate has changed since the previous statement of account and correction of any errors contained in the previous statement of account;
- amounts paid by or credited to the consumer;
- if there is a minimum amount payable the amount and the due date (s 34).

There are some exceptions to the requirement that credit providers give periodic statements of account, for example, where the interest rate is fixed for the whole period of the contract; where the balance is nil; where the consumer is in default and legal proceedings have commenced; or where the consumer has died and the executor/trustee has not requested account statements (s 33).

Credit card statements must also include a warning to the borrower of only making minimum monthly repayments on the account. The form of the warning is prescribed in reg 79B of the *NCCP Regulations*. It is not required if the balance is \$50 or less or a payment arrangement is in place which replaces the minimum monthly payments.

A credit provider must give the consumer (including any joint debtor) their account information on request within 14 days if the information sought relates to a period less than one year previous, or within 30 days if it relates to a period greater than one year but less than seven years. The account information required includes the balance; the credits and debits to the account during the requested period, and any overdue amounts and, if so, the date payable (NCC, s 36).

Consumer leases

The lessor must provide to the lessee statements of account no less than every 12 months outlining the matters prescribed in reg 105B (NCC, s 175E(1)(d)). The following information must be included:

- the dates on which the statement period begins and ends;
- particulars of any amounts paid by the lessee to the lessor during the statement period;
- particulars of any amounts credited to the lessee's account during the statement period;
- particulars of payments debited from the lessee's account and paid to a third party during the statement period;
- any corrections to information contained in a previous statement of account.

Lessees are also entitled to an end-of-lease statement under s 175H(1) of the NCC to be provided not less than 90 days before the end of the term of the lease outlining the matters prescribed in reg 105C:

- the date the consumer lease ends;
- that the goods must be returned and the date they are to be returned;
- the total amount to be paid by the lessee;
- the details of the collection or return of the goods;
- the amount to be paid by the consumer if the goods are not returned;
- whether the consumer lease provider is willing to negotiate for the sale of the goods, and if so the estimated cost and contact details of the lessor.

[13.190] Disputed accounts

Where a dispute arises over a liability referred to in an account statement, the consumer can give written notice to the credit provider that the liability is in dispute and the credit provider must

give the consumer a reasonably detailed written explanation of the liability (NCC, s 38(1)). This is not required where the consumer and credit provider reach an agreement about the disputed account (s 38(2)).

A consumer should give the credit provider written notice of the disputed liability within a certain timeframe. In the case of a continuing credit contract, notice of the dispute should be provided to the credit provider before the due date (s 38(3)) or, otherwise within 30 days of the consumer receiving the disputed account and if there are no account statements, within three months (s 38(4)–38(5)).

A credit provider cannot commence enforcement proceedings against a consumer with respect to the disputed liability until 30 days have elapsed since providing a “reasonably detailed” explanation to the consumer about the liability (s 38(6)). A credit provider who has commenced such proceedings within the 30 days can only proceed to enforcement with the permission of the court (s 38(8)). A consumer or a credit provider can apply to a court for orders with respect to the disputed liability (s 38(7)).

Similar provisions exist at s 175G of the NCC in relation to consumer leases.

[13.200] Changes the lender or lessor can make unilaterally

There are restrictions on the unilateral changes that credit providers can make to credit contracts.

Credit contracts

These notice obligations cannot be ousted by the terms of the credit contract. The strict notice requirements for unilateral changes are set out in ss 63–70 of the NCC.

A credit provider must give a consumer no less than 20 days’ written notice of any change or changes to repayments unless the changes reduce the liability of the consumer (s 65).

Credit limit increases must be at the request of or with the written consent of the consumer (s 67(4)). Written notice of a decision by a credit provider to reduce or refuse further credit to a consumer (where there is no default) must be given “as soon as practicable” after the decision has been made by the credit provider (s 67).

A credit provider must give a consumer not less than 20 days’ written notice of a change to a credit

contract that is open to them under the contract. The notice requirement does not apply if the effect is to reduce the liability of the consumer (s 68).

It is prohibited for a credit provider to make unilateral changes to a credit contract where the annual rate is otherwise fixed for a period and the effect of the change is to increase fees and charges applicable on early termination or prepayment under the contract (s 70).

Consumer leases

Under s 174A of the NCC, alteration of (including an addition to) a consumer lease document by the lessor after it is signed by the lessee is ineffective unless the lessee has agreed in writing to the alteration. Section 174 of the NCC does not apply where an alteration has the effect of reducing the lessee’s liabilities under the consumer lease.

[13.210] Right to hardship variations

It is generally better to obtain a hardship variation from the credit provider or lessor before going into default and enforcement steps have been taken. It is important to keep a record of any dealings with the credit provider and any response/s received with respect to requests or applications for hardship. Financial counselling can assist with requests/applications for hardship variations and negotiating financial hardship. (Use the following contact details to locate a financial counsellor at Financial Counselling Australia: www.financialcounsellingaustralia.org.au: 1800 007 007.)

Credit contracts not regulated by the credit law

There is a presumption that the *NCCP Act* applies to all credit contracts and consumer leases and that the onus is on the credit provider to prove otherwise.

However, even a credit contract that is not regulated under the *NCCP Act* (or where the loan amount is over the relevant hardship threshold – see below for information about the threshold) can usually still be varied where there is financial hardship. Credit providers have an obligation to treat consumers fairly which necessarily involves considerations of hardship. Non-bank lenders also subscribe to Codes of Practice that include similar provisions.

The disadvantage of not being regulated by the credit law in a financial hardship is that the decision might not be reviewable by a court. However, they may still be reviewable by AFCA.

Credit contracts regulated by the credit law

Basis for hardship variation

A hardship application to vary a credit contract can be requested orally or in writing if the consumer considers that they will be unable to meet their obligations under a credit contract (NCC, s 72(1)). There must be a reasonable cause for the consumer's hardship, such as illness or unemployment.

Types of variation

The NCC does not prescribe the kind of hardship variation that can be proposed by a consumer. The intent of the NCC hardship provisions is that the financial hardship would be ameliorated and the credit contract salvaged if the proposed variation was granted. Therefore, there must be an expectation that the consumer will be able to return to making normal repayments, or otherwise meet the loan obligations, if the hardship variation was granted.

Some examples of hardship variations include:

- extending the term of the contract and so reducing payments (without a change to the annual percentage rate/s);
- postponing payments for a specified period (without a change to the annual percentage rate/s);
- extending the term of the contract and postponing payments for a specified period (without a change to the annual percentage rate/s);
- combining any of these with a timetable to sell mortgaged property, obtain a compensation payment or other lump sum.

Hardship process

The credit provider must consider an application for hardship and give their response within 21 days. Within this timeframe, the credit provider may ask the consumer orally or in writing for more information regarding the consumer's inability to pay the loan (NCC, s 72(2)). The consumer must

provide this further information if requested within 21 days (s 72(3)). Otherwise, the credit provider may decide the hardship application on the basis of the information available. If the credit provider has all the relevant information, it must give a response to the consumer's hardship application according to the applicable time limit prescribed in s 72(5) of the NCC.

If the credit provider agrees to the hardship variation, the credit provider must give the consumer and any guarantor notice of the change within 30 days after the date of the agreement. The notice must set out the particulars of the change in the terms of the credit contract and any information required by the *NCCP Regulations* (s 73(1)). If the credit provider does not agree to the hardship variation, the credit provider must respond to the consumer providing reasons for their decision, the name and contact details of the AFCA scheme and notice to the consumer of their rights under the AFCA scheme (s 72(4)).

Equivalent provisions exist for consumer leases in ss 177B–177E of the NCC.

A credit provider must respond to an outstanding application for hardship before it can commence enforcement proceedings and the credit provider must wait 14 days after giving this response before commencing proceedings (s 89A).

Challenging the hardship decision

Where there is a refusal or the consumer is otherwise dissatisfied with the credit provider or lessor's response, the consumer can complain to AFCA (NCC, s 72(4) for credit contracts and s 177B(4) for consumer leases). In some circumstances, it may be best to apply for a hardship variation directly to AFCA. This may be appropriate where court proceedings have been commenced by the credit provider. Lodging an AFCA complaint will place those proceedings on hold while the complaint is being considered. See [13.350] for information about time limits, jurisdictional limits of AFCA and other matters.

A refusal by a credit provider to grant a hardship variation can also be reviewed by a court (NCC, s 74 for credit contracts and s 177D for consumer leases). The court has the power to grant a stay of enforcement proceedings and to make orders varying the credit contract.

Hardship thresholds

The *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) removed the hardship threshold altogether for loans entered into from 1 March 2013.

However, under older contracts a consumer's right to seek a hardship variation in a court may be restricted by a threshold based on the amount of the loan. For contracts entered into or refinanced from 1 July 2010 to 1 March 2013, the relevant threshold is \$500,000. A floating hardship threshold applies to loans that were entered into between 1 December 2004 and 30 June 2010 and regulated by the Uniform Consumer Credit Code. The relevant hardship threshold figure

was calculated quarterly using Australian Bureau of Statistics (ABS) data. The floating threshold figure can be accessed via the ASIC "Money Smart" website at www.moneysmart.gov.au.

For contracts entered into during the period between 1 November 1996 and 30 November 2004, the threshold is only \$125,000.

Whether or not a hardship threshold applies, it does not affect a consumer's right to seek a hardship variation through a credit provider's internal dispute resolution procedure or by making a complaint through AFCA (see [13.350]).

Various other protections

[13.220] Advertising, misrepresentations and credit hawking

The credit law prohibits a person from:

- making false or misleading representations material to entry to a credit contract/consumer lease or in an attempt to induce another person to enter into a credit contract/consumer lease or related transaction (NCC, ss 154, 179U);
- harassing someone to get them to apply for credit, or enter into a credit contract or a related transaction (s 155) or to apply for or enter into a consumer lease (s 179V);
- credit canvassing – visiting someone at their home or place of business without prior arrangement to induce them to apply for or obtain credit (s 156);
- advertising credit where the provider is not licensed (NCCP Act, s 31);
- holding out that they hold a licence or are otherwise authorised under a licence or exemption when that is not the case (NCCP Act, s 30).

It is also an offence under s 39 of the *Australian Consumer Law (Competition and Consumer Act 2010)* (Cth), Sch 2) and s 12DL of the *ASIC Act* to send a credit or debit card to someone except in response to a request in writing from that person, or in

replacement of, or substitution for, a previously requested card.

These can all attract civil and criminal penalties. Consumers can also seek compensation for loss suffered as a result of a misleading representation from anyone involved in the representation.

[13.230] Additional rules for credit cards

From 1 July 2012, credit providers must not send unsolicited credit limit increase invitations to consumers unless they have obtained the consumer's consent. The new rules also ban over-the-limit fees on credit cards, unless the fees are expressly requested by the consumer (NCCP Act, s 133BI).

Unless the consumer agrees otherwise, payments on a credit card must first be allocated to the part of the closing balance shown in the last account statement to which the highest rate of interest applies (s 133BQ).

If payments are not applied in accordance with these and other requirements in Div 6 of Pt 3.2B the credit provider has committed a strict liability offence and must refund or reverse the transaction (s 133B).

From 1 January 2019, when you apply for a credit card or a credit increase, lenders must assess your request based on your ability to repay the credit limit within three years.

[13.240] Linked credit

Linked credit describes transactions where goods or services are purchased by getting a loan at the place where the goods are purchased or when there is a certain connection between the supplier and the credit provider. The most common examples are buying a motor vehicle and buying larger household items (like furniture or white goods) where the loan is arranged at the retailer's premises.

Part 7 of the NCC (ss 125–139) deals with Related Sale Contracts (linked credit) and offers additional protection to consumers. The main protection offered by the linked credit provisions is that the credit provider can be liable for (ss 128, 129):

- misrepresentations by the supplier;
- failure of the supplier to provide the goods and/or services;
- other breaches of contract by the supplier.

The consumer can request that the credit provider reduce or annul the credit contract depending on the loss caused by the misrepresentation.

If there is a misrepresentation by a supplier, the consumer can take legal action against both the supplier and the credit provider in a court that can hear both complaints. Taking action in AFCA is also possible; however, it can be complicated as the supplier may not be a member of AFCA. A way around this is where there is an argument that the supplier is the agent of the credit provider.

Where a consumer makes it known to a supplier of goods that they require credit in order to enter a linked contract to obtain goods and where, after making reasonable efforts, no credit could be obtained, the consumer can terminate the contract to acquire the goods (s 134(1)). The section applies even if goods and services have already been supplied pursuant to the related contract (s 134(2)). The consumer must return the goods, although this can give rise to a claim for compensation on the part of the provider for any damage to goods provided or for the value of services already rendered (s 134(3)).

If a consumer experiences a fault or problem with the goods or services, the consumer may have remedies under the *Australian Consumer Law* (see Chapter 10, Consumers). Under the NCC, if a sale contract is rescinded or discharged the consumer is entitled to terminate the linked credit contract (s 135).

The *ASIC Act* also gives a consumer the right to claim compensation or have their credit contract varied or rescinded if the credit provider (or its agent) has engaged in misleading or deceptive conduct, or if the consumer contract is in a standard form and contains an unfair term (*ASIC Act*, ss 12DA, 12BF).

[13.250] Reverse mortgages

A “reverse mortgage” is a type of credit contract which allows the consumer to borrow money using the equity in their home as security. The consumer can borrow money as a lump sum, a regular income stream, a line of credit or a combination of these options. Interest is charged on the loan amount; however, the consumers do not have to make any repayments while they continue to live in their home. The consumer must repay the loan amount in full, including interest and any fees, upon passing away, selling their home or moving to aged care.

The credit provider's decision to enter a reverse mortgage is not dependent on the consumer's income; however, credit providers are still required to comply with the responsible lending requirements in the *NCCP Act*. A reverse mortgage is presumed to be unsuitable if:

- at the time the credit contract is entered into, the youngest borrower under the reverse mortgage is 55 or younger and the loan-to-value ratio of the reverse mortgage is higher than 15% (*NCCP Regulations*, reg 28LC(6)(b)(c)); or
- at the time the credit contract is entered into, the youngest borrower under the reverse mortgage is older than 55 and the loan-to-value ratio of the mortgage is the sum of 15% and 1% for each year that the borrower is older than 55 (reg 28LC(7)(b)(c)).

The loan-to-value ratio is the amount of credit owed under the credit contract for the reverse mortgage multiplied by 100, divided by the value of the reverse mortgaged property (reg 28LC(8)).

The credit provider must make reasonable inquiries about the consumer's requirements and objectives in meeting possible future needs, such as aged care and whether the consumer would prefer to leave the equity in their home to their estate (reg 28HA(2)).

Break fees for reverse mortgages can be substantial, so a consumer should be aware of the consequences of terminating a reverse mortgage

early before entering into the credit contract. Under the NCC and the *ASIC Act*, particularly the unfair contract term provisions in Subdiv BA of Div 2 of Pt 2 of the *ASIC Act*, the consumer can challenge the validity of a break fee if they think it is unconscionable or unfair (see [13.160]).

Negative equity protection

The “negative equity protection” was introduced by Subdiv B of the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) for all new reverse mortgage contracts entered into on or after 18 September 2012. When the reverse mortgage contract ends and the consumer’s home is sold, the consumer cannot be held liable for any debt in excess of the sale price (except in certain circumstances, such as fraud or misrepresentation). If the consumer’s home sells for more than the amount owed to the credit provider, the consumer or the consumer’s estate will receive the surplus funds. If the consumer entered into a reverse mortgage before 18 September 2012, the consumer should check their credit contract to see if there is a protection in circumstances where the loan balance exceeds the value of the home. The consumer should also check if their credit provider is a member of the Senior Australians Equity Release Association of Lenders (SEQUAL). The SEQUAL Code of Conduct sets out a minimum standard of ethics and consumer protection, including that a member will only offer reverse mortgages that protect the consumer from negative equity. Legal advice may be required in relation to these loans.

[13.260] Unjust contracts

The NCC contains similar provisions in relation to unjust contracts as the CRA. These provisions at s 76 of the NCC apply to credit contracts, guarantees and mortgages. If a contract is unjust, a court or AFCA can find that it should be set aside or varied to remedy the unjustness.

The application must be brought while the contract is still on foot or otherwise within two years of it coming to an end (eg, by paying it off).

A contract can be unjust because the actual terms of the contract are unjust or the circumstances in which the contract was entered into make it unjust (which is more often the case) or it can be due to a combination of the terms and the circumstances. The circumstances taken into account will not

be circumstances which arose after the contract was entered into unless they were reasonably foreseeable at that time (s 76(4)). However, the court can take into account the conduct of the parties after the contract was entered (s 76(5)).

The NCC sets out at s 76(2) a long list of factors that the court may have regard to when considering whether or not a contract is unjust. It must have regard to the public interest and also may have regard to:

- the consequences of compliance or non-compliance with the contract;
- the relative bargaining power of the parties;
- whether the contract was the subject of negotiation;
- whether it was reasonably practicable to be able to reject or alter the contract provisions;
- whether any of the provisions of the contract are unreasonably difficult to comply with or are reasonably necessary for the protection of the legitimate interests of a party to the contract;
- whether or not the consumer was reasonably able to protect their interests because of their age or physical or mental condition;
- the form of the contract and how it is expressed;
- whether the consumer had independent legal or other expert advice;
- whether the contract was accurately explained to the consumer and whether they understood the contract and its consequences;
- whether any unfair pressure, undue influence or unfair tactics were used and their nature and extent;
- what steps were taken to ensure that the consumer understood the transaction and the adequacy of those steps;
- whether the consumer could not pay without suffering substantial hardship and that the credit provider either knew this or could have ascertained it by reasonable enquiry;
- whether the terms of the transaction or the conduct of the credit provider is justified in the light of the risks undertaken by the credit provider;
- for a mortgage – whether it is void under s 50 of the NCC;
- how it compares with other comparable contracts and particularly if excessive interest is unjust by way of comparison;
- any other relevant factor.

If a court decides that the contract is unjust, it can make various orders under s 77 of the NCC including:

- setting aside the contract completely or in part;
- ordering that the consumer owes nothing under the contract or a lesser amount;

- ordering a mortgage be discharged;
- otherwise revising or altering the contract.

Similar orders can be made under s 177G of the NCC in relation to consumer leases. AFCA may take into account the above factors in making a determination.

Protections under the credit law for related guarantees, mortgages and insurance contracts

[13.270] Mortgages

Mortgages that secure obligations under a credit contract regulated by the credit law will themselves usually be regulated by the *NCCP Act*.

To be valid under the credit law, a mortgage:

- must, with limited exceptions, be in writing and signed by the mortgagor (NCC, s 42);
- must specify the goods or land to be mortgaged (s 44);
- need not be in a separate document, but if it is, a copy must be given to the mortgagor within 14 days (s 43).

The credit law prohibits:

- a blanket mortgage over all property and assets (NCC, s 44(1));
- a mortgage over property to be acquired in the future unless the property is specified or to be bought with credit provided under the loan contract, or is instead of, or in addition to, goods already subject to the mortgage (s 45);
- a mortgage seeking to secure credit that may be provided under a future contract unless the credit provider has given the mortgagor a copy of any future contract to be secured by the existing mortgage, and also subsequently obtains the mortgagor's acceptance, usually written, of the extension of the mortgage (s 47);
- a third-party mortgage, that is, the consumer giving the mortgage must also owe the debt or at least be a guarantor (s 48);
- a mortgage securing an amount exceeding the debtor's total liabilities under the credit contract together with reasonable enforcement expenses (s 49);

- a mortgage created over an employee's remuneration, employment benefits or benefits under a superannuation scheme (s 50(1));
- for mortgages created on or after 1 July 2010, a mortgage over essential property.

Generally, essential property is defined as the property which is protected under the *Bankruptcy Act 1966* (Cth), for example, household furniture such as beds, basic kitchen items, televisions – see regulations made under s 116(2)(b)(i) of the *Bankruptcy Act 1966* (NCC, s 50). There are some exceptions to this prohibition (s 50(2)).

It is a criminal offence to include provisions in the credit contract or mortgage in contravention of these requirements. The provisions themselves are void and unenforceable, and in some circumstances, this will mean the whole mortgage cannot be enforced.

Assignment or sale

A mortgagor cannot assign or sell property subject to a mortgage without the credit provider's consent; a mortgagor who breaches this provision can be fined. However, the credit provider cannot unreasonably withhold, or attach unreasonable conditions to, its consent to sell or assign the property (NCC, s 51).

The mortgagor may ask for orders to allow them to sell the goods if the credit provider fails to give its consent within a reasonable time, unreasonably withholds its consent or attaches unreasonable conditions to its consent (NCC, s 51(3)).

[13.280] Guarantees

Similar to mortgages, contracts of guarantee will be regulated by the *NCCP Act* where these

guarantees secure obligations under an *NCCP Act*–regulated credit contract, so long as the guarantor is a natural person or strata title corporation. If so there will be a number of protections available including those set out below.

Note for potential guarantors

Agreeing to be a guarantor means taking on a legal liability. It should not be done lightly and you should always get independent legal advice. It is not “just a formality”. It does not mean the guarantor is just witnessing the borrower’s signature. Nor does it just mean the guarantor believes the borrower is good for the money.

What it does mean is that the guarantor is agreeing to repay the amount lent to the borrower plus the interest and enforcement costs if the borrower fails to do so. So, a guarantor should be fully informed about the terms of both the guarantee and the borrower’s contract. Some conditions can be very difficult for a guarantor to meet – for example, if the borrower fails to meet payments, the lender may be able to demand that the guarantor pay the whole amount in a single lump sum, rather than in instalments as the borrower did.

A potential guarantor should ask the lender for all the information they have about the risks they see in the transaction. If the lender is not willing to give convincing reasons for requiring a guarantor, or the borrower is not willing to disclose information about their financial situation or the loan, it may well be that the risk of the guarantee being called upon is very real.

To be enforceable the following requirements must be met:

- prior to the guarantee being signed, the guarantor must be given a copy of the credit contract (NCC, s 56);
- the guarantee must be in writing and signed by the guarantor. It is sufficient if the guarantee is contained in a mortgage and signed by the guarantor (s 55).

The credit provider must also:

- provide the guarantor with an Information Statement prescribed by the *NCCP Regulations* setting out the guarantor’s rights and obligations;
- within 14 days of signing, provide the guarantor with a copy of both the signed guarantee and the credit contract or signed credit contract (s 57).

The guarantor may withdraw by giving the credit provider written notice before the credit has been provided (s 58(1)).

There are limits on the guarantor’s liability as follows:

- the maximum liability cannot exceed the debt under the credit contract plus reasonable enforcement expenses (s 60(1));
- the guarantor can withdraw by giving written notice where the credit contract is different in some material respect to the proposed credit contract given to the guarantor before the guarantee was signed (s 58(2));
- the guarantor’s liability is usually not increased where the liability under the credit contract is increased unless the guarantor agrees to this and usually this agreement will need to be in writing (s 61(1));
- the guarantor’s agreed liability for future credit contracts will not be enforceable unless there is a subsequent, usually written, acceptance of this by the guarantor and after the guarantor has already been provided with a copy of the future credit contract (s 59);
- where the debtor is under 18 the guarantee will not be enforceable unless it contains a prominent statement to the effect that the guarantor may not be entitled to an indemnity against the debtor (s 60(3));
- similarly, a guarantee will not be enforceable to the extent that it limits the guarantor’s right to indemnity or the right to enforce that indemnity (s 60(5)).

It is a criminal offence for the credit provider to contravene these requirements in guarantees. The provisions themselves are void or unenforceable if they do so (s 62).

The guarantor is entitled to request and receive the same information the debtor is entitled to during the term of the contract.

Guarantors also have certain rights in relation to hardship variations (see [13.210]).

The guarantor can also make an application to the court in their own right about the unjustness of a credit contract, change to a credit contract or a guarantee. The matters to be taken into account are the same as those for a consumer (s 76).

The guarantor also has the same right as a debtor to pay out a credit contract at any time (s 82).

A credit provider cannot enforce a judgment against the guarantor unless either:

- the credit provider has obtained judgment against the debtor and has then made a written demand for payment and at least 30 days have elapsed without the debt being paid; or

- the court has ruled this is not necessary because it is satisfied that the credit provider has made reasonable but unsuccessful attempts to locate the debtor or that recovery from the debtor is unlikely (s 90).

The Codes of Practice also set out the expectations of business entering guarantees if they are to comply with best industry practice.

[13.290] Insurance

The *NCCP Act* applies to credit-related insurance. The relevant provisions are contained in ss 142–149 of the NCC.

Credit-related insurance is insurance connected with a credit contract where it involves insurance over mortgaged property, consumer credit insurance or other insurance if that type of insurance is specified in the credit law (s 142(1)).

However, the protections under the national credit laws will only apply in relation to insurance over mortgaged property so far as the mortgage secures obligations under the credit contract and will also not apply to insurance for an extended period of warranty (s 142(2)). Similarly, with consumer credit insurance, the protections under the national credit laws will only apply where that consumer credit insurance insures obligations under the credit contract (s 142(3)).

A credit contract must contain certain information about credit-related insurance. Specifically, the contract must state (NCC, s 17(15)):

- the name of the insurer;
- the premium payable or if not known the method of calculation of premium payable;
- the type of insurance (eg, income protection);
- the disclosure of any commissions payable to the credit provider;
- the amount of any such commission or if not known, the proportion of the premium payable that is a commission. Such commissions are capped at 20% of the premium (NCC, s 145).

Credit-related insurance costs must also be disclosed in account statements. Periodic account statements must disclose the name of the insurer, the amount of premium and the type of insurance (s 34(10)).

Credit providers are prohibited from requiring or representing to consumers that they are required to obtain credit-related insurance except

where the insurance is otherwise compulsory, for example, insurance over a mortgaged property. The NCC also prohibits credit providers from requiring a consumer to obtain insurance cover through a particular insurer (unless there is no other insurer offering the particular kind of insurance) or otherwise obtain linked insurance on unreasonable terms (s 143). There are some exceptions to this (s 143(2)).

Credit providers are also prohibited from knowingly providing credit for or financing a consumer's insurance premiums for mortgaged property for periods exceeding 12 months (s 144(1)). Credit providers are also prohibited from deducting insurance premiums from consumers' accounts more than 30 days before the premiums are due (s 144(2)). Consumers are entitled to a refund of premiums paid in breach of this section (s 144(3)).

The *insurer* must provide the consumer with a copy of the policy within 14 days of accepting the insurance proposal (s 146(1)). If the consumer has a beneficial interest in property insured by the credit provider, the credit provider must provide a copy of the insurance policy to the consumer within 14 days of the consumer acquiring the beneficial interest (s 146(2)).

Where the credit provider is going to finance the amount payable by the consumer for a credit-related insurance, contract notice must be given to both the consumer and the credit provider if the consumer's insurance proposal is refused (s 147(1)). It is the credit provider's duty to ensure that any premiums paid by the consumer in relation to the refused insurance proposal are refunded unless they are applied to alternative insurance premiums (s 147(2)).

When a credit contract is terminated, any insurance contract financed under the credit contract is also terminated (s 148(1)). The credit provider is then required to rebate the consumer the proportionate amount of insurance premiums (s 148(2)).

Where the credit contract over mortgaged property is terminated and there is insurance cover financed through the credit contract, the consumer can give written notice to the insurer to terminate the insurance contract and seek a rebate on any paid insurance premiums from the insurer (s 149(1)).

Protections where a consumer defaults

[13.300] Default notices

A credit provider must serve a default notice on a consumer (and, where relevant, a guarantor) that sets out specific information about the default and how to remedy the default, otherwise known as a “section 88” notice (NCC, s 88). The prescribed form of the notice is at Sch 1 of the *NCCP Regulations*.

A credit provider must not commence legal proceedings against a consumer unless a s 88 notice has been served. Some of the information that must be contained in a s 88 notice is:

- the amount of the default;
- what action is necessary to rectify the default;
- how long the consumer has to take action to rectify the default;
- in the case of mortgages, advice to the consumer about how much time before repossession activity could commence if the default is not rectified;
- notice to the consumer that sale of mortgaged goods may not discharge all the debt;
- notice to the consumer about s 72 of the NCC hardship variation applications (see [13.210]), s 94 to negotiate a postponement and to apply to the Court about both the hardship variation under s 74 and the postponement under s 96;
- notice that if there is a further default by the consumer during the notice period, enforcement action can still commence without a further notice;
- information about the AFCA scheme and the consumer’s rights under that scheme.

There are some exceptions to the requirement that credit providers must serve s 88 default notices (s 88(5)).

If a s 88 notice is served, urgent legal advice should be sought as the credit provider may commence court proceedings without further notice to the consumer if the default is not remedied or if an arrangement is not reached with the credit provider, for example by a hardship variation (see [13.210]).

An equivalent notice must be served under s 179D of the NCC before a lessor can take enforcement action against a consumer in relation to a consumer lease.

[13.310] Repossession of mortgaged land

If a default has not been remedied within the 30-day period set out in a s 88 notice, or if an arrangement is not reached between the consumer and credit provider (eg, by a hardship variation) and there is no outstanding hardship application made by the consumer, the credit provider can commence enforcement proceedings without further notice to the consumer.

Where the loan is secured by a mortgage, legal proceedings for possession of the mortgaged land are commenced by the credit provider filing a statement of claim in the Supreme Court of NSW. After the statement of claim has been served on the consumer (defendant), the consumer has 28 days in which to act, by filing a defence and/or cross-claim, before the credit provider can take further action. Consumers should get legal advice before filing a defence or cross-claim.

If a consumer has been served with a default notice or statement of claim to repossess land, they should seek advice by phoning Financial Counselling on 1800 007 007. It is very important to remember that court proceedings must be stayed if the consumer lodges a complaint with AFCA at any time before judgment, unless too many steps have been taken in the court proceedings by the consumer. AFCA’s rules also prevent a financial firm from taking action to recover a debt, including enforcement of a default judgment obtained in Court, while AFCA considers a complaint.

If no defence, cross-claim or AFCA complaint staying the proceedings (see [13.340]) has been lodged within 28 days of service of the statement of claim, a credit provider can apply for default judgment. Default judgment can be for possession of land and an amount of money owing under a credit contract but can be just for possession of the land. The time this court process takes to obtain default judgment varies depending on court delays and other factors and often there will be little delay.

After judgment has been obtained, the credit provider can apply for a Writ of Possession which is enforced by the Sheriff’s Office of NSW. The

sheriff will serve a Notice to Vacate the property that sets out a date and time for eviction. If a Notice to Vacate has been served, a consumer can do any of the following:

- leave the property in accordance with the Notice to Vacate;
- negotiate with the lender for more time to make other arrangements;
- negotiate with the lender to stay and keep paying;
- apply to the Supreme Court of NSW for a stay of the writ;
- apply to the Supreme Court of NSW to set aside judgment and enter a defence and/or cross-claim;
- be removed by the sheriff in accordance with the Notice to Vacate.

Where a Notice to Vacate has been served but more time is needed to take necessary steps, then a “stay” should be sought from the court. A stay is obtained from the Supreme Court of NSW. Note that the Sheriff has no discretion so where the credit provider will not agree to allowing more time, then a stay of the execution of the Writ of Possession must be obtained.

To obtain a stay, a Notice of Motion form and an affidavit in support must be filed with the court. These forms are available from the Supreme Court of NSW website or from the Supreme Court Registry itself. There is no filing fee. In some circumstances, the duty registrar can grant short stays on an Ex parte basis, usually for periods of no more than seven days. Otherwise, the credit provider will have to be served with a copy of the stay application and the matter will be listed before a registrar or judge.

There are a number of grounds for seeking a stay. These include the chance to have more time to refinance, or to sell the property or to challenge the judgment or on compassionate grounds where more time is needed to find alternative accommodation. There is no automatic right to a stay, so it is generally better to take appropriate steps (eg, hardship variation, selling the property, refinancing, moving) earlier in the repossession process where possible.

A mortgagee exercising a power of sale in respect of mortgaged land must take reasonable care to ensure that the land is sold (*Conveyancing Act 1919* (NSW), s 111A):

- for not less than its market value, if the land has an ascertainable market value when it is sold; or
- in any other case, the best price that may reasonably be obtained in the circumstances.

[13.320] Repossession of goods mortgaged under a credit contract

Prior to repossession

A credit provider can require a consumer to advise it within seven days of the location of goods mortgaged under a credit contract. It is an offence for a mortgagor not to comply with such a request (NCC, s 98).

Repossession itself

A credit provider cannot enter residential premises to repossess mortgaged goods without the written consent of the occupier or permission of a court. A credit provider in breach of this section commits an offence (NCC, s 99).

A credit provider is prohibited from taking possession of mortgaged goods without the permission of the court unless the amount owing under the default is at least 25% of the amount of credit available under the contract or \$10,000, whichever is the lesser amount (s 91(1)). There are exceptions to this, for example, where the credit provider believes, on reasonable grounds, that the goods have been, or are about to be, disposed of without the credit provider’s permission, or the situation otherwise requires urgent action to protect the goods (s 91(2)(b)) or where it is a continuing credit contract (s 91(2)(a)). Where there is a legal dispute about whether a credit provider has breached this section, the onus will be on the credit provider to establish its compliance (s 91(4)).

A court may also make orders that a person who has possession of mortgaged goods surrender them to the credit provider and a contravention of such an order is an offence (s 101).

After repossession

The credit law imposes a compulsory procedure for dealing with repossessed mortgaged goods (NCC, ss 102–105). That procedure involves the following:

- the credit provider must, within 14 days of taking possession of mortgaged goods, provide the mortgagor with a written notice setting out the estimated value of the mortgaged goods, the enforcement expenses associated with the repossession and a statement of the mortgagor's rights (s 102(1));
- a credit provider cannot sell the repossessed goods for 21 days from the date of the written notice referred to above unless authorised by the court to do so (s 102(2));
- the credit provider must return the mortgaged goods if the arrears (not including any accelerated amount) and enforcement costs are paid or the contact is paid out during the 21-day notice period (s 102(2));
- a mortgagor can nominate a purchaser who can buy the mortgaged goods at the estimated value (as per the credit provider's written notice above). The credit provider must sell the goods to the mortgagor's nominee unless there is a written offer to purchase the mortgaged goods at a higher amount (s 103);
- where there is no nominee, the credit provider must make arrangements to sell the goods for the best price reasonably obtainable and credit the proceeds of sale to the mortgagor's account, less any deductions they are entitled to (see below). The credit provider must provide a mortgagor with a written notice that sets out the gross amount of the sale, the amount required to pay out the credit contract (or due under a guarantee) and any further recovery action intended with respect to any shortfall (s 104);
- the credit contractor can claim the following: the amount required to discharge the contract,

amount or amounts required to discharge any prior mortgage/s, and reasonable enforcement costs (s 105);

- a mortgagor has the right to bring court action against a credit provider for orders to adjust credits following sale of mortgaged goods if not satisfied that the credit provider sold the goods as soon as reasonably practicable and for the best price obtainable. A mortgagor can also seek compensation from a credit provider for any loss they suffer with respect to prior mortgages as a result of a breach of this procedure by the credit provider (s 106).

[13.330] Repossession of goods provided under a consumer lease

If a consumer misses a lease payment the lessor must usually give the consumer at least 30 days' written notice of its intention to take the possession of the leased goods (NCC, s 178(1)). That notice is not required where:

- the term of the lease is over;
- the lessor reasonably believes that, contrary to the terms of the lease, the goods have either been disposed of or the lessee intends to dispose of them;
- the lessor has made reasonable attempts to locate the lessee without success;
- the lessee is insolvent;
- the court authorises it (s 178(2)).

The goods cannot be repossessed from private residential property without the consumer's written consent or a court order (s 99).

Disputes

[13.340] Compensation and other remedies for breach of the credit law

Get advice!

If you are in dispute with a credit provider, there are a number of services that provide free legal advice

and financial counselling. These are listed at [13.650]. A good reason to get advice is that the lender must usually do more than simply meet the contractual obligations. They must also act in accordance with the law and their respective Codes of Practice.

A consumer can seek compensation from a court or AFCA for loss or damage suffered as a result of a breach of the credit law (*NCCP Act*, s 178). Other remedies such as injunctions and declarations that

can be ordered by a court are outlined in Pt 4.2 of the *NCCP Act*. Specific remedies in relation to certain breaches, such as varying an unjust contract or refunding an unconscionable fee, have been dealt with above.

In some instances, civil or criminal penalties may also apply. There are more than 50 specific criminal offences created under the national credit law. These apply to more serious breaches of the credit law (such as failure to have an ACL) and need to be prosecuted by ASIC.

Civil penalties can also be sought by ASIC in relation to some breaches of the *NCCP Act*. The consumer can instigate their own civil penalty claim in respect of breaches of some sections of the NCC. This largely relates to breaches of key disclosure requirements at [13.110].

Either ASIC or the debtor/guarantor/lessor needs to apply to the court for a civil penalty to be imposed. There is a six-year time limit for bringing such applications from the date of the contravention (NCC, s 123(1)).

The amount of the civil penalty will vary depending on who makes the application.

Where the application is made by ASIC, the maximum penalty that may be imposed is 5,000 penalty units for each key requirement that is breached (s 116). If the application is made by a debtor or guarantor and is successful, the court is to order a penalty of at least the amount of the loss suffered by the debtor or guarantor (s 114(2)). This can be all interest charges payable under the credit contract (s 114(1)). It may be set off by the debtor or guarantor against any amount due to the credit provider under the contract (s 115).

More tailored remedies can be sought through internal dispute resolution and AFCA (see [13.350]).

[13.350] Where to take disputes: whether the credit law applies or not

Negotiation and internal dispute resolution

Most disputes should be first raised with the credit provider to give them an opportunity to explain or respond. Credit providers have obligations under the relevant Codes of Practice to participate in negotiation with the consumer.

Nearly all unresolved disputes will first be referred to the credit provider's own internal dispute resolution (IDR) process.

If there is no satisfactory resolution at IDR, then the consumer can take the matter to external dispute resolution, the Australian Financial Complaints Authority. AFCA encourages consumers to complain directly to the credit provider before lodging a complaint with AFCA. In some circumstances, for example, where a credit provider has commenced court proceedings, it may be appropriate to complain to AFCA directly.

External dispute resolution

EDR is the preferred model for resolving disputes between consumers and credit providers and consumer lease providers.

From 1 November 2018, AFCA replaces the Financial Ombudsman Service (FOS) the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT) and is now the sole EDR body to resolve financial complaints. Financial firms have an obligation to ASIC to be a member of AFCA as part of their licensing conditions (see [13.30]).

AFCA deals with a broad range of disputes between consumers and credit providers. AFCA's jurisdiction is detailed in its rules and operational guidelines. Like its predecessor schemes, AFCA has a streamlined process for complaints about financial difficulty in repaying credit obligations, and these disputes are given high priority.

There are a number of benefits of complaining to AFCA:

- it is free for the consumer;
- it is usually quicker than court;
- it gives an independent decision that is binding on the credit provider;
- on the other hand, the consumer does not have to accept the decision of AFCA if they do not like it and can still proceed to a court (as long as the relevant court time limits have not expired);
- disputes can be lodged before and, in most circumstances, after court proceedings have commenced. Once a complaint has been lodged with AFCA the credit provider cannot take further enforcement action, including court proceedings, while AFCA considers the complaint.

Disputes can be lodged online, by mail or by phone.

There are some limitations on the matters that AFCA will hear, most notably with the amounts involved and with time limits. However, AFCA has a greater monetary jurisdiction than its predecessor schemes. It can award up to \$1 million for a claim arising from a credit facility. It can also award up to \$5,000 for non-financial loss and indirect financial loss. Refer to AFCA's website for a detailed breakdown of its monetary jurisdictional limits.

Time limits

AFCA's time limits are detailed in its rules and operational guidelines.

Where a complaint relates to a variation of a credit contract as a result of financial hardship, an unjust transaction or unconscionable interest and other charges under the NCC, AFCA will generally not consider the complaint unless it was submitted to AFCA before the later of the following time limits:

- within two years of the date when the credit contract is rescinded, discharged or otherwise comes to an end; or
- where, prior to lodging the complaint with AFCA, the complainant was given an IDR response in relation to the complaint from the financial firm – within two years of the date of that IDR response.

In other situations, AFCA will not consider a dispute unless the dispute is lodged with AFCA before the earlier of the following:

- within six years after the consumer first became aware, or "should reasonably have become aware", that the consumer suffered the loss that the consumer wants to complain about; or
- if the consumer has already complained directly to the financial firm through its IDR process, then the consumer needs to complain to AFCA within two years of getting an IDR response from the financial firm (AFCA operational guidelines, B.4).

AFCA's complaint-resolution process depends on the kind of matter subject to the complaint. More details can be found on AFCA's website.

[13.360] Courts

The preferred model for dealing with credit disputes is through AFCA.

However, all state courts, the Federal Circuit Court and the Federal Court are vested with

jurisdiction to hear credit disputes. With state courts, the Local Court, District Court, and the Supreme Courts in NSW all have jurisdiction to hear matters up to their jurisdictional limit. The Local Court has jurisdiction up to \$100,000 (or \$120,000 in some limited circumstances); the District Court has a jurisdictional limit up to \$750,000, while the Supreme Court has jurisdiction to hear claims over \$750,000. If the dispute involves a dispute over land, for example, a mortgage, then only the Supreme Court has jurisdiction to hear that dispute.

There is an "opt-in" small-claims procedure under s 199 of the *NCCP Act*. This applies to the Local Court and the Federal Circuit Court. The types of matters that can be heard are limited and can include:

- applications for financial hardship;
- applications for compensation or a breach of the responsible lending obligations where the amount in dispute is under \$40,000;
- unjust applications where the contract value (loan amount) is under \$40,000.

The benefit of the small-claims procedure is that it is not bound by the rules of evidence and legal costs are limited. Legal costs can only be ordered if the court is satisfied that the proceedings were brought vexatiously or incurred as a result of a party's unreasonable act or omission.

Some types of remedies a court can provide are:

- granting of an injunction to restrain a person from doing something;
- granting an order declaring the whole or any part of the credit contract void;
- granting an order varying a contract;
- granting an order directing the credit provider to refund money or return property;
- ordering compensation.

The losing party in a court action is usually required to pay the legal cost of the successful party. Legal costs (outside the small-claims provisions) can be considerable and for this reason it is recommended that legal advice be obtained before commencing court proceedings.

In general, a court action must be commenced within six years of the contravention; however, time limits can be complex issues and legal advice should also be sought on this. For further information about court debt recovery processes, see Chapter 15, Debt.

PAWNBROKERS

[13.370] A pawnbroker is a person who lends money and holds items owned by the borrower until the money is repaid. Pawnbrokers are regulated by the *Pawnbrokers and Second-hand Dealers Act 1996* (NSW). The definition of a pawnbroker does not include people licensed under another act to hold securities for loans (eg, in the course of commercial and banking business).

[13.380] Licences

A pawnbroker operating in NSW must apply to the NSW Government Licence Service for a licence. Certain criteria apply before a licence will be granted or renewed (and a person may have their licence revoked in some circumstances) (s 8).

[13.390] Records that must be kept by a pawnbroker

The pawnbroker must keep a numbered record for each article pawned, which must contain:

- a description of the goods pawned (including all serial numbers or other identifying characteristics);
- the total amount lent, together with the rate of interest charged per week, month or other period (as the case may be) and any other charges;
- the annual interest rate;
- the name and address of the owner of the goods;
- the date the goods were pawned.

A pawnbroker must display a notice in their business premises setting out the rates of interest charged and specifying any other applicable fees or charges (s 28).

[13.400] Pawn tickets

The record is signed by the borrower, who is then given a copy signed by the pawnbroker (the *pawn ticket*) (s 28(5)). The pawn ticket must contain, or be accompanied by, a notice in the form prescribed by Sch 1 of the *Pawnbrokers and Second-hand Dealers Regulation 2015* (NSW) setting out the rights and obligations of the borrower, and include details of:

- any fees and charges associated with the loan, including the total amount if this can be ascertained;

- the method or methods by which the goods may be sold if they are not redeemed;
- the intervals at which interest charges may be debited from the loan and, if interest is to be debited at intervals greater than one month, a statement that the borrower may choose to pay interest at monthly intervals;
- the address where the goods will be kept;
- the last day on which the goods may be reclaimed (the end of the *redemption period*).

[13.410] The redemption period

Unless a longer period is agreed, and stated on the record, the borrower has three months in which to reclaim the goods. After that period, the borrower may claim the goods at any time before they have been consigned for sale (s 29(2)).

A pawnbroker may agree to extend the redemption period (s 29A(2)). If they do so, they must give the borrower certain information, including the new redemption period and any new rates, fees or charges that may be payable.

If a pawn agreement provides that interest is to be paid at the end of the redemption period, or at intervals greater than one month, the agreement must provide the borrower with an option to pay interest on a monthly basis (s 32A). The agreement must set out the amount of interest that would be payable for each month or if the actual amount is not known, a method of calculating this amount.

A pawn agreement must not contain a provision that charges a borrower interest *after* the redemption period. Nor can an agreement provide for an increase in charges for storing and safekeeping of pawned goods after the redemption period expires (s 32B).

[13.420] Redeeming the goods

A person who presents the ticket, repays the loan and reproduces the signature on the pawn ticket must normally be given the article (*Pawnbrokers and Second-hand Dealers Regulation 2015*, cl 29(1)).

If a borrower loses the pawn ticket, the pawnbroker must demand sufficient identification before allowing the goods to be redeemed (cl 29(2)). The borrower should produce identification with a photograph, a signature and a current address

issued by an Australian (state, territory or federal) government authority. Identification must:

- contain the required information;
- be issued by entities other than the borrower;
- not appear to have been forged or tampered with.

There are various other documents and combinations of documents that may be acceptable (cl 29(2)).

[13.430] Articles not reclaimed

Any articles not reclaimed by the end of the redemption period are forfeited to the pawnbroker and must be sold as soon as practicable after the redemption period has expired (s 30(1)). The pawnbroker may not purchase the pawned goods (s 32).

If the article is sold for at least \$100 more than the amount owing (including the cost of the sale and any other charges), the pawnbroker must notify the person who pawned the goods of the surplus within 21 days of the sale (*Pawnbrokers and Second-hand Dealers Act 1996*, s 31A; *Pawnbrokers and Second-hand Dealers Regulation 2015*, cl 31). This notice should specify that the person may claim this amount within 12 months (s 31).

The pawnbroker must keep records of all goods sold (s 16).

[13.440] Stolen goods

A person who believes that a pawnbroker holds stolen goods belonging to them should contact

the police for assistance. The police may in certain circumstances give the pawnbroker a *restoration notice* directing the return of the goods to the claimant within 28 days, during which the pawnbroker must not dispose of or alter the goods (s 32F).

Before such a direction can be made, the person claiming the goods must give the police:

- a written statement to the effect that:
 - the goods belong to them and were stolen and pawned without their permission;
 - they have previously reported the theft to police;
- evidence of their claim to the goods (such as a statutory declaration that the goods belong to them or photographs of the goods while in their possession).

It is a criminal offence to falsely claim ownership of pawned goods or make a false statement under the provisions of the Act relating to the return of stolen goods (s 32K).

If the pawnbroker disputes that the goods have been stolen, they may apply to the NSW Civil and Administrative Tribunal (the Tribunal) within the 28 days prescribed in the restoration notice for an order allowing them to keep the goods (or a range of other orders) (s 32G). The pawnbroker commits an offence if they do not return the goods or apply to the Tribunal. In these circumstances, the claimant should complain to NSW Fair Trading and can apply to the Local Court for return of the goods.

CREDIT REPORTING

[13.450] The purpose of credit reporting

The purpose of the consumer credit reporting system is to balance the protection of a person's personal information with the need for credit providers to have enough information to help them decide whether or not to give that person credit. To achieve this, the credit reporting laws set out the specific types of personal information that a credit reporting body can include in a person's consumer credit report.

[13.460] The credit reporting laws

The laws regulating the handling of personal information for consumer credit reporting in Australia are contained in the *Privacy Act 1988* (Cth) (principally in Pt IIIA), the *Privacy (Credit Reporting) Code 2014 (Version 2)* (referred to as the *CR code*) and the *Privacy Regulation 2013* (Cth) (the *Privacy Regulation*).

[13.470] Credit reporting bodies

Credit reporting bodies collect personal information about a person's consumer credit history from credit providers (and other sources) for the purpose of including that information in the person's consumer credit report. Credit reporting bodies may also use that information to make an assessment about the person's creditworthiness, for example, by producing a credit score. Making an assessment about a person's creditworthiness includes making an assessment of the person's:

- eligibility to be provided with consumer credit;
- history in relation to consumer credit; and
- capacity to repay an amount of credit that relates to consumer credit (*Privacy Act*, s 6(1)).

Credit reporting bodies can then provide that report and assessment to credit providers for certain purposes, including to help a provider decide whether to give a person credit (s 20F).

[13.480] Information that can be included in a consumer credit report

The following types of personal information can be included in a person's consumer credit report (s 6N):

- certain information necessary to identify the person (ss 6N(a), 6(1));
- the names of any current and former credit providers that have provided the person with consumer credit, and certain other information about that credit, including the day the credit was made available and the credit limit (ss 6N(b), 6(1));
- repayment history information (ss 6N(c), 6V);
- a statement that a credit provider has requested access to information held in the person's consumer credit report in connection with an application that the person has made to that credit provider for consumer or commercial credit (sometimes called a "credit enquiry") (ss 6N(d), 6R);
- the type and amount of consumer or commercial credit that the person sought in that application (s 6N(e));
- that the person has defaulted on a consumer credit payment of \$150 or more (a default occurs if the person is at least 60 days overdue in making a payment) (ss 6N(f), 6Q);

- a statement that the person has since paid an amount that was recorded as a default in their consumer credit report (ss 6N(g), 6T);
- a statement that, as a result of a default, the person has agreed to a variation in the terms and conditions of the consumer credit, or is provided with new consumer credit (ss 6N(h), 6S);
- any court judgments made against the person that relate to credit that they have been provided, or applied for (ss 6N(i), 6(1));
- certain information about a person that is recorded on the National Personal Insolvency Index, including information that relates to bankruptcy and debt agreements (ss 6N(j), 6U);
- certain publicly available information that relates to the person's activities in Australia and their creditworthiness (however, a credit reporting body can only collect this information from a Commonwealth Government agency or a state or territory authority) (s 6N(k); *CR code*, para 11.1);
- the opinion of a credit provider that the person has committed a serious credit infringement in relation to consumer credit it provided to the individual (ss 6N(l), 6(1)).

Repayment history information

Information about a person's repayment history (sometimes called "repayment history information") is information about whether the person has met their consumer credit payment obligations in a particular month (s 6V).

A person will be recorded as having not met their consumer credit obligations for a particular month if they miss even one payment that is due to be paid in that month. It does not matter if they made all of the other payments that were due to be paid that month, or if they paid part (but not all) of the amount owing (*Privacy Regulation*, s 12).

A person can only be considered to have missed a consumer credit payment if they make the payment more than 14 days after the day it was due to be paid (*CR code*, para 8.1).

Importantly, only a credit provider that holds an Australian Credit Licence issued by ASIC, or prescribed by the Regulations, can disclose repayment history information to a credit reporting body or access repayment history information contained in a person's credit report (ss 21D(3), 20E(4)). Generally, that means credit providers who provide:

- mortgage credit;
- personal loans; or
- credit cards.

Importantly, the following credit providers are not able to view or receive information from a credit reporting body about a person's repayment history:

- electricity, gas and water utilities;
- telecommunications carriers;
- toll road and public transport operators; and
- retail companies that permit payment for goods or services to be deferred.

This also means that a person's credit report will not include information about whether they have made or missed a payment to those credit providers. For example, a person's credit report will not include information about missed payments for electricity, water, gas, mobile phone or internet bills.

Repayment history information cannot be included in a person's consumer credit report for more than two years after the payment was due (s 20W).

Defaults

A default is different to information about a person's repayment history. A default is information about a payment of \$150 or more that has been overdue for at least 60 days (s 6Q). A credit provider must give the person two specific notices before information about a default can be included in their consumer credit report (for more information about defaults, see [13.490]).

Serious credit infringements

A serious credit infringement is where a person:

- uses fraud (or attempts to use fraud) to obtain credit or evade their credit obligations; or
- acts in a way that indicates an intention not to comply with their credit obligations and the credit provider has been unable to contact the person for a period of at least six months (s 6(1)).

Information about commercial credit

A person's consumer credit report may contain three types of information about any commercial credit that they have applied for:

- a statement that a credit provider has requested access to information held in the person's consumer credit report in connection with

an application that the person has made to that credit provider for commercial credit (sometimes called a "commercial credit enquiry");

- a statement that a trade insurer (a business that insures credit providers in relation to commercial credit they have provided) has requested access to information held in the person's consumer credit report, in connection with providing insurance for commercial credit; and
- the type and amount of commercial credit that the person sought in that application (ss 6N, 6R).

The credit reporting laws do not apply to the handling of any other personal information (defined in s 6(1)) about a person's commercial credit activities. Instead, where a credit reporting body or credit provider is also an APP entity (defined in s 6(1)) the Australian Privacy Principles contained in the *Privacy Act* will apply to the handling of that information (s 15). However, the credit reporting laws set out when a credit provider can handle a person's consumer credit report for a purpose connected with an application the person has made for commercial credit (s 20F).

[13.490] Requirements for listing a default

A default occurs when a person is at least 60 days overdue in making a consumer credit payment of \$150 or more. Importantly, a default cannot be included in a person's consumer credit report if it relates to an overdue payment that:

- is less than \$150; or
- is statute barred (meaning that the credit provider is prevented by a statute of limitations from enforcing the debt) (s 6Q).

Notice requirements

Before a credit provider can give a credit reporting body information about a default for inclusion in a person's consumer credit report, the credit provider must send the person two separate notices. Those notices are:

- Notice 1: a written notice informing the person about the overdue payment and requesting that they pay the amount outstanding (s 6Q);
- Notice 2: a written notice informing the person that if they do not pay the overdue amount the

credit provider intends to give information about the default to a credit reporting body (s 21D(3)).

The first notice can be sent as soon as the payment becomes overdue. However, a credit provider must wait 30 days after sending the first notice before it sends the second notice. Each of these notices may be included with notices required by other legislation (such as a default notice under NCC, s 88), as long as this 30 days' separation is maintained (*CR code*, para 9.3).

Time restrictions for listing a default

A credit provider must wait at least 14 days after the second notice is given to the individual, before listing the default (s 21D(3); *CR code*, para 9.3). However, a credit provider cannot wait more than three months after giving a person the second notice to list the default (*CR code*, para 9.3).

If the credit provider does not disclose the default to a credit reporting body within that three-month period, it must send the person a new Notice 2 informing them of the provider's intention to list the default. The credit provider must then wait at least another 14 days before disclosing the default to a credit reporting body for inclusion in the person's consumer credit report (s 21D(3)).

Multiple defaults

Once an overdue payment is included in a person's consumer credit report as a default, the amount of the default cannot be changed to reflect any subsequent payments or further missed payments (*CR code*, para 9.4). This means that if the person subsequently misses another payment in relation to the same credit account, the later missed payment must be listed as a separate default. This ensures that information about a default only remains on the person's credit report for five years (the retention period for a default), from the date that the information was first included on that report (s 20W).

If the person pays the whole overdue amount that has been listed as a default, the credit provider must inform the credit reporting body (s 21E). The credit reporting body will then include a statement on their consumer credit report next to the default, indicating that the overdue amount was paid and

the date it was paid (s 6T). However, the default will not be removed from the person's consumer credit report until the retention period has expired.

[13.500] Credit scores

A credit reporting body may use personal information included in a person's consumer credit report to create a credit score. A credit score is a number that indicates the body's assessment of the person's level of consumer creditworthiness. Importantly, a credit reporting body cannot use personal information that is not permitted to be included in a consumer credit report (ie, information other than those types listed at [13.500]) to produce a credit score (or otherwise assess the person's consumer creditworthiness) (*CR code*, para 5.1).

A credit provider may also create its own credit score about a person, using information in the person's consumer credit report (that has been disclosed to the provider by a credit reporting body) and other personal information it holds. However, a credit provider cannot give this score to a credit reporting body.

[13.510] Information that cannot be included in a consumer credit report

Credit reporting bodies are not permitted to collect any other information about a person's consumer credit activities (ie, information other than those types listed at [13.500]) for the purpose of including that information in the person's consumer credit report (*CR code*, para 5.1). This includes, for example, information about a person's assets and income.

[13.520] Credit refusals

If a credit provider decides to refuse a person's application for credit and the refusal is based wholly or partly on information in the person's consumer credit report, the credit provider must give the person written notice of that decision and certain other matters, including reasons for that decision and how they can get a copy of their consumer credit report for free (s 21P; *CR code*, para 16.3).

[13.530] Automatic deletion of information in a consumer credit report

Personal information about a person's consumer credit activities can only be included in their credit report for between two and seven years (referred to as the "retention period"), depending on the type of information (s 20W). A credit reporting body must remove the information from the person's credit report within one month of the end of the relevant retention period (s 20V).

[13.540] Access to information in a consumer credit report

The credit reporting laws restrict who can access the personal information contained in a person's consumer credit report.

Businesses that can access information in a credit report

The following businesses are able to request access to information contained in a consumer credit report from a credit reporting body:

- other Australian credit reporting bodies;
- credit providers, including banks, building societies, credit unions, retail companies that issue credit cards, small-amounts lenders (including payday lenders), businesses that provide goods or services on credit and which allow payment to be deferred for seven days or more (including energy and water utility companies, telecommunications carriers and toll road and public transport operators) (s 6G);
- mortgage insurers; and
- trade insurers.

However, a credit reporting body will only be permitted to give a copy of a person's consumer credit report to those businesses for certain purposes (s 20E).

Businesses that cannot access information in a credit report

The following businesses are not credit providers and are, therefore, not permitted to access information contained in a person's consumer credit report directly from a credit reporting body:

- real estate agents;
- landlords;

- employers; and
- insurance companies other than mortgage insurers and trade insurers (s 6G(5); *Privacy Regulation*, s 10).

In addition, foreign credit providers or foreign credit reporting bodies are not permitted to access information held by Australian credit reporting bodies.

When a person can get a free copy of their consumer credit report

A person can get a copy of their credit report for free from each credit reporting body in all of the following circumstances:

- if the person has applied for, and been refused credit, within the past 90 days;
- where the person's request for access relates to a decision by a credit reporting body or a credit provider to correct information included in their consumer credit report; and
- once a year (not counting the above circumstances) (s 20R(5); *CR code*, para 19.3).

Following a request for access, a credit reporting body will provide the person with:

- a copy of all the personal information contained in their consumer credit report; and
- a summary and explanation of the information to help the person understand the impact that their consumer credit report has on their ability to access credit (s 20R(4); *CR code*, para 19.4).

A credit reporting body must provide this information within a maximum of 10 days from the date of the request for access (s 20R(3)).

[13.550] Seeking correction of information in a consumer credit report

If a person believes that the personal information included in their consumer credit report is incorrect, they can approach any credit reporting body or credit provider and request to have the information corrected for free (ss 20T, 21V).

Information may be "incorrect" because it is inaccurate, out-of-date, incomplete, irrelevant or misleading, having regard to the purpose for which it was collected.

A credit reporting body or credit provider will usually make a decision about the correction request within 30 days of the person making the

request (s 20T). After making the decision, the body or provider then has five days to notify the person about the outcome (*CR code*, para 20.7).

[13.560] Complaints

A person can make a complaint where they believe that a credit reporting body, credit provider or other recipient of their consumer credit report has handled that report (or the personal information contained in that report) in a way that is inconsistent with the credit reporting laws.

An individual's complaint will generally follow a three-stage process:

- Step 1: A person should first complain to the relevant credit reporting body, credit provider or other recipient (unless the person's complaint is about a decision not to correct, or not to grant access to, information contained in their consumer credit report, in which case they can go straight to Step 2);
- Step 2: If a person is not satisfied with the outcome of Step 1, they may complain to an external dispute resolution (EDR) scheme of which the credit reporting body, credit provider or other recipient is a member;
- Step 3: If the person is not satisfied with the outcome of the EDR process or if they would rather complain directly to the regulator, they may complain to the Office of the Australian Information Commissioner (OAIC).

Step 1: Complaints to credit reporting bodies and credit providers

A person should first complain directly to the credit reporting body or credit provider if they believe that the body or provider has breached the credit reporting laws (s 23A).

Complaints to credit reporting bodies and credit providers are free, and the provider or body must respond in writing within seven days. That notice must set out how the body or provider will deal with the complaint (s 23B).

Generally, a credit reporting body or credit provider must make a decision about a person's complaint within 30 days of receiving the complaint. The body or provider must then notify the person in writing of the decision and explain who the person can complain to if they are not satisfied with that decision (s 23B).

Step 2: Complaints to recognised external dispute resolution schemes

All credit providers that provide information to credit reporting bodies, and all credit reporting bodies, are required to be a member of an external dispute resolution (EDR) scheme recognised by the Information Commissioner (ss 21D(2), 35A; *CR code*, para 21.2).

If a person is not satisfied with the response that they receive from a credit reporting body or a credit provider about their complaint (or if a person wants to complain about a decision by a body or provider not to correct, or not to provide access to, information in their consumer credit report), they can make a complaint to a recognised EDR scheme that the body or provider is a member of.

Step 3: Complaints to the Australian Information Commissioner

Under the *Privacy Act*, an act or practice that breaches a provision of the credit reporting laws is an interference with the privacy of an individual (s 13(2)). A person can complain to the Information Commissioner about any act or practice that may be an interference with their privacy (s 36).

The Information Commissioner has the power to investigate possible interferences with privacy, either following a complaint or on their own initiative (ss 40(1), 40(2)).

The *Privacy Act* does not prevent individuals from lodging a complaint directly with the Information Commissioner, where they have not first complained to the relevant credit reporting body, credit provider, or EDR scheme. However, the Information Commissioner can decline to investigate a complaint on a number of grounds, including that the complainant has not already complained to the relevant credit reporting body or credit provider, or the complaint is already being dealt with by an EDR scheme, or that the complaint would be more effectively or appropriately dealt with by an EDR scheme (s 41).

The Information Commissioner will generally attempt to resolve a complaint by conciliating an outcome between the parties (s 40A). If conciliation does not resolve the matter and it is not finalised on some other basis under the *Privacy Act*, the Information Commissioner may consider whether to make a determination, which may

include a declaration that the person is entitled to compensation for any loss or damage suffered, including for humiliation or injury to feelings (s 52).

In some circumstances, the Information Commissioner may also accept an undertaking from the credit reporting body or credit provider to do, or stop doing, a specific thing so that they

do not breach the *Privacy Act* (s 33E). If the body or provider fails to meet the undertaking, the Commissioner can ask for it to be enforced by a court (s 33F). The Commissioner may also ask for a court to make a civil penalty order, in the case of serious or repeated breaches of privacy (ss 13G, 80W; *Regulatory Powers (Standard Provisions) Act 2014* (Cth), s 82).

DEBT COLLECTION (INCLUDING BY CREDIT PROVIDERS)

[13.570] Debt collectors must be licensed as a Commercial and Private Enquiries Agent with the NSW police. If they are collecting debts regulated by the *NCCP Act* the agent must also have an Australian Credit Licence with ASIC. The joint Australian Securities and Investments Commission (ASIC) and Australian Competition and Consumer Commission (ACCC) *Regulatory Guideline 96 Debt Collection Guideline: for Collectors and Creditors July 2017* (the Debt Collection Guideline) also sets out the expectations of debt collectors. A breach of these guidelines can form the basis of an internal or external dispute resolution complaint.

[13.580] Agent or assignee?

A debt collector is either an agent or assignee of a debt. There is an important distinction because it affects who has the legal responsibility for the debt.

Agent: If a debt collector is an agent of a credit provider, that is, they are collecting a debt on behalf of a credit provider, they are exempt from being licensed. The credit provider retains legal responsibility for the debt and must comply with credit laws including being a member of AFCA.

Assignee: If a debt collector buys a regulated credit contract entered into from 1 July 2010, they become the credit provider and must be licensed and be a member of AFCA.

[13.590] Rules about debt collection practices

The Debt Collection Guideline provides that contact to a debtor must be made at reasonable

hours, taking into account the debtor's circumstances and reasonable wishes. Reasonable hours are defined as:

Contact by telephone

Monday to Friday: 7.30 am to 9 pm.

Weekends: 9 am to 9 pm.

National public holidays: No contact recommended.

Face-to-face contact

Monday to Friday and weekends: 9 am to 9 pm.

Workplace contact

Debtor's normal working hours if known, or 9 am to 5 pm on weekdays.

There may be reasons why contact during the above times is unreasonable or contact outside these times is reasonable. For instance, a debtor may ask that contact be made at other times due to various reasons, for example, because the debtor:

- is a shift worker;
- is responsible for children, or caring for a family member, and contact at certain times is inconvenient;
- does not wish to be contacted when other family members are present.

The guidelines also state that a debt collector must not try to pressure a debtor by misleading, harassing, threatening or putting pressure on a debtor's spouse or partner, a member of a debtor's family (especially a child) or other third parties such as authorised representatives (cl 18).

[13.600] Harassment and coercion

Undue harassment and coercion is prohibited in relation to the supply of goods and services

(*Australian Consumer Law*, s 60) and the supply of financial services (*ASIC Act*, s 12DJ).

Generally, undue harassment occurs when a credit provider or debt collector repeatedly approaches a person about an alleged debt in a manner that is unreasonable and is designed to intimidate, annoy or wear down the person.

Coercion generally occurs where a debtor is subject to force or a threat that unfairly pressures them to comply with the demands of a person enforcing a debt. It is unlikely that a threat of debt recovery proceedings would be considered to be coercion for the purposes of these provisions.

[13.610] Offences by debt collectors

Debtors should be aware that a debt collector cannot disclose certain private information in the course of seeking to recover a debt (see Chapter 15, Debt). If this information is disclosed the debt collector's conduct should be reported to the Australian Information Commissioner (see [13.650]).

A debt collection agency operating in NSW must be licensed under the *Commercial Agents and Private Inquiry Agents Act 2004* (NSW) (the *Act*). Under s 25 of the *Act*, it is an offence for a commercial agent to:

- unduly harass a debtor by leaving material at or outside the debtor's home or workplace indicating they were there to collect a debt;
- tell, or threaten to tell a person's employer that the person is a debtor;
- make unreasonably frequent telephone calls. The Debt Collection Guideline notes that a debtor should not be contacted more than three times a week or 10 times a month.

[13.620] Collection of old debts

Under the *Limitation Act 1969* (NSW), a credit provider or debt collector has six years to pursue a debt from the date of the last payment or acknowledgement of the debt in writing. If a court

judgment is made in regard to the debt, the credit provider or debt collector has 12 years to pursue the debt from the date of the judgment. There are exceptions to this, including mortgages. Seek legal advice regarding this.

[13.630] Mistaken identity or fraud

Debt collectors sometimes contact a person about a debt that is not theirs as a result of mistaken identity or fraud. It is recommended to write to the debt collector and/or credit provider requesting copies of all relevant documents relating to the alleged debt from the date of the judgment. Follow the complaint-handling procedure listed below.

[13.640] Advice and complaints

Where to get advice

Either ASIC or the ACCC can provide assistance and should be contacted if harassment occurs. Consumers can also seek legal advice (see [13.650]).

Where to take complaints

The recommended steps depend on whether the debt collector is an agent or an assignee of the debt (see [13.600]).

Many debt collectors are members of AFCA. Complaints about debtor harassment can be made to AFCA, as can other types of disputes, such as problems in making a repayment arrangement.

Complaints under the *Act* can be made to the police or the agent's place of business, with relevant documents and witness details.

Options include:

- write to the debt collector and/or the credit provider;
- lodge a dispute with the internal dispute resolution department of the debt collector and/or the credit provider;
- lodge a dispute with AFCA;
- lodge a complaint with ASIC.

Contact points

[13.650] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Financial counselling and legal help

A large number of organisations offer financial counselling and legal help. To find someone near you, contact one of the organisations below.

Financial Rights Legal Centre

www.financialrights.org.au
Credit and debt hotline
ph: 1800 007 007

The Financial Rights Legal Centre (formerly the Consumer Credit Legal Centre) deals with matters concerning credit, debt, bankruptcy, banking and insurance issues. It does not deal with other general consumer issues.

Legal Aid NSW

To find an office near you or obtain legal information contact LawAccess NSW

www.lawaccess.nsw.gov.au
ph: 1300 888 529 or go to
www.legalaids.nsw.gov.au

Financial Counsellors' Association of NSW

For referral to a financial counsellor
www.fcan.com.au
ph: 1300 914 408

External Dispute Resolution Schemes

Australian Financial Complaints Authority

www.afca.org.au
ph: 1800 931 678

Government bodies

Australian Competition and Consumer Commission (ACCC)

www.accc.gov.au
ph: 1300 302 502

Australian Information Commissioner, Office of the (Federal)

www.oaic.gov.au
ph: 1300 363 992

Australian Securities and Investments Commission (ASIC)

www.asic.gov.au
ph: 1300 300 630

Information and Privacy Commission NSW (IPC)

www.ipc.nsw.gov.au
ph: 1800 472 679

MoneySmart (ASIC)

www.moneysmart.gov.au
ph: 1300 300 630

Industry Associations and Codes of Practice

Australian Collection and Debt Buyers Association (ACDBA)

www.acdba.com

Customer Owned Banking Code of Practice (COBCOP)

(previously Mutual Banking Code of Practice) (for credit unions and building societies)
www.customerownedbanking.asn.au

Mortgage & Finance Association of Australia Code of Practice (MFAA)

(mortgage managers, non-bank lenders and finance brokers) –
www.mfaa.com.au
www.mfaa.com.au

Senior Australians Equity Release Association of Lenders (SEQUAL)

www.sequal.com.au
Sequal is the peak industry body for the Australian equity release market, for example, an example of an equity release product is a reverse mortgage.

