



CREDIT LAW

Toolkit



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About this toolkit

This latest version of the Credit Law Toolkit covers the law as at December 2015. This toolkit is not meant to cover every technical aspect of the Credit Law. The intention is to cover in detail those parts of the Credit Law that caseworkers regularly use when advising consumers.

Different parts of the Credit Law commenced operation at different times. This is explained in more detail in the section—When the Credit Laws apply?

This toolkit is aimed at both financial counsellors and lawyers, particularly those lawyers in legal aid offices and generalist community legal centres who do a range of civil law work, but do not necessarily specialise in credit law. This toolkit is intended to assist financial counsellors to assist their clients more effectively, but not to replace timely legal advice. Generalist lawyers should also consider consulting a specialist credit lawyer if they are unsure about the application of the law to a client's particular circumstances, or the best strategy to pursue. All caseworkers should pay particular attention to the relevant time limits for taking action noted throughout this kit.

*Remember:
If you have
a tricky
consumer credit
problem—get
legal advice.*

An important part of the work of a caseworker is solving the consumer's problem. The Credit Law requires that all credit providers and those arranging credit must be a member of an approved External Dispute Resolution Scheme (EDR). For this reason, this toolkit concentrates on using EDR to resolve consumer disputes/problems and not court. Court is a last resort and it is recommended that legal advice from a lawyer with appropriate expertise be obtained before going to court.

We have tried to cover the most common client situations in this toolkit. In reality, clients present to caseworkers with an endless variety of circumstances and questions.

The toolkit is divided into three sections:

Section 1: The Credit Law

This is the reference section. It contains an overview of the National Consumer Credit Protection Act and Regulations (the Credit Law). It will be useful as a starting point to understand the Law. The Credit Law has two main parts:

1. The *National Consumer Credit Protection Act 2009* (NCCP)
2. The *National Credit Code* (at Schedule 1 of the NCCP) (NCC)

Section 2: How to guides & sample letters

This is the problem solving part of the toolkit. This section include how to guides, sample letters and EDR Guides covering the following topics:

1. Financial hardship
2. Unsuitable lending
3. Requesting information
4. Debt Collection and enforcement
5. Requesting a debt release
6. High cost small loans
7. Consumer leases
8. Complaining to ASIC

Section 3: Other useful stuff

This section includes useful reference material:

1. Credit Law forms
2. Relevant financial hardship provisions of relevant Codes of Practice

Useful contacts

External Dispute Resolution

Financial Ombudsman Service

ph: 1800 367 287
www.fos.org.au
GPO Box 3, Melbourne VIC 3001

Credit & Investment Ombudsman

ph: 1800 138 422 Fax: 02 92738440
www.cio.org.au
PO Box A252. Sydney South NSW 1235

Free Legal advice

Specialist Credit Law Advice—Community Legal Centres

ACT: Consumer Law Centre ACT

ph: (02) 62571788
www.carefcs.org

NSW: Financial Rights Legal Centre

ph: 1800 007007
www.financialrights.org.au

SA: Consumer Credit Law Service

Ph: (08) 83421800 or 1300 886220
www.consumercreditsa.org

VIC: Consumer Action Law Centre

ph: 1300 881 020
www.consumeraction.org.au

WA: Consumer Credit Legal Service (WA)

Phone:(08) 9221 7066
www.cclswa.org.au

Other Community Legal Centres

The National Association of Community Legal Centres
www.naclc.org.au

Legal Aid

NSW ph: 1300 888 529 (LawAccess NSW) or at www.legalaid.nsw.gov.au

QLD ph: 1300 651 188 or at www.legalaid.qld.gov.au

VIC ph: 1800 677 402 or at www.legalaid.vic.gov.au

NT ph: 1800 019 343 or at www.ntlac.nt.gov.au

ACT ph: 1300 654 314 or at www.legalaidact.org.au

TAS ph: 1300 366 611 or at www.legalaid.tas.gov.au

SA ph: 1300 366 424 or at www.lsc.sa.gov.au

Some community legal centres and legal aid offices also employ specialist consumer credit lawyers

Financial Counselling

Referral to a free financial counsellor: 1800 007 007

Financial Counselling Australia

www.financialcounsellingaustralia.org.au

To lodge a complaint about a licensee or credit representative

Australian Securities and Investments Commission

Phone: 1300 300 630

www.asic.gov.au or www.moneysmart.gov.au.

Online at <http://www.asic.gov.au/about-asic/contact-us/how-to-complain/>

Problem solving guide

The following is a list of questions you should consider in relation to every credit-related debt your client has, with a reference to the parts of this toolkit that may be helpful depending on the answer to the question.

Regulated credit

➤ **Has the debt arisen because of a regulated consumer credit contract?**

[See Chapter 1 | Overview](#)

If the answer is no, then think about whether other laws or codes of practice may apply (these apply to regulated credit contracts also, but also have wider application to non-regulated contracts):

- *ASIC Act* including:
 - Unfair terms
 - Misleading and deceptive conduct
 - Unconscionable conduct Harassment or coercion
 - *Contracts Review Act* (NSW) (For contracts entered in NSW only.)
 - Industry codes of practice
-

➤ **If the debt arises from a regulated credit contract – is the credit provider licensed?**

[See Chapter 1 | Overview](#)

➤ **Was the client given a Credit Guide?**

[See Chapter 11 | Responsible lending conduct](#)

➤ **Does the credit contract comply with the disclosure provisions?**

[See Chapter 10 | Disclosure](#)

➤ **Was there a broker or other intermediary? Were they licensed? Did the broker give the client a Credit Guide and Quote?**

[See Chapter 13 | Finance brokers](#)

Enforcement

➤ **Has a default notice been issued? When does it expire?**

Does it contain everything the law says it should? Can the consumer pay the amount in default (plus usual repayment)? If yes, then the consumer has complied with the default notice. If no, consider:

- Is there a dispute about the amount of the debt?
- Formally request financial hardship and stay

[See Chapter 3 | Financial hardship and the Financial Hardship section of the How to Guides and Sample letters](#)

[See Chapter 6 | Enforcement](#)

➤ **After the default notice has expired and default not fixed (no legal action commenced yet):**

Is legal action or repossession of secured property threatened? Ring credit provider and ask them not to proceed with any legal action, as you will be raising a dispute and/or financial hardship. If they agree, confirm this in writing. If they refuse, see below.

Request a hardship repayment arrangement and/or raise a dispute and lodge in EDR.

[See Chapter 2 | External Dispute Resolution](#)

[See Chapter 6 | Enforcement](#)

➤ **Have legal proceedings commenced?**

(The consumer would usually have been served with an official court document, such as a Summons or Statement of Claim.)

- Work out when the consumer was served with the court proceedings.
- Find out how much time the consumer has to file a defence before the credit provider can obtain judgment.
- Lodge in EDR well before the time (to file a defence) expires and ring EDR to make sure they have received the dispute/complaint. Make sure the credit provider agrees not to proceed to judgment.
- If it is after the time allowed to file a defence, check with the court to see if there is a judgment. If there is no judgment can still lodge in EDR.
- If judgment has been obtained then the consumer cannot lodge in FOS and can get limited assistance in CIO.

Disputes

See Chapter 2 – External Dispute Resolution

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- **Is it the client's debt (mistaken identity/fraud)? If not, raise a dispute with credit provider. If unresolved go to EDR.**

See Chapter 4 | Debt collection

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- **Is the debt statute barred? If yes, raise a dispute with credit provider. If unresolved go to EDR.**

See Chapter 4 | Debt collection

-
- **Has there been a change of financial circumstances for the consumer? Do they qualify for hardship under the Credit Law or a Code of Practice?**

See Chapter 3 | Financial hardship and How to Guides & Sample letter: Financial hardship

-
- **Was the consumer ever in a position to meet their obligations under the contract (Did they have the capacity to pay when the contract was made)?**

See Chapter 11 | Responsible lending conduct, Chapter 12 | Unjustness, and How to Guides and Sample letter: Challenging a lending decision

-
- **Is there something else unfair or unsuitable about the contract? Did it meet the consumer's needs and requirements? Was it unjust?**

See Chapter 11 | Responsible lending conduct, Chapter 12 | Unjustness, and How to Guides and Sample letter: Challenging a lending decision

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- **Has the amount claimed been calculated correctly?**

If not, raise a dispute. If you cannot resolve the dispute, lodge a complaint in EDR.

See Chapter 2 | External Dispute Resolution

-
- **What about the fees and charges? Are they unconscionable? Unfair?**

See Chapter 12 | Unjustness

-
- **Are there compassionate reasons for asking the credit provider to waive the debt?**

See How to Guide and Sample letter: Requesting a release from a debt



THE CREDIT LAW

This is the reference section. It contains an overview of the *National Consumer Credit Protection Act* and Regulations (the Credit Law). It will be useful as a starting point to understand the Law. The Credit Law has two main parts:

1. The *National Consumer Credit Protection Act 2009* (NCCP)
 2. The *National Credit Code* (at Schedule 1 of the NCCP) (NCC)
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Main Points

- New national legislation being the *National Consumer Credit Protection Act 2009* (NCCP) applies to consumer lending and consumer leases from 1 July 2010.
- All credit providers, brokers and other intermediaries must be registered or licensed with ASIC, or appointed as credit representatives by another licensee, and be members of an EDR scheme under the new law.
- The Credit Law, including the *National Credit Code*, covers lending for investment in residential property from 1 July 2010.
- Small Amount Credit Contracts (payday loans) and Medium Amount Credit Contracts are now subject to specific laws commencing 1 March 2013 and 1 July 2013
- There are new laws regulating reverse mortgages which commenced on 18 September 2012 and then 1 March 2013
- The specialist tribunals available for credit matters in some States and Territories will no longer have jurisdiction.
- If the loan is not covered by the Credit Law, your client still has a number of options.

What is the *National Consumer Credit Protection Act*?

The *National Consumer Credit Protection Act 2009* (“NCCP”) and Regulations make up the consumer protection law for credit in Australia (the “Credit Law”)¹. It is Commonwealth legislation.

The objective of the Credit Law is:

- To create a single, uniform national credit law
- To regulate credit industry participants in addition to credit contracts and transactions
- To protect consumers and the economy by encouraging responsible lending and some flexibility in response to financial hardship

The Credit Law represents a transfer of the regulation of credit from the States and Territories of Australia to the Commonwealth Government. Previously, there was Uniform State and Territory legislation called the *Uniform Consumer Credit Code* (“the Code”).²

The Code has been transferred to the Commonwealth with some major changes. The amended Code is now called the *National Credit Code* (“NCC”) and forms Schedule 1 of the NCCP. The sole regulator for the Credit Law is the Australian Securities and Investments Commission (“ASIC”).

Why is the Credit Law important?

For consumer advocates, the Credit Law contains important rights and protections for consumers. It has six major purposes for advocates:

1. The contract has to contain certain information
2. Credit providers must take certain steps before seizing goods/property and/or commencing court proceedings
3. Credit providers and other credit assistants must be in an external dispute resolution scheme (giving consumers free access to dispute resolution)
4. Consumers have the ability to request documents
5. Consumers can challenge unjust contracts or unsuitable loans
6. Consumers have rights in relation to financial hardship

In what circumstances does the Credit Law apply?

The Credit Law applies when:

- The debtor is a natural person (or strata corporation)
- The credit is provided or intended to be provided wholly or predominantly for—
 - › Personal, domestic or household purposes (or to refinance a loan taken out for these purposes)
 - › To purchase renovate or improve residential property for investment purposes (or to refinance a loan taken out for these purposes)

1 The Credit Law also includes the *National Consumer Protection (Transitional and Consequential Provisions) Act 2009*. This Act sets out among other things, how contracts that are already in force prior to 1 July 2010 will be treated under the new Credit Law.

2 The Uniform Consumer Credit Code is also referred to as the “UCCC”. For the purposes of this toolkit it is referred to as “the Code”.

- › A charge is or may be made for the credit

and

- › The credit provider provides credit in the course of a business of providing credit in Australia or incidentally to a business in Australia.

The Credit Law is presumed to apply to a loan (s. 13(1) NCC) unless it is established that the Credit Law does not apply. This presumption does not apply if the debtor signs an effective declaration stating the loan is for a purpose not regulated by the Credit Law.

The Credit Law applies to the following types of loans:

- Home loans
- Personal loans
- Credit cards
- Loans to purchase or refinance a residential investment property
- Consumer leases (for cars and goods)
- Pay day loans
- Promissory Notes and Bills of Exchange (not issued by Banks)
- Reverse mortgages
- Vendor Finance
- Loans with no interest for the purchase of overpriced goods

The Credit Law does not apply to the following types of loans:

- All business loans or loans mainly for business purposes
- Investment loans for the purchase of investments other than residential real estate (eg, shares or investment in commercial property)
- Margin loans (Margin loans are not regulated under the credit law but they are regulated under the *Corporations Act*).
- Loans where no interest or other charges are or may be made for the provision of credit
- Charge cards (eg, American Express and Diners where the whole balance must be repaid at the end of the month)
- Short-term credit under 62 days where the fees and charges are not more than 5% of the amount of credit and the maximum interest charges are 24% p.a.
- Unarranged credit
- Loans where only an account charge is payable
- Insurance premiums by instalments
- Pawnbrokers (except that ss. 76–81 of the NCC still apply)
- Trustees of Estates
- Employee loans and novated leases

Credit contracts (including consumer leases) that are covered by the Credit Law will be referred to in this toolkit as “regulated credit contracts”.

What if the loan is partly for personal purposes and partly for business purposes?

The Credit Law applies if more than 50% of the credit is used for personal purposes or to buy a residential property for investment purposes.

Where the credit is used to purchase goods or property the relevant purpose is the use for which more than 50% of the goods are used for, or for which they are used more than 50% of the time.

What if the debtor has signed a declaration confirming the Credit Law does not apply?

This is only a problem if the Credit Law should have applied to the loan. Some credit providers misuse the Business/Investment Declaration to try to prevent the Credit Law from applying to the loan.

- *The Credit Law is presumed to apply unless an effective Declaration has been signed.*

The Declaration is ineffective if the credit provider, or another person prescribed by the regulations, knew or had reason to believe that the purpose of the loan was mainly for personal purposes or a residential investment purpose (“a credit law purpose”). The Declaration is also ineffective if the credit provider, or other relevant person, *would have known or had reason to believe* the loan was for a credit law purpose, if they had made reasonable enquiries as to the purpose of the loan. The Declaration is also ineffective if it is made after entering the contract or it is not in proper form.

When will the new Credit Law apply?

The new Credit Law commenced on 1 July 2010. All of the provisions did not commence immediately. There have also been further amendments to the Credit Law (see below under “A summary of the changes to the Credit Law introduced after it commenced (phase 2 changes)”). **All provisions now apply.**

The new Credit Law applies to any person or organisation in the business of conducting “credit activities” after 1 July 2010, unless the person or organisation is exempt.

The dates for compliance with the Responsible Lending obligations under the Credit Law have been staggered according to the type of entity:

- Banks, other Authorised Deposit-Taking Institutions (“ADIs”) such as Credit Unions, and Registered Finance Companies (“RFCs”) do not have to comply with the new responsible lending obligations until 1 January 2011.
- Brokers and other credit providers not included above (“non-bank credit providers”) must comply with—
 - › the obligation to assess whether a loan is “not unsuitable” from 1 July 2010;
 - › the obligation to give a Credit Guide and, in the case of brokers, a Quote signed by the consumer, from 1 January 2011.

In some States and Territories, broker legislation requiring specific agreements and/or disclosures has been extended to remain in force until 31 December 2010 to prevent any gap in consumer protection because of the delayed commencement of the disclosure provisions under the new Credit Law. In many States, no such legislation exists. You may need to get advice about the situation in your State or Territory if you are dealing with a dispute involving a broker between 1 July 2010 and 1 January 2011.

Credit providers have been given a two-year period in which to start using all the prescribed forms under the Credit Law. That two year period expired on 1 July 2012.

As of 1 July 2010, all credit contracts currently subject to the Code will be subject to the NCC instead, with the exception of some of the new provisions. These are also referred to as “regulated credit contracts”.

A loan that was not subject to the Code immediately before 1 July 2010 will not become regulated because of the new laws. For example, a loan for a residential investment property taken out before 1 July 2010 will not become regulated after that date.

Contracts that are refinanced after 1 July 2010 (or the relevant date for the commencement of a particular section of the law), including credit limit increases granted after the relevant date, will be subject to the new law in its entirety.

What’s different in the Credit Law compared to the Consumer Credit Code?

Most of the numbering under the Code has changed in the transition to the NCC. Where there was a corresponding section in the Code, that section is mentioned in the first column of the table below along with the corresponding new section under the NCC in the second column.

The third column of the table below indicates to which contracts a new provision or Chapter of the Credit Law will apply.

Consumer Credit Code	New Credit Law	To which Credit Contracts does the new law apply?
No regulation of finance brokers.	Finance brokers now regulated. (ch. 2 and 3–1 NCCP)	Any assistance given in relation to regulated contracts entered into from 1 July 2010 only.
Regulator is State or Territory Fair Trading/Consumer Affairs Offices.	Regulated by ASIC.	All regulated contracts from 1 July 2010 regardless of when they were entered into.
No licensing regime.	All credit providers, finance brokers and other credit intermediaries must be licensed. (ch. 2 NCCP)	All industry players who are lending or assisting consumers to obtain credit from 1 July 2010.
Credit providers and finance brokers not required to be in an EDR.	Credit providers and finance brokers (and all other credit intermediaries) must be in EDR as a condition of their license. (Ch 2–2 Div 5 s. 47(i) NCCP)	All industry players who are lending or assisting consumers to obtain credit from 1 July 2010.

Consumer Credit Code	New Credit Law	To which Credit Contracts does the new law apply?
<p>Some States and Territories had specialist credit tribunals for dealing with credit law matters. In some cases, these tribunals had exclusive jurisdiction over all or some credit matters.</p>	<p>State based specialist tribunals will no longer have any jurisdiction over credit matters. All State and Federal courts have jurisdiction under the credit law. For some types of matters there is a low cost "small claims procedure" that can be used in the Federal Magistrates Court (or the lower tier state courts such as the Local or Circuit Courts).</p> <p>(Part 4–3 NCCP)</p>	<p>The tribunals will no longer be available from 1 July 2010, except in relation to proceedings commenced before that date.</p>
<p>Only loans for personal purposes covered (s. 6 NCC).</p>	<p>Loans to purchase, renovate or improve (or refinance loans for) residential investment properties are covered. (s. 5 NCC)</p>	<p>Contracts signed from 1 July 2010 only.</p>
<p>Some jurisdictions (NSW, QLD, & the ACT) capped interest, fees, and charges at 48%. Victoria capped interest at 48% for unsecured loans and 30% for secured loans, but did not cap fees and charges. South Australia had undertaken to introduce a cap but had not done so when the agreement to transfer jurisdiction to the Commonwealth occurred.</p>	<p>An interest cap applies (excluding consumer leases).</p>	<p>General interest rate cap of 48% p.a. applies from 1/7/13. Different caps apply to SACCs and MACCs (see chapter 16).</p>
<p>No positive obligation to assess whether a loan is suitable, or affordable. Consumers could, however, seek the re-opening of unjust contracts (ss. 70 & 71 Code).</p>	<p>Credit providers, brokers and lessors under consumer leases, are required to comply with responsible lending obligations including:</p> <ul style="list-style-type: none"> • additional disclosure • assessing that a loan is "not unsuitable" • Consumers can seek compensation and other remedies for failure to comply with these obligations. <p>(Ch 3 NCCP)</p> <ul style="list-style-type: none"> • Consumers can still seek the re-opening of unjust contracts <p>(ss. 76 & 77 NCC).</p>	<p>Banks, mutuals, and registered finance companies must comply from 1/1/11.</p> <p>Brokers and other non-bank credit providers must comply with responsible lending from 1/7/10. The other disclosures commence 1/1/11.</p> <p>Unjust contract provisions apply to all regulated credit contracts regardless of when they were entered into.</p>

Consumer Credit Code	New Credit Law	To which Credit Contracts does the new law apply?
Individuals could seek relief from unjust contracts, unconscionable changes in interest rate, and some unconscionable fees (s. 72 Code).	Individual rights remain unchanged (s. 78 NCC), but ASIC can also take class actions on behalf of a group of affected individuals. (s. 79 NCC).	Applies to all regulated credit contracts (Code and NCC) from 1 July 2010 regardless of when they were entered into.
No obligation to respond to a hardship variation (s. 66 Code).	Credit providers and lessor must respond to requests for financial hardship within 21 days of the request, give reasons if they refuse and inform the consumer of their right to complain to EDR (s. 72 NCC).	All regulated credit contracts from 1 July 2010 regardless of when they were entered into.
Only minimal information was required in default notices (s. 80 Code).	A detailed list of information must be included in a default notice including information about EDR and hardship variation rights. (s. 88 NCC).	All regulated credit contracts regardless of when they were entered into.
A floating threshold applied to applications for hardship variations and postponement of enforcement in court (\$350,240 as at 12/4/10) (ss. 66 (3) and 86(2) Code).	No threshold applies after 1/3/13. Between 1/7/10 and 28/2/13 a threshold of \$500,000 applies for applications for hardship variations and postponement of enforcement (s. 72(5) NCC). (including loans refinanced after 1/7/10, or where additional credit is granted after 1/7/10). The old floating threshold still applies to loan contracts entered before this date.	No threshold applies to contracts entered into after 1/3/13. The \$500,000 threshold applies to regulated credit contracts entered into or refinanced between 1/7/10 and 28/2/13. The old floating threshold continues to apply to loans entered before 1 July 2010.
Pawnbroking exempt from all but the unjust contracts ss. 70 and 72 provisions of the Code. The pawnbroking exemption could be used to avoid the law by asking the consumer to pawn a very low value item as security for the loan. (s. 7 (7) Code).	Pawnbroking still exempt from all but ss. 76–81 of the NCC (unjust contracts and unconscionable fees). Capacity to avoid the law using the pawnbroking exemption reduced by confining pawnbroking to those loans where there is no recourse against the consumers beyond the retention and sale of the pawned item(s) (s. 6(9) NCC).	All regulated credit contracts entered into from 1 July 2010 only.

Consumer Credit Code	New Credit Law	To which Credit Contracts does the new law apply?
<p>Minimum charges for the Code to apply to credit contracts under 62 days did not expressly include brokers' fees (s. 7 Code).</p>	<p>Brokers' fees and other fees payable to third parties in association with the credit contract included for the purposes of calculating whether the NCC applies to credit contracts under 62 days (s. 6(2) NCC).</p>	<p>All regulated credit contracts entered into from 1 July 2010 only.</p>
<p>Where a car or other goods were repossessed in contravention of the Code there was no clear remedy for the consumer.</p>	<p>Consumers can apply for the return of their vehicle or other goods if they are repossessed in contravention of the NCC (ss. 108–110 NCC).</p>	<p>Applies to all regulated credit contracts (Code and NCC) from 1 July 2010 regardless of when they were entered into.</p>
<p>No requirement for the credit provider to do anything when a direct debit was dishonoured.</p>	<p>Credit providers required to give a prescribed notice to consumers the first time a direct debit fails, unless the default is rectified within 10 days (s. 87 NCC).</p>	<p>Applies to all regulated credit contracts (Code and NCC) from 1 July 2010 regardless of when they were entered into.</p>
<p>There are a range of prescribed forms required to be given to consumers.</p>	<p>The prescribed forms have been amended to include information about hardship, EDR, financial counselling and legal assistance. (Regulations Schedule 1 NCC)</p>	<p>Applies to all regulated credit contracts (Code and NCC) from 1 July 2010, regardless of when they were entered into, however the equivalent form under the Code can be used for 2 more years.</p>

A summary of the changes to the Credit Law introduced after it commenced (phase 2 changes)

The recent changes to the Credit Law are summarised in the table below:

Recent amendments	Details	Commencement date
Key Fact Sheet (home loans and credit cards)	For home loans: It must be made available on the credit provider's website or on request For credit cards: Must be provided with the credit card application form	01/01/2012 (for Home loans) 1 July 2012 (for credit cards)
Credit Limit increase invitation (credit cards)	Credit providers must not invite the debtor to increase their credit limit unless the debtor has expressly consented	1 July 2012
Exceeding Credit Limit (credit cards)	Credit Providers may be required to notify consumers of over the limit use of their credit card. Feed for over limit use cannot be imposed	1 July 2012
48% interest rate cap (excluding small amount credit contracts, bridging finance and all finance provided by an ADI)	The annual interest rate (credit cost) cannot exceed 48% p.a.	1 July 2013
Enforcement of credit contract	A credit provider must not bring enforcement proceedings against a debtor unless the debtor is in default, notice has been given under section 88 of the NCC and the default has not been remedied within 30 days from the date of the notice	1 March 2013
Unfair/dishonest conduct by Credit service providers	When a person (other than a credit provider, lessor or a beneficiary of a guarantee) engages in conduct that is unfair or dishonest, an order may be made by the court to recover an amount as a debt due to the person who was subjected to the conduct	1 March 2013

Recent amendments	Details	Commencement date
Representations about eligibility for credit	A credit provider must not make representations to consumers about their eligibility to either enter a credit contract or increase their credit limit unless the credit provider has assessed whether the credit contract is unsuitable	1 March 2013
Prohibition on using certain words	A credit provider or any other licensee must not use the words “independent”, “impartial”, “unbiased”, “financial counsellor” or “financial counselling”.	1 March 2013
Reverse mortgages (equity mortgages)	Credit providers must provide projections of the debtor’s equity in the property. The information statements must be available on the credit provider’s website or on request.	1 March 2013
Reverse mortgage as remedy	If a credit provider approves (or increases the credit limit) of a credit contract that is unsuitable for the debtor but a court is satisfied that a reverse mortgage would be suitable, the court can make orders that the debtor can reside in the property	1 March 2013
Reverse mortgages- occupying the property	The credit contract may make provision for the debtor to nominate a person to be allowed to occupy the reverse mortgaged property	1 March 2013
Reverse mortgages – excluded provisions	The credit contract must not provide for a basis to begin enforcement proceedings against the debtor because the debtor failed to: prove occupation comply with unclear terms defaulted on other separate liabilities	1 March 2013
Reverse mortgages – statements of account	The debtor must be provided with account statements at least yearly	1 March 2013
Reverse mortgages – Early repayment	A debtor can end a reverse mortgage early. The debtor’s maximum liability is the adjusted market value of the home	18 September 2012

Recent amendments	Details	Commencement date
Reverse Mortgages – enforcement	A credit provider must not begin enforcement proceedings unless: the debtor is in default default notice has been sent the credit provider has spoken directly to the debtor and confirmed the default notice has been received and explained the consequences and the default notice is not remedied within 30 days.	1 March 2013
Small amount credit contracts	See chapter 16	1 March 2013
Small amount credit contracts – cap on costs	See chapter 16	1 July 2013
Consumer leases	See chapter 14	1 March 2013
Financial hardship	See chapter 3	1 March 2013

Licensing and External Dispute Resolution

Licensing

All credit providers, finance brokers, mortgage managers, and mortgage originators who participate in credit activities regulated by the Credit Law from 1 July 2010 must be licensed with ASIC or appointed as a credit representative by another licensee. Licensees are responsible for the credit representatives they appoint. The applicable licence is an Australian Credit Licence (“ACL”). You can check whether a particular person or organisation is registered, licensed or has been duly appointed as a credit representative at www.moneysmart.gov.au (check ASIC lists)

Credit activities include any of the following in relation to a regulated credit contract or consumer lease (ss. 6–10 NCCP):

- Being the credit provider or lessor (whether as the original party or as an assignee)
- Exercising the rights of a credit provider or lessor
- Being the mortgagee or beneficiary of a guarantee or exercising the rights of either
- Providing a credit service including–
 - › Suggesting that a consumer apply for a particular loan, an increase to a particular loan, or a particular lease
 - › Suggesting that a consumer stay with an existing credit provider or lessor
 - › Assisting the consumer to apply for a loan, an increase to a loan, or a lease
- Being an intermediary between any of the above parties, or the consumer and any of the above parties

Credit representatives can be appointed by any licensee, for example, a broker or a credit provider can appoint one or many credit representatives (Chapter 2, Part 2–3 NCCP). Credit representatives can be appointed by more than one licensee at any one time, as long as each licensee consents to the appointment. If it is not clear who a licensee is acting for in relation to a particular consumer complaint, then all licensees who have appointed that credit representative are jointly and severally liable for his or her conduct. In practice, appointments by multiple licensees will be rare as a result.

There are certain exemptions (National Consumer Credit Protection Regulations 2010):

- Debt collectors licensed under a State or Territory law who collect debts as agents of the credit provider (Regulation 21). Assignees that purchase debt must, however, must be licensed as credit providers.
- Point of sale credit assistants (for example interest free loans through a retail store to enable consumers to buy goods, or the sales persons at the car dealership). The credit provider, on the other hand, (eg, GE Money or Toyota Finance) must be licensed (Regulation 23 & 23A).
- Lawyers in their usual business (provided they are not lending or brokering loans) (Regulation 24).
- Part IX Debt Agreement Administrators & Trustees/Receivers under the *Bankruptcy Act 1966* (Regulation 20).
- Financial counsellors (Regulation 20).



Credit providers and mortgage managers who are no longer offering new loans after 1 July 2010 but are still managing and collecting existing loans are subject to different rules. Get advice if the credit provider or mortgage manager of a contract from prior to 1 July 2010 is not in EDR.

Unlicensed conduct

Consumers can apply for compensation if they can demonstrate a loss caused by unlicensed conduct. Further, where a licensee deals with another entity (such as a broker) that is not licensed, the licensee can also be responsible for any loss. However, the loan contract will not be automatically void or otherwise changed because the lender or broker was unlicensed. Unlicensed conduct should be reported to ASIC, whether or not the consumer has suffered a loss, because penalties apply.

External Dispute Resolution (“EDR”)

All credit providers, finance brokers, mortgage managers, and mortgage originators who participate in credit activities regulated by the Credit Law from 1 July 2010 must be members of an ASIC-approved EDR scheme as a condition of the licence (or registration). Credit representatives must also be members of an EDR scheme.

EDR is a free service for resolving disputes between consumers and members of the EDR Scheme. EDR is the main way to access justice for credit disputes in Australia. It is vitally important to understand the uses and benefits of EDR. See Chapter 2 – *External dispute resolution* for an overview.

What about court?

The specialist credit tribunals that existed in some States and Territories under the Code will no longer have jurisdiction in credit matters. Instead there is an “opt-in”, small claims procedure available in the lower tier courts (such as the Local or Magistrates courts) and the Federal Circuit Court, with limited costs and risks for some types of matter. For example, the following matters could be taken to court using this procedure:

- An application for a hardship variation
- An order for the return of a vehicle
- An application for compensation for a breach of the responsible lending obligations where the amount sought is under \$40,000
- An unjust contract application where the contract value (loan amount) is under \$40,000

This is not an exhaustive list.

All of the State and Territory courts have also been vested with jurisdiction under the law so that it can be pleaded in a defence and cross-claim in any enforcement proceedings for a contract covered by the law.

However, as stated above, we do not recommend consumers opt for commencing or remaining in court proceedings where EDR is available. If a consumer is already in court proceedings, get legal advice. It may still be possible and preferable for the consumer to lodge the dispute in EDR.

Some matters under the Credit Law can only be dealt with by a court. Specifically, an application for a civil or criminal penalty under the law could only be dealt with by a court. If an ACL license holder has repeatedly breached provisions of the Credit Law, you should seek permission from your clients to make a complaint to ASIC on their behalf.

What if the Credit Law does not apply?

The Credit Law does not apply to a range of loans, particularly, loans for business purposes or for investment in anything other than residential property.

1. You can still negotiate.
2. You can request a hardship variation (but you cannot use the Credit Law to get a determination in EDR or enforce this request in court).
3. If it is a small business or investment loan, a dispute or request for financial hardship can be lodged in EDR provided the broker or credit provider is a member.
4. The credit provider, finance broker or other credit intermediary may subscribe to a Code of Practice where they promise to keep to certain levels of conduct (including considering financial hardship).

The relevant Codes are:

- Code of Banking Practice – membership list (banks) and Code available at www.codecompliance.org.au (Covers small business and some investment lending by individuals)
- Customer Owned Banking Code of Practice – membership list (Credit unions and Building Societies) and Code available at www.customerownedbanking.asn.au.
- Mortgage & Finance Association of Australia Code of Practice – membership list (non-bank credit providers, mortgage managers, and finance brokers) and Code available at www.mfaa.com.au (Covers some small business and investment lending)

Main Points

- EDR is the main form of dispute resolution for consumers under the Credit Law (although EDR is not available for all matters).
- EDR is free to the consumer and they do not lose any of their rights to go to court if they are dissatisfied with the result.
- Consumers do not need legal representation to go to EDR, however, financial counsellors and lawyers may advocate for the consumer.
- EDR schemes can vary the credit contract (make repayment arrangements) under the Credit Law.
- Consumers can go to EDR even after legal proceedings have commenced, but usually not after judgment.
- All credit providers and credit assistants must be members of an EDR scheme.

What is EDR?

EDR is a service for resolving disputes between consumers and members of the EDR Scheme. EDR is funded by the members of the EDR Scheme (the credit providers and credit assistants/representatives). The funding is a combination of membership fees and complaint handling fees. Both EDR Schemes are independent and have equal numbers of consumer and industry representatives on the Board.

All credit providers, finance brokers, mortgage managers and mortgage originators who arrange or provide credit under the Credit Law from 1 July 2010 must be members of an ASIC-approved EDR scheme as a condition of the licence (or registration). Credit representatives must also be members of an EDR scheme.

This should mean that most credit providers and intermediaries in the credit industry should be members of an EDR Scheme. Some exclusions will be:

- Where the credit provider is not lending anymore (although some may choose to remain members of EDR)
- Where the credit provider only lends for business purposes (including commercial equipment/vehicle leasing arrangements for business purposes)
- Where the credit representative or credit assistance provider (broker) only arranges or manages loans/leases for business purposes
- Where the credit provider only lends for investment purposes (but not including investment loans for real property)
- Where the credit representative or credit assistance provider (broker) only arranges or manages loans for investment purposes (but not including investment loans for real property)

There are two EDRs available for credit disputes in Australia. They are:

1. Financial Ombudsman Service Australia (FOS) – www.fos.org.au
2. Credit and Investments Ombudsman (CIO) – www.cio.org.au

Both FOS and CIO have been approved by ASIC. There are different members in each scheme.

The consumer must direct their complaint to the scheme of which the person or organisation complained about is a member. This can be determined by:

- ringing 1800 367 287 or
- checking the Member Lists on both the FOS and CIO web sites above

Sometimes there will be two relevant schemes, for example, where there is a broker and a credit provider involved in the same complaint. In those situations, a complaint should be made to both schemes with each scheme being notified that this has been done.



You must actually lodge in EDR to have the consumer's dispute considered in EDR. It is not enough just to ring EDR. You will know you have lodged successfully when you get confirmation from EDR and a case number.

Why EDR is important

EDR has several important benefits:

1. It is free for consumers
2. It is independent (despite being funded by industry)
3. All enforcement stops (including Court proceedings) while EDR considers the dispute
4. It encourages negotiation between the parties
5. A decision will (usually) be made by the EDR if the parties cannot negotiate a solution
6. EDR can decide on repayment arrangements due to financial hardship (“hardship variations”) under the Credit Law
7. Disputes can be lodged in EDR before and after court proceedings³ have been issued but usually not after Court judgment (See below under the heading “After Judgment and EDR” for information about the limited circumstances in which EDR can assist after judgment has been obtained)
8. There are no costs payable to use EDR
9. The consumer does not have to accept the decision of EDR on a dispute; the consumer can still go to court (as long as the time limits to go to court have not expired)
10. The Credit Law will mean that EDR will be the main way to resolve disputes if negotiation does not work.

EDR is one of the key tools for caseworkers assisting consumers with resolving a problem. For this reason, all of the *How to Guides* in this toolkit will focus on applying to EDR if a dispute is unresolved.



The credit provider or credit assistant/representative will be charged at each level of the dispute in EDR. This can be an incentive to negotiate a settlement to avoid further cost (particularly if the amount in dispute is small). So be prepared to try to negotiate to obtain a quick and fair outcome for your client.

EDR and financial hardship

Both EDR Schemes can make determinations on financial hardship under the Credit Law. This is an enormously important tool for caseworkers. This right has only recently been achieved (2010) and was a hard fought for right.

Importantly, when it comes to financial hardship, the EDR Schemes consider the value of the dispute or claim, not the value of the contract. This means that even if your client has a large home loan, the amount in dispute will be interpreted as, for example, the amount of the repayments sought to be postponed. This means that very few hardship disputes will be excluded from EDR threshold.

Both EDR Schemes have streamlined procedures for hardship. This means that hardship disputes are a high priority and are dealt with accordingly. This means that if you lodge a dispute in EDR you (and your client) must be ready and prepared to negotiate and exchange information.

3

There are limitations on going to EDR after court proceedings have commenced –see page 18 If legal proceedings have commenced.

The reason hardship is urgent is that arrears are usually accumulating so it is essential that an arrangement is made as soon as possible. This is also in the interests of your client.

Your client may be required to:

- Fill out a questionnaire about themselves and the dispute
- Fill out a statement of financial position for the EDR Scheme
- Attend telephone conciliations
- Provide further information and evidence of income and expenses.
- Explain why the repayment arrangement proposed is both affordable and reasonable

The EDR Scheme will encourage your client to continue to make repayments to the debt. This is good advice. If your client is having trouble making repayments because the credit provider will not change the direct debit or provide your client with another way to make the loan repayments you should complain about this to the credit provider (and if necessary to EDR) and request details of a way to pay. It is recommended you keep encouraging your client to make repayments.

EDR Schemes prefer to settle disputes so there will be a great deal of pressure to settle. Some hints:

- Never agree to a repayment arrangement your client cannot afford. Credit providers will often want bulk payments and this is usually unworkable.
- Keep making offers to settle. Don't give up; just keep trying to come to an arrangement. Support your proposals with reasons as to why the proposal is both reasonable and affordable.
- Make sure your client is making regular repayments, as this will help show they are trying.
- Always respond to requests for information from the EDR Scheme.
- Make sure any settlement covers all of the dispute, makes sense and is in writing

See Chapter 3 for more information about financial hardship and EDR.

Problem solving and EDR

EDR presents a great opportunity to negotiate a fair outcome for your client.

Some hints:

1. Always lodge your complaint in writing (either on-line or by mail or fax). Don't be deterred by a telephone conversation that suggests your complaint may not have merit.
2. Be persistent. Don't give up.
3. Always be courteous, professional, and friendly with EDR staff. They are always trying to help. It can also be very helpful to you to understand how the complaint is going. Don't be afraid to ring and chat about your case and the procedure for resolving the complaint.
4. Keep a copy of the FOS Terms of Reference and the CIO Rules on your desk or PC. EDR have to follow their own rules.
5. Keep up to date with EDR position statements and information, as it may be relevant to issues you have.

There are some traps to look out for.

You must always respond within the required deadlines

If you do not respond within the required deadlines, the EDR Scheme will close your client's file! Therefore, it is essential you have a diary system in place to make sure these deadlines are met. If you know there is a good reason why you cannot meet a deadline ask for an extension of time. These are usually granted if you have a good reason (and sometimes even when you don't). Ring up and get an extension before the deadline expires and confirm this in writing.

The “close file” problem

Even if you respond within the required deadlines, a problem with EDR is for the client's file to be closed as the EDR Scheme has decided there is no merit in the dispute BEFORE the matter has even been determined.

It is important that you always get legal advice about this as it may be that the EDR Scheme has not understood the dispute or there is further evidence you need to provide (See *Chapter 3 – Financial hardship, How to Guides and Sample letters: Financial hardship.*)

The evidence problem

EDR Schemes cannot take evidence under oath or examine witnesses. For this reason, your best evidence in EDR will be documents. If it becomes a question of “he says, she says” with no other compelling evidence available the EDR scheme will either find against your client or decide that EDR is not the most appropriate forum for your dispute.

The EDR scheme is often helpful in telling you what evidence to get. It is strongly suggested that if the EDR Scheme asks for evidence you should try to obtain that evidence.

Therefore, if you are having trouble with getting sufficient evidence together for your dispute – get legal advice.

If legal proceedings have commenced



If legal proceedings have commenced you need to lodge a dispute in EDR urgently. You or the client should lodge the dispute online immediately. Once judgment is obtained access to EDR is severely limited if not completely unavailable for the dispute

If legal proceedings have already commenced (and court judgment has **not** been obtained by the credit provider), the consumer can still complain to EDR provided they have not taken a step in the legal proceedings beyond lodging a defence (and cross-claim). Just attending a directions hearing or pre-trial review would not be a significant step.

If legal proceedings have commenced, you should encourage and assist the consumer to lodge an urgent complaint in the relevant EDR Scheme immediately.

You need to:

- As soon as you become aware of the court proceedings work out–
 - › When the consumer was served
 - › How long they have before judgment can be obtained (usually 21 or 28 days)
- Make sure you lodge in EDR immediately. You should do this online.
- Your client (or you as representative) will get an email acknowledging the successful lodgment of the dispute immediately. If you do not get an email lodge the dispute again.
- Ring the EDR Scheme and make sure they received the complaint if time is running out and the credit provider may be able to obtain judgment soon.

If you lodge online in EDR a copy of the complaint will automatically be sent to the credit provider or credit representative. If lodging by mail or fax send a copy of the dispute to the credit provider or credit representative Get legal advice if there are any problems with the court.

When resolving a dispute in EDR after court proceedings have commenced, you need to:

- Make sure the settlement includes an agreement that court proceedings are discontinued. This is usually done by either–
 - › Filing consent orders saying the matter is settled and discontinued
 - › The credit provider filing a notice of discontinuance
 - The credit provider (or their lawyers) have not added their costs of defending the matter at EDR to the loan (as EDR is free).
 - The consumer understands whether they have to pay the legal costs of the credit provider commencing court proceedings. You should try to resolve the matter on the basis the consumer does not have to pay these costs.
- ☛ *Get legal advice on this if you are not clear on what is happening.*
- ☛ *DO NOT agree to the credit provider having judgment in settling the dispute. This compromises your client's situation and possibly deprives your client access to EDR.*

After judgment and EDR

EDR Schemes have very limited jurisdiction to consider disputes after judgment has been obtained.

Financial Ombudsman Service

FOS can only consider the exercise of the power of sale (a mortgagee sale) in home mortgage matters. This would include disputes about enforcement costs. Also, see *Chapter 8 – Home repossession* for a more detailed discussion on this aspect of the FOS jurisdiction.

Credit & Investments Ombudsman

For financial hardship matters, CIO can direct a Member not to enforce a default judgment in appropriate circumstances, where for example:

- the consumer wishes to sell the security property and has a contract for sale available and an agent appointed
- the consumer is able to demonstrate that there is a reasonable prospect of refinancing the loan or
- the immediate execution of the writ of possession will cause physical hardship (eg, a person with significant illness or disabilities needs to time to find alternative accommodation with appropriate modification/support)

For other matters (not financial hardship), CIO can, in appropriate circumstances, direct a Member not to enforce a default judgment if the Complainant indicates that they want to set aside the default judgment on the basis of a substantive defence, such as for example, unconscionability, duress, unjustness, undue influence or a breach of the responsible lending provisions.

Problems with jurisdiction

EDR Schemes have a limited jurisdiction defined by the Terms of Reference/Rules. This means there are some complaints an EDR Scheme will not consider. Some reasons EDR may not consider a dispute are:

- The amount in dispute is more than the maximum compensation that can be given (FOS and CIO \$309,000 as at 1/1/15). If the amount in dispute is less than \$500,000 but more than the compensation limit the consumer can still apply to EDR and agree not to seek more in compensation than the limit. Remember that for the hardship claims the amount in dispute will usually be much, much lower than the value of the contract.
- That EDR is not the most appropriate place to hear the dispute (a very wide power).
- Where another EDR is considering the dispute.
- Where a court decision has been made on the dispute.
- The dispute is lacking in substance.
- The consumer is out of time to lodge a dispute in EDR.

The time limits for FOS and CIO are:

For disputes involving financial hardship, unjustness and/or unconscionable interest/charges under the National Credit Code must be lodged before the later of:

- 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 Dispute with FOS, the Applicant received an IDR Response in relation to the Dispute from the Financial Services Provider – within 2 years of the date of that IDR Response.

In all other situations the dispute must be lodged before the earlier of:

- Within 6 years of the applicant first became aware of (or reasonably should have become aware of) the loss; and
- Where, prior to lodging the dispute, the Applicant received an IDR Response in relation to the Dispute from the Financial Services Provider – within 2 years of the date of that IDR Response.

If a consumer's dispute is rejected on the grounds of a lack of jurisdiction you may be able to appeal the EDR decision to the EDR Scheme. This appeal would be referred to the Ombudsman. Remember that if the EDR Scheme has decided the complaint is not within its jurisdiction, then:

- Legal action can commence and is no longer stayed
- The credit provider can get judgment if you lodged in EDR after court proceedings had commenced (although your client will be given 14 days to file a defence)

• *Get advice immediately if your client's EDR case has been closed*

Main Points

- A debtor who is unable to meet their repayments under a credit contract or lease can give the credit provider notice (a hardship notice). The notice can be made verbally or in writing.
- Within 21 days of the hardship notice the credit provider can ask the debtor for relevant information. The debtor must provide the relevant information within 21 days of the request.
- Credit providers must respond to the hardship notice within a set time frame including, if they say no, their reasons for refusal and details of the EDR scheme the consumer can complain to.
- The credit provider cannot commence enforcement proceedings until 14 days after a notice of refusal following a hardship notice (this requirement does not apply if a hardship notice had been made in the preceding 4 months).
- EDR schemes can make repayment arrangements on the grounds of financial hardship (vary the credit contract) under the Credit Law.
- Consumers can go to EDR even after legal proceedings have commenced, but not after judgment.
- Consumers may have rights under a Code of Practice in addition to the Credit Law or if the Credit Law does not apply to their loan. EDR can also accept these disputes although the powers of the EDR scheme may be more limited if the loan is not covered by the Credit Law.
- See chapter 8 for financial hardship and home loans.

What is financial hardship?

Financial hardship is difficulty in paying loans and debts when repayment is due.

Many consumers only seek out financial counsellors, community workers, and credit lawyers because they are in financial hardship. There may be other issues to consider but the central problem is often that the consumer is having trouble making their loan repayments.

There are often two main reasons for financial hardship:

1. The consumer could afford the loan when it was obtained but a change of circumstances has occurred after getting the loan or
2. The consumer could not afford to repay the loan when it was originally obtained.

If the consumer is in the second category, you need to consider a dispute based on irresponsible lending conduct and/or unjustness. See *Chapters 11 and 12*.

Consumers have certain rights under the Credit Law to access repayment arrangements because they are in financial hardship. Knowing about and using these rights is one of the most important tools available to caseworkers to assist consumers.

- ☛ *Remember: Financial Hardship is not limited to hardship rights under the Credit Law. Many credit providers are prepared to negotiate a wide range of repayment arrangements regardless of whether the Credit Law applies or not. Some credit providers are required to reasonably negotiate financial hardship under a relevant Code of Practice.*

The difference is that the consumer's request for financial hardship under the Credit Law can be enforced in court or determined in EDR if the credit provider refuses the request and the request complies with the criteria set out in the law. EDR can also determine whether there has been a breach of a relevant Code of Practice.

How does the Credit Law help?

The Credit Law has sections (s. 72-75 NCC) that specifically deal with financial hardship.

The Credit Law assists consumers in financial hardship by:

- Giving consumers the right to apply for financial hardship (subject to certain requirements).
- Requiring the credit provider to respond to the application in writing within 21 days (after any information requested is supplied) stating–
 - › Whether the credit provider agrees to the change and
 - › If the credit provider does not agree to the change notify the consumer of–
 - the contact details of the relevant EDR
 - the consumer's right to go to EDR and
 - the credit provider's reasons for refusing the hardship application.
- All enforcement is stopped until 14 days after the credit provider's refusal of the request for a change on the grounds of hardship
- If the credit provider agrees to the repayment arrangement it must give the consumer a notice in writing within 30 days after the agreement is made stating the particulars of the change.
- If the credit provider does not agree to the application for change then the consumer can apply to EDR for the requested change.

- If the consumer is unsuccessful in EDR then the request for hardship can be enforced in Court.

These are all important rights for the consumer.

Hardship Options Summary

Contract details	EDR	Court
Contract is regulated by the Credit Law (and possibly a Code of Practice) and the loan is below the relevant hardship threshold prescribed by law. Credit Provider is a member of EDR.	Can apply to EDR. EDR has the power to vary the contract in a variety of ways if an agreement cannot be negotiated provided the value of the variation sought is less than the maximum compensation amount for the EDR scheme. As it is calculated on the value of the variation almost every hardship case will be below the compensation cap.	Can apply to Court. The Court can vary the contract if agreements cannot be negotiated. To succeed in Court the application must address all the elements of s. 72 and be confined to one of the variation options given in s. 72. The loan must be less than the relevant hardship threshold. Note: The threshold is determined by when the loan was entered and not the amount at the time of the application.
Contract is regulated by the Credit Law and the loan is below the relevant hardship threshold prescribed by law. Credit Provider is not in EDR.*	EDR is not available.	Can apply to Court. The Court can vary the contract if agreements cannot be negotiated. To succeed in Court the application must address all the elements of s. 72 and be confined to one of the variation options given in s. 72.
Contract is regulated by the Credit Law (and possibly a Code of Practice) but above the hardship threshold. Credit Provider is a member of EDR.	Can apply to EDR. EDR has the power to vary the contract in a variety of ways if an agreement cannot be negotiated provided the value of the variation sought is less than the maximum compensation amount for the EDR scheme. As it is calculated on the value of the variation almost every hardship case will be below the compensation cap.	Court is not available.
Contract is not regulated by the Credit Law, but the Credit Provider is a member of an EDR and/or a signatory to a relevant Code of Practice.	Can apply to EDR. EDR can negotiate, determine whether any relevant provision of a Code of Practice has been breached and an appropriate remedy, but it cannot ultimately vary the contract on grounds of hardship if the lender refuses to do so.	Court is not available.

Contract details	EDR	Court
Contract is not regulated and the Credit Provider is neither a signatory to a Code of Practice, nor a member of EDR. This is most likely to be the case for (real and ostensible) business or investment debts (excluding residential property).**	No EDR available.	Court is not available.
	Negotiation is the only option.	

Note

- ☛ * *Lenders who are still managing/collecting loans, but have not entered any new loans, or increased the limited on any loans, from 1 July 2010, do not have to be licensed or members of EDR.*
- ☛ ** *This may also occur where the lender is no longer lending (see previous note), and the loan is regulated but above the hardship threshold.*

How to apply for a hardship variation under the Credit Law

Section 72 of the Credit Law covers the circumstances where a consumer can request a repayment arrangement on the grounds of financial hardship.

There are six parts of an application for financial hardship:

1. The consumer must be having (or will have) difficulty meeting their obligations under the loan (s.72(1) NCC)
2. The consumer must contact the credit provider and give them notice (the hardship notice). This notice can be given in writing or orally (s.72(1) NCC)
3. If the credit provider requests further relevant information the consumer must provide that information within 21 days of the request (s.72(2) NCC)
4. The credit provider does not need to agree to the requested change, especially if the credit provider:
 - › Does not believe there is a reasonable cause for the hardship (eg. illness or unemployment)
 - › Reasonably believes that the consumer would not be able to reasonably repay the loan even if it was changed.
5. The consumer will receive a decision from the credit provider in writing (except for arrangements less than 90 days in duration) on the request for a change on the grounds of hardship within a certain time frame (see page 43 for details)
 - › If the request is agreed then the details of agreement are confirmed in writing
 - › If the request is refused the consumer will be notified in writing of:
 - That the requested change is not agreed
 - The reasons for not agreeing
 - The name and contact details of the EDR scheme that the credit provider is a member
 - The consumer’s rights in that EDR scheme
6. A threshold applies to go to Court (depending on the date the loan was given)

So what does all this mean?

Note

- *Financial hardship is available for loans and consumer leases. Generally the guidance below applies to consumer leases but see chapter 14 for specific guidance.*

Part 1: Trouble meeting an obligation

The most common obligation a debtor cannot meet is their loan repayments. This will be the focus of this chapter. However, there are other obligations that may be relevant, for example, negotiating time to pay a home building insurance policy. If you have a client who is in default of another obligation other than repayments seek legal advice.

Significantly, this section makes it clear that a financial hardship variation can be requested when the consumer knows they will in future have trouble making their loan repayments.

Part 2: Contact the credit provider

The hardship notice can be given orally or in writing. The most common way a consumer will request hardship will be over the phone, often in response to a debt collection call. It is worth noting that the consumer only has to give notice of their inability to make the repayments. The consumer does not have to mention particular words like “hardship”.



The Credit Law no longer states the types of hardship variations that can be agreed. This means there is now a lot of flexibility in the agreements that can be made. It also means that a hardship variation can be requested where no interest is charged for a period of time. Getting interest stopped for a period of time may be available for some hardship requests usually for smaller debts. This is new, and at this stage it is unlikely to be a remedy you can seek in EDR or Court.

Part 3: The credit provider can request further relevant information.

The credit provider does not have to request further information. If only a short term arrangement is required the credit provider may request very little information and simply agree to an arrangement. If the requested arrangement is more complicated the credit provider will often request a statement of financial position to be completed and relevant documents to be provided.

The information requested by the credit provider must be relevant to deciding:

- Whether the consumer is having trouble making the repayments
- How to change the contract

In practice, this will mean the credit provider may request any of the following:

- Statement of financial position
- Income (and evidence of this)
- Major expenses (e.g. loans and evidence of this)

It is recommended that any relevant information/documents requested by the credit provider are provided by your client.

Part 4: Credit provider is under no obligation to agree to the requested change

It can just say “no” and give reasons. However, that decision is subject to review if the consumer lodges in EDR (or more rarely Court). If that decision is unreasonable then it can be overturned and the variation made by EDR (or court).

The credit provider can say no to the change and, in particular, can say no for either of the following main reasons:

- There is no reasonable cause for the hardship; and/or
- Even if the proposed change was made the consumer could still not reasonably repay the loan

Reasonable cause

There must be a reasonable cause for the financial hardship. A reasonable cause must impact on the consumer’s income in some way. Examples of reasonable causes are:

- Illness (which includes mental illness)
- Unemployment
- Family breakdown
- Business failure
- Caring for an ill relative
- Funeral expenses

There are very few court decisions on this part of the law but it is recommended that these words be interpreted widely. As the law does not provide a limitation to what may be a reasonable cause, there may be other acceptable reasons that are not listed here.

Reasonably repay the loan

This the most common reason for refusal of a hardship notice by credit providers. It is essential that a plan is set out on how the loan will be repaid.

As a guide, here are some examples where it could be argued the consumer would reasonably expect to repay the loan:

✓	The consumer has a loan of \$20,000 and loses their job. It takes 6 months to get another job. An arrangement is made to pay minimal repayments while unemployed and the loan term is extended by 6 months.
✓	The consumer has a loan of \$20,000 and loses their job. It may take 6 months to get another job. The 6 months to get a job is an estimate. An arrangement is made to pay minimal repayments while unemployed and the loan term is extended by 6 months.
✓	The consumer is ill for 6 months and has a home loan of \$350,000. The consumer’s partner continues to work and repay part of the mortgage. An arrangement for 50% of the normal repayments to be made for 6 months with the loan term extended.
✓	A consumer has \$15,000 left to repay on their home mortgage when they become permanently disabled in an accident. A repayment arrangement could be made for a lesser amount to be paid until the loan is repaid in full.

✓	A consumer is made redundant from their job when they are 58 years old. They are unable to find further work. They have a \$4000 credit card. A permanent repayment arrangement could be negotiated until the credit card debt is paid in full with the card cancelled.
✓	The consumer has a serious illness and will not be able to work for the foreseeable future. He has a home mortgage of \$300,000. He decides to sell his home and seek a reduced repayment arrangement for 6 months until his home is sold which will repay the loan in full.

As a guide, here are some examples where it would be very difficult to argue the consumer would reasonably expect to repay the loan:

✗	The consumer is suffering from a chronic mental illness that emerged after the loan was obtained. She has a personal loan of \$30,000. The amount she can afford from her Centrelink payments does not cover the interest. She cannot return to work for at least another year, if at all.
✗	The consumer has a loan of \$500,000. He has been injured at work and receiving workers compensation payments. Due to the injury, it is expected he will not be able to work for some years. The workers compensation payments only allow him to pay part of the interest repayments. He refuses to sell his home.



FOS Approach to Financial Difficulty (available at www.fos.org.au.) specifically discusses the situation of a hardship notice by one of two or more co-borrowers. *FOS Approach to financial difficulty* (available at www.fos.org.au) specifically discusses the situation of hardship application by one of two or more co-borrowers.

- **Remember:** *The borrower requesting hardship needs to make an arrangement that demonstrates they (alone) can reasonably repay the debt.*

Part 5: Credit provider must respond to the hardship notice

The following time frames:

If:	When the reply must be sent by:
The credit provider does not require further information	21 days after receiving the hardship notice
The credit provider requests information and the consumer does not provide that information	28 days after the date of the notice given by the credit provider requesting further information
The credit provider requests information and the consumer provides the information	21 days after the date of receiving the information.

The credit provider is only required to respond in writing if the requested hardship variation is for more than 3 months



Encourage your clients to keep notes of their request for hardship and the response. Note the date, time, name of the person they spoke to and details of the response.

- *If it is likely the financial hardship request may need to be enforced in Court, the application must be one (or more) of the options listed above. See page 31 – What if the credit provider is not in EDR?*

Part 6: Hardship threshold

The threshold under the Credit Law is not relevant to making an application to EDR. EDR schemes have thresholds based on the amount of compensation sought. The EDR schemes take the view that the compensation is the amount of the variation sought. Therefore, if the consumer were seeking a temporary reduction in repayments for 3 months, the amount in dispute would be those 3 months of repayments.

- *This means that almost all hardship claims will be well below the threshold for EDR!*

For enforcement in court:

- For contracts entered into, or refinanced, from 1 July 2010, the relevant threshold is \$500,000 (being calculated on the original loan amount approved).
- For contracts entered into prior to 1 July 2010, the floating threshold applicable under the Code will still apply.

What does a workable arrangement look like?

The aim is to make a repayment arrangement that is affordable and sustainable. It is essential to propose a repayment arrangement that will work.

Angela's story

Angela was behind on her personal loan repayments because she had lost her job. BIG BANK rang after she missed her second repayment. Angela was told by BIG BANK that it had already sent her a letter telling her to pay. Angela tried to explain that she was unemployed and had applied for Centrelink support but currently had no income until she got her first payment. BIG BANK asked Angela what she could afford to pay. Angela had no income and again repeated that she did not know until she got her first payment from Centrelink. BIG BANK insisted that she had to agree to a repayment arrangement. Under pressure Angela agreed to \$100 a month.

The arrangement agreed in the story above is unworkable because Angela had no way to pay the 1st repayment of \$100. Angela also does not know whether the payment of \$100 a month is affordable when she starts getting Centrelink payments.

What is an unworkable arrangement?

Examples of an unworkable arrangement are:

- Where the repayments are not affordable
- Lump sum repayments where the consumer does not have that money available or cannot definitely get that money within the time available
- A reduced repayment arrangement of a certain amount per month but no agreement as to whether the arrears are capitalised at the end of the term of the reduced repayment arrangement
- Increased repayments at the end of a term of reduced repayments that are not affordable

A workable repayment arrangement will be:

- Flexible – if circumstances change the arrangement can change.
- Realistic – getting a job in 2 weeks may not be realistic
- Affordable – the repayments must be affordable
- Cover the whole arrangement – it must cover both the reduced repayment arrangement and what happens at the end of the arrangement
- The credit report – will there be a listing?
- Default fees and default interest – should stop being charged

An example:

- Repayments will be reduced to \$500 per month for 6 months
- At the end of the 6 months, repayments go back to the normal scheduled repayments of \$1,000 per month
- All arrears will be capitalised (added to the loan) and the loan term extended
- No credit report listing
- No default fees and/or default interest to be charged once the repayment arrangement commences provided the borrower complies with the arrangement

How to ask for a financial hardship arrangement (hardship notice)

Most financial hardship arrangements are made over the phone with the credit provider. The consumer may be contacted by the collections department or the consumer may contact the credit provider to tell them they cannot afford their repayments.

It can be very difficult to request a hardship arrangement when a consumer has to deal with an aggressive person from the credit provider's collections department.

Most often, the consumer will come to see you after unsatisfactory contact with the credit provider.

Some suggestions for your client when contacting the credit provider are:

- State you are in financial hardship
- State why you are in financial hardship
- Have a proposal to make
- Always make a note of the details of the phone conversation including the name of who you talked to, what happened, the date and the time
- Ask to be referred to the financial hardship team (if there is one)
- Don't agree to arrangements you cannot afford— If the arrangement being offered won't work for you then consider writing to the credit provider and getting advice

If you are a caseworker then it is strongly suggested you request a financial hardship arrangement in writing. This is not required by the law but it will enable you to:

- Have a record of the application
- Write to the IDR contact (or specific hardship contact if one is listed) for the relevant EDR Scheme—This can be found by going to either www.fos.org.au or www.cio.org.au and searching for the member contact details
- Gather any required information, eg, evidence of reduced income
- Mention the relevant sections of the Credit Law (s. 72 NCC) and any applicable Code of Practice (See *Section 3* of the toolkit for the relevant Code of Practice provisions)
- Give some thought to the requested arrangement and tailor the request to your client's instructions
- Get advice, if required
- Request that the credit provider not take legal action
- Give a written authority from your client to the credit provider



If you are a financial counsellor, you will have usually assessed your client's capacity to pay before you offer a repayment arrangement. If you are a lawyer, it is strongly recommended you consider referring your client to a financial counsellor to conduct such an assessment before you offer an ongoing repayment arrangement. Some consumers can be very unrealistic in their assessment of their own ability to meet a certain level of repayments. You can always make an interim arrangement with the credit provider while your client is being assessed.

Negotiation

This section deals with the art of negotiation in making a financial hardship arrangement.

1. Always make sure the client understands that they should be making regular repayments of an amount they can afford. This is so it is clear to the credit provider that the consumer is acting in good faith in requesting the repayment arrangement and has the capacity to stick to it. It also reduces the debt.
2. This is so it is clear to the credit provider that the consumer is acting in good faith in requesting the repayment arrangement and can demonstrate ability to pay. It may also reduce the debt.
3. Make the request in writing and follow the request up with a phone call to confirm the credit provider has received the letter AND has stopped all collection action.
4. Gather and provide relevant information to the credit provider.
5. Be persistent. Ring and write to try to persuade them to make an arrangement. Remember, the consumer is usually being charged default fees and interest until a repayment arrangement is made. You can ask for these default fees to be stopped whilst hardship assistance is provided.
6. The credit provider must respond within 21 days of the request. Mark your diary for when to expect this response.
7. If legal action is threatened, then lodge in EDR to stop legal action until the request for the variation can be determined. You should still be continuing to try to get an arrangement directly with the credit provider.

What do you do if the credit provider agrees?

This will usually be the outcome for the first request. Credit providers will often readily agree to arrangements of less than 3 months.

Make sure:

- The arrangement is in writing (if not by the credit provider then by you or the consumer)
- Your client understands what they need to do
- Your client understands to get advice immediately if they cannot keep to the arrangement

You need to check:

- Are the proposed repayments affordable?
- Is the term sufficient for the predicted period of hardship?
- Does the arrangement need to include a review (e.g. for unemployment)?
- Does the consumer have to return to making higher repayments (than the scheduled repayments) at the end of the arrangement? If so is this affordable given the recent period of financial hardship?
- Does the agreement mention what happens with the arrears? It is usually more workable for the borrower to capitalize the arrears and extend the term of the loan so repayments are not increased.

If the arrangement is not suitable, the borrower needs to go back to credit provider and review the arrangement.

What if the credit provider says no or does not respond?

If the credit provider rejects your request for financial hardship it must give reasons (s. 72(4) (b) (ii) NCC).

There is no requirement in the Credit Law for the credit provider to act in good faith in considering a request for financial hardship. It is likely that the reasons given by the credit provider will not be detailed. If the request for the repayment arrangement is rejected it is worth ringing the credit provider to discuss this and see if the request could be changed so it could be accepted to address the credit provider's concerns.

. The credit provider might reject a reasonable repayment arrangement. Be prepared to escalate a complaint if the proposal is reasonable, yet rejected. If the credit provider gives a reason that is not relevant under the Credit Law, this should be pointed out in your response, or subsequent EDR complaint. Examples of irrelevant considerations include:

- The length of time the borrower has been in the loan
- The borrower's repayment history (except in so far as it is relevant to their ability to reasonably repay the loan)
- The decision of the relevant credit provider's mortgage insurer
- The fact that a request for hardship assistance has been made and/or accepted before and
- Whether the borrower can make a particular (usually lump sum) payment towards arrears as a precondition to the credit provider considering their request for a hardship variation

If further negotiation does not work, the next step is to lodge in EDR. Include both the consumer's application and the credit provider's response in the complaint.

If you do not get a response, you should consider complaining to ASIC as well as EDR. See *How to Guides* and *EDR Guides: Financial hardship*.

See also Unreasonable Enforcement Expenses in Chapter 12.

Financial hardship and EDR

EDR is the main way of resolving disputes under the Credit Law. As EDR is free and both EDR schemes can make determinations in hardship disputes where the Credit Law applies then it is far preferable to go to EDR than court. Remember that for the hardship claims the amount in dispute will usually be much, much lower than the value of the contract.

If any of the following is happening you should consider filing in EDR:

- Negotiation with the credit provider has failed
- The credit provider is threatening legal action or repossession
- The credit provider has issued a Summons or Statement of Claim

If the credit provider has issued legal proceedings, you must lodge in EDR before the credit provider obtains judgment. After judgment, EDR cannot consider the dispute. There is a limited power for the Credit and Investments Ombudsman to review a matter after judgment has been given, but it is safer to lodge in EDR beforehand. (See *Chapter 2 – External dispute resolution* for more detail in relation to CIO's post judgment jurisdiction.)

- *If you are concerned about imminent legal action or a statement of claim/summons has been served you should lodge in EDR immediately!*

See Section 2 *How to Guides* and sample letters for how to make an application in EDR.

If the consumer is unsuccessful in EDR, they still have the option of going to court (s. 74 NCC) and should seek legal advice on how to do this.



When a hardship application has been rejected by the credit provider, or no response made, you can lodge immediately in EDR. Where legal proceedings have commenced, you can also go to EDR immediately. Lodge a complaint urgently (online if possible) and follow up to ensure your client's dispute has been accepted into the EDR's system. If the consumer has not formally requested a hardship variation, do so at the same time as lodging in EDR, particularly if the time for lodging a defence has, or is about to, expire.

What if the credit provider is not in EDR?

Credit providers who are still managing/collecting loans, but have not entered any new loans, or increased the limit on any loans, after 30 June 2010, do not have to be licensed or members of EDR (they can choose to be members). These lenders are subject to different rules, including more onerous reporting to ASIC in relation to breaches of the law and hardship applications. If a consumer is having difficulty getting a hardship variation from a credit provider in this category, they can seek legal advice about applying to the court for a hardship variation. This is only possible if all the criteria under s. 72 of the NCC are met, including that the loan is below the relevant threshold and that the variation sought meets the requirements set out in s. 72.

- *Always check if the lender is a member of EDR before considering other options.*

What if the Credit Law does not apply to the loan?

There are still other options available.

Three Codes of Practice deal with financial hardship. The Codes of Practice do not limit financial hardship to loans regulated by the Credit Law. Therefore, if the credit provider subscribes to a relevant Code of Practice they may need to consider financial hardship requests in relation to investment loans⁴ and small business loans in addition to regulated credit. EDR can also consider disputes about whether a member has complied with their obligations under a relevant Code of Practice. This can be particularly useful if the credit provider has blatantly failed to comply with a relevant Code of Practice, but it can also help if negotiations have simply stalled. EDR will not, however, make a final decision about any particular repayment arrangement unless the credit law regulates the credit contract.

The relevant Codes of Practice are:

- Code of Banking Practice (most banks subscribe) available at www.codecompliance.org.au
- Customer Owned Banking Code of Practice (most building societies and credit unions) available at www.coba.org.au
- Mortgage and Finance Association of Australia (MFAA) Code of Practice (all members of the MFAA) available at www.mfaa.com.au

Copies of the relevant provisions of each Code of Practice are included in *Section 3*.

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Other than loans for investment in residential property, which are covered by the Credit Law and the Codes of Practice.

Main Points

- A debt collector who is the agent of a credit provider is exempt from being licensed and in EDR in some circumstances. The credit provider will usually be in EDR.
- If a debt collector buys a regulated credit contract debt entered into after 1 July 2010, it becomes the credit provider and must be licensed and in EDR.
- Debt collectors must give the consumer a Credit Guide if they are licensed or in EDR.
- Check if the debt is statute barred before advising your client to make repayments.
- Consumers can be the victim of mistaken identity or fraud. If this is suspected, request documents.
- If the consumer is a victim of debtor harassment consider making a complaint to ASIC and EDR.

Debt collectors

This chapter is about debt collectors. Debt collectors are specialists who only collect debts. The credit provider can either:

- Ask the debt collector to act on its behalf to collect the debt (act as an agent). If the debt collector is an agent, the credit provider is still responsible for the debt and complying with the Credit Law; or
- Sell the debt to the debt collector (assignment).

Credit providers can collect their own debts and the information in this chapter can also be applied to credit providers collecting their own debts. Similarly, any reference to an obligation imposed on a credit provider in this kit applies equally to a debt collector except in relation to licensing and EDR as explained below.

Licensing and EDR

Debt collectors are caught by the new Credit Law when they either:

- Exercise the rights of the credit provider under a regulated credit contract; or
- Purchase a debt arising from a regulated credit contract, in which case they become the credit provider.

In both cases, these are credit activities that are caught by the law (ss. 6 & 10 NCCP).

This means that debt collectors who have purchased the debt (also known as assignees or debt factors) will need to be licensed in their own right and be member of an EDR scheme like any other credit licensee. It does not matter how many times a debt is sold; the NCCP covers the new credit provider assignee in the same way each time (s. 10(2) NCCP).

Debt collectors, who are acting as agents for the credit provider, do not need to be licensed and members of EDR, provided they meet the criteria for the exemption. It is still worth checking whether a particular debt collector you are dealing with is in an EDR scheme, because increasingly debt collectors have been joining EDR schemes voluntarily or perhaps because they have been pressured to do so by the credit providers using their services. Debt collectors might also be collecting in both capacities, as agent for some contracts and assignees for others. In this case they will be required to be licensed and members of EDR. Once a debt collector joins an EDR scheme, the scheme will be able to consider a dispute about non-regulated debts, provided the dispute is otherwise within its jurisdiction.

Debt collectors

So if you have a dispute with a debt collector:

- If the debt collector is acting as the agent of the credit provider raise a dispute with the credit provider (send a copy of the dispute to the debt collector). If the dispute is unresolved lodge in EDR against the credit provider.
- If the debt collector has bought the debt raise a dispute with the debt collector. If the dispute remains unresolved lodge a dispute in EDR.

Other aspects of the Credit Law

As debt collectors are not involved in the initiation of credit contracts, they are not covered by the requirement to assess the suitability of credit contracts. However, debt collector assignees must:

- Comply with the general conduct provisions and all other requirements of credit licensees (Division 5 NCCP); and
- Give the debtor under a contract a Credit Guide as soon as practicable after accepting the assignment of a contract (s. 127 NCCP credit contracts, s. 150 NCCP leases).

The Credit Guide must:

- Be in writing
- Specify the credit provider's (the debt collector assignee's) name, contact details, and license number
- Details of the credit provider's (the debt collector assignee's)–
 - › Internal Dispute Resolution Procedures
 - › The EDR of which the credit provider (the debt collector assignee) is a member

If the Debt Collector is acting as an agent of the credit provider instead of as an assignee, then these obligations do not apply.⁵ Instead, the obligations are placed on the credit provider, and the credit provider is responsible for the conduct of the debt collector if any obligation has not been complied with (*Chapter 2, Part 2–3, Division 4 Liability of Licensees for Representatives ss. 74–78, and ss. 324 and 325 of the NCCP*).

A Debt Collector who is a licensee, or appointed a credit representative, under the credit law, also has to give a Credit Guide covering the same issues outlined above as soon as practicable after it has been authorised to collect on the credit provider/lessor's behalf. A Debt Collector who is working as an agent of the credit provider (not an assignee) but neither is licensed nor appointed a credit representative does not have this obligation.

Compliance with the NCC

Debt collectors are required to comply with any relevant obligation placed on the credit provider under the NCC. In practice, this will most often include:

- Complying with any request for information covered by the NCC (See *Sample letter: Requesting documents*)
- Complying with the provisions governing hardship applications and postponements of enforcement (See *Chapter 3 – Financial hardship, the How to Guides and Sample letter: Financial hardship*)

Other issues, such as disclosure, misleading and deceptive conduct, and unjust or unsuitable contracts, may arise after a debt collector has purchased a debt. As these complaints usually relate to events that occurred prior to the assignment of the debt, there may be “buy-back” arrangements between the debt collector assignee and the original credit provider. In practice you would lodge your complaint with the debt collector (being the owner of the debt) as it is responsible for resolving any dispute raised.

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Unless the debt collector is a licensee or appointed as a credit representative, in which case they have to also give a Credit Guide as soon as practicable after being authorised to collect a debt.

Other legal issues

Three common problems occur with debt collection by debt collectors:

1. Collection of old debts
2. Mistaken identity/fraud
3. Debtor harassment

Other problems do occur and if you are unsure, get legal advice.

Statute barred debts

A statute barred debt is a debt to which the consumer has a complete defence at law because of the operation of a *limitation act*. There are various limitation acts that apply throughout Australia. They differ in a number of ways, but each places a limit on the period of time a credit provider has to enforce a debt.

Usually, there is a period in which to commence court action to enforce a debt, and a further period in which to enforce any judgment. For example, in NSW a credit provider has 6 years to pursue a debt in court from the date the debt arose, the date of the last repayment or written acknowledgment of the debt (whichever comes last). After the 6 years has passed, the consumer has a complete defence to the debt claimed. However, a longer period applies for mortgages. Once a judgment has been obtained, the credit provider has a further 12 years to enforce the judgment.

As the rules and periods vary in the various States and Territories, and with different types of contracts and claims, you should get legal advice applicable to your jurisdiction. You should be sure you are familiar with the most common limitation periods applying to credit contracts in your State or Territory, so that you are aware of when this issue might be likely to arise.

- *Do NOT advise your client to make a repayment towards a debt or acknowledge the debt in writing if you think the limitation period has expired, or is about to expire. If you are writing to the credit provider you should also be very careful to not acknowledge the debt is owed by your client. This is because in most jurisdictions a payment or written acknowledgment of the debt can restart the limitation period afresh, giving the credit provider many more years to enforce the debt. If your client has made a recent repayment or written to the credit provider, get legal advice. The rules vary about what happens when a repayment or written acknowledgment is made after the expiry of the limitation period.*

Case Decision

Ms Taylor, who was unemployed, had negligible assets and a dependent deaf teenager, made two payments totalling \$5,000 on her credit card towards a statute barred debt. The Supreme Court of Victoria *Collection House Limited v Taylor [2004] VSC 49 (3 March 2004)* upheld a decision by the Victorian Civil & Administrative Tribunal that it was unconscionable for a debt collector to insist on repayment of such a substantial sum from an impecunious and unsophisticated debtor in circumstances where the debtor was unaware that she had a complete defence at law. If your client is in a similar position, get legal advice!

Mistaken identity or fraud

It is common for credit providers to sell debts in circumstances where they have lost contact with the consumer. In such cases, the debt collector then has to try to find the consumer before they can collect the debt. When a debt collector believes they have found the debtor, they will then make a demand for payment. Sometimes they get it wrong and demand the money from the wrong person, particularly if the person has the same name, or a very similar name, as the debtor.

If this happens to one of your clients, you need to write to the debt collector immediately disputing the debt and asking for documentation to support the existence of the debt. In some cases, the consumer will need to go to considerable lengths to prove that they are not the debtor. This is unfair, but unfortunately necessary. If you think the debt collector is being unreasonable, lodge a complaint in EDR. Provide as many details as you can to the EDR scheme that your client is not the debtor, so that the onus is clearly on the debt collector to satisfy the EDR scheme that your client is in fact the debtor (for example, by providing an application form or 100 points of identification used when the loan was applied for). If they are not a member of an EDR scheme get legal advice.

If you convince the debt collector that they are dealing with the wrong person:

- Ask that the debt collector confirm this in writing and tell the consumer to keep a copy of this letter for an indefinite period.
- If the debt collector won't confirm this in writing, write a letter to the debt collector confirming that the debt collector has acknowledged that the debt is not your client's. Immediately lodge in EDR to have the matter confirmed.
- Make sure your client's credit report does not have an inaccurate listing relating to the (inaccurate) debt. If it does, ask the debt collector to remove all of the inaccurate listings. If the debt collector refuses or won't respond, lodge in EDR.

There are many instances where the same debt collector, or a subsequent assignee, will try again to collect from the same person despite the apparent resolution of the dispute so evidence of the resolution of the dispute is very helpful.

A similar problem can occur when your client's details have been used to obtain credit fraudulently. In these circumstances, it can be even more difficult to convince the debt collector or credit provider that your client is not the debtor, but the principles outlined above still apply. If your client has been the victim of identity theft they should get legal advice. More information can be found <http://www.ag.gov.au/identitysecurity>

Sometimes your client will tell you that it is not his or her debt simply because the debt collector is unknown to them. Always get a copy of the original credit contract and details of the assignment so that you can make sure that it is not a debt the client has simply forgotten.

- *Remember, always get your client to check his or her credit report if they are being chased for a debt they do not owe. There will often also be an incorrect listing on their credit report pertaining to the debt. When you are negotiating with the debt collector or credit provider, removal of the listing should be one of the outcomes you insist upon as part of the resolution of the dispute. If your client gets a copy of their credit file their personal information will be updated, so if a debt collector is actively looking for them the new information will be available.*

Debtor harassment

Debtor harassment is a frequent problem for consumers dealing with debt collectors. Debtor harassment is a breach of section 12DJ of the *ASIC Act*, which prohibits the use of physical force or undue harassment or coercion in connection with the supply of, or payment for, a financial service⁶.

ASIC and the Australian Competition and Consumer Commission have jointly produced a guideline detailing the types of conduct that might constitute a breach of the law. *The Debt collection guideline: for collectors and creditors*, (“the Debt Collection Guideline”) is available at: www.moneysmart.gov.au.

Examples of conduct that might breach the Guideline include:

- Contact for the purpose of frightening, intimidating, exhausting, or embarrassing the debtor
- Contacting a debtor after 9:00 PM at night or before 7:30 AM on weekdays or before 9:00 AM on weekends
- Contacting a debtor by telephone more than 3 times per week or 10 times per month
- Misrepresenting the credit providers rights at law – such as indicating an intention to seize property over which there is no mortgage without an appropriate court order
- Revealing details of the debtor’s indebtedness to third parties, such as colleagues and neighbours
- Advising a consumer that it does not enter into repayment arrangements when this is not accurate
- Demand repayment in full or a large up front payment when the consumer cannot afford the requested payments
- Demand a large up front payment before a repayment arrangement will be considered
- Insist that the consumer get a loan from a credit provider or friends/relatives
- Insist on the consumer accessing their superannuation early

The Guideline is not law and the courts would ultimately decide whether a particular course of action constituted undue harassment or coercion. However, the Guideline is a good indicator of the types of conduct that should be reported to ASIC, and will no doubt be highly persuasive in an EDR complaint. Further, compliance with the Guideline has also been incorporated into the industry codes of practice and failure to comply with the Guideline would constitute a breach of the relevant code of practice.

If your client has been the subject of debtor harassment you can:

- Write to the debt collector or credit provider alleging a breach of the Guideline and ask that the conduct cease (*Sample letter: Debtor harassment*); and/or
- Raise a dispute with the IDR of the debt collector or credit provider seeking compensation for the consumer and lodge a complaint in EDR if the dispute is not resolved to your client’s satisfaction; and
- Make a complaint to ASIC. (See How to Guide and Sample letter: Complaining to ASIC.)

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Other debts, such as telecommunications debts, are covered by s.50 of the Australian Consumer Law and the Australian Competition and Consumer Commission is the appropriate regulator for complaints.



Compensation for harassment will not be large unless the conduct is extreme. For example, when ASIC took action against GE for their debt collection practices (Media Release 08–106 ASIC acts on GE Money’s insurance and debt collection practices available at www.moneysmart.gov.au) the typical range for compensation recommended by FOS was from \$250 to \$1,000. If there were multiple claims for different types of harassment, the total compensation payable may be greater, but the EDR scheme may also have a cap on the total amount of non–financial loss that can be claimed. The fact that your client has been harassed does not reduce your client’s liability for the debt.

Main Points

- Mortgages that were prohibited under the Code are also prohibited under the Credit Law.
- There is an additional prohibition on mortgages over essential household goods (blackmail securities).

Mortgages and the Credit Law

A mortgage is security for a transaction. A mortgage can be taken over goods (eg, a car) or real estate (eg, a block of land or a consumer's home). If the credit provider has a mortgage over property, that property can be taken if the loan is not repaid.

Under the Credit Law, a mortgage must:

- Be in writing and signed by the mortgagor (the person giving the mortgage) (s. 42(1))
- Describe or identify the property being mortgaged (there cannot be a mortgage over “all property”)(s. 44)
- **Not** be a third party mortgage – the consumer giving the security must also owe the debt, or be a guarantor (s. 48)
- **Not** mortgage goods bought under a continuing credit contract (credit card or line of credit) (s. 46)
- **Not** secure credit which may be provided in the future unless the consumer accepts this in writing (s. 47)
- Only secure the amount of debt in the credit contract plus reasonable enforcement expenses

If you see a client with a mortgage that appears to breach any of the above requirements, get legal advice, as the mortgage, or part of it, may not be enforceable.

Prohibited securities

Some goods cannot be taken as security for a new loan after the commencement of the Credit Law (s. 50). The goods that cannot be taken as security are “essential household property”. This is defined as the same as household property protected under the regulations to the *Bankruptcy Act 1966*. As a guide this would be:

- Basic kitchen equipment
- Sufficient household furniture
- Sufficient beds for the members of the household
- Education, sporting and recreational equipment for use of children and students in the household—as computers are used for education, this should be covered
- Equipment for the safe transport, sustenance, and containment of babies (eg, car seats, prams and strollers, playpens, bottles, sterilisers)
- A television
- A stereo
- A radio
- A washing machine and a dryer
- A fridge and freezer
- A generator
- Telephone
- Video recorder

Property used by the mortgagor in earning income by personal exertion (tools of trade) is also unable to be used as security if they are valued below the limit in the Bankruptcy regulations.

If a client has a loan provided after the new Credit Law starts with any of the above goods used as security, a dispute should be lodged in EDR, and a complaint made to ASIC.



There is an exception to this rule if the goods have been purchased with the loan itself, but conditions apply to prevent scams such as the consumer selling the credit provider their own goods and buying them back again with a loan. If the credit provider insists that the goods are not caught by the prohibited securities provisions for any reason, get advice.

See related sections:

- Chapter 6 – Enforcement
- Chapter 8 - Home Repossession
- Chapter 11 – Responsible Lending Conduct
- Chapter 12 - Unjustness
- Chapter 17 – Reverse Mortgages

Main Points

- The Credit Law prescribes the process that must be followed before a debt can be enforced.
- Default notices are covered by section 88 of the National Credit Code and require additional information, most significantly:
 - › Information about the consumer's right to apply for hardship
 - › Information about EDR.
- Consumers can go to EDR even after legal proceedings have commenced, but not usually after judgment.

Enforcement and the Credit Law

The Credit Law provides certain rights to consumers in the event of enforcement action. Enforcement action is when the credit provider starts to pursue payment of the debt in full (including taking action in a court) and/or take possession of any security for the loan.

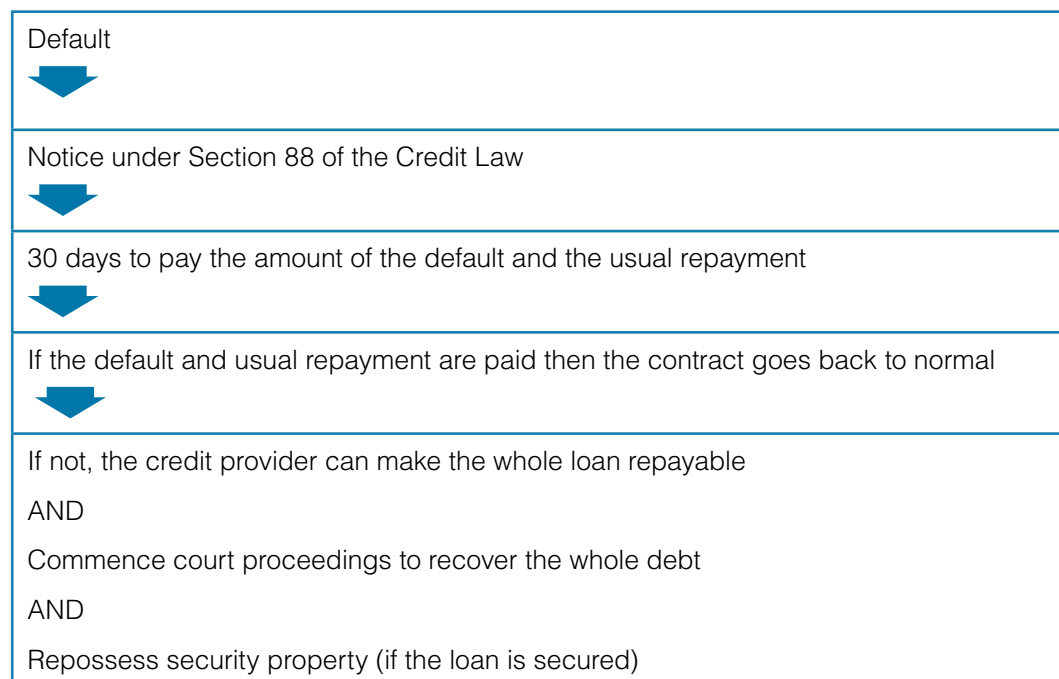
A consumer's loan contract will provide that if the consumer defaults on a condition of their loan then the credit provider can take action on that default.

There are many possible ways to default on a loan but the most common one is a failure to make the repayments required under the contract. Some other ways to default are:

- Failure to insure the security (eg, home or car)
- Going bankrupt or committing an Act of Bankruptcy
- Failure to keep the security for the loan in reasonable condition
- Selling or disposing of mortgaged property (such as a car) or significantly modifying mortgaged property (such as extensive renovations) without permission

What is the enforcement process?

General Enforcement Process (applies to all regulated contracts)



More detail about the process for repossessing goods and vehicles that are security for the loan is contained in *Chapter 7 – Repossession of goods (including vehicles)*. There is more information about enforcement process for leases in *Chapter 15* and for home mortgages in *Chapter 9*.

The default notice

The default notice requirement in the Credit Law is a key consumer right. In contracts not regulated by the Credit Law, it is possible for the credit provider to make the debt immediately owing on default.

In the Credit Law, it is a requirement (s. 88 NCC) that before enforcement proceedings can be commenced:

- The consumer must be in default
- The credit provider has given the consumer at least 30 days written notice to fix the default (See *Form 12* in *Section 3*)
- Those 30 days have expired and the consumer has not fixed the default

The default notice must contain:

- A prominent heading stating that it is a default notice. It does not have to mention s. 88 of the Credit Law.
- What needs to be done to fix the default.
- The date when enforcement proceedings may begin in relation to the default and possession of the mortgaged property (the security for the loan) if the default is not fixed.
- That the repossession and sale of the mortgaged property may not extinguish the consumer's liability. That is, there may be a shortfall and the consumer will be liable for that shortfall.
- Information about the consumer's right to–
 - › Apply for financial hardship under s. 72.
 - › Negotiate a postponement of enforcement under s. 94⁷
 - › Make an application to the court under ss. 74 and 96 to enforce an application for hardship or postponement of enforcement.
- The right to apply to EDR.
- If a further default occurs during the period of the default notice period that no further notice is required. A common mistake consumers make is to pay the arrears in the default notice but forget to make the usual repayment!
- That the debt may be listed on a consumer's credit report if the debt remains overdue for more than 60 days and the credit provider has taken steps to recover all or part of the debt (section 6Q of the *Privacy Act*)
- That the whole debt is payable if the default is not fixed. This is called an acceleration clause (ss. 92 & 93 NCC).

There is a prescribed form to be used for a default notice (*Form 12*) and a copy of the form is in *Section 3*.

- *If the default is remedied as described in the default notice then the contract is reinstated. This is an important right for consumers.*

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Section 94 gives the consumer the right to apply for a postponement of enforcement provided the application is made within the period of the default notice. This will rarely be necessary as lodging in EDR effectively provides a postponement of enforcement in any case. In any event the consumer can apply for a stay of enforcement under s. 74 if they are applying for a hardship variation.

Some practical tips for default notices:

- Work out when this notice is due to expire, tell your client and mark it in your diary.
- If possible, get a repayment arrangement in place BEFORE the default notice expires. Make sure you have a record that the client has applied to the credit provider for a hardship variation (s. 72 NCC) within the default notice period. The safest way to do this is to correspond in writing (you can use faxes or email in urgent situations), or follow up any verbal conversations with written confirmation of what you have requested on behalf of the client and to what, if anything, they have agreed.
- If the default notice is due to expire soon, or has expired (without being fixed), then make sure you or your client rings the credit provider and gets its confirmation that it will not proceed with further legal action while the dispute is being investigated or a request for financial hardship is being considered. If the default notice has expired without being fixed:
 - › Check with the client if legal proceedings have been commenced and, if so, when
 - › If the client is not sure whether legal proceedings have been commenced, contact the credit provider
 - › Apply for a hardship variation and an undertaking from the credit provider to stay enforcement action, if you have not already done so
 - › Keep trying to negotiate
 - › Lodge in EDR if legal action is being threatened or has commenced

What about court?

Court is commonly used by credit providers to enforce their debts.

For the consumer, it is best avoided due to the cost and intimidating procedures. For consumers, EDR is the place to be if a dispute cannot be resolved or for financial hardship.

If the consumer is in Court and EDR is not an option, the consumer needs to get legal advice. For more information on when this might happen, see *Licensing and External Dispute Resolution* in *Chapter 1 – Overview*.

Can a credit provider commence enforcement proceedings without a default notice?

Although this happens rarely, there are certain situations when a credit provider can commence enforcement proceedings without issuing a default notice (or within the 30-day period of the default notice):

- The credit provider believes on reasonable grounds that it was induced by fraud on the part of the consumer to enter into the loan
- The credit provider is unable to locate the consumer
- The court authorises the credit provider to begin enforcement proceedings
- The credit provider believes on reasonable grounds that the consumer has disposed of or intends to dispose of the mortgaged property without permission

Financial hardship and enforcement

If the consumer has requested a change on the grounds of financial hardship (s. 72 NCC) then the credit provider cannot proceed with enforcement proceedings until the credit provider has responded to the hardship notice (s.72(4)(b)) and 14 days has elapsed from the date that notice was given. This requirement will not apply if a hardship notice was given to the credit provider in the 4 months preceding the current hardship notice.

Credit Reporting and defaults

For a default to be listed on your client's credit report the credit provider must:

1. Send a section 6Q (of the *Privacy Act*) notice which must tell your client the payments is overdue. This notice is usually included in the default notice under section 88 of the National Credit Code
2. Your client must be 60 days in default
3. Your client must also be sent a section 21D(3) (of the *Privacy Act*) informing your client that a default will be listed. The listing cannot be made until 14 days after the notice or more than 3 months after the notice.

Unreasonable enforcement expenses

Section 107 of the NCC states that a credit provider cannot recover enforcement expenses from a consumer in excess of those reasonably incurred by the credit provider.

If you believe the enforcement costs are unreasonable:

- Ask for full details of all enforcement expenses charged including detailed legal invoices
- Raise a dispute about the enforcement expenses with the credit provider
- Lodge a dispute in EDR

Main Points

- The Credit Law prescribes a process that must be followed before goods or vehicles can be repossessed.
- The Credit Law gives consumers the right to apply for the return of their goods/vehicle plus compensation for loss if the goods/vehicle have been repossessed in contravention of the law.
- The Credit Law prescribes a process that must be followed before goods/vehicles can be sold and what must be done after the sale.
- Consumers have rights to either pay the amount owing or apply for hardship or a postponement of enforcement to prevent the sale of the goods/vehicle.
- The Consumer can apply for compensation if the credit provider sells the goods/vehicle in contravention of the law.
- EDR is available for disputes in relation to repossession and can order the return of the goods/vehicle or compensation.

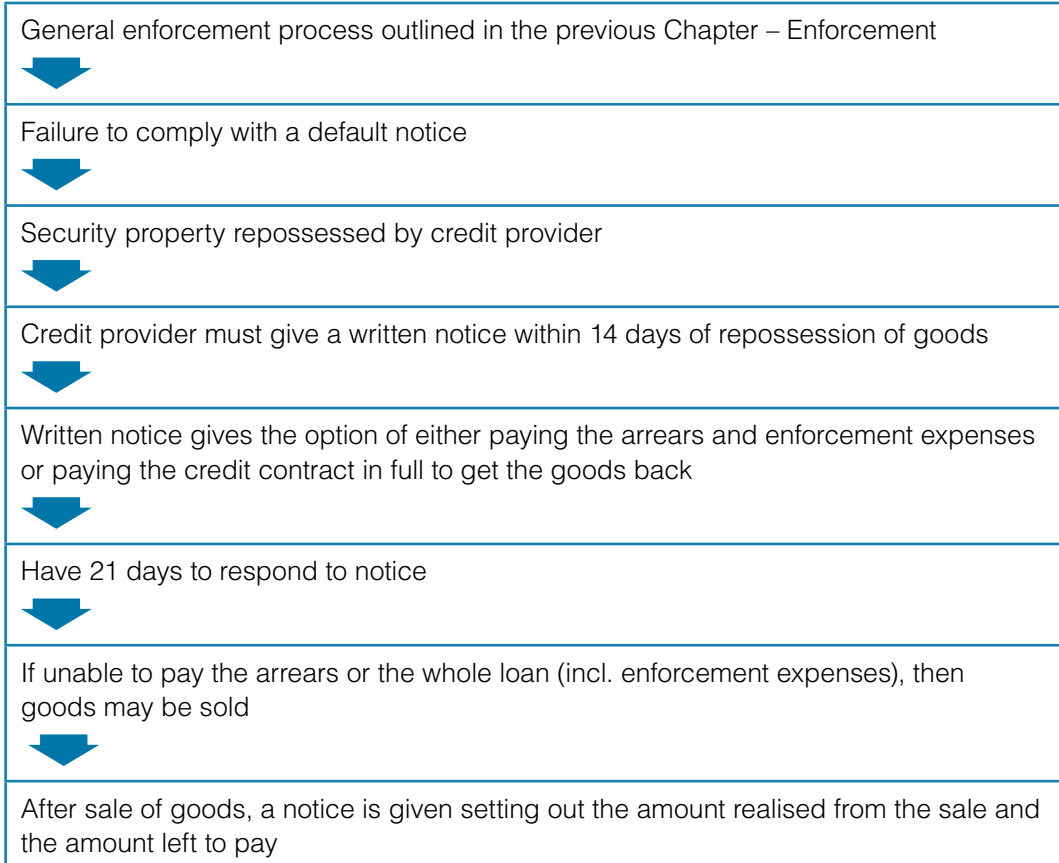
Repossession of goods (including vehicles)

- Remember to check that the goods (or vehicle) are actually security for the loan! You can check this by looking at the loan contract.

Your client should also be aware that any goods listed as security may be listed on the Personal Property Securities Register (PPSR). The PPSR allows credit providers and businesses to register a security interest. The PPSR can be searched at www.ppsr.com.au.

- Remember: If the security is not listed on the PPSR your client should get legal advice.

Enforcement process if the loan is secured by goods or a vehicle:



In the case of real property (land, homes, and other buildings), there is no process for repossession set out in the Credit Law. The credit provider must follow the general enforcement process only. Repossession in relation to home mortgages is covered in *Chapter 8 – Home repossession*.

The credit provider cannot repossess goods used as security

1. A credit provider cannot, without the consent of the court, repossess goods used as security if the amount outstanding is less than 25% of the original amount borrowed (or under \$10,000 whichever is lesser). If the credit provider attempts to do this, the consumer should request a copy of the court order.
2. The credit provider cannot repossess goods from a residential property unless:
 - › The credit provider has a court order; or
 - › The occupier of the premises has consented in writing after being informed of their rights.

This is an important right for consumers.

If the car is repossessed in breach of either of these requirements, the consumer should immediately apply to EDR for the return of the goods or vehicle.

Before repossession of goods

As soon as the default notice period has expired (without the default being fixed), the credit provider can repossess any goods or vehicles that are security for the loan. Therefore, if you know the default notice has expired, then the consumer needs to act quickly.

It is very costly getting goods back so it is better to negotiate a repayment arrangement instead to avoid repossession of the goods.

You may also need to lodge in EDR if the credit provider refuses to negotiate or respond to your hardship request or dispute and/or threatens repossession.. Once the dispute is lodged in EDR, action for repossession is put on hold until the matter is determined. That time should be used by your client to demonstrate that they will be able to repay the loan or to resolve the dispute.

After repossession of the goods

The credit provider must give a notice to the consumer within 14 days of the repossession (s. 102 NCC). The notice must confirm the following:

- The estimated value of the goods
- Enforcement expenses incurred to date
- A statement of the consumer's rights (See *Form 14* in *Section 3*)

The consumer has 21 days from the date of the notice to:

- Negotiate an agreement with the credit provider before the goods and/or vehicle is sold
- Pay the arrears and reasonable enforcement expenses (and the usual repayment) to get the goods and/or vehicle returned and the contract reinstated
- Pay out the loan
- Apply to EDR if the consumer is in financial hardship or has a dispute
- Apply to court (the Local Court or the Federal Circuit Court) for a hardship variation under s. 74 (if appropriate) and a postponement or stay of enforcement proceedings under s. 94 and/or s. 74(3)—this option is NOT recommended unless EDR has decided against the consumer, or refused to accept the dispute and stay enforcement action accordingly—get advice

- Nominate a purchaser for the goods at an amount that is the same or more than the estimated value of the goods and/or vehicle (s. 103)

The credit provider cannot sell the goods and/or vehicle if the court has ordered a stay of proceedings.

If the consumer takes none of the steps above 21 days after the date of the notice has elapsed the goods and/or vehicle may be sold.

Can the consumer get the goods back if repossessed in breach of the Credit Law?

Yes. If the credit provider fails to comply with the Credit Law then the consumer can seek an order for the return of the goods in EDR or court (ss. 108 and 109 NCC). If the credit provider has not complied with the law, the consumer can apply for the return of the vehicle even if they have not remedied the default. Failure to comply with the credit law could include:

- Failure to send the client a default notice that complies with s. 88 (unless the matter falls within one of the exceptions described above in *Chapter 6, Can a credit provider commence enforcement proceedings without a default notice*)
- Repossession prior to the expiry of the default notice, or prior to the date nominated in the default notice as the date after which enforcement action may commence
- Repossession without a court order when the amount outstanding was less than 25% of the original amount borrowed or under \$10,000, whichever is lesser
- Repossession from private property without a court order or the informed and written consent of the consumer
- The consumer can apply to have the goods returned at the credit provider's expense, for compensation for any damage to the goods in the repossession process, and any other orders considered appropriate to restore the consumer to the position they were in prior to the unlawful repossession.

Of course, if the consumer does not rectify the default, the credit provider will simply start the repossession process again and probably get it right!

EDR can take a long time to determine issues such as unlawful repossession. Your client should continue to make payments and remedy any arrears pending the resolution of the dispute. Clients can be unwilling to do this when they do not have the goods, but it is in their interests as otherwise large fees and interest will accrue.

Can the consumer get the car or goods returned if a hardship variation is agreed?

If the hardship variation is agreed to prior to the repossession of the goods or vehicle, then the contract is varied and the credit provider cannot proceed with the repossession process. If, on the other hand, an arrangement is made after the repossession, return of the goods is not necessarily automatic and needs to form part of the negotiations.

If you are unable to convince the credit provider to return the goods or vehicle, apply to EDR. You can also lodge a dispute in EDR if the credit provider proceeds to repossession after they have agreed to a repayment arrangement. If EDR will not consider the request for the return of the vehicle urgently, the consumer may need to consider applying to the court. Get legal advice.

After the sale of the goods

The credit provider must sell the goods as soon as reasonably possible for the best price reasonably obtainable (s. 104 NCC).

The amount realised from the sale of the goods must then be credited to the loan account less enforcement and sale expenses. The credit provider must send the consumer a written notice covering the following:

- The amount the goods and/or vehicle was sold for (without deducting costs)
- The amount left from the sale after costs have been deducted
- The amount required to pay out the loan
- Details of any further recovery action to be taken by the credit provider

When the goods have been sold, any amount left owing becomes immediately payable.

In the vast majority of cases where goods and/or a vehicle are sold following repossession, there is a shortfall. This amount is due in full according to the Credit Law. The consumer rarely has the ability to repay this amount in full so in almost every case it will be necessary to make a repayment arrangement following the sale of the goods and/or vehicle.

Some tips for getting a repayment arrangement:

- Recommend that the consumer continue making payments (of what they can afford) to the loan throughout the repossession process
- Approach the credit provider and commence negotiations for a repayment arrangement on the grounds of financial hardship (See *Chapter 3 – Financial hardship*)
- Use EDR if all else fails or further legal action is threatened

Enforcement costs may also be challenged if they have been unreasonably incurred (*Chapter 12 – Unjustness, unreasonable enforcement expenses, s. 107 NCC*).

Can the consumer get compensation if the goods are sold in contravention of the Credit Law?

Yes. The consumer can seek compensation from the credit provider if the credit provider failed to:

- Sell the goods as soon as reasonably practicable and/or
- Obtain the best price reasonably obtainable for the goods

If the credit provider refuses to compensate the consumer, a dispute can be lodged in EDR (or court, but this is not recommended). Get advice.

Main Points

- Unlike goods and vehicles, the Credit Law does not prescribe a process for taking possession of real estate.
- The usual enforcement procedures in relation to issuing a default notice covered in Chapter 5 Enforcement apply.
- Some States/ Territories impose additional obligations on the credit provider under property law.
- The most useful tool for dealing with home repossessions will be the financial hardship provisions (including the Codes of Practice for loans over the threshold) and EDR (See Chapter 2 EDR & Chapter 3 Financial Hardship).
- Consumers can go to EDR even after legal proceedings have commenced.
- Consumers cannot go to EDR after judgment except in very limited circumstances.
- You may also wish to challenge a home lending decision under the responsible lending or unjust contract provisions.

Home repossession

The only procedural protection in the Credit Law for consumers facing home repossession is the default notice. None of the requirements regarding the repossession of goods apply. Of course, your client may still have rights covered in other sections of this toolkit (eg, *Chapter 3 – Financial hardship, Chapter 11 – Responsible lending conduct, and Chapter 12 – Unjustness*).

This means that consumers are not entitled under the Credit Law to:

- Any right to get the home back after repossession even if the consumer can now afford to pay the arrears and repayments
- Details of how much the home was sold for with details of the enforcement expenses charged⁸

Credit providers have two ways to take possession of a home used as a security for a loan:

Method 1

1. Issue a default notice
2. Default notice expires without default being fixed
3. Take possession of home
4. This method is uncommon unless the home is unoccupied or vacant land

Method 2

1. Issue a default notice
2. Default notice expires without default being fixed
3. Issue a Statement of Claim/Summons in court
4. Wait the required time under the Statement of Claim/Summons (21 or 28 days depending on State/Territory)
5. If no defence is filed, the credit provider can obtain judgment
6. Credit provider can then apply for an order for possession through the court
7. Court order issued for possession of home giving the consumer notice of when they must leave the home
8. Sheriff takes possession and changes locks after giving notice to home owner/occupier of home

Once the credit provider obtains judgment (step 5), the consumer cannot:

- Access EDR (except in very limited circumstances)
- Apply for hardship under the Credit Law⁹

• *It is essential that you keep track of where the consumer is up to in the repossession process. If legal proceedings have commenced, consideration should be given to immediately lodging in EDR.*

8

Although there is a common law duty to account and this information can be requested through EDR.

9

Based on the decision in *Permanent Mortgages Pty Ltd v. Upston* [2006] NSWSC 1128 (27 October, 2006). However, there is some question that this decision may be incorrect on this point as the time limit for applying for hardship (section 80) is “2 years after the relevant credit contract is rescinded, discharged or otherwise comes to an end”. The contract comes to an end at judgment. However, pursuant to s. 80 the consumer still has 2 years to apply for hardship. This issue needs to be resolved by a further court decision.

Negotiating for time to sell the home

If the consumer will inevitably lose the home, it is best that they negotiate or apply for a financial hardship arrangement allowing for time to sell the home. If the consumer sells the home this will mean they have the best chance of getting the best price for the home.

If the consumer wishes to negotiate on this basis, they need to:

- Provide evidence to the credit provider that the home is on the market, such as–
 - › Copy of contract with real estate agent
 - › Marketing plan
 - › Advertisements of the home
- Set a realistic price so the home will sell in the time negotiated (usually 3 to 6 months)
- Make sure the contract of sale is unconditional
- Make sure the settlement time frame is 6 weeks or less
- Get the credit provider's permission to sell at the nominated price (if the loan will not be repaid in full with the sale of the home)

Financial hardship and selling the home

Consumers who need time to sell their home may benefit from applying for a hardship variation from the credit provider. The application for financial hardship would be on the basis that the consumer has a certain time to sell their home with the loan being repaid when the home is sold.

The financial hardship application would satisfy the requirements under s. 72 NCC because:

- The consumer is in financial hardship for a reasonable cause (the reason why the consumer needs to sell the home)
- The contract can be changed to either reduce repayments or not make any repayments until the home is sold
- The consumer would reasonably expect to discharge their obligations because the sale of the home will repay the loan

So if the consumer is selling the home then consider making an application for a financial hardship arrangement to give the consumer time to sell.

Accessing superannuation

Applying for early access to a portion of the consumer's superannuation is sometimes a possibility where foreclosure (repossession) on a mortgage is threatened. More details on how to do this can be found at: www.humanservices.gov.au

However, you should be aware that:

- The amount that can be obtained is limited
- The process can take much longer than anticipated (and possibly longer than the credit provider's patience)
- Approval is not guaranteed
- Tax will have to be paid on the amount withdrawn

- The amount withdrawn will no longer be protected in Bankruptcy (as superannuation usually is)—if it is inevitable the home will be lost, then it is better not to erode the superannuation account by early withdrawals
- If there is a judgment for possession of the property, accessing superannuation may still not save the home

It is recommended that consumers only access their Superannuation in limited circumstances. For example, where they have found a job after a period of unemployment and can afford the normal repayment, but cannot catch up on the arrears, or where they have a serious but temporary illness.

It is never enough to accept the credit provider's verbal assurances that it will not enforce a debt pending an application for Superannuation. Always request a hardship variation that is not dependent on approval for the access of the superannuation.

Saving the home, or delaying enforcement, after judgment

If the credit provider has obtained judgment in relation to an application for possession of the consumer's property, the options are much more limited. However, you may still have the following courses of action available (this may vary from State to State):

- Setting aside the judgment in some circumstances. Usually this will only be an option if the consumer has a good reason for not filing a defence earlier AND they have a defence/cross claim. The consumer will need legal advice and representation.
- Seeking a stay of enforcement from the court – usually to seek more time to either sell the house, refinance, or find alternative accommodation. Occasionally, a hardship arrangement can be negotiated with the credit provider at this late stage after obtaining a stay. Stays granted by the court are usually for short periods (days or weeks rather than months) and applications need to be supported with good evidence. Always get or recommend legal advice for consumers seeking a stay through the court.
- If the credit provider is a member of CIO, lodge a dispute seeking a stay of enforcement. (See *Chapter 2 – External dispute resolution* for more detail in relation to CIO's post judgment jurisdiction.)

Voluntary surrender

The consumer has the option of voluntarily surrendering the home. Although it is preferable that the consumer sell the home him or herself, there are circumstances when surrender may save costs. The main reason would be that there is little equity and the consumer wants to save on legal costs, as this would reduce any shortfall. Get advice.

Shortfalls/mortgage insurance

Mortgage insurance is paid by the consumer to the credit provider when a home loan is first obtained. The insurance is to protect the credit provider in the event that the consumer defaults on the home loan and the home is sold but the sale price does not repay the home loan. This means the credit provider will be repaid the shortfall. The mortgage insurer then takes over the shortfall debt (subrogation). The consumer will then be pursued for the shortfall by the mortgage insurer. Mortgage insurers are required to be licensed and members of EDR.

If there is no mortgage insurance, then the consumer will be pursued for the debt by the credit provider (or a debt collector if the credit provider appoints it as an agent or sells the debt).

If the consumer is being pursued for a shortfall debt:

- Apply for a release from the debt on compassionate grounds or on the basis of long term financial hardship (if applicable)
- Negotiate a repayment arrangement on the grounds of financial hardship (there may be no right to a variation at law because there will often already be a judgment – you can still negotiate)
- Lodge in EDR if you cannot come to a satisfactory arrangement
- Consider other options, such as bankruptcy

Post repossession and EDR

The credit provider owes certain duties to the consumer in the sale of the home following repossession or surrender. The credit provider has a duty to:

- Take reasonable steps to sell the property at market value; and
- Act in good faith; and
- Not recklessly sacrifice the interests of the mortgagor (consumer who owned the home)

There are also laws in States and Territories in Australia imposing additional obligations.

There is no requirement for the credit provider to keep the mortgagor informed about the progress of the sale of the home. The credit provider has no obligation to improve the property for sale. The credit provider can charge the consumer for its reasonable costs in taking possession of the home, maintaining it (eg. insurance) and selling it.

The credit provider has a duty to account after the sale of the property. It is recommended that the consumer always ask for a full account of all the expenses and costs in selling the home. If the costs seem excessive, a dispute should be raised with the credit provider at first instance, and then in EDR if the dispute cannot be resolved with the credit provider.

See FOS Approach Mortgagee Sales at www.fos.org.au

Some matters that could be considered in deciding whether the credit provider has acted inappropriately in the sale of the home are:

- The credit provider did not take reasonable care when selling the property. Some examples of possible arguments are:
 - › The home was sold well below the market value. The credit provider will obtain a valuation and you are entitled to ask for a copy.
- Whether the sale was not an independent bargain or “arms length”.
- Only seek to get a sale to cover the outstanding debt and not consider whether a higher price could be achieved
- A lack of advertising of the property

See also *Unreasonable enforcement expenses in Chapter 1*

Main Points

- The Credit Law prescribes the information that must be given to a guarantor (including a prospective guarantor).
- The Credit Law imposes some limits on a guarantor's liability.
- The Credit Law provides that judgment must generally be obtained against the primary debtor under the contract before enforcing the guarantee.
- The common law and other legislation are useful in dealing with guarantee cases.
- The contract may be unjust (see chapter 12 *Unjustness*) or unsuitable if the contract was entered into after 1/7/10 (see chapter 11 *Responsible lending*)
- Industry Codes of Practice can be useful
- Consumers (including guarantors and co-borrowers) can go to EDR even after legal proceedings have commenced, but not usually after judgment.

Guarantors and the Credit Law

A guarantee is when a consumer (the guarantor) agrees to pay a loan if the person borrowing the money does not pay.

The guarantor does not get any direct benefit from the loan.

Guarantees are often given by family and friends.

A guarantee must be in writing and signed by the guarantor (s. 55 NCC). A guarantor must be given a copy of the contract (s.57 NCC).

Before signing a guarantee, a guarantor must be given (s. 56 NCC):

- A copy of the credit contract; and
- An Information Statement. (See *Form 9, Section 3.*)

A guarantor can withdraw from the guarantee before the loan is provided (s. 58 NCC).

The amount secured under the guarantee cannot be increased unless (ss. 59 and 61 NCC):

- The guarantor is provided a copy of the proposed loan contract; and
- The guarantor has agreed to the increase in the loan (or the new loan).

There is a specific exemption from this section for changes due to financial hardship of the borrower.

The guarantor's liability is limited to the borrower's debt plus reasonable enforcement expenses (s. 60).

Guarantors and other laws (including the common law)

There are a number of laws that may assist guarantors in the case of a dispute. They include:

- Unconscionable conduct under State Fair Trading Laws
- Unconscionable conduct under the *ASIC Act*
- *Contracts Review Act* (NSW only)
- The common law (which includes case decisions on unjustness and guarantors – some leading cases are *Garcia v. National Australia Bank* [1998] 194 CLR 395; *Commercial Bank of Australia v. Amadio* [1983] 151 CLR 447)

Unconscionable conduct is like unjustness and it broadly means that where one person has taken unconscientious advantage of another person.

A guarantee may also be unjust under s. 76 of the NCC. (See *Chapter 12 – Unjustness*) or *unsuitable if the credit contract or guarantee was entered from 1 July 2010 (see Chapter 11 – Responsible lending conduct.)*

- Remember to get advice on what laws may apply and may assist in a dispute.

Industry Codes of Practice

Clause 31 of the Code of Banking Practice and Clause 12 of the Customer Owned Banking Code of Practice are also relevant. Both Codes incorporate the Code into the terms and conditions of the loan contract. This means that if a member of the Code breaches the requirements for guarantees under the Code this also represents a breach of contract. It may make the guarantee unenforceable. It is worth checking compliance with the Code in guarantee disputes.

Enforcement of a guarantee

The credit provider cannot enforce the debt against a guarantor until:

1. A default notice has been issued to the guarantor (see Chapter 6 Enforcement) and
2. The default notice remains unpaid and
3. The credit provider has obtained a judgment against the borrower and that judgment remains unpaid for 30 days.¹⁰

- *Important: The default notice gives the guarantor an opportunity to rectify the default and this will reinstate the contract. This does not give the guarantor much time, so it is important to get legal advice to see if the guarantor may have a defence. (See Chapter 12 – Unjustness and Chapter 11 – Responsible lending conduct.)*

The co-borrower who is really a guarantor

Credit providers often try to avoid taking guarantees, as they believe that it is easier for a guarantor to challenge a guarantee successfully. This has led to consumers who are really guarantors being described as co-borrowers on the contract.

If the co-borrower:

- Did not receive any benefit from the loan and
- The credit provider knew or should have been aware of this.

Then, arguably, the co-borrower is really a guarantor. If this is the case, the guarantee may not comply with the Credit Law and may not be enforceable. See also Clause 29 of the Code of Banking Practice and Clause 11 of Customer Owned Banking Code of Practice in relation to Joint Debtors.

Get advice if you think your client is in this position.

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The Court can relieve the credit provider from the need to obtain judgment against the borrower if recovery from the borrower is unlikely or the borrower cannot be reasonably located (s. 90 NCC).



Conflicts of interest are most likely to arise when working with co-borrowers and guarantors. You should avoid acting for both the guarantor and the borrower, as their interests are almost always different. Even if both parties are contemplating bankruptcy, the guarantor should get independent advice as she or he may have a defence, particularly if the guarantee is the only significant debt, or the debt that will force the person into insolvency.

You can act for co-borrowers provided their interests coincide and they are acting as one. However, as soon as it becomes apparent that their interests differ, or they have ceased to co-operate with one another, you can no longer assist them both. For example, a couple who are co-borrowers may separate, or it may become apparent that one has received a benefit from a loan and the other has not (the co-borrower who is really a guarantor), or that one has deceived the other in some way in relation to the transaction.

Dealing with separation and co-borrowers

Remember, if your client has a joint debt:

- Both borrowers are jointly and severally liable for the debt. If one co-borrower stops paying, the other co-borrower will be expected to repay the rest of the loan.
- The credit provider or debt collector can pursue either or both co-borrowers.
- If a co-borrower settles a debt in full and final settlement for a reduced amount, or enters a Part IX Agreement under the *Bankruptcy Act 1966*, the other co-borrower can still be pursued for the remaining amount of the debt.
- If one co-borrower goes bankrupt, the other is still liable for the debt, or whatever part of the debt remains unpaid.

If your client is separated and has joint loans with their ex-partner, you should consider the following:

- Have any additional cards on the client's credit card account been stopped?
- If there is a joint home loan, is there a redraw facility or a linked credit card? Should these be stopped/frozen? (See also Clause 30 of the Code of Banking Practice in relation to Joint Accounts and Subsidiary Cards and Clauses 10 of the Customer Owned Banking Code of Practice.)
- Is it clear who has taken responsibility for paying any joint loans? Just because one member of a couple has taken the car or is living in the house, for example, does not extinguish the other's liability for the debt if it is not paid. If the other party is paying, is your client also receiving statements so that they can monitor whether the loan is being paid?
- Has your client sought family law advice?
- Is there a secured asset and a disagreement as to whether it should be sold or not. If so, your client should seek legal advice.
- Are there any factors which suggest that your client may have a defence at law? For example, is the loan unjust or unsuitable, or is it possible that there was duress (force or coercion) or fraud by the other party to the relationship in relation to the loan. If so, you or your client should seek legal advice.

Main Points

- The Credit Law requires disclosure about the credit provider/broker and key information about the loan.
- If key information is not contained in the contract, the consumer may be entitled to a reduction in the interest charged and compensation.
- Disclosure can also be useful in identifying the parties to a contract, and whether any prohibited amounts have been charged.
- Key Facts Sheets must be provided to the consumer for new credit cards and home loans

Why does disclosure help?

There are two types of disclosure required under the Credit Law:

- Disclosure about the entity the consumer deals with. This is called a Credit Guide. It must be provided by all credit providers, credit representatives, brokers and any other intermediary who provides “credit assistance” directly to the consumer. This is covered in *Chapter 13 – Finance brokers* and *Chapter 11 – Responsible lending conduct*.
- Disclosure about the loan contract itself. These disclosures help the consumer to identify the main terms of the loan. This chapter deals with this second type of disclosure.

The Credit Law has a list of disclosures that are required in all loans. The disclosure helps the consumer to identify the main terms of the loan.

It is worth being familiar with where the main disclosure information is located in a contract.

For example, clients can sometimes be confused about who is the credit provider under their contract. They may have dealt with a broker and/or a mortgage manager and may not have had any direct contact with the credit provider. It is important to check who the credit provider is so that if you are raising a dispute on behalf of your client, you are complaining about the right entity. It is the credit provider under the contract who must comply with the *National Credit Code*.

A failure to disclose by the credit provider as required by the Credit Law may entitle the consumer to compensation, or in the case of key requirements, the credit provider could be penalised and interest refunded to the consumer. The key requirements are marked with a tick in the checklist below.¹¹

Most credit providers generally comply with the disclosure requirements in the Credit Law. Failure to disclose is more likely to be found in fringe lending contracts, including particularly where the credit provider has not been caught by the Code in the past, or has successfully avoided it. If so, it can be a useful tool in problem solving.

11 There is an additional key requirement under s. 23 that deals with fees and interest charged that are prohibited by the Credit Law. See How to Guide on high cost loans for an example of when this key requirement may be breached.

A checklist of the required disclosures

Disclosure requirement	Relevant section of the NCC	Key requirement ?
Information Statement about the contract.	s. 16(1) (b)	
The credit provider's name.	s. 17(2)	
The amount of credit to be provided or credit limit and who it is to be paid to.	s. 17(3)(a) and (b)	Yes (s. 17(3)(b) only is a key requirement for credit cards, lines of credit)
The cash price of the goods or land in the case of a sale of goods by instalments or a purchase of land by instalments.	s. 17(3) (c)	Yes
The annual percentage rate or rates and how they apply. If there is a reference rate, it must include the name of the rate, any margin on top of the rate, and where the rate is published.	s. 17(4)	Yes
The method of calculation of the interest charges and the frequency of when the interest is charged.	s. 17(5)	Yes
The total amount of interest charges and repayments payable if the loan term is less than 7 years.	s. 17(6) *and (7) (iii)	Yes (s. 17(6) is not a key requirement for credit cards and lines of credit)
The amount of the repayments and how this amount is calculated.	s. 17(7) (a) (i)	
The number of repayments (if known).	s. 17(7) (ii)	
When the first repayment is due and the frequency of repayments.	s. 17(7) (a) (iv)	
The amount (or method of calculation if the amount is not known) of credit fees and charges that are payable and when. The total amount of credit fees and charges should be disclosed if known.	s. 17(8)	Yes
If the interest rate or fees can be changed, a statement to this effect.	s. 17(9)	Yes
The frequency with which Statements of Account are to be issued (except in the case of contracts where the interest rate is fixed for the whole term, where statements are not required to be issued).	s. 17(10)	
The default interest rate and how it applies. If there is a reference rate used for the calculation of the default interest rate it must include the name of the rate, any margin on top of the rate and where the rate is published.	s. 17(11)	Yes

Disclosure requirement	Relevant section of the NCC	Key requirement ?
A statement that enforcement expenses may become payable in the event of a breach of the contract.	s. 17(12)	
If there is a mortgage, a statement that a mortgage has been taken and a description of the property being mortgaged.	s. 17(13)	
If a commission is to be paid by a credit provider, it must state this, the amount, who is paying the commission, and who is receiving the commission.	s. 17(14)	
If the credit provider knows that the consumer will be entering into a credit related insurance product, it must state: the name of the insurer, the amount payable to the insurer, the kind of insurance, and the amount (can be as a proportion) of any commission.	s. 17(15) NCC	(s. 17(15) is not a key requirement for credit cards and lines of credit)

Key Facts Sheets

Key Facts Sheets are required to be provided to consumers getting a new credit card or home loan. The information sheet contains basic information about the loan or credit card.

What if there are required disclosures missing from the contract?

There are two levels of seriousness when a credit provider fails to disclose required information:

1. Key requirements (s. 111 NCC) (these are marked with ticks above). If the credit provider fails to disclose this information, it may be liable for a penalty.
2. Disclosure requirements that are not key requirements and not subject to a penalty.

In both of the above cases, the consumer can claim any loss caused by the contravention.

In the case of a breach of a key requirement, the **maximum penalty that can be awarded to the consumer is (s. 114 NCC):**

- All interest charges (except if 2 and 3 below apply)
- All interest charges (if a credit card or line of credit) for the statement period where a statement did not contain the interest charge for the statement period or interest charge (s. 34(6) NCC)
- If there is a breach of a prohibited monetary obligation (s. 23 NCC)(eg, if there is an interest rate cap, charging more interest than the cap) all interest charges from the date of the contravention
- Any other established losses (s. 114(2) NCC)

This penalty can be awarded in relation to each breach so if, for example, there were four breaches of key requirements, up to four times the penalty could be awarded.

If there is a breach of a disclosure requirement, the only way to get compensation is to go to court. EDR Schemes cannot make orders for compensation for breaches of disclosure requirements. Get legal advice.

Main Points

- Credit providers have obligations under the Credit Law in relation to responsible lending.
- Credit providers must give all consumers they contract with a Credit Guide.
- Credit providers must not enter unsuitable loan contracts.
- In order to assess whether a loan is unsuitable a credit provider must:
 - › Make reasonable enquiries about the consumer's financial situation
 - › Make reasonable enquiries about the consumer requirements and objectives in seeking a loan
 - › Take reasonable steps to verify the consumer's financial situation.
- A loan will be unsuitable if:
 - › The consumer cannot meet the financial obligations under the contract, or not without substantial hardship
 - › The loan does not meet the consumer's objectives and requirements.
- Consumers can apply for remedies including changes to the contract and compensation if credit providers breach these provisions.
- There are additional obligations for payday loans see Chapter 16.

What is responsible lending conduct?

Responsible lending conduct is narrowly defined as a breach of the provisions of the Chapter 3 of the NCCP. Those provisions are confined to rules aimed at “better informing consumers and preventing them from being in unsuitable credit contracts.” Responsible lending under the Credit Law does not encompass broader issues such as the marketing of credit.

Responsible lending obligations are imposed on five different classes of entity:

- Credit assistance providers
- Credit providers
- Lessors under consumer leases
- Credit representatives of any of the above
- Debt collectors (disclosure only)

Credit assistance providers are usually brokers and their obligations are covered in more detail in *Chapter 13 – Finance brokers*. Lessors are covered in *Chapter 14 – Consumer leases*. Debt collectors are covered in *Chapter 4 – Debt collection*. Credit representatives may play a role in fulfilling the obligations of the licensee who appoints them (credit provider, lessor or broker), but are also obliged to give additional disclosure. This is covered below but applies equally to a credit representative authorised by a broker or lessor. The responsible lending obligations of credit providers are covered in this chapter. There are additional responsible lending obligations for payday lenders. See chapter 16

ASIC has given some guidance as to how it will interpret the responsible lending provisions in Regulatory Guide 209 – Credit Licensing: Responsible Lending Conduct (“RG 209”), a copy of which can be downloaded from the ASIC Web site (www.asic.gov.au).

Why is responsible lending conduct important?

Responsible lending conduct represents an important step forward in consumer protection. It represents an attempt to ensure that consumers are only given loans they can afford to repay.

For caseworkers, it represents an opportunity to challenge loans where the credit provider has given the consumer an unsuitable loan.

Required disclosures

Credit providers are required to give consumers a *Credit Guide*. *The Credit Guide (s. 126 of NCCP) must:*

- Be in writing
- Specify the credit provider’s name, contact details, and licence number
- Provide details of the credit provider’s–
 - › Internal Dispute Resolution Procedures
 - › The EDR of which the Credit Provider is a member
- Inform the consumer of the prohibition on credit providers entering contracts that are unsuitable for the consumer and of the consumer’s rights in relation to requesting a copy of the assessment.

Failure to comply means that the credit assistant may be liable for a penalty. Penalties can only be obtained through court or by ASIC. Consumers can also apply for compensation as part of a dispute if they can demonstrate a loss.

Credit representatives

If the credit provider's credit representative gives the consumer the credit provider's Credit Guide, then s/he must also give the consumer a copy of the credit representative's Credit Guide.

The credit representative's Guide must:

- Be in writing
- Specify the credit representative's name, contact details, and credit representative number
- Give information about any fees or charges payable for the credit representative's services
- Give information about the licensees the credit representative represents – they must be listed by name if there are less than six, or if there are more than six, the six licensees for whom the credit representative believes it conducts the most business
- State the credit activities the credit representative is authorised to conduct for these licensees
- Specify the credit representative's–
 - › Internal Dispute Resolution Procedures
 - › EDR of which the credit representative is a member

Credit representatives are required to have a unique identifier, the credit representative's number, and to be a member of an EDR scheme in their own right.

Failure to comply means that the credit representative may be liable for a penalty. Penalties can only be obtained through court or by ASIC. Consumers can also apply for compensation as part of a dispute if they can demonstrate a loss.

While there is no limit on the number of licensees a credit representative can act for, each licensee must consent to the credit representative acting for any other licensee(s) and each licensee is potentially jointly and severally liable for their conduct. This means that it will be unusual in practice for a credit representative to act for more than one licensee.

The assessment

Credit providers must make an assessment as to whether the loan is unsuitable before entering a contract with a consumer (s. 129 NCCP). The assessment must be made no more than 90 days before the credit contract is entered into to be valid (s. 128 NCCP).

In making an assessment, the credit provider must (s. 130 NCCP):

- Make reasonable inquiries of the consumer's requirements and objectives
- Make reasonable inquiries about the consumer's financial situation
- Take reasonable steps to verify the consumer's financial situation

The consumer can request a copy of the credit assessment either before the credit contract is entered, or up until 7 years after the date of the credit contract (s. 132 NCCP). The credit provider must give the consumer a written copy of the credit assessment if the consumer requests a copy of it.

It is likely that the credit assessment will be very generic in nature as credit providers need to incorporate this into their procedures. This assessment may provide vital evidence in the case of a dispute. Caseworkers should request a copy of the assessment from the credit provider, as part of considering whether to raise a dispute in relation to an arguably unsuitable loan.

Failure to make the assessment attracts a penalty and could result in compensation for the consumer if a loss can be shown.

Unsuitable loans

A loan or increased credit limit arranged by a credit provider may be unsuitable if (s. 131(2) NCCP):

- The consumer could not comply with the consumer's financial obligations under the contract, or only with substantial hardship; or
- The loan will not meet the consumer's requirements and objectives. Arguably *not suitable* is a lesser standard than a positive obligation to place a consumer in a *suitable* loan. Certainly, it is not the same as a requirement to place a consumer in the *most suitable* loan.

The credit provider is prohibited under s. 133 of the NCCP from entering unsuitable loan contracts, including increasing a limit on an existing contract if doing so would make the contract unsuitable.

There are two main categories of loans that will be arguably unsuitable: loans the consumers cannot afford and loans that otherwise do not meet their needs and requirements. If a loan fails the first test, then presumably it would also fail the second.

Loans that the consumer cannot afford

This could occur in a number of different ways:

1. The credit provider fails to make reasonable enquiries as to the consumer's financial situation.

This has been a common practice in relation to credit card limit increases, for example, where the credit provider has some information about the consumer, specifically their repayment history, and decides not to make any further enquiries of the consumer in relation to their financial situation. This type of failure to make reasonable enquiries is arguably a breach of the responsible lending conduct requirements.

2. The credit provider performs the assessment but receives incorrect, misleading, or inconsistent information.

Credit providers are required by s. 130 of the NCCP to take reasonable steps to verify the consumer's financial situation. Therefore, the fact that a broker, for example, has completed an application form with false information, or a consumer has made a genuine error on the face of the application (eg, stating their fortnightly income as weekly), does not excuse a credit provider from relying on this false information. This is perhaps the biggest difference between the new Credit Law and the old law under the Code, where the credit provider is only required to make reasonable enquiries *of the debtor*.

Typical low documentation loans, or no documentation loans, where the consumer *self-certifies* in relation to income are unlikely to satisfy the responsible lending conduct obligations under the Credit Law without some further verification. Further information on what constitutes reasonable verification is covered below.

Of course, consumers who deliberately supply false information are at risk of being charged under the criminal law, and may have any compensation under the credit law reduced because of their contribution to the loss.

3. The credit provider performs the assessment, and takes steps to verify the consumer’s information, but is provided with false information.

A completely fraudulent loan application, for example, with fake pay slips and bank statements provided, is unlikely to cause the credit provider to fall foul of the responsible lending obligations unless there is something on the face of the information that should have alerted the credit provider to the problem. This is substantially the same as the previous situation under the Code. The only difference is that any broker who has committed fraud, or aided and abetted a fraud, is more likely to suffer some consequence, including loss of license. The consumer may also have some recourse against the broker, depending on the level of the consumer’s complicity in the fraud. See *Chapter 13 – Finance brokers*.

Again, consumers who deliberately supply false information are at risk of being charged under the criminal law, and may have any compensation under the credit law reduced as a result.

4. The credit provider has made the assessment, but the consumer and the credit provider disagree whether the loan would have caused “substantial hardship” to repay

“Substantial hardship” is not defined in the *Act* and credit provider’s interpretations are likely to vary. It may be necessary for EDR or Court to determine the matter to settle arguments on the meaning of substantial hardship. See below for a discussion on the meaning of substantial hardship.

5. Where the loan is structured to disguise the fact that the consumer cannot repay without substantial hardship.

Examples may include:

- › A home loan where there are interest only payments for a specified period followed by principal and interest payments that the consumer cannot afford
- › A home loan where there are interest only payments for a period, or a *repayment holiday* (and interest is essentially capitalised) and, the entire loan is repayable as a lump sum at the end of the term (the term may be as short as 1–5 years)
- › A large balloon payment at the end of a car loan or lease¹²

It will be more difficult to establish that such loans are unsuitable than in the situation where the consumer cannot meet the repayments, but there is some helpful information below and in the *How to Guides*.

In all cases where the consumer cannot afford a loan, you should argue both that they cannot meet their financial obligations without substantial hardship AND that the loan does not meet their objectives and requirements. You should also argue that the loan is an unjust contract under s. 76 – See *Chapter 12 – Unjustness*.

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This particular example is used in both the RG 209 and the Explanatory Memorandum to the Act when it was introduced into parliament. This does not mean that balloon payments are illegal, only that the credit provider needs to have considered the consumer’s ability to meet any balloon payment.

What are reasonable enquiries?

The NCCP does not define reasonable enquiries, but ASIC has given some guidance in RG 209.

ASIC suggests that the following enquiries would be prudent in relation to the consumer's financial situation (RG 209, p.15 - 17):

- The consumer's amount and source of income, including the length and nature of their employment
- The consumer's fixed expenses such as, for example, rent, repayments on other loans/ debt, child support, insurance
- The consumer's variable expenses
- Any existing debts that are to be repaid from the loan
- The consumer's credit history
- The consumer's age and number of dependents
- The consumer's assets
- Reasonably foreseeable changes, such as the end of a honeymoon period on an existing loan, pending retirement, or the end of seasonal employment
- Geographical factors, such as remoteness (which may increase expenditure)
- Indirect income sources, such as income from a spouse, where the income is reasonably available to the consumer.

In relation to their requirements and objectives, ASIC lists (RG 209, p. 18):

- The amount of credit sought or the maximum sought (in the case of a credit card for example)
- The timeframe for which it is required (for example, the term and the date by which the loan is required)
- The purpose and the benefit sought
- Whether the consumer seeks particular product features or flexibility, and understands the costs of these features and any additional risks
- whether the consumer requires any additional expenses, such as premiums for insurance related to the credit or consumer lease, to be included in the amount financed, and understands the additional costs of these expenses being financed.

However, RG 209 also says that these obligations are "scalable" (that is, what is required may vary according to the circumstances). Relevant factors to be taken into account are (RG 209, p.13):

- The potential impact on the consumer if the credit contract is unsuitable
- The complexity of the product
- The capacity of the consumer to understand the product (only if any incapacity is evident)
- Whether the customer is a new customer or an existing customer (that is, how much information the credit provider already holds about the customer)

RG 209 suggests that a reverse mortgage, or a debt consolidation, would require far more enquiries about the customer's financial situation, requirements, and objectives, than a standard personal loan.

- *Remember: Regulatory guidance is not the same as the law. However, it may be influential in negotiations and in an EDR dispute – at least until a court makes a decision that contradicts any regulatory guidance.*

What is reasonable verification?

Again, the NCCP is silent on what constitutes reasonable verification, but ASIC has given some examples (RG 209 Table 4, p.21-22).

Type of consumer	Possible verification
PAYG employees	Recent payslips/payroll receipts Confirmation of employment with employer
Self-employed consumers	Recent income tax returns Statement from the person's accountant Business Activities Statements
All consumers	Credit reports Information from other credit providers Bank account, credit card records held by the credit provider about an existing customer

These are only given as examples and it is emphasised that the standard must be that of a reasonable and prudent credit provider. Further verification is also recommended where the credit provider discovers inconsistent information, or information that appears outside a standard range, such as an excessively high income, or an income that seems very high having regard to the consumer's stated occupation.

What is substantial hardship?

While the NCCP does not define substantial hardship, there is a presumption that if the only way a consumer can afford to repay a loan is by selling their principal residence, then the consumer cannot afford the loan without substantial hardship unless the contrary is proved (ss. 131(3) & 133(3) NCCP). This should be especially useful in fringe lending scenarios such as where a short-term loan is secured over the consumer's home and the consumer is inevitably forced to sell the home at the end of the term (equity stripping), but may also be useful in the case of other loans such as credit cards if the consumer can clearly only repay the principal debt by selling their home.

ASIC has also provided some guidance in relation to substantial hardship in Regulatory Guide 209. Credit providers are expected to have detailed policies and processes to assess whether a consumer will be able to repay a loan, including processes for calculating what funds a person needs to pay for basic living expenses, in order to determine at what level a consumer can make repayments. Such processes:

- Must have reference to the consumer's situation as ascertained from reasonable enquiries;
- Must involve some process for enquiring about living expenses or estimating living expenses using a benchmarking tool such as, for example, the *Henderson Poverty Index* plus a margin, or the maximum level of benefits for a person or family in the consumer's situation; and
- Should generally involve the consumer meeting the repayments from income rather than assets (with obvious exceptions such as reverse mortgages and bona fide bridging loans).

In advocating for a consumer, you could argue:

- That the credit provider has *failed to make reasonable enquiries* as to the consumer's actual living expenses (arguably this should include specific questions about their cost of housing if it is not a housing loan and other loan/lease commitments, in addition to general living expenses); and/or
- That the credit provider has *failed to take into account the information* it ascertained via those reasonable enquiries in determining the level of repayments the consumer could make; and/or
- That the credit provider *should have applied an appropriate benchmark* (but did not) as a safety mechanism to prevent consumers generally from inadvertently underestimating their expenditure, or presenting a best case scenario in order to get the loan that will not withstand the test of time over the term of the loan; and/or
- That a particular *benchmark applied by the credit provider is inadequate*, or inadequate in the circumstances (it may be difficult to obtain evidence of what benchmark the credit provider has applied but this may become apparent as submissions are exchanged).

It is important that you gather the best evidence you can of the consumer's actual costs at the time the loan was taken out, and any negative impact on the consumer experienced as a result of meeting the repayments (if they have actually met any repayments).

It would be very difficult to succeed in a dispute on this point if the consumer has underestimated their living expenses on the application, AND all the right questions have been asked, AND the credit provider has applied a recognised benchmark to determine minimum living expenses. It is important that you get a copy of the application to get evidence of what questions were asked and what replies were given.

Loans that do not meet the consumer's objectives and requirements (other than because the consumer cannot afford the loan)

This is another way in which the new law has at least the potential to expand the types of loans that can be challenged beyond what was available under the unjust contracts provisions of the Code. There are many ways in which loan may be affordable and yet not meet a consumer's objectives and requirements. For example:

- The consumer may have requested a loan to purchase a fridge valued at \$1,000 and be given a credit limit for \$8,000
- The consumer wanted interest-free finance to purchase a computer but ended up with a lease with no right to own the computer
- The consumer may have wished to pay their home off faster and have been given a line of equity loan with a linked credit card in circumstances where a standard home loan with redraw may have been both cheaper and more effective in assisting them to achieve their objective
- The consumer may have wanted a home loan to pay off their home over a long term (such as 25 years) but is sold a loan that is structured as an "on demand" facility that can be recalled at any time regardless of whether the consumer is in default
- The consumer may have wanted a small loan repayable over several months, but is instead given a loan that must be repaid in full within their pay cycle
- The consumer wants to get a loan to purchase a car and ends up with a consumer lease

There are no doubt many other possible scenarios.



Line of Credit loans for the purchase of a home, or refinance of a home loan, which do not have a term or provision for repayment of the loan over a term present a particular challenge (the loan can usually be drawn on and repaid continually up to the specified credit limit, just like a giant credit card).

It could be argued that this is simply another way of structuring a loan to disguise the fact that the consumer cannot afford it. However, credit providers will argue that some more sophisticated borrowers are content not to pay off their home and to rely on the capital gain to improve their financial position over time.

The best way to dispute such a loan is to argue that the consumer's objectives and requirements included paying off their home over time (if this is in fact the case). You will need a copy of the loan application, any assessment done by the credit provider, and the broker if applicable, and any other evidence from the consumer about what was said at the time the loan contract was made. If the consumer could not afford principal and interest payments on the same loan amount, then it should also be argued that the consumer could not afford to repay the loan without substantial hardship.

What if the loan is (arguably) unsuitable?

The consumer can seek an order from the court:

- Declaring part or all of the contract to be void
- Varying the contract
- Refusing to enforce one or more terms in the contract
- For the credit provider to refund money or return property
- For payment of loss or damage
- For the credit provider to supply a specified service

It is likely that the remedy will be that the consumer is put back in the position they would have been but for the unsuitable loan. In practice, the remedies are likely to be similar to those available for unjust contracts (s. 76 NCC; s. 70 the Code). Examples of what this means appear in *Chapter 12 – Unjustness*.

EDR Schemes consider they are more limited in what they will do. For instance, an EDR Scheme will usually refuse (and argue it does not have the power) to:

- Make any part of the contract void
- Vary the contract (apart from the ability to determine a variation on the grounds of hardship see *Chapter 3 – Financial hardship*)
- Refuse to enforce one or more terms in the contract (apart from the ability to order compensation)
- Supply a specified service

EDR Schemes do have the power to:

- Refund money
- Order compensation
- Require the return of goods, cars, or even real property

The time limit for taking action in relation to breaches of the responsible lending obligations is six years from the date of the breach. If the conduct occurred more than 6 years ago, an application under the unjust contracts provisions (ss. 76 & 77 NCC) will usually be the only option.

When did the responsible lending provisions start?

The responsible lending conduct provisions generally apply only to loans and leases entered from 1 January 2011.

For brokers and non-bank credit providers (basically, any credit provider who is not a bank, credit union, building society or registered finance company) the requirement to assess whether a loan is unsuitable commences on 1 July 2010, but the disclosure provisions do not commence until 1 January 2011.

If the contract was made prior to the relevant date, your only option is to argue that the contract is unjust under s. 76 of the NCC (*see Chapter 12 – Unjustness*). If there is a dispute about when the contract was actually entered, get legal advice.

What and who isn't covered by responsible lending?

Responsible lending under the Credit Law does not cover:

- Marketing, which can only be dealt with under the *ASIC Act* provisions in relation to misleading and deceptive conduct and representations and the NCC, as opposed to under the responsible lending provisions (*ASIC Act*, ss. 12DA and 12DB; s. 154 NCCP); or
- Debt collection, which is subject to the hardship provisions of the NCC as discussed above, the *ASIC Act* (s. 12DJ) and the Joint ASIC/ACCC Guidelines under that section; or
- Credit advice, which is not covered unless it involves suggesting a consumer enter, remain in, or increase the credit limit of, a particular credit contract or consumer lease, with a particular credit provider or lessor, and/or assisting the consumer to do so.

Main Points

- If a contract is found to be unjust, it can be re-opened and the obligations varied.
- There are a range of factors to be considered to determine whether a contract is unjust in all the circumstances.
- EDR can consider unjust contracts disputes.
- Consumers can go to EDR even after legal proceedings have commenced, but not after judgment.
- If you are disputing a contract as unsuitable under the responsible lending provisions, you should also argue that it is unjust.
- You can also dispute a change of interest rate, establishment fees and early termination or exit fees as unconscionable.
- You can also dispute a change of interest rate, establishment fees and early termination or exit fees as unconscionable.

What is unjustness?

Definition of unjust: “*Unjust includes unconscionable, harsh or oppressive*” (s. 76(8) NCC). This means that unjustness is defined very widely. Even though unjustness is defined widely, it is difficult to prove that a credit transaction is unjust. The reason for this is that the court is reluctant to interfere in a contract between two parties unless there is a clear injustice.

There are two sections of the NCC dealing with unjust transactions. They are:

- Section 76 – court may reopen unjust transactions
- Section 78 – court may review unconscionable interest and other charges

When is a contract unjust?

Section 76 – court may reopen unjust transactions

A credit contract, mortgage, or guarantee can be reopened if the court is satisfied that the contract is unjust.

In determining whether a contract is unjust at the time the contract was entered into or changed the court must consider the public interest and all the circumstances of the case. The public interest – this is widely defined but matters that may be relevant are whether the credit provider is:

- The consequences of compliance or non-compliance with the contract
- The relative bargaining positions of the parties
- Whether the contract was subject to negotiation
- Whether the borrower was realistically able to reject or renegotiate any of the contract provisions
- If the contract imposes conditions that are unreasonably difficult to comply with or not reasonably necessary to protect the legitimate interests of a party to the contract
- Whether the consumer (or their representative) was reasonably able to protect their own interests because of their age, physical or mental condition
- The form of the contract and how it is expressed
- Whether the consumer received independent legal advice or other expert advice
- Whether the contract was explained to the consumer and whether they understood that explanation
- Whether unfair tactics or pressure were used on your client
- Whether the credit provider explained the consequences of the contract to the consumer
- Whether the credit provider knew or could have reasonably ascertained by reasonable inquiry at that time that the consumer could not repay the loan, or could not pay it without substantial hardship
- Whether the terms of the transaction or the conduct of the credit provider is justified in light of the risks undertaken by the credit provider
- Whether any part of a mortgage is void other another section of the NCC
- Whether in comparison with other similar loans the interest and fees are excessive
- Any other relevant factor

The court can consider these factors or can consider other factors. It is only a guide.

Principles to consider in determining whether the contract is arguably unjust:

- The consumer does not need to show any unjust conduct by the credit provider. The contract itself may be unjust.
- The factors to consider when deciding whether the contract is unjust are those that were present when the contract was being entered into or changed. Any circumstances that were not reasonably foreseeable at the time the contract was entered (such as that someone subsequently became ill or separated from their partner) cannot be considered when deciding whether a contract is unjust.
- The contract can be unjust because of the way it operates in relation to the consumer, or the way it was made, or both.
- A contract will not be unjust simply because one of the factors to consider applies. The factors must be considered in the light of all of the circumstances of the case.
- It is possible for a contract to be unjust when none of the factors to consider apply, but in all the circumstances the contract is still unjust.
- A Court may find a contract unjust even if the credit provider was unaware of the circumstances that made the loan unjust (eg misleading information supplied by a broker without the consumer's knowledge). However, a Court is less likely to grant a remedy that relieves injustice at the expense of the credit provider, if the credit provider is innocent of the cause of the injustice.

Other matters to consider

- Proceed very carefully if it is possible that the consumer has lied to get the loan. Get advice.
- Always get all relevant documents first before launching an unjustness dispute.
- Always get a (at least a brief) statement from the consumer about what happened when they got the loan.

Working out a remedy

This is the most important part of an unjustness case. The nature of the likely remedy will help you decide how to run the case.

Remember an unjustness remedy is discretionary. The remedy will vary depending on the circumstances of the case. The principles below are a guide only. The examples are simplifications of complex calculations but do give a guide on the likely remedy.

The court usually works on the following principles in unjustness cases (EDR will apply the same principles):

- If the consumer received a benefit, they (almost always) need to repay that benefit. Some examples:
 - › Example 1 – If the consumer buys a house (but cannot afford the loan), then, if they want to keep the house, they still need to repay the loan amount that covered the purchase of the house.
 - › Example 2 – If the consumer refinances a home loan (but cannot afford the new loan), then, they received the benefit of the refinance, and this amount needs to be repaid.

- › Example 3 – The consumer buys a house (but cannot afford the loan) and the house has been sold, the consumer still received the benefit of living in the house. The value of this benefit will be set off against any losses.
- › Example 4 – The consumer buys a car and gets a loan they cannot afford to repay. The consumer received the benefit of the use of the car.
- The consumer should be put back in the position they should have been in but for the unjust transaction. Some examples:
 - Example 1– Consumer bought a car and a loan was arranged for the car. Consumer could not afford the car loan and was misled about the features of the car. Consumer should not have got the loan. Car needs to be surrendered. Car payments made are then offset against use of the car. The shortfall should not be payable.
 - Example 2 – Consumer refinanced into a home loan they cannot afford to repay. They surrender the home. All fees associated with the set up of the loan are not payable. Interest is payable on the amount of home loan refinanced.

Interest is usually payable on the use of money where the consumer got a benefit. Although interest may not be payable in certain circumstances for example, if a high interest rate is one of the factors that contributed to the unjustness of the loan, then the interest rate may be reduced.

EDR and unjustness

There are difficulties with running an unjustness dispute in EDR. The problems are:

- EDR schemes cannot take evidence on oath. So if the best evidence of the unjustness is from the consumer it may be difficult to get a fair outcome from EDR.
- EDR schemes have varying ways of dealing with unjustness. For example, FOS applies “maladministration in the decision to lend” and CIO does not. In practice, this will make less difference for credit contracts entered after 1 July 2010 because there is considerable overlap between the new responsible lending obligations and maladministration as applied by FOS.
- The Credit Law did not give any particular powers to EDR. The EDR Scheme’s ability to consider a dispute comes from its rules or terms of reference. It is possible for remedies to be available under the Credit Law that are not available in EDR.
- The EDR time limits are slightly different from the Credit Law. It is possible to be unable to go to EDR because a time limit has expired but still be able to go to court and vice versa.

These problems should not dissuade you from going to EDR if the dispute is within the relevant time limit. It is free and a good opportunity to resolve the dispute. You do need to be aware of the limitations of EDR, which are a particular problem in cases of unjustness. Get legal advice immediately if you are struggling with an unjustness case in EDR.

☛ *Be aware that time limits can affect how you approach the case.*

Time limits for EDR (for unjustness)

For those aspects of credit disputes that relate to hardship applications, unjust transactions and unconscionable interest and other charges under the National Credit Code, the later of either:

- two years from when the credit contract is rescinded, discharged or otherwise comes to an end; or
- two years from when a final response is given at IDR.

• *If the loan has been refinanced beware of the time limit expiring on any previously refinanced loans.*

Time limits for court

- The time limit for an unjust contract application to court is 2 years from when the contract ends
- There is a 6-year time limit to take action in court for a breach of the responsible lending conduct provisions

There may be situations where you can apply to the court but you are out of time for EDR. There may also be situations where you can argue unjust contracts even though the responsible lending (or maladministration) time limit has expired or vice versa.

Unconscionable fees and interest

(s. 78 NCC)

There are four types of fees and charges that the consumer may be able to reduce or annul.

They are:

- A change in the annual percentage rate or rates
- An establishment fee or charge
- A fee or charge payable on early termination of the loan contract
- Fee or charge for the prepayment of an amount under the credit contract

Each of the above types of problem is dealt with below:

Change to the annual percentage rate (s. 78(2) NCC)

This section only applies to changes in the annual percentage rate. It cannot be used to challenge interest rates that appear to be unfairly high from the outset. (In those situations, the only option is to argue that the contract is unjust.)

As a guide, to satisfy a court or tribunal that the change is unjust or unconscionable, the consumer would need the following information:

- The advertised interest rates at or before your client entered the loan contract.
- Representations made by the credit provider or their agent (for example the car dealer). For example, the credit provider may have represented that the interest rate would stay in line with a particular rate or promotional material may have represented that an interest rate would always be “low”.
- The current interest rate on other similar loan contracts.

Establishment fee (s. 78(3) NCC)

The question here is whether the establishment fee is equal to the credit provider's reasonable costs to determine the application for credit and the initial administrative costs of providing the loan. It is difficult to approximate the credit provider's reasonable costs but a particularly high establishment fee compared to other credit providers for similar loans would be a good indicator that the establishment fee may be unconscionable and liable to review.

Early termination and prepayment fees and charges (s. 78(4) NCC)

There are three types of fees:

1. Fixed rate break costs
2. Deferred establishment fees (mortgages)
3. Early repayment fees and deferred establishment fee (non-mortgages)

Fixed rate break costs

It is fairly well established that where the rate is fixed for the term of the contract then the credit provider is entitled to compensation for the difference between the interest rate payable under the contract and the current market rate at which the money is likely to be lent out at, although the method of calculating the amount payable should be clearly disclosed in the contract and should not exceed the credit provider's loss

Deferred Establishment fees (mortgages)

There has been a ban in place for all mortgage exit fees since 1 July 2011.

As a guide, the early termination and/or prepayment fees must not exceed a reasonable estimate of the credit provider's loss arising from the early termination or prepayment, including the credit provider's reasonable administrative costs. It is difficult to state when a termination fee may be unjust. If the fee appears to be very large as a percentage of the loan, it is worth comparing the fee to other, comparable loans then seek legal advice for your client.

It is fairly well established that where the rate is fixed for the term of the contract then the credit provider is entitled to compensation for the difference between the interest rate payable under the contract and the current market rate at which the money is likely to be lent out at, although the method of calculating the amount payable should be clearly disclosed in the contract and should not exceed the credit provider's loss. In recent years, however, some credit providers are also charging significant exit fees on variable rate contracts. The principles in this area are less well established and you should get legal advice.

If an unconscionable fee or interest rate case is successful, the remedy could be:

- The fee is reduced
- The fee is not payable
- The fee is reversed (if it has been charged)
- The interest rate change is void and interest is recalculated

What about court?

Unjustness is an area of law where court proceedings may still be necessary because:

- In some cases the relevant time limit for applying to EDR may have expired
- The EDR Scheme may decide that it cannot hear the dispute if they deem that the charge (or fee) is a “commercial decision” of the credit provider (which can be excluded from jurisdiction)
- Even if it can be shown that the fee change had been misrepresented or unconscionable, the EDR schemes may take a very conservative view of the law (successful unconscionable fee challenges under s. 72 of the Code - now s. 78 of the NCC - have rarely been successful, if ever, at EDR)
- Some remedies may not be available at EDR such as voiding terms of the contract

If it seems like court may be the consumer’s only option, or the case is proceeding badly in EDR, get legal advice. There are many risks associated with court proceedings and only contracts under \$40,000 will be able to use the new small claims procedure for any of the issues covered in this chapter. This means that almost all home loans are excluded by definition, even if the dispute is only about a fee (such as an exit fee) and the consumer will risk having to pay the full costs of the proceedings for both parties if they are unsuccessful.

ASIC’s powers

ASIC can take action under ss. 76, 77, & 78 in relation to a class of contracts. If you are dealing with a systemic problem in relation to unjust contracts or fees, consider complaining to ASIC. (*See How to Guide and Sample letter: Complaining to ASIC.*)

Other available arguments to challenge fees

There may be other possible arguments available to challenge fees, for example that a fee is not permitted under the contract, was not clearly disclosed in the contract, has been calculated incorrectly or unfairly applied, or constitutes a breach of an interest rate or cost cap in those States where caps are in force. Although not covered in this toolkit, you may also want to consider arguing that the charging of the fee is an unfair term of the contract or constitutes a penalty. Unfair terms can be challenged under amendments to the *ASIC Act* that commenced on 1 July 2010. All of these arguments can be made in EDR, although the EDR approach to unfair terms remains to be seen.

Main Points

- Brokers are referred to in the Credit Law as credit assistance providers.
- Brokers are required to give a Credit Guide and a Quote before providing credit assistance in relation to a contract.
- There are some limited protections in relation to fees (there is no ability to challenge fees as excessive as has been possible under some State legislation).
- Brokers must not suggest or assist consumers to enter unsuitable loan contracts or leases.
- In order to assess whether a loan is unsuitable a broker must:
 - › Make reasonable enquiries about the consumer's financial situation
 - › Make reasonable enquiries about the consumer requirements and objectives in seeking a loan
 - › Take reasonable steps to verify the consumer's financial situation
- A loan will be unsuitable if:
 - › The consumer cannot meet the financial obligations under the contract, or not without substantial hardship
 - › The loan does not meet the consumer's objectives and requirements
- Consumers can apply for remedies including changes to the contract and compensation if brokers breach these provisions.
- Unfair or dishonest conduct

What is a finance broker?

A finance broker is a go-between (or intermediary) between a consumer wanting credit and a credit provider. Ideally, a finance broker should find the best loan for a consumer from the range of products and credit providers in the market. In practice, finance brokers can only source loans from a limited panel of credit providers and products and in some cases, finance brokers only refer to one credit provider.

In the Credit Law, there is no mention of finance brokers; they are called “credit assistance providers” instead.” Credit assistance is defined as where a person or entity that is not the credit provider’s agent (in other words the consumer’s agent):

- Suggests that a consumer apply for a loan, an increase to a loan, or a lease
- Suggests that a consumer stay with an existing credit provider or lessor
- Assists the consumer to apply for a loan, an increase to a loan or a lease

This is a very wide definition. Anyone who carries out any of these functions is a credit assistant and must be licensed, or appointed a credit representative by a licensee, and be a member of EDR (s. 29 NCCP). Credit providers must not do business with unlicensed persons (s. 31 NCCP). Consumers can seek compensation for both unlicensed conduct and for loss caused by a licensee dealing with an unlicensed person.

There is an exemption from Licensing and EDR for credit assistance at the point of sale. This would include:

- Car dealers
- Retailers, eg, stores such as Myer and Harvey Norman

The credit provider under any credit contract, even if sold at a retail store or car dealership, must be licensed and must comply with the responsible lending conduct provisions.

Required disclosures

Consumers dealing with a credit assistant are required to be given a Credit Guide. The Credit Guide (s. 113 NCCP) must:

- Be in writing
- Specify the name, contact details, and licence number of the credit assistant
- Specify any fees payable for the credit assistance
- Specify the six credit providers that the credit assistant refers to most often (if the credit assistant deals with less than six credit providers, then the names of those credit providers)
- Specify any commissions to be received (and a reasonable estimate and how they are calculated) for the referral
- Provide details of the credit assistant’s–
 - › Internal dispute resolution procedures and
 - › The EDR of which the credit assistant is a member
- Inform the consumer of the prohibition on credit assistants suggesting, recommending, or assisting consumers to enter or remain in contracts that are unsuitable for the consumer, and of the consumer’s rights in relation to requesting a copy of the assessment
- The credit assistant must give a Quote (s. 114 NCCP) to the consumer that–
 - › Must be in writing

- › Specifies the services being provided
- › Specifies the maximum amount that will be payable by the consumer (including fees and charges)
- › States whether the fee is still payable if the consumer does not proceed with the loan

The Quote must be signed and dated, or there must be some other indication that the consumer has accepted the quote and the date that this acceptance occurred. The latter provision is basically to accommodate online broking.

Failure to comply means that the credit assistant may be liable for a penalty. Penalties can only be obtained through court or by ASIC. Consumers can also apply for compensation as part of a dispute if they can demonstrate a loss.

Compliance with these provisions is not required until 1 January 2011. In some States, broker legislation has been extended to cover this period. You will need to get advice in your state about broker disputes arising between 1 July 2010 and 1 January 2011.

Credit representatives

Like credit providers, brokers may also appoint credit representatives. In this case, additional disclosure is required about the representative. (*See Chapter 11 – Responsible lending conduct for a summary.*)

Preliminary assessment

Credit assistants are required to comply with responsible lending conduct requirements from 1 July 2010. This means that credit assistants must make a preliminary assessment as to whether the loan is unsuitable.

The consumer can request a copy of the preliminary credit assessment up until seven years after the original quote for arranging the loan was made (s. 120 NCCP).

It is likely that the preliminary credit assessment will be very generic in nature as the credit assistants will need to incorporate this into their procedures. This preliminary assessment may provide vital evidence in the case of a dispute.

In making a preliminary assessment, the credit assistant must (s. 117 NCCP):

- Make reasonable inquiries of the consumer's requirements and objectives
- Make reasonable inquiries about the consumer's financial situation
- Take reasonable steps to verify the consumer's financial situation

More information about these concepts is provided above in *Chapter 11 – Responsible lending conduct*.

In many ways, the preliminary assessment made by a credit assistant will be similar to the assessment eventually made by the credit provider.

Arranging unsuitable loans

The loan arranged by a credit assistant may be unsuitable if (s. 118(2))

- The consumer could not repay the loan at all or only with substantial hardship
- The loan will not meet the consumer's requirements and objectives

The credit assistant is prohibited under s. 123 of the NCCP from providing credit assistance in relation to unsuitable loan contracts. There is a penalty applicable for arranging an unsuitable loan. Civil penalties are only available through court or ASIC. Consumers can also apply for compensation as part of a dispute if they can demonstrate a loss.

Can a credit provider rely on the information provided or verified by a broker?

The law places a separate obligation on both the credit assistance provider and the credit provider to assess loan suitability. The fact that the former has performed this role will not excuse the latter at law if they fail to do so. However, ASIC RG 209 (p.18, See *Chapter 11 – Responsible lending conduct* for more details) indicates that credit providers may be able to rely on information gathered by credit assistance providers as part of the preliminary assessment and passed on but also suggests that reasonable and prudent credit providers:

- Will have processes in place to ensure the reliability of any information collected by third parties, including information contained in a preliminary assessment (eg, spot checks where random information is re-verified)
- Will only use information from intermediaries assessed as having robust compliance arrangements
- Will have processes to actively discourage inappropriate practices, including the structuring of incentives
- Will, despite all the above, not rely on information about which they have any reason to doubt the reliability

Broker fees

Some previous State finance broker legislation provided the following consumer protections:

- The broker fee could not be charged unless the finance broker strictly complied with all disclosure requirements and
- The broker fee could be challenged on the basis it was excessive.

None of those protections are available under the Credit Law. However, a refund of the fee may be sought as compensation in the event that the credit assistance provider fails to comply with a requirement of the law, including the requirement to give a signed quote, a credit guide and not to assist the consumer enter, or increase the limit, of an unsuitable loan contract. If the credit assistance provider complies with these provisions, it will be difficult to get relief purely because the fee is excessive for the work done, provided it does not exceed the maximum quoted. The NCCP does include a prohibition on:

- Fees that exceed the maximum quoted (s. 114 (4) NCCP)
- Fees payable prior to the credit assistance being provided (s. 114(5) NCCP)
- Lodging, or threatening to lodge, a caveat over land in order to induce payment of the credit assistant's fees (s. 144(6) NCCP)

Unfair and dishonest conduct

A new provision inserted in the phase 2 reforms and commences on 1 March 2013 was s. 180A NCCP which enables a court to make orders following unfair and dishonest conduct. This section does not apply to credit providers. It does apply to credit assistance providers (finance brokers) and other intermediaries that arrange credit.

There are four parts to this section:

1. There must be:
 - a) conduct by the service provider connected with the provision of a service; and
 - b) the conduct is unfair and dishonest
2. The conduct resulting in:
 - a) the consumer entered into a loan or lease contract or guarantee they would not have entered into
 - b) the consumer entered into a loan or lease contract or guarantee on different terms
 - c) The consumer incurs fees and charges
3. Determining whether the conduct was unfair and dishonest the following need to be considered:
 - a) the consumer is at special disadvantage or in a class of persons more likely to be disadvantaged and a reasonable person would consider the conduct was directed at that class
 - b) the consumer was unable or considered themselves to be unable to enter to a loan or lease contract or guarantee other than the credit provider the service provider arranged.
 - c) the conduct involved a technique that was manipulative and should not have been used in good conscience
 - d) the service provider could significantly influence the terms of the contract
 - e) the terms of the contract were less favourable

Although the court is not limited to the above circumstances

4. The court can make the following orders:
 - a) an order to refrain from or take a specified action
 - b) an order to pay an amount
 - c) an order that an amount is not payable
 - d) any other order to address the unfairness or dishonesty EXCEPT an order that affects the credit contract, lease or guarantee.

If you think the conduct of a credit assistance provider or other intermediary is dishonest and unfair then seek legal advice.

Problem solving

There are a number of aspects of the Credit Law that may assist caseworkers in solving a consumer's problem with a finance broker:

1. The requirement to be licensed
2. The requirement for credit providers to deal only with licensed brokers
3. The requirement to give a Credit Guide
4. The requirement to conduct a preliminary assessment (and provide copy to consumer if requested)
5. Prohibition on arranging unsuitable loans
6. Obligation to conduct business efficiently, honestly, and fairly (s. 47 (1)(a) NCCP)
7. Obligation to manage conflicts to interest (s. 47 (1)(b) NCCP)
8. Prohibition on providing false or misleading information (s. 33 NCCP)
9. Compensation for consumers for breaches of the Credit Law
10. Compensation for the consumer can include an order from the court:
11. Declaring part or all of the contract to be void
12. Varying the contract
13. Refusing to enforce one or more terms in the contract
14. For the credit assistant to refund money or return property
15. For payment of loss or damage
16. For the credit assistant to supply a specified service
17. Unfair and dishonest conduct

Common broker problems

The following table lists some common complaints consumers make about brokers and the sections of the law that may be useful.

Problem	Useful law
Failure to provide a loan with required features – eg, redraw, two credit cards attached	Responsible lending conduct provisions in relation to loans which meet the consumer's requirements and objectives. Misleading and deceptive conduct under the <i>ASIC Act</i> (where loan features actively misrepresented).
Failure to provide the cheapest loan.	Responsible lending conduct provisions in relation to loans that meet the consumer's requirements and objectives; argue that the cheapest loan was one of the consumer's requirements and objectives (may be difficult to prove – no obligation to provide the most suitable loan). Failure to manage conflicts of interest (if this is the case).

Problem	Useful law
Failure to arrange a loan in time (eg, for settlement on a home purchase).	Responsible lending conduct provisions in relation to loans which meet the consumer's requirements and objectives.
Charged fees when consumer did not proceed.	Check whether this is permitted according to the Quote, if so no prohibition on this – try arguing the responsible lending conduct provisions in relation to loans which meet the consumer's requirements and objectives if this is true.
Recommend/assist with loan the consumer cannot afford.	Responsible lending conduct prohibition on providing assistance in relation to unsuitable loans. (This rarely occurs without also false or misleading information also being provided to the credit provider – see below.)
Provided false information on the loan application (including false financial information and false business purpose declarations).	Responsible lending conduct prohibition on providing assistance in relation to unsuitable loans. Obligation to act honestly and fairly. Prohibition on providing false and misleading information. Presumption that loan us regulated and provisions for challenging false declarations. (See <i>How to Guide: Setting aside an inaccurate business purpose declaration.</i>)
Provided poor advice – eg, to refinance credit card debt into home or take out a line of credit loan with a linked credit card.	Credit Law will not assist unless unsuitable loan recommended/applied for. Argue misleading and deceptive conduct under the <i>ASIC Act</i> and/or breach of fiduciary duty to client.
Excessive fees.	Fee cannot exceed maximum quoted. If loan unsuitable, claim reduction/reversal of the fee as part of compensation. Argue unconscionable conduct under the <i>ASIC Act</i> if the client is at a special disadvantage. If the broker is not licensed, the fee is not payable under the s. 32 NCCP.
Broker is unlicensed.	Prohibition on unlicensed conduct. Prohibition on licensees dealing with unlicensed persons. Note: EDR may not be available, complain to ASIC and get legal advice.

Main Points

- Leases are regulated differently to consumer credit contracts.
- Less disclosure is required in relation to leases.
- The financial hardship and unjustness provisions of the National Credit Code apply to leases.
- A lease with a right to buy is deemed to be a credit contract.
- Leases may contain terms which may be unfair under amendments to the *ASIC Act*.
- Lessors must be licensed and have obligations under the Credit Law in relation to responsible lending.
- Lessors must give all consumers they contract with a Credit Guide
- Lessors must not enter unsuitable leases.
- Lessors must send statements of account at least yearly
- Lessors must provide information on request about the costs of terminating a lease and the actions required by the lessee.

Consumer leases

Five parts of the Credit Law are relevant for consumer leases:

1. Part 11 of the NCC – Consumer leases
2. Financial hardship provisions of the NCC (see *Chapter 3* of this toolkit)
3. Unjustness (see *Chapter 12* of this toolkit)
4. Part 3–4 of the NCCP – Responsible lending conduct and leases
5. Section 9 of the NCC – deemed credit contracts

What is a lease?

A consumer lease is a contract for the hire (rental) of goods where the consumer **has no right to purchase the goods.** (s. 169 NCC)

Some examples of consumer leases:

- Car lease
- Rental contracts for any goods, eg, fridge, washing machine, television

The Credit Law applies to the lease, which means (s. 170 NCC):

- The purpose for renting the goods is mainly for personal purposes
- The charge for the lease (the total cost of the rental) is more than the cash price of the goods
- The lessor (the person/business offering the goods for rent) is usually in the business of renting goods or the rental of the goods is incidental to another business

The Credit Law does not apply to leases that are (s. 171 NCC):

- Under four months in duration
- For an indefinite period
- Employment-related leases, eg, car leases as fringe benefits. Novated leases can fall into this exemption

Disclosure

A consumer lease must be in writing. The consumer must be given a copy of the lease.

A consumer lease must contain the following information:

- A description or identification of the goods being rented
- The amount to be paid before the consumer receives the goods
- The amount of any government charges payable
- The amount of each rental payment
- The number of rental payments to be made
- A statement of the conditions on which the consumer can terminate the lease
- A statement of the liabilities of the consumer if the lease is terminated

The consumer must also receive a statement explaining their rights and obligations. A copy of this statement is included in *Section 3*.

Statements of account

The lessor must send the consumer statements of account at least yearly. A statement of account can also be requested by the lessee at any time. The lessor has 14 days to respond if the information requested is less than a year old or 30 days if the information requested is more than a year. (s. 175E NCC)

Consumer's right to terminate the lease

A consumer can terminate a lease at any time before the end of the term if they:

1. Return the goods; and
2. Pay the amount outstanding under the lease

The consumer can request a statement of the amount required to terminate a lease as at a particular date. The request must be in writing. The statement from the lessor must include the following information:

- the amount required to terminate the lease
- a statement to the effect that the amount payable to terminate the lease may change depending on the date of payment.
- a statement that the lessee has no right to own the goods
- statement that the leased goods must be returned

The statement must be provided within 7 days of the request.

End of lease statement

A lessor must send an end of lease statement no later than 90 days before the end of the lease. the end of lease statement must include the following information:

- the date the consumer lease ends
- a statement that the goods leased must be returned
- the total amount the lessee will pay for the lease (assuming all repayments are made)
- the date the goods must be returned
- if the goods can be collected by the lessor - a statement on how the collection can be arranged
- if the goods are to be returned by the lessee - a statement on how and where the goods are to be returned
- the amounts the lessee will have to pay if the goods are not returned
- a statement on whether the lessor is prepared to negotiate for the sale of the goods
- if the lessor is prepared to negotiate for the sale of the goods - an estimate of the sale price and the contact person to negotiate the sale

There is no requirement to provide the end of lease statement if the debt has been written off, the lessor has commenced enforcement proceedings or the lessee has died or is insolvent.

Enforcement

If the consumer fails to make the lease repayments, the lessor must give the consumer at least 30 days written notice of its intention to take possession of the leased goods (s. 178 NCC).

This notice is not required if:

1. The term of the lease has finished
2. The consumer has sold or otherwise disposed of the goods
3. The lessor is unable to locate the consumer
4. The consumer is insolvent
5. The court authorises the lessor to take possession of the goods

It is worth noting that the consumer does not have any rights to catch up payments under the notice. All the consumer gets is a notice that the goods may be repossessed in 30 days. The goods cannot be repossessed from private residential property without the consumer's written consent or without a court order.

The consumer does have a right to request hardship. This is the main tool available when a consumer is having difficulty making their lease/rent repayments (see *Chapter 3 – Financial hardship*).

What if there is a right to buy?

If the consumer has a right/option to buy the goods (and there is a charge above the cash price of the goods), the lease is not a consumer lease; it is a sale of goods by instalments. In effect, this means it is a normal loan and the usual provisions in the Credit Law that apply to loans will apply to the contract.

For the above reason, the lessor is usually very careful to make sure that there is no option to purchase in the lease. A common problem for consumers is that they are told they have a right to buy the goods or are misled to believe this when in fact the contract specifically states that they have no right to purchase.

Even lease contracts called “Rent/Try/Buy” usually have no right to purchase. So if the consumer wants to own the goods then leases should be avoided.

If the consumer has been misled or told they will own the goods then it is arguable that it is a sale of goods by instalments (s. 9 NCC). The consumer will need evidence of the (mis) representation to show that it should apply.

Responsible lending conduct

Lessors are required to give consumers a Credit Guide. The Credit Guide (s. 149 NCCP) must:

- Be in writing
- Specify the lessor's name, contact details, and licence number
- Specify details of the lessor's:
 - › Internal dispute resolution procedures
 - › The EDR of which the lessor is a member
- Inform the consumer of the prohibition on lessors entering contracts that are unsuitable for the consumer and of the consumer's rights in relation to requesting a copy of the assessment.

Failure to comply means that the lessor may be liable for a penalty. Civil penalties can only be obtained through court or by ASIC. Consumers can also apply for compensation as part of a dispute if they can demonstrate a loss.

The assessment

Lessors must make an assessment as to whether the loan is unsuitable (s. 151 NCCP).

The consumer can request a copy of the preliminary credit assessment up until 7 years after the date of the credit contract (s. 155 NCCP).

It is likely that the assessment will be very generic in nature, as lessors will need to incorporate this into their procedures. This assessment may provide vital evidence in the case of a dispute.

In making an assessment, the lessor must (s. 153 NCCP):

- Make reasonable inquiries of the consumer's requirements and objectives
- Make reasonable inquiries about the consumer's financial situation
- Take reasonable steps to verify the consumer's financial situation

Unsuitable leases

The loan or increased credit limit arranged by a credit provider may be unsuitable if (s. 154 NCCP):

- The consumer could not make the lease repayments at all or only with substantial hardship
- The lease will not meet the consumer's requirements and objectives

The lessor is prohibited under s. 156 of the NCCP from entering unsuitable lease contracts.

Some examples of arguably unsuitable leases are:

- Being sold a lease when the consumer wanted to own the goods
- Being sold a lease when the consumer cannot afford the repayments for the lease



A common problem with leases is that they cost too much. For example, a rental contract available from a major retail chain can cost more over the term of the lease than purchasing the same goods with a credit card and paying interest at 12–29% (depending on the card). At the end of the lease, the consumer may then be offered the option to buy the goods for a further sum. If you have clients in this position, you should try arguing:

- that the lease was unsuitable because the consumer 's objective was to own the goods;
- that the lease was unsuitable because the consumer was seeking the most competitive form of finance;
- that the consumer was misled about the nature of the contract.

What if the lease is (arguably) unsuitable?

The consumer can claim compensation that can include an order from the court:

1. Declaring part or all of the contract to be void
2. Varying the contract
3. Refusing to enforce one or more terms in the contract
4. For the refund of money or the return of property
5. For payment of loss or damage
6. For the lessor to supply a specified service

It is likely that the remedy will be to put the consumer back in the position they would have been but for the unsuitable lease. Some recognition of the benefit the consumer received for the use of the goods will probably need to be taken into account in arriving at an appropriate remedy.

Unfair terms

Many consumer leases contain arguably unfair terms. For example, it is not unusual for the penalty for failure to meet the rental payments is that the goods are forfeited AND an amount must be repaid equivalent to the rental payments due for the remainder of the contract. It may be possible to argue this is an unfair term under new unfair terms legislation in the *ASIC Act* which commenced on 1 July 2010.

Main Points

- In some circumstances where goods are purchased using credit sold at the point of sale (such as a shop or car dealership), the retailer/supplier and the credit provider have a linked credit arrangement.
- If you cancel the sale contract you can terminate the credit contract.
- The credit provider is liable for any misrepresentation about the credit contract by the retailer.
- The credit provider is also jointly liable for any inadequacy of the goods purchased with the credit.
- In some states linked credit could be dealt with by making an application against the retailer/supplier AND the credit provider at the same time in a specialist tribunal. This will no longer be possible.
- There are limitations on what EDR can do in relation to linked credit.

What is linked credit?

Part 7 of the NCC deals with Related Sale Contracts. This is also sometimes called linked credit.

This section deals with transactions where goods or services are purchased by getting a loan at the place where the goods are purchased. There are a number of situations where the credit provider will be considered a linked credit provider. Some common examples of linked credit arrangements are:

- A car dealer arranging a car loan to buy a car
- An “interest free” deal to buy some furniture from a department store

If the arrangement is linked credit the credit provider and the supplier of the goods and services will have an agreement, arrangement, or understanding in relation to the marketing of credit for the purposes of purchasing those goods.

How do you prove that it is linked credit?

Actually, it is impossible to prove the contract, arrangement, or understanding actually exists until this evidence is obtained from the credit provider and supplier. In court, this would be done by issuing a subpoena. In EDR, the EDR Scheme would request further information if the credit provider was arguing that they were not a “linked credit provider”.

As you will not have this evidence at the outset, you should just assume it is linked credit if:

- Credit is offered to facilitate the purchase of goods and/or services and
- The supplier regularly refers consumers to a particular credit provider(s) or
- The supplier makes the credit provider’s application forms available at the shop or dealership or
- The credit is applied for at the offices of the supplier or the credit is applied for at the home of the consumer as part of the sale of a good or service

How does linked credit help?

Credit provider liable for the misrepresentations of the supplier

The main protection offered by linked credit is that the credit provider can be liable for:

- The misrepresentations of the supplier
- The breach of contract of the supplier
- Failure of consideration by the supplier (the services or goods were not provided)

More importantly, it gives the consumer a way to make the credit provider reduce or annul the loan depending on the loss caused by the misrepresentation.

In practice, this means that if there is a misrepresentation by a supplier then the consumer should take legal action against both the supplier and the credit provider. This will mean the action must be taken in a court that can hear both complaints (eg, the Federal Circuit Court or Local Court).

Taking action in EDR under the linked credit provisions of the Credit Law is difficult because the supplier is not in EDR. The only option is to argue that the supplier is the agent of the credit provider. As EDR is more convenient and cheaper, it is recommended you argue that the supplier is the agent of the credit provider at the first instance. *Chapter 2, Part 2–3, Division 4 Liability of Licensees for Representatives* (ss. 74–78), and ss. 324 and 325 of the NCCP provide support for this argument.

In summary it should be possible to raise a dispute in EDR where the supplier/retailer has misrepresented the loan contract, or otherwise engaged in poor conduct in relation to the consumer entering the loan. If the essential problem is with the goods, however, rather than the loan, EDR is less likely to be able to assist.

Rescinding the contract

The consumer is entitled to terminate the credit contract if the sale contract is “rescinded or discharged”. The sale contract could be “rescinded or discharged” when:

- The supplier fails to deliver any goods and/or services
- The supplier goes into liquidation (although this is not automatic still need to show misrepresentation, breach of contract and/or failure of consideration)
- The goods and/or services are not fit for purpose
- There was a fundamental misrepresentation about the goods and/or services
- The supplier discharges the consumer from the sale contract
- To be able to terminate, it is necessary for the consumer to:
- Have evidence that they are discharged from the contract or
- Rescind the contract in writing with the supplier. The consumer would need to give reasons for the rescission
- Then terminate the credit contract in writing, accompanied by a copy of the letter rescinding the sale contract

It is likely that the supplier will argue that the rescission is not valid but it is still necessary to send the rescission letter so the credit contract can be terminated if the rescission with the supplier is upheld. Termination must be in writing, usually accompanied by a copy of the letter rescinding the sale contract.

👉 *Get advice as this can be tricky.*

Main points

- Loans with terms of less than 15 days are banned
- **Small Amount Credit Contracts (SACCs)** are loans up to \$2000 for terms up to 12 months. Charges (including interest) are capped at a 20% establishment fee and charges of 4% per month (flat rate). No security can be taken for the loan
- **Medium Amount Credit Contracts (MACCs)** are loans between \$2001 and \$5000. Charges (including interest) are capped at a 20% establishment fee and 48% p.a. Security can be taken for the loan.
- Additional responsible lending requirements apply to SACCs
- The total repayments of small amount loans cannot exceed 20% of the Centrelink income of the consumer (where Centrelink payments are at least than 50% of their total income)

Small Amount Credit Contracts

SACCs are small amount loans \$2000 and under for a term of 12 months or less. These types of loans are often called payday loans even though the term is significantly longer than 2 weeks.

Loans under 15 days are banned under the NCCP.

The cost of credit on SACCs is capped. This means that credit providers offering SACCs can only charge the following:

- a 20% establishment fee calculated on the amount being borrowed
- a fee of 4% per month
- government fees (if applicable)
- default fees and enforcement costs

The monthly fee of 4% is charged on the total amount borrowed not the outstanding balance – that means it is charged on the amount of the original loan regardless of whether some of that amount has already been repaid. The fee can be charged for a whole month even though the loan may only be outstanding for a small part of that month.

The 20% establishment fee cannot be charged if any part of a SACC is used to refinance any part of another SACC.

There is currently no requirement to disclose an Annual Percentage Rate for SACCs.

The maximum amount that can be charged for the loan is twice the amount borrowed. This includes default fees but not enforcement costs such as solicitor's costs or court costs.

Security cannot be taken for a SACC.

Medium Amount Credit Contracts

MACCs are loans between \$2001 and \$5000. The term of the loan must be between 15 days and 24 months.

An establishment fee of \$400 of the loan amount can be charged and interest is capped at 48% p.a.

Security can be taken for a MACC and can include a mortgage over goods, car and/or real estate. The prohibited security provision (s.50) still applies.

Responsible lending

The responsible lending requirements set out in chapter 11 apply to both SACCs and MACCs.

There are additional responsible lending obligations for credit providers who provide SACCs:

- there is a presumption that the contract will be assessed as unsuitable if the consumer is in default under another SACC at the time of the application (s.123(3A)) unless the lender can prove that it was not unsuitable in the circumstances
- there is a presumption that the contract will be assessed as unsuitable if in the 90 day period prior to the loan application the consumer has already had two other SACCs (s.123(3A)) unless the lender can prove that it was not unsuitable in the circumstances
- consumer bank account statements must be obtained and reviewed for 90 days prior to the application for the SACC (s.117(1A)) as part of the assessment
- if the repayments on all SACCs for the borrower exceeds 20% of the income of a person whose main (at least 50%) source of income is Centrelink then the loan must not be granted (s.133CC)

SACC lenders are also required to give potential customers a notice about the fact that small loans can be expensive and to provide referrals to explore alternative options to meet their needs. The warning must be given on the premises, over the telephone or online depending on how the borrower accesses the service.

What is a reverse mortgage?

A reverse mortgage is a loan contract where (usually) the home has been mortgaged with an older person as the borrower. The loan does not require repayments (although payments can be made) and interest compounds on the debt until the consumer sell their home, dies or moves into aged care. It is a type of equity release product.

This type of product can be very convenient as it enables an older person to access equity in their home. The main concerns with this type of product are:

- the equity in the property can get eroded over time through compounding interest. This may leave the consumer with insufficient equity to access aged care or buy a property elsewhere.
- the beneficiaries of the consumer's estate can get annoyed about the impact on their inheritance. Note: this is an issue for consideration, however, the consumer has no obligations to discuss this with intended beneficiaries
- it may cause difficulties for another person (who does not own the home) but usually lives there
- where the reverse mortgage is being used to refinance unaffordable debt. The consumer should always get legal advice before doing this.

Protections for consumer who obtain a reverse mortgage

There are several important protections in the Credit Law for consumers who obtain a reverse mortgage.

Another type of product that is marketed to older people is a type of equity release product where part of the home is sold to the credit provider. This type of product is not covered by the credit law.

The protections for consumers using reverse mortgages are:

- the consumer must receive an information statement containing projections of the changes in equity of the consumer's home over the life of the loan.
- there must be no negative equity unless the consumer has been involved in fraud. This means that if the sale of the home does not cover the loan, the consumer or their estate is not left with a debt (s.86A NCC)
- if the credit provider agrees, the consumer can nominate a person to be allowed to occupy the home (s.67A)
- statements of account must be provided at least 12 monthly (s.33 NCC)
- the enforcement procedures require contact with the consumer by phone and confirmed the default notice has been received which is in addition to the usual enforcement procedures (s.88 NCC)

- the credit contract may not provide for a basis to begin legal proceedings because the consumer failed to inform or prove matters relating to the occupation of the home (s.18A NCC)
- the reverse mortgage can be repaid early at any time (s.26(6) NCC)

Additional responsible lending obligations for reverse mortgages

There are additional circumstances where a reverse mortgage is unsuitable unless it is proved otherwise if:

- if the youngest borrower is 55 or younger and the loan to value ratio is higher than 15%
- An additional 1% is added to the loan to value ratio for each year above 55 of the youngest borrower. For example, if the youngest borrower is 60 then the loan to value ratio should not be above 20%.



HOW TO GUIDES & SAMPLE LETTERS

This is the problem solving part of the toolkit. This section include how to guides, sample letters and EDR Guides covering the following topics:

1. Financial hardship
2. Unsuitable lending
3. Requesting information
4. Debt Collection and enforcement
5. Requesting a debt release
6. High cost small loans
7. Consumer leases
8. Complaining to ASIC

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How To Guide: Home Loans, Credit Cards and Personal Loans

So what is financial hardship?

Financial hardship is any situation where the consumer is having difficulty repaying his/her loan.

There are four types of financial hardship:

1. Financial hardship that fits within the definition of financial hardship under the Credit Law
2. Financial hardship that fits within the definition of a Code of Practice and the Credit Law
3. Financial hardship that does not fit under the Credit Law but a Code of Practice does apply
4. Financial hardship where neither the Credit Law nor any Code of Practice applies

Dealing with financial hardship will usually involve a negotiation between you and the credit provider to agree to an arrangement where your client can repay the loan. You can ask for a whole range of solutions for your client.

Financial hardship under the Credit Law has certain requirements that must be met. The advantage is the consumer's request for financial hardship under the Credit Law can be determined by EDR (or enforced by the court) if the credit provider refuses the request and the request complies with the criteria set out in the law.

Requirements to obtain financial hardship under the Credit Law

The criteria below assumes that if the dispute is unresolved you will go to EDR (if you are considering enforcing in court get legal advice)

There are four requirements to be met:

1. The amount in dispute (not the loan amount) must be under the relevant compensation limit for EDR. The amount in dispute is the amount of the repayments being reduced over the time they are being reduced. For example, if the variation is to reduced repayment of \$4,000 for 3 months then the amount in dispute is \$12,000. The EDR compensation limits are \$309,000 for FOS and CIO. Therefore, it is very unlikely that any request for hardship in EDR will be over the compensation limit.
2. The consumer must be having trouble making their loan repayments (s. 72(1) NCC).
3. There must be a reasonable cause for the financial hardship e.g. Illness or unemployment

4. If the variation was made as requested, the consumer must “reasonably expect” to be able to discharge their obligations (s. 72(1) NCC).

Do I decide to request financial hardship under the Credit Law?

Some guidelines are:

- Any type of arrangement can be requested under the Credit Law so it is recommended that all requests be made under the Credit Law. Note: that a request for hardship does not need to specifically mention the Credit Law.
 - Take into account the rules of the EDR scheme that the credit provider belongs to and any applicable Code of Practice.
 - Remember that any hardship notice needs to demonstrate that the loan would still be repaid (if granted)
- *If this request is rejected and legal action is imminent then you need to make a revised request under the Credit Law to EDR urgently.*

Multiple debts

Many consumers have more than one debt. Not all debts are created equal. Secured debt (particularly a home loan) is a higher priority debt than a credit card. This is because the consumer is at risk of losing their home if they do not pay their home loan.

For this reason, a useful strategy is often to reduce the payments on the credit card so the consumer can make their usual (or close to usual) repayments to their home loan.

Below is the priority of debts chart which is a guide only. It is possible for lower priority debts to become higher priority, for example, if the credit provider obtains a judgment and bankruptcy is threatened (which may put the home at risk). Therefore, it is necessary to keep reviewing the priorities.

Priority debts (in order of priority):

1. Home loan
2. Car loan where the car is required for earning income
3. Council rates or strata fees where there are significant arrears
4. Utilities if the person is dependent on life support
5. Judgment debts over \$5,000
6. Other car loans
7. Utilities
8. Council rates
9. Personal loans
10. Credit cards
11. Other debts
12. Debts to friends & family

The other important part of requesting hardship on multiple debts is to reduce the amount of debts on which you need to request hardship. This means if your client can make the minimum repayments on some of the debts they should do so and then request hardship on a few debts only. This cuts down on the number of debts where hardship is being negotiated.

Multiple hardship variations

The consumer can have multiple requests for hardship assistance over the course of a loan. There is nothing in the law to prevent this. The only difficulty is that the more often the consumer requests hardship assistance the harder it is to show that the consumer will be able to reasonably repay the loan.

Steps to make a repayment arrangement on the grounds of hardship

Step 1 Tell the consumer to regularly pay what they can afford to the debt (and keep paying)!

Step 2 Questions to answer:

- Does the Credit Law apply? (See *Chapter 1* of the Toolkit)
- Does it meet the requirements to get a variation on the grounds of hardship under the Credit Law?
- Is there a relevant Code of Practice? The relevant Codes of Practice are:
 - › Code of Banking Practice (most banks subscribe), available at www.codecompliance.org.au.
 - › Customer Owned Banking Code of Practice (most building societies and credit unions), available at www.customerownedbanking.asn.au
 - › Mortgage and Finance Association of Australia (MFAA) Code of Practice (all members of the MFAA), available at www.mfaa.com.au.
- Does the client have reasonable prospects of being able to pay the debt in the future?
- Are there any higher priority debts?
- How much can the client afford to pay?

Step 3 Call the credit provider and request a financial hardship arrangement or send a letter requesting financial hardship (see *Sample letter: Financial hardship (credit law)*).

Keep a copy of the letter. Make sure the consumer understands what is being requested and is paying the amount offered. Diarise for 21 days into the future for a response to be received (although do not wait if legal action is threatened or has commenced). A response with reasons must be sent within a certain time frame. See *Chapter 4*.

If the Credit Law does not apply, check if a Code of Practice applies. The relevant sections of the Codes of Practice are below. It is strongly recommended you review the requirements.

Relevant sections are:

- Code of Banking Practice – Financial hardship (s. 28); Responding to disputes (s. 37)
- Customer Owned Banking Code of Practice –Financial Difficulties (s. 24); Responding to disputes (s. 28)
- MFAA Code of Practice – Hardship applications (s.13); Responding to complaints (s. 11)

Step 4 If accepted, make sure the consumer understands the arrangement and confirm the hardship arrangement in writing. If rejected or no response, go to EDR.

EDR is the main way of resolving disputes under the Credit Law. As EDR is free and both EDR schemes can make determinations in hardship disputes then it is far preferable to go to EDR rather than court.

- *Note: EDR Schemes cannot make a determination of hardship disputes unless the Credit Law applies. If it does not apply then the EDR Scheme can only review the dispute, it cannot make a binding determination on the credit provider. EDR can make a determination in relation to whether the credit provider has breached a relevant Code of Practice. It can also assist you or your client to negotiate with the credit provider.*

If any of the following is happening, you should consider filing in EDR:

- Negotiation with the credit provider has failed
- The credit provider is threatening legal action including repossession
- The credit provider has issued a summons or Statement of Claim

If the credit provider has issued legal proceedings, you must file in EDR before the credit provider obtains judgment. After judgment, EDR cannot consider the dispute except in very limited circumstances (See *Chapter 3 – Financial hardship*).

- *If you are concerned about imminent legal action or a statement of claim/summons has been served you should file in EDR immediately!*

Follow up

If you are continuing to work with your client through the period of the hardship variation, then it is a good idea to monitor their situation to ensure that:

- They are sticking to the arrangement if they are required to make payments and
- That they are taking steps to address their situation in the longer term

If you are not going to be working further with the client, make sure the client understands that:

- S/he must keep to the arrangement or the credit provider may commence enforcement action
- S/he must use the period of the hardship variation to take steps to improve their situation, such as paying down other debts, or looking for work, or claiming on their insurance, or whatever is appropriate to their circumstances (of course clients suffering financial hardship as a result of temporary illness or accident may not need to do this)
- S/he will not necessarily be notified at the end of the agreed arrangement that it is time to resume normal repayments, the first they may hear about could be a default notice
- If s/he cannot resume normal repayments at the end of the agreed arrangement they should apply for hardship again, preferably before they go into default by missing a normal repayment
- Another request for hardship will not necessarily be approved; in fact, it will get more difficult each time they apply

Specific strategies depending on the type of loan

Home loans

Why home loans are important

The home is the consumer's shelter. It is the highest priority payment they need to make!

An important aspect about home loans is that it is almost always the consumer's largest debt. This means that if interest is not covered by repayments the debt will grow and compound.

If possible:

- The best option is that the consumer continues to make the required repayments on their home loan and make hardship arrangements on other debts
- If this is not possible, then the consumer should at least try to cover the interest
- Moratoriums (where the consumer does not make repayments at all) should be avoided because of the problem with interest compounding
- The consumer should continue to try and make repayments (even if small) to show they are trying to pay (to assist with negotiation)

If the consumer cannot return to normal scheduled repayments within 6 months (longer if the loan is smaller) then consideration needs to be given to selling the home and asking for hardship on this basis.

Accessing Superannuation or Mortgage Assistance (if available)

Your client may wish to access their superannuation or apply for mortgage assistance. If the client is very likely to lose their home in the future, it is pointless accessing superannuation or mortgage assistance.

If the client's financial hardship is likely to be resolved, it may be worth accessing superannuation or applying for mortgage assistance as long as this is in addition to an application for hardship. This means that you should try to negotiate a hardship arrangement that does not rely on access or approval being granted. This is to avoid the problems that occur when the amount is not sufficient making it necessary to renegotiate again.

Credit cards

Credit cards are a low priority debt. It is relatively easy to get repayment arrangements on credit cards. It is also often possible to negotiate:

- interest to stop for 3 months or more
- repayment moratoriums (where no repayments are made) for 3 months or more

Many credit providers are now reluctant to give moratoriums. If your client cannot afford any repayments you still need to negotiate a moratorium. A moratorium in these circumstances is reasonable as long as you can demonstrate how the consumer will be able to reasonably repay the loan in future (for example, when your client returns to work).

The other option is to negotiate for a nominal repayment amount while your client is in financial hardship. This amount needs to be affordable. If interest is being charged, a payment that covers interest will help to keep the debt from rising. Remember, if your client will not be able to afford to reasonably repay the debt then you may need to consider other options. Check whether your client may be able to get a waiver. See How to Guide Requesting a debt release.

Personal Loans (unsecured)

Personal loans are usually to be repaid over a term of 3 to 7 years. The term of the loan is important because credit providers are usually reluctant to extend the term of the loan. This does not mean it cannot be extended but it may be arguably unreasonable to double the term of the loan (for example). In practice, the loan can be extended by a year or so but it can be difficult to extend it further than that. If the loan was quite small it can be easier to extend the term than if the loan is for a larger balance. You need to take this into account when negotiating a repayment arrangement.

It is also difficult to get moratoriums or a break from interest being charged with a personal loan. The credit provider will want the consumer to return to making the scheduled repayments as soon as possible. Again, it is a matter of showing that the proposed arrangement will repay the loan in a reasonable time.

Personal loans (secured) or car loans

This can be a high priority debt. A car may be essential for a consumer to get to work, get children to school, and/or get to medical appointments. For consumers who live in rural or remote areas the car can be essential for shopping. If the car is essential, repayments need to be a priority.

If a repayment arrangement has not been agreed and the default notice has expired unpaid then it may be necessary to lodge in EDR urgently to protect the car from repossession. As the car is at risk if a consumer defaults on a repayment arrangement, it is essential that repayment arrangements are affordable and the consumer understands that they need to prioritise this payment.

Sample letter: Financial hardship | credit law

Date

Credit provider

(Write to the IDR contact person for the credit provider available at www.fos.org.au or www.cio.org.au. – use search for members)

Address

Dear,

RE: Client name

Type of loan:

Account number:

I am assisting (client name) in relation to the above loan account.

Please find attached an authority to release information, signed by my client.

My client gives notice of hardship under s. 72 of the National Credit Code (Schedule 1 of National Consumer Credit Protection Act 2009) (“NCC”)

I assume you will stay all enforcement action while you consider this application. If this is not possible, please let me/us know immediately in writing.

Reasonable cause

My client(s) have been in financial hardship because of illness and/or unemployment, and/or [examples of other reasonable causes are family breakdown, decreases in income, children’s illnesses, and/or caring responsibilities].

The details of my client’s illness/unemployment and/or other reasonable cause are as follows:

Give Details, eg, My client was unwell with a heart condition for six months ending in February 2009. A medical certificate is attached.

Expectation of being able to reasonably repay the loan if the variation is granted

My client(s) expect to be able to reasonably repay the loan if the requested variation below is granted.

Delete the options that are not applicable.

My client has been paying loan repayments of \$ per fortnight/per month while s/he/they have been in hardship. OR

My client has now returned to work and can now afford the scheduled repayments on the loan. OR

My client(s) expect to return to work on [give date or number of months] and then my client will be able to afford the scheduled loan repayments.

The requested change to the contract

My client requests the following change to his/her/their contract:

Give details of the requested change

Please send a detailed Financial Statement of Position to be completed by my client, if required.

I assume that you will not continue to charge default fees, default interest or make an adverse listing on my client’s credit report while my client(s) hardship request is being considered.

As can be seen from the above information, my client will be able to discharge his/her/their obligations under the above contract if you agree to the proposed change. I/we ask that you consider this application as a matter of urgency.

I await your reply in writing within 21 days of the date of this letter.

Yours faithfully,

Sample letter: Financial hardship | no credit law

Date

Credit provider

(Write to the IDR contact person for the credit provider available at www.fos.org.au or www.cio.org.au. – use search for members)

Address

Dear,

I am assisting (client name) in relation to the above loan account.

Please find attached an authority to release information, signed by my client.

My client wishes to apply to you for a variation of the above loan contract on the grounds of hardship.

Choose one of the options below if applicable:

Where the credit provider is a bank (check whether the bank is a subscriber to Code of Banking Practice at www.codecompliance.org.au):

I/we also refer to the commitment of the bank to:

s. 28 of the Code of Banking Practice

Where the credit provider is a credit union or building society (check whether the credit union or building society is a subscriber to Customer Owned Banking Code of Practice at www.customerownedbanking.asn.au):

I/we also refer to the commitment of the credit union/building society to:

s. 24 of the Customer Owned Banking Code of Practice

Where the non-bank lender is a member of the Mortgage and Finance Association of Australia (check at www.mfaa.com.au):

I also refer to your commitments under s. 13 of the Mortgage and Finance Association of Australia Code of Practice.

I assume you will stay all enforcement action while you consider this application. If this is not possible, please let me/us know immediately in writing.

My client's financial hardship

My client(s) have been in financial hardship because (give reason that is causing hardship – can be anything).

The requested change

My client requests the following change to his/her/their contract:

Give details of the change requested.

Please send a detailed Financial Statement of Position to be completed by my client, if required.

I assume that you will not continue to charge default fees, default interest or make an adverse listing on my client's credit report while my client(s) hardship request is being considered.

I ask that you consider this application as a matter of urgency.

Yours faithfully,

EDR guide: Financial hardship

- The contact details for both EDR schemes are:
 - › FOS ph: 1800 367 287 and www.fos.org.au
 - › CIO ph: 1800 138 422 and www.cio.org.au
 - Applying online to EDR is processed faster and confirmation can be received quickly
 - You can apply online for your client
 - There are application forms that can be printed available at www.fos.org.au or www.cio.org.au.
 - EDR stops all legal action while EDR is considering the dispute
 - If court proceedings have commenced, always lodge online and make sure you get confirmation of successful lodgement and that you state in the application that court proceedings have commenced.
-

This guide is for completing an application to EDR. There are a number of questions in the form but this guide concentrates on answering the problem description and the requested resolution.

Financial Hardship and EDR

Both EDR Schemes have the power to determine financial hardship under the Credit Law. They can also review compliance with a Code of Practice. The relevant rules are:

FOS – Terms of Reference

- Clause 9.1(f): Remedies include a variation of the terms of a Credit Contract in case of financial hardship.
- Clause 8.2: In deciding disputes, FOS must have regard to what is fair in all the circumstances having regard to, among other things, applicable industry codes or guidance as to practice.

CIO – Rules

- Clause 9.6(i): Resolution of complaints may include the variation of the terms of a Credit Contract on grounds of financial hardship.
- Clause 1.5: In resolving disputes, CIO will have regard to, among other things, applicable codes of practice.

Complaint Forms

The complaint forms for both EDRs are available online. You can also lodge online, which can be vital if the dispute is urgent. If you don't have all the information and evidence you need, lodge with the best information you have at your disposal and forward the remainder as soon as possible.

Most of the form is self-explanatory. The following is a guide to the two questions requiring considerable detail.

- *Note: when completing the application form make sure you complete the following:*

1. If court proceedings have been received you should ensure you answer the question confirming this in the application. If court proceedings have been received it may be necessary to do the initial request for financial hardship in the application to EDR.
2. If your client has discussed their payment difficulties with the credit provider then give a date for when the dispute was raised. If your client does not know the exact date then just estimate a date.

Dispute/Complaint Details

My client gave notice to (name of credit provider) about his/her financial hardship on (or about) / / . The request was made over the phone *or* in writing.

- My client is in financial hardship because (give details)
- My client will reasonably be able to repay the loan if the hardship arrangement requested is granted.

Delete the options that are not applicable:

- My client received a reply from the (name of credit provider) on / / , rejecting the application, a copy of which is attached. OR
- My client has not yet received a reply from (name of credit provider). OR
- My client has been asked by (name of credit provider) to provide the following information (describe what has been requested). This is not possible/practical because (insert reasons why this request is unreasonable in the circumstances).

If your client has received a reply rejecting the application for hardship and giving reasons, address those reasons here. The most common reasons given will be that your client cannot reasonably repay the loan.

Fair and reasonable resolution of the dispute requested

My client requests the following resolution of his/her/their dispute (Delete the options that are not applicable):

- A reduction of the amount of each repayment to \$ per week/fortnight/month or a moratorium. This change is requested for (number of months) months. The term of the loan to be extended and any arrears added to the loan (capitalised).
- A reduction of the amount of each repayment to \$ per week/fortnight/month or a moratorium. This change is requested for (number of months) months. The arrears will be added to the loan and the scheduled loan repayments increased so the term of the loan remains the same.
- *for credit cards* - the minimum repayment is reduced to \$ for (number of months) months or permanently with no interest to be charged.
- *for home loans if the home is being sold*- a reduction in the amount of each repayment or a moratorium for 6 months with contracts for the sale of the home to be exchanged within 6 months.
- *if there is a statement of claim/summons*-the statement of claim/summons discontinued
- no default listing. If a default listing has been made it must be removed

☛ *Remember: the above list is a guide of what to request. Depending on the circumstances, some of the requests listed above will be subject to negotiation.*

If a detailed income and expenditure statement required by the credit provider has been completed, attach a copy, along with any proof of income or unusually high expenditure.

How to Guide: Challenging a lending decision—credit cards & personal loans

This How to Guide covers challenging a credit card debt on the grounds that it is unjust or unsuitable. The main reason a credit card debt will be considered unjust or unsuitable is where the consumer was granted a credit card limit, or limit increase, where the credit provider knew or ought to have known that the consumer could not afford to repay the credit card without substantial hardship. This Guide should be read in conjunction with *Chapter 11 – Responsible lending conduct* and *Chapter 12 – Unjustness*.

Caseworkers see many consumers who have too much credit card debt. Before launching into allegations of unjustness or unsuitability, you need to find out some information from the consumer such as:

- Overall financial situation including outstanding debts and current income
- Approximately when the credit was obtained and when the limit increases occurred
- If their income has dropped and when this occurred (and why)

When is the contract unlikely to be unjust or unsuitable?

Some examples of when the contract is unlikely to be unjust are:

- If the change in income is recent and after the last limit increase
- The consumer deliberately lied about their income when applying for the credit card
- The consumer has sufficient savings or investment to cover the payment of the credit card

☛ *Remember: If the consumer deliberately lied on the loan application then this is obtaining credit by deception. If the consumer was a willing and knowing participant in this then it is very difficult to argue a loan is unjust.*

Options if the contract is not unjust or unsuitable

The options are:

- A repayment arrangement on the grounds of financial hardship
- Release from the debt on compassionate grounds (see *How to Guide: Requesting a release from a debt*)
- Bankruptcy

How to tell if the contract is unjust or unsuitable

The test for unsuitability is that at the time the credit card was granted or the limit increased the consumer could not afford to meet his or her financial or personal loan obligations under the credit card contract without substantial hardship.

For personal loans you need to demonstrate that the client could not afford the repayments. For credit cards, if you can demonstrate that your client could not meet the minimum repayments on the credit card without substantial hardship, you probably have a good case. If, on the other hand, the consumer can meet the minimum repayments, but could not pay off the debt, or not without substantial hardship, then the case is more difficult but it is still arguable. ASIC Guide RG 209 (See *Chapter 11 – Responsible lending conduct* for more details) says at page 35:

Example

For credit cards, there may be some risks associated with assessing a consumer as having the capacity to repay the contract based solely on being able to meet the minimum monthly repayments. If, by paying only the minimum monthly repayments, the consumer is likely to take a long period of time to repay the maximum limit on the card, credit licensees should consider whether this would meet the consumer's requirements and objectives (i.e., taking a number of years to repay a relatively small debt, and paying high amounts of interest on this debt).

If the responsible lending provisions apply, the consumer's financial situation has not changed, and it would take the consumer more than two years to pay off the debt if they cut the card up and stopped using it, then it is worth raising a dispute. Of course, the longer it would take the consumer to pay the debt off, the stronger the case.

The ASIC credit card calculator, available at www.moneysmart.gov.au is a useful tool for calculating how long a consumer would take to pay off the debt. You must first calculate how much the consumer can afford to pay based on their income and expenditure. Next, you enter the details of the contract into the calculator. Then you enter the amount the consumer can afford into the Choose faster repayment field to calculate the number of years it will take to pay off the debt at the current interest rate. (Note: Do not simply use the minimum repayment calculation, as this will reduce the minimum repayment as the debt reduces, exaggerating the number of years required to pay the debt).

Some examples of arguably unsuitable credit card debts

- The client is on Centrelink and the credit card debt is over \$3,000 with an interest rate of 19%. He has \$50 per month or less available income to pay this debt. He has no other debts.
 - The credit card limit was increased when the consumer could not afford to make the required repayments on their other debts.
 - The client was meeting her minimum repayments and occasionally paying extra. Her balance, however, never dropped below 50% of the available limit and the general trend of the balance was upward over time. The client was then offered a limit increase, gradually maxed out the card over a number of months, and went into default.
-

Client circumstances where an unjustness argument should be considered:

- The consumer did not receive the benefit of the loan
- The consumer could not understand the meaning and consequences of the loan for example, illiteracy, non-English speaking background, disability
 - › Unfair tactics were used
 - › The consumer was misled about the loan
 - › The credit provider knew or ought to have known the consumer did not understand what was happening or took advantage of the consumer

The above list is not exhaustive.

- *Remember: If the responsible lending provisions do not apply then unjustness may be the main argument. For loans granted prior to 1 July 2010 (non-bank finance companies) or 1 January 2011 (all credit providers) responsible lending is not available as an argument.*

Each consumer case is different. The strength of each case will depend on the circumstances.

Arguing unjustness or unsuitability

There are two relevant parts of the Credit Law:

- Responsible lending conduct division 3–2 of *National Consumer Credit Protection Act 2009* (for new credit card contracts or limit increases after 1 January 2011)
- Section 76 of the National Credit Code (s. 70 of the Consumer Credit Code)

Before you raise a dispute with the credit provider

- Get the relevant details and evidence of the consumer's income at the time the credit or credit limit increase was granted.
- Get details of the amount and timing of the credit limit increases from the credit provider if the consumer does not remember the details. (See *How to Guide: Requesting documents and Sample letter: Requesting documents*.)
- For all loans, consider your clients personal circumstances:
 - › Have they obtained credit before – are they sophisticated or naive
 - › Were they misled or coerced by a third party?
 - › What is their age, background and literacy skills?
- For loans covered by the responsible lending provisions, consider–
 - › Did the credit provider make reasonable enquiries about the consumer's financial situation?
 - › Did the credit provider take reasonable steps to verify the consumer's financial situation?
 - › What else did the credit provider already know about the consumer (such as that their Centrelink or salary is paid into an account with the same bank, or their repayment history on this card or another loan)?
 - › Did the credit provider make reasonable enquiries about the consumer's objectives and requirements? (Ask for a copy of the assessment required under s. 129 of the NCCP.)
 - › Is the loan unsuitable having regard to all the above?

- For all loans, consider–
 - › Could the consumer have met their obligations under the loan without substantial hardship? Could the lenders have known this by reasonable enquiry of the debtor?
 - › Is there anything else about the loan contract, or the circumstances in which it was entered, to suggest that the loan might be unjust? (See the relevant list of factors in Chapter 12 – Unjustness.)
- Think about the likely outcome . Will the dispute achieve a workable outcome for the consumer?
- Explain to the consumer that the card is always cancelled (and never to be reused) in this type of dispute. You cannot reasonably argue for a debt to be reduced while the consumer continues to run up debt!

Why is the outcome so important?

Sometimes, even if you win the unjustness or unsuitability case, the debt is not reduced sufficiently to avoid the consumer needing to consider going bankrupt. This is because the consumer will usually be required to repay any money for which they received a benefit.

The best–case scenario (if you can show unjustness or unsuitability) is:

- The debt is reduced to the amount the consumer could afford if the loan had been properly assessed to be repaid without substantial hardship
- All interest and fees are reversed on the amount above the last limit increase that was affordable
- The repayments made to date are deducted from the amount remaining
- The consumer needs to make repayments on the remaining debt

If the consumer was granted a series of limit increases up to \$20,000 while they were working and then received further limit increases after they lost their job and became permanently disabled, the outcome would only get the debt back down to \$20,000. If the consumer still cannot afford to repay this reduced amount, then the best hope is to negotiate a lower debt (that is affordable) or a release on compassionate grounds.

EDR: unsuitability and unjustness

It is recommended that all disputes about unsuitability and unjustness be raised in EDR if you are unable to resolve the dispute with the credit provider. If legal action is threatened or commenced, you should consider lodging immediately in EDR. The relevant EDR scheme for almost all credit card disputes is the Financial Ombudsman Service. The way FOS will consider the dispute is very relevant to raising a dispute on unjustness.

As EDR involves a process of facilitating negotiation, almost all unjustness disputes will be resolved by negotiation. It is recommended that you recognise this and be prepared to make an offer to settle the dispute. A sample letter is attached you can use to send to the credit provider.

- *Remember: You can often get a better settlement in negotiation than if the matter proceeded to determination in EDR!*

Hints for EDR:

- Read the FOS approach to responsible lending
 - Keep negotiating
 - Recommend the consumer make the payments you are trying to negotiate as a final outcome—this is a gesture of good faith.
 - Make sure you respond by all relevant deadlines
 - If you are relying on your client’s limited English or other personal factor, consider what evidence you can get to back this assertion up
 - Get advice if anything tricky comes up
- *FOS cannot make a determination about a repayment arrangement unless it is on the grounds of financial hardship. If you are proceeding to determination at FOS you must raise unjustness and financial hardship.*

Time limit problems

You need to check when the loan contract was entered or refinanced as soon as possible so you are aware of any potential time limits that may expire soon.

The FOS and CIO time limits for unjustness are:

- Within two years of the date the contract is rescinded, discharged or otherwise comes to an end; and
- Where, prior to lodging the Dispute with EDR the consumer received an IDR Response in relation to the Dispute from the Financial Services Provider – within two years of the date of that IDR Response.

Whichever is later.

The FOS and CIO time limit for responsible lending is:

- within six years of the date when the consumer became aware (or should have reasonably become aware) of the loss; or
- Where, prior to lodging the Dispute with EDR the consumer received an IDR Response in relation to the Dispute from the Financial Services Provider – within two years of the date of that IDR Response.

Whichever comes first.

- *If you or the consumer have raised a dispute with the credit provider (and received a response), you should always seriously consider lodging a dispute in EDR straightaway if the dispute remains unresolved.*

Credit limit increases may occur over many years, with the consumer able to maintain minimum repayments by paying income onto the debt and then using the card for living expenses. The time limit means that the original credit granted and all limit increases can be reviewed as part of the dispute.

If EDR is unsuccessful, you can seek legal advice about going to court and the relevant time limits are:

- Unjust contracts: two years from the date the contract is rescinded, discharged or otherwise comes to an end. This means the time limit cannot expire while the debt remains outstanding and there is no court judgment.
 - Responsible Lending Conduct: (If the contract was entered, or the relevant limit increases occurred after 1 January 2011), six years from the date of the granting of the credit.
- *Remember: File in EDR straight after receiving a final response from IDR. Be aware of the time limits for FOS & CIO for different types of complaint*

Sample letter: Challenging a lending decision—credit cards & personal loans

Date

Credit provider

(Write to the IDR contact person for the credit provider available at www.fos.org.au or www.cio.org.au. – use search for members)

Address

“Without prejudice” (only if making a settlement offer)

Dear,

RE: Client name

Type of loan:

Account number:

I am assisting (client name) in relation to the above loan account.

Please find attached an authority to release information, signed by my client.

My client wishes to raise a dispute about the granting of his/her credit card and/or credit card limits. My client contends that (name of credit provider) has granted credit to my client when you knew or should have known my client could not afford to repay the debt without substantial hardship.

My client’s circumstances

My client instructs me that:

Example only of matters to mention

- My client’s sole source of income is Centrelink benefits since 1996. My client receives the Disability Support Pension. Evidence of my client’s income is attached.
- My client has a number of chronic illnesses, including emphysema.
- My client is 62 years old.
- My client obtained a credit card from you on or about 2005 with an initial limit of \$2,000. Since that time there have been three increases in her credit card as follows:
 - Increase from \$2,000 to \$3,000 in 2006
 - Increase from \$3,000 to \$5,000 in 2011
 - Increase from \$5,000 to \$7,000 in 2013

My client’s dispute

My client contends that:

She could not pay the increased minimum repayments without substantial hardship for the limit increases after \$2,000.

The increased limits are unjust and/or unsuitable under:

- Section 76 of the *National Credit Code*.and/or
- The Responsible Lending provisions of the *National Consumer Credit Protection Act 2009*.

Settlement Offer

My client wishes to offer to settle this dispute on the following basis:

Example of a settlement offer

- The debt is reduced to \$2,000.
- My client repays the debt at \$50 per month.
- No interest or fees to be charged.
- No default listing on my client's credit report.

Please respond by / / .

I assume you will not take any further action against my client (including making any adverse listing on my client's credit report) while you are investigating my client's dispute and considering the above offer. If this assumption is incorrect, please advise me in writing immediately.

Yours faithfully,

How to Guide: Challenging a lending decision—home loans

This How to Guide covers challenging home loans as unjust or unsuitable. This Guide should be read in conjunction with *Chapter 11 – Responsible lending conduct* and *Chapter 12 – Unjustness*.

Some home loans are arguably unjust or unsuitable.

Some common examples

- Where the credit provider made no assessment of the consumer's ability to repay. These are often called "lo-doc" or "no-doc" loans. The consumer usually self-certifies their own income.
- Predatory home loans are usually high interest loans, often as a second mortgage. These loans all seek to avoid the Credit Law with the use of a Business Purpose Declaration. They may involve self-certification, or false application information, or they may be blatant asset-based lending.
- Home Loans where the finance broker has put false information in the loan application.
- For loans covered by the new responsible lending conduct provisions, there may be loans that the consumer can afford that are nevertheless unsuitable. See *Chapter 11 – Responsible lending conduct*.

☛ *Remember: If the consumer deliberately lied on the loan application then this is obtaining credit by deception. If the consumer was a willing and knowing participant in this then it is very difficult to argue a loan is unjust.*

Before launching into allegations of unjustness or unsuitability, you need to find out some information from the consumer:

- Overall financial situation including outstanding debts and current income
- Overall financial situation including outstanding debts and income at the time the consumer applied for the loan
- What the consumer recollects of any conversations with the credit provider or broker when the loan was being considered and applied for
- Other information relevant to the unjust contracts check list (See *Chapter 12 – Unjustness*)

You also need to request all relevant documents including: (See *How to Guide and sample letter on requesting documents*):

- The loan application
- Loan contract and mortgage
- Any notices under the NCC
- Copies of all account statements
- Copy of the assessment required under s. 129 of the NCCP. This will be loans entered from 1 July 2010, or 1 January 2011, depending on the type of credit provider (See *Chapter 11 – Responsible lending conduct* for more details)

So when is a home loan arguably unjust or unsuitable?

For loans covered by the responsible lending conduct provisions, whether:

- The consumer could repay the loan without substantial hardship; and/or
- the loan met the consumer's requirements and objectives.

For unjustness, the client circumstances which should be considered:

- The consumer did not receive the benefit of the loan eg. it was given to their child. Although it is noted that people can gift money so it is important to show that unconscientious advantage was taken of the consumer
- The consumer could not understand that their home may be sold in the event of default. The consumer may not have understood this because of for example, illiteracy, non-English speaking background, disability
- Unfair tactics were used.
- The consumer was misled about the loan. For example, the consumer was told they could not lose their home
- The credit provider knew or ought to have known the consumer did not understand what was happening or took advantage of the consumer
- Whether the could afford to repay the loan without substantial hardship.

The above list is not exhaustive. With unjustness, all the factors are considered in deciding whether a loan is unjust. One factor of unjustness may not be sufficient.

- *Remember: If the responsible lending provisions do not apply then unjustness may be the main argument. For loans granted prior to 1 July 2010 (non-bank finance companies) or 1 January 2011 (all credit providers) responsible lending is not available as an argument.*

Some examples:

- The client is on Centrelink. Consumer obtains a home loan for \$250,000 and certifies that her projected income will be \$60,000 on the basis she may get a job. She told the broker she was on Centrelink. She refinances an existing home loan of \$200,000 and borrows \$50,000 extra. The only way to repay the loan is to sell the home.
- A consumer has a home loan of \$200,000 and is barely managing the payments. There have been several defaults in the last few years on the existing loan. The consumer decides to borrow another \$20,000 for renovations. The credit provider approves the loan and the consumer defaults on the increased loan on the first repayment.
- A consumer is seeking a loan to build a home. The consumer wants to pay the loan off over 25 years. The credit provider convinces the consumer to borrow a little more than they thought they needed by structuring the loan as interest only for the first three years. The consumer manages the repayments for the first three years, but defaults almost immediately when the repayments increase. Worse, the value of property in the area has decreased and the consumer, who has not reduced the balance at all in the interest only period, is facing a potential negative equity situation.
- A consumer is paying off a loan comfortably when a broker offers to assist him to pay off his home loan faster. The broker convinces the consumer to switch to a line of credit loan with a linked credit card on the basis that paying the consumer's entire salary into the home loan and living off the credit card until the end of the month will cut years off the loan. The consumer makes the switch but discovers that the increased interest rate more than negates any savings he can make. He also paid the broker a fee of several thousand dollars to set up the loan.

Each case is different. Some cases will be easier to win than others. The result may also be different depending on when the loan was entered (which law applies), and the personal characteristics of the consumer (a comparatively well-educated consumer may have trouble establishing that a loan was unjust).

What is “asset lending”?

“Asset lending” is when the credit provider gives a loan with no interest in the consumer's ability to pay but knowing the loan will be repaid from the sale of the home. Arguably, this is an unjust loan. If the responsible lending conduct provisions apply, there is a presumption that if the only way a consumer could meet their obligations under a loan contract is to sell their home, then the loan may be unsuitable. This does not mean that asset lending is illegal, only that the onus is on the credit provider to prove that such a loan is not unsuitable.

Arguing unjustness or unsuitability

There are two relevant parts of the Credit Law:

1. Responsible lending conduct division 3–2 of *National Consumer Credit Protection Act 2009* (for new loans, refinances, or limit increases from 1 July 2011, or 1 January 2011, depending on the type of lender)
2. Section 76 of the *National Credit Code* for loans

Before you raise a dispute with the lender:

- (If possible) make sure you have all relevant documents.
- Make sure you have a detailed statement from your client about what happened when they got the loan. This needs to cover–
 - › Why they got the loan?
 - › What were they told about the loan? What explanation was received about the loan and the consequences of the loan?
 - › Did they get a benefit from the loan?
 - › Financial position at the time of obtaining the loan.
- For loans covered by the responsible lending provisions, consider–
 - › Was the credit provider licensed (or registered)?
 - › Did the lender make reasonable enquiries about the consumer’s financial situation?
 - › Did the lender take reasonable steps to verify the consumer’s financial situation?
 - › What else did the lender already know about the consumer (such as that their Centrelink or salary is paid into an account with the same bank, or their repayment history on another loan)?
 - › Did the lender make reasonable enquiries about the consumer’s objectives and requirements?
 - › Is the loan unsuitable having regard to all the above?
- For all loans, consider–
 - › Could the consumer have met their obligations under the loan without substantial hardship? Could the lender have discovered this by making reasonable enquiries?
 - › Is there anything else about the loan contract, or the circumstances in which it was entered, to suggest that the loan might be unjust?
- Think about the likely outcome. Some considerations–
 - › Will the consumer have to sell their home even if successful with the unjustness dispute?
 - › Should the consumer be continuing with making repayments?
 - › Will there be a large shortfall if the home has to be sold?
- A valuation of the property from local real estate agents (as an indication of the value of the property).

What if there was a broker involved in setting up the loan?

If there is a broker involved, you will usually need to lodge a complaint about the broker as well (which may involve complaining to two different EDRs). If your complaint is successful, responsibility may be split between the broker and the credit provider depending on the circumstances. You will need to get any relevant documents from the broker also. If the responsible lending conduct provisions apply, you should request a copy of the preliminary assessment by a credit assistance provider under the NCCP, and ask all the same questions included under unsuitable lending above in relation to the broker’s role. (See *Chapter 13 – Finance brokers* for more information on problem solving in relation to brokers.)

Why is the outcome so important?

Sometimes, even if you win the case under any of these provisions, the debt is not reduced sufficiently to allow the consumer to keep their home.

The best-case scenario (if you can show unjustness or unsuitability) is:

- The debt is reduced to the amount that the consumer received as a benefit. For example, if the consumer—
 - › Bought a home, this is a benefit
 - › Refinanced another loan or loans, this is a benefit
 - › Borrowed money to renovate their home, this is a benefit
- The set-up costs for the loan are reversed
- The interest is still payable on the loan (although may be reduced)

If the consumer cannot afford to repay the loan after successfully arguing the loan is unjust or unsuitable, they need to think about selling their home. The big question will then be whether there is equity in the home or negative equity.

Equity means that the sale price for the home is higher than the loan. If the equity is small (under \$20,000) then it is likely some of that equity might be reduced because of the costs of selling and possible legal costs and default fees if the credit provider is proceeding with enforcement action. It is recommended that the consumer sell the home and try to obtain the best price.

- *Don't forget to reassure the client that if there is equity they will get that money even if the credit provider sells the house.*

Negative equity means that the sale price is less than the loan. This means that after the home is sold the consumer will still owe the credit provider money. How much money will be owed is important. There are three options:

1. Make a repayment arrangement on the remaining debt. If the consumer is likely to want to take this option then they should continue to try to make repayments while the home is sold. This will reduce the amount owing when the home is sold.
2. Request that the remaining debt be waived.
3. Consider bankruptcy.

If the negative equity is large and bankruptcy is inevitable anyway due to multiple debts, the best solution is for the consumer to surrender the home as soon as they have found somewhere else to live.

Are there circumstances when it is possible to keep the home?

Yes. This will be where the home loan is not too large and a reduction in the amount could make a repayment arrangement workable. If your client is over 55 a reverse mortgage may be a possible remedy to consider.

Are there circumstances where the consumer will be repaid?

Compensation for loss is available under the new responsible lending provisions. This would usually only be likely if the home is sold with little or no equity. For example, if a consumer had considerable funds from a compensation payout or a previous property settlement prior to getting the loan but little income, and those funds were depleted by set-up costs, interest, default fees, and enforcement costs, some compensation may be payable if the loan was found to have been unsuitable. Any amount payable would still need to be set off against the benefit obtained by living in the home.

EDR and unjustness

If legal action is threatened or has commenced, you should file in EDR immediately. It is essential to file in EDR before the credit provider gets judgment. You cannot get into EDR after judgment to dispute unjustness.

It is recommended that all disputes about unjustness be raised in EDR in the first instance. Therefore, the way EDR will consider the dispute is very relevant to raising a dispute on unjustness.

As EDR involves a process of facilitating negotiation, almost all unjustness disputes will be resolved by negotiation. It is important you make sure that you have good evidence to support your case. It is also recommended you recognise and be prepared to make an offer to settle the dispute. A sample letter is attached you can use to send to the credit provider.

- *Remember: You can often get a better settlement in negotiation than if the matter proceeded to determination in EDR.*

Hints for EDR:

- Read the FOS approach to responsible lending and bulletin 60 on maladministration in the decision to lend for secured loans.
- Keep negotiating.
- If the aim is to keep the home, recommend the consumer make the payments you are trying to negotiate as a final outcome. This is a gesture of good faith.
- Make sure you respond by all relevant deadlines.
- Get advice if anything tricky comes up.

FOS cannot make a determination about a repayment arrangement unless it is on the grounds of financial hardship. Therefore, if you are proceeding to determination at FOS you must raise unjustness and financial hardship.

Time limit problems

You need to check when the loan contract was entered or refinanced as soon as possible so you are aware of any potential time limits that may expire soon.

The FOS and CIO time limits for unjustness are:

- Within two years of the date the loan was rescinded, discharged or otherwise come to an end; and
- Where, prior to lodging the Dispute with EDR, the consumer received an IDR Response in relation to the Dispute from the Financial Services Provider – within two years of the date of that IDR Response.

Whichever is the later.

The FOS and CIO time limit for responsible lending is:

- within six years of the date when the consumer became aware (or should have reasonably become aware) of the loss; or
- Where, prior to lodging the Dispute with EDR the consumer received an IDR Response in relation to the Dispute from the Financial Services Provider – within two years of the date of that IDR Response.

Whichever comes first.

If you or the consumer have raised a dispute with the credit provider (and received a response), you should always seriously consider lodging a dispute in FOS straightaway if the dispute remains unresolved.

Under the NCC the time limit for unjust contracts is two years from the date the contract is rescinded, discharged, or otherwise comes to an end. This means the time limit cannot expire while the debt remains outstanding and there is no court judgment. FOS and COSL may change their rules in the near future to reflect this, so it is important to check the relevant time limits at the time you are considering a potential complaint.

The time limit under the NCCP for breaches of the responsible lending obligations is six years from the date of any breach, which will usually be six years from the granting of the loan.

Remember:

- File in EDR straight after receiving a final response from IDR
- Be aware that if the loan has been refinanced there is a two year time limit from the date the loan was refinanced
- If arguing responsible lending be aware of the six year time limit
- Be aware that different time limits apply for different types of complaint

Sample letter: Challenging a lending decision—home loans

Date

Credit provider

(Write to the IDR contact person for the credit provider available at www.fos.org.au or www.cio.org.au. – use search for members)

Address

“Without prejudice” (only if making a settlement offer)

Dear,

RE: Client name

Type of loan:

Account number:

I am assisting (client name) in relation to the above loan account.

Please find attached an authority to release information, signed by my client

My client wishes to raise a dispute about the granting of his/her loan. My client contends that (name of credit provider) has granted my client a loan when it knew or should have known my client could not afford to repay the debt or not without substantial hardship.

My client’s circumstances

My client instructs me that:

Example only of matters to mention

Delete the options that are not applicable:

1. My client obtained a loan/lease from (name of credit provider) of \$(insert amount borrowed) for (insert purpose of the loan/lease) on / / and/or my client received limit increases of: insert details of limit increases – amounts and dates.
2. At the time of the seeking the loan, my client’s financial position was as follows: insert details of client’s income, expenditure, assets, and debts. (Note: if there are multiple limit increases or refinances details of the client’s circumstances at each point will need to be provided).
3. My client’s situation at the time of getting the loan was: age, number of dependents, any illness or disability, employed, any other relevant factor.
4. My client’s requirements and objectives in relation to the loan were: insert details of client’s requirements and objectives. Examples might include – refinancing his home loan to save money, to consolidate debts in order to save money, to purchase a motor vehicle. How much details will depend on the nature of the complaint and the complexity of the product.
5. My client was told: insert details of any conversations or representations that are relevant to the dispute.
6. My client could not afford the loan. Give details of any hardship
7. The loan did not meet my client’s objectives and requirements because: insert details of why loan was unsuitable.
8. (name of credit provider) failed to:
 - Make reasonable enquiries as to my client’s financial situation;
 - Take reasonable steps to verify my client’s financial situation;
 - Make reasonable enquiries as to my client’s needs and objectives;

- Adequately assess whether my client could meet the financial obligations under the loan without substantial hardship;
 - Adequately assess whether the loan granted met my client's requirements and objectives.
9. My client's loan is unjust under s. 76 of the NCC because: (address any of the list of factors included in s. 76 (See *Chapter 12 – Unjustness*) that are relevant to the case).
10. I attach copies of:
- My client's completed loan application;
 - My client's loan contract;
 - A copy of the assessment provided by the (name of Credit Provider) under the NCCP Act (if applicable);
 - A copy of correspondence with (name of credit provider) in relation to this dispute;
 - Any supporting evidence to establish the client's financial situation at the time of the loan being granted.
11. My client is also in financial hardship: (insert details of client's income, expenditure, assets, and debts).
12. My client's situation now is: age, number of dependents, any illness or disability, employed, any other relevant factor.

My client's dispute

My client contends that:

1. He/she/they could not pay the home loan repayments without substantial hardship.
2. The loan is unjust and/or unsuitable under:
 - Section 76 of the *National Credit Code*;
 - Section 25.1 of the Code of Banking Practice (if a subscribing bank) or Section 7 of the Mutual Banking Code of Practice (if a subscribing credit union or building society) (if applicable);
 - The Responsible Lending Conduct provisions of the *National Consumer Credit Protection Act 2009*.

Settlement Offer

My client wishes to offer to settle this dispute on the following basis:

- My client has or will put their home on the market to be sold. My client will provide evidence of this including a copy of the contract of sale and contract with the real estate agent within 14 days of the date of this letter;
- My client will exchange contracts on the sale of their home within four months of your acceptance of this offer;
- All set-up costs are refunded, including any interest charged on those costs;
- All default fees and enforcement costs are refunded;

No default listing made on my client's credit report.

Please respond by / / .

I assume you will not take any further action against my client (including making an adverse credit listing on your client's credit report) while you are investigating my client's dispute and considering the above offer. If this assumption is incorrect, please advise me in writing immediately.

Yours faithfully,

EDR Guide: Responsible lending dispute

- The contact details for both EDR schemes are:
 - › FOS ph: 1800 367 287 and www.fos.org.au
 - › CIO ph: 1800 138 422 and www.cio.org.au
 - Applying online to EDR is processed faster and you get confirmation of lodgment quickly.
 - You can apply online for your client.
 - EDR stops all legal action while the dispute is being considered
 - If court proceedings have commenced, always lodge online and make sure you get confirmation of successful lodgement and that you state in the application that court proceedings have commenced.
-

This guide is for completing an application to EDR. There are a number of questions in the form but this guide concentrates on answering the problem description and the requested resolution.

Unjust/Unsuitable contracts and EDR

Both EDR Schemes have the power to review lending decisions as either unsuitable under the NCCP or unjust under s. 76 of the NCC. The relevant rules are:

FOS – Terms of Reference:

- Clause 8.2 Disputes must be resolved according to legal principles, among other things;
- Clause 9.1 (a)–(d) & 9.2 FOS can order the repayment of a sum of money, forgiveness or variation of a debt, the release of security for a debt, repayment, waiver, or variation of a fee, a variation in the applicable interest rate on a loan, the reinstatement or rectification of a contract, and compensation for direct financial loss.

CIO – Rules

- Clause 1.5 refers to relevant legal requirements or rights provided by law to consumers in relation to the subject matter of the Complaint;
- Clause 9 of the CIO rules refers to the ability to order the payment of a sum of money, the variation of a debt, the release of security for debt, the repayment, waiver or variation of a fee, a variation in the applicable interest rate on a loan, the discontinuation of enforcement action, require the member (credit provider or broker) not to enforce a default judgment, the release of a complainant from a contract, and compensation for direct loss.

Complaint Forms

The complaint forms for both EDRs are available online. You can also lodge online, which can be vital if the dispute is urgent. If you don't have all the information and evidence you need, lodge with the best information you have at your disposal and forward the remainder as soon as possible.

Most of the form is self-explanatory. The following is a guide to the two questions requiring considerable detail.

Dispute/Complaint Details

Delete the options that are not applicable:

- My client obtained a loan/lease from (name of credit provider) of \$(insert amount borrowed) for (insert purpose of the loan/lease) on / / and/or my client received limit increases of: insert details of limit increases – amounts and dates.
- At the time of the seeking the loan, my client’s financial position was as follows: insert details of client’s income, expenditure, assets, and debts. (Note: if there are multiple limit increases or refinances details of the client’s circumstances at each point will need to be provided).
- My client’s situation at the time of getting the loan was: age, number of dependents, any illness or disability, employed, any other relevant factor.
- My client’s requirements and objectives in relation to the loan were: insert details of client’s requirements and objectives. Examples might include – to refinance his home loan to save money, to consolidate debts in order to save money, to purchase a motor vehicle. How much detail will depend on the nature of the complaint and the complexity of the product.
- My client was told: insert details of any conversations or representations that are relevant to the dispute.
- My client could not afford the loan. Give details of any hardship.
- The loan did not meet my client’s objectives and requirements because: insert details of why loan was unsuitable.
- (name of credit provider) failed to–
 - › Make reasonable enquiries as to my client’s financial situation
 - › Take reasonable steps to verify my client’s financial situation
 - › Make reasonable enquiries as to my client’s needs and objectives
 - › Adequately assess whether my client could meet the financial obligations under the loan without substantial hardship
 - › Adequately assess whether the loan granted met my client’s requirements and objectives
- My client’s loan is unjust under s. 76 of the NCC because: (address any of the list of factors included in s. 76 (See *Chapter 12 – Unjustness*) that are relevant to the case).
- I attach (or I will send) copies of–
 - › My client’s completed loan application
 - › My client’s loan contract
 - › A copy of the assessment provided by the (name of Credit Provider) under the *NCCP Act* (if applicable)
 - › A copy of correspondence with (name of credit provider) in relation to this dispute;
 - › Any supporting evidence to establish the client’s financial situation at the time of the loan being granted
- My client is also in financial hardship: (insert details of client’s income, expenditure, assets, and debts).
- My client’s situation now is: age, number of dependents, any illness or disability, employed, any other relevant factor.

Fair and reasonable resolution of the dispute requested

My client requests the following resolution of his/her/their dispute (Delete the options that are not applicable): Insert details of settlement sought.

Note: It may not always be a good idea to outline the desired resolution of the dispute until you have more evidence. You do not have to ask for a resolution at all. So you can either ask for a generic resolution such as:

- The contract be varied and compensation paid to the client on the grounds that the loan is unsuitable under the NCCP; or
- Determine the matter based on the principles of unjustness, responsible lending conduct and a repayment arrangement on the grounds of financial hardship.

Examples of possible resolutions

For example (for a credit card)

- The debt is reduced to \$2,000.
- My client repays the debt at \$50 per month.
- No interest or fees to be charged.
- The credit card is cancelled (usually already cancelled so delete if not applicable).
- No default listing on my client's credit report.

Or for an unjust home loan:

- The house is put on the market.
 - My client has six months to exchange contracts for the sale of the home
 - All set up costs are refunded, including any interest charged on those costs.
 - All default fees and enforcement costs are refunded.
-

How to Guide: Requesting documents

Why do you need to get loan documents?

You should consider requesting loan documents when:

- You are assisting the consumer with a dispute and you do not have all of the relevant documents.
- The debt is very old (particularly when it is over six years old) and the consumer does not hold all relevant account statements (take care to avoid re-starting time limits) .
- The consumer believes the amount owing is incorrect but is unable to verify this because they do not have a complete set of account statements.
- The consumer does not have their own copies of the loan documents. This can be because they have been lost, or another person has them (eg, the joint borrower).
- The consumer has some copies of their loan documents but not others.
- You need copies of documents that the consumer will not have (or would ever have had), eg, a copy of the loan application form or the preliminary assessment from the credit provider, lessor, or credit assistant (finance broker).

Remember you do NOT have to:

- Explain why you do not have the documents
- Explain why you want the documents
- Obtain the consent of any joint borrower

What documents do you need and when?

It is recommended that you tailor your request for documents. This means that you don't ask for documents you don't need. It may become obvious later in the dispute that you need to request further documents – you should make a further request then.

Credit providers can charge for copying and providing the requested documents. Those charges must be reasonable. At the moment, credit providers do not usually charge for copies of documents. This could change. For this reason, it is important to request only the documents actually needed.

- So, what do you request and when?
- If you are requesting financial hardship, you may not need to request documents at all. You should ask your client to keep copies of any account statements they are receiving in case fees have been charged (which may need to be challenged if charged when an arrangement has been made).

- If you are disputing on the basis of unjustness (for a home or personal loan), you will need copies of all relevant documents including copies of the loan application, credit contract, account statements, notices and preliminary assessment (if applicable).
- If you are disputing on the basis of unjustness in relation to a credit card, you need a copy of the loan application form and details of any limit increases (when and how much).
- If the consumer wants to repay the loan in full, you will just need a payout figure with details of how it is calculated.
- If you are disputing the amount owed, you should request copies of account statements.
- If you are arguing the debt is statute barred (Check the law in your State or Territory), you may need copies of loan account statements to check the date of the last payment.

Credit Law

Under the National Credit Code (NCC), you can request certain documents and information from the credit provider. To check if the Credit Law applies to the loan see *Chapter 1* of the Credit Law Toolkit.

The documents and information that borrowers, mortgagors, or guarantors can request are:

- (s. 185(1) NCC) Copies of–
 - › Any loan contract
 - › Any credit related insurance contracts in the credit provider’s possession. For example, consumer credit insurance
 - › A copy of any notices previously given to you under the NCC. For example, a default notice
- (s. 36(1) NCC) A statement of the following–
 - › Current balance of your loan account(s)
 - › Any amounts credited or debited during the term of your loan contract(s)
 - › Any amounts currently overdue and when they became overdue
 - › Any amount currently payable and the date that it became due
- (s. 83 NCC) A loan payout figure with details of the items that make up the amount. For example, interest and fees.

How long does the credit provider have under the Credit Law to give me the requested documents?

- Copies of contracts and notices (s. 185 NCC) – 14 days from the date of the request if the loan was given less than one year ago, or within 30 days from the date of the request if the loan was given more than a year ago.
- Statement of account (s. 36 NCC) – 14 days from the date of the request if the loan was given less than one year ago, or within 30 days from the date of the request if the loan was given more than a year ago.
- Payout figure (s. 83 NCC) – the credit provider has 7 days after the request for the payout figure is given to the credit provider.

National Consumer Credit Protection Act

Credit Providers and Credit Assistants are required to make a suitability assessment under s. 129 of the NCCP before entering into or increasing the credit limit of a credit contract.

The consumer can request a copy of the credit assessment either before the credit contract is entered, or up until seven years after the date of the credit contract (s. 132 NCCP). If you are considering challenging a loan as either unjust or unsuitable, you should request a copy of the assessment if the consumer does not already have a copy.

How do I ask for the documents and information listed above?

A sample letter you can use as a guide is Sample letter: Requesting documents. Keep a copy of the letter you send.

What if there is a court judgment?

The Credit Law does not apply to requesting documents. The credit provider does not have to supply the documents but usually will if the documents are requested. Get advice if the credit provider refuses to supply requested documents.

What if the Credit Law does not apply?

You can still request a copy of the consumer's file pursuant to the Privacy Principles (under the *Privacy Act*). You may also be entitled to request documents if the credit provider subscribes to a Code of Practice:

- Code of Banking Practice (section 13) (www.codecompliance.org.au to check if a bank subscribes to the Code of Banking Practice)
- Customer Owned Banking Code of Practice (section 19) (www.abacus.org.au to check if a credit union or building society subscribes to the Mutual Banking Code of Practice)

What do I do if the Lender refuses to give me the requested documents?

- Raise a dispute in EDR and request the documents; or
- Complain to the Federal Privacy Commissioner (Phone: 1300 363 992 or www.privacy.gov.au); or
- Make an application to the Federal Circuit Court to obtain an order that the credit provider must provide the requested documents as required under the Credit Law. Get legal advice before you do this.

Sample letter: Requesting documents

Date

Credit provider

(Write to the IDR contact person for the credit provider available at www.fos.org.au or www.cio.org.au. – use search for members)

Address

Dear,

RE: Client name

Type of loan:

Account number:

I am assisting (client name) in relation to the above loan account.

Please find attached an authority to release information, signed by my client.

My client requests copies of the following documents and information:

Delete the documents not required

1. Copy of the credit contract.
2. Copy of the loan application form(s).

Finance brokers only - copy of the preliminary assessment

Credit cards only - details of the original limit and any limit increases on my client's credit card account including:

1. The amount of the original limit granted;
2. The date of the limit increase;
3. The amount of the limit increase.
4. A copy of the assessment performed pursuant to s. 129 of the *National Consumer Credit Protection Act*.
5. Any credit related insurance contract in your possession.
6. Any notices under the National Credit Code or Consumer Credit Code previously sent to my client.
7. Account statements for the period from / / to / / .
8. A statement of the payout figure as at / / with details of how this amount is calculated.

Please provide the requested information by / / .

If enforcement action is threatened

I assume that you will not take any legal action in relation to the above account until 28 days after the documents and information requested above have been received. If this assumption is not correct, please advise me in writing immediately.

Yours faithfully,

How to Guide: Dealing with debt collectors

There are two types of debt collectors:

1. Agents
2. Assignees

Agents

Agents are debt collectors who are acting on behalf of the credit provider. This means that the credit provider is responsible for the debt collector. You can raise the dispute directly with the credit provider. If the loan is regulated under the Credit Law (See *Chapter 1*) then the credit provider must be a member of an EDR Scheme.

Assignees

Assignees are debt collectors who have bought the debt from the original credit provider. Under the Credit Law, assignees must be in EDR and comply with their Credit Law obligations.

Which type of debt collector are you dealing with?

There are two ways to work it out:

1. Get a copy of a letter to your client from a debt collector. If the debt collector is an agent it will state they are “acting on behalf of” the credit provider or similar. If they are an assignee, they will refer to the assignment of the debt.
2. Ring the debt collector and ask. Remember you will need to send an authority under the *Privacy Act* signed by your client otherwise they will not talk to you.

Step 1 Does your client owe the debt?

Before you advise your client on their options for paying the debt, you need to make sure the client actually owes all of the money.

Ask your client:

- Do they remember the debt?
- Does the amount being claimed seem accurate (remembering interest and fees) would continue to be charged while ever the debt was outstanding)?
- Did they have a repayment arrangement? If so–
 - › Was the repayment arrangement confirmed in writing?
 - › Did they strictly keep to the arrangement?
 - › If not, did they receive another default notice?

- When was the last repayment? Get advice if it is possible the debt is statute barred (See *Chapter 4 – Debt Collection*).
- When the original credit was approved, could the client afford to make the repayments? If not, get advice as the contract may be unjust or have breached the responsible lending conduct provisions of the Credit Law (See *Chapter 11 – Responsible lending conduct and Chapter 12 – Unjustness*).
- Did they receive a notice assigning the debt?
- If there appears to be a problem with the amount claimed or your client has a possible defence:
 - › Get advice
 - › Request documents (See *How to Guide: Requesting documents and Sample letter: Requesting documents*)

If the client is sure they owe part or all of the debt and do not have a defence, then proceed to step 2.

Step 2 Making repayments

If your client cannot afford repayments consider options such as a release on compassionate grounds (see *How to Guide: getting a release*) or bankruptcy.

If your client does not have a defence then your client should begin making repayments. Even if your client is sure they only owe part of the debt claimed your client should still start making repayments to work towards clearing the undisputed amount of the debt while raising a dispute on the amount they believe they do not owe.

You should encourage your client to start making repayments (or continue making repayments) while trying to negotiate a repayment arrangement

Your client should start making repayments because:

- It will start reducing the debt
- It shows that your client is willing to pay
- It gives your client a chance to make sure the repayments they are making are affordable

If your client is in a position to repay the debt in full, or close to this, you may wish to try to negotiate a reduced lump sum settlement. This means that you offer an amount less than the amount claimed (eg, 50–80%). Debt collectors will often consider a reduced lump sum settlement as the debt collector usually buys the debt for a reduced price.

- Do NOT start making repayments if there is a chance the debt is statute barred. Get legal advice.

Step 3 Negotiating a repayment arrangement

It is recommended that you negotiate a repayment arrangement on the grounds of financial hardship. (See *Chapter 3* of the Toolkit, *How to Guide: Financial hardship and Sample letter: Financial hardship*.)

Remember: Debt collectors can be very aggressive. They also usually have very poor financial hardship policies in place. You will need to consider going to EDR urgently if negotiations are failing.

Always confirm any successfully negotiated repayment arrangement in writing. Do not wait for the debt collector to confirm the arrangement in writing! (See *Sample letter: Confirming a repayment arrangement*.)

EDR

Many debt collectors have now joined EDR. This means that if you have a dispute with a debt collector, or are having difficulty making a repayment arrangement, you can file a dispute in EDR.

As there is a transition period, it is possible some debt collectors will not have joined EDR. If this is the case for your dispute, get advice immediately.

Where the debt collector is an agent?

File in EDR against both the credit provider. You should tell the debt collector that a dispute has been lodged in EDR with the credit provider. The credit provider will deal with the dispute but it helps to keep the debt collector informed as well.

Where the debt collector has purchased the debt (assignment)

If the debt collector owns the debt, it is now responsible for any disputes regarding the debt. You should lodge in EDR against the debt collector.

If the debt collector has issued a Statement of Claim

You need to act fast to file in EDR.

- Immediately work out when the debt collector can obtain judgment
- Make sure you file in EDR well before this time expires
- Keep trying to negotiate with the debt collector

If the debt collector is not in EDR (because of the transition of the Credit Law), get legal advice immediately. Your client may be able to file a defence on the grounds of financial hardship.

Negotiating a repayment arrangement after a court judgment has been obtained

Many debt collectors take legal action quickly to get a court judgment. As you cannot go to EDR after a court judgment, it is essential to go to EDR before the Statement of Claim or Summons expires.

Once the debt collector has a court judgment there are a number of possible consequences, including a garnishee against the client's salary or bank account, or seizure and sale of personal property. If your client owns their own home, there is a real risk of your client being forced into bankruptcy by the debt collector, which can result in the forced sale of the home and up to tens of thousands of dollars in trustee's fees.

If you have a client with a court judgment debt – Get advice!

Debtor harassment

See *Chapter 4 – Debt collection*.

If your client has been a victim of debtor harassment you should encourage your client to:

- Seek compensation in EDR
- Complain to ASIC (see How to Guide: Complaining to ASIC and Sample letter: Complaining to ASIC)
- Refer to specific breaches of the Debt Collection Guideline.

Sample letter: Debtor harassment complaint

Date

Credit provider

(Write to the IDR contact person for the credit provider available at www.fos.org.au or www.cio.org.au. – use search for members)

Address

Dear,

RE: Client name

Type of loan:

Account number:

I am assisting (client name) in relation to the above loan account.

Please find attached an authority to release information, signed by my client.

My client has instructed me to raise a dispute about your conduct in relation to the collection of my client's alleged debt. I also refer to your obligations under the ASIC/ACCC Debt Collection Guideline: for collectors and creditors.

Write the details of your client's experience of harassment by the debt collector. Include dates, times, events, and names of people involved. See *Chapter 4 – Debt collection* for examples of conduct by a debt collector that may be considered debtor harassment. Some examples of harassment appear below:

Example 1:

A representative (name) of your business has been ringing my client very frequently. During the last four weeks, my client has been contacted over 30 times by phone. Some of those phone calls occurred after 9:00 PM.

Example 2:

A representative (name) of your business rang my client at their workplace (name of workplace) and spoke to a co-worker about my client's alleged debt. The representative also asked my co-worker for personal details about my client including my client's home address and phone number. My client was terribly embarrassed and I believe that your conduct caused significant harm to my client's professional reputation.

Example 3:

On or about (date) (name) of your business contacted my client by phone. At that time, my client was told s/he owed a debt. You told my client that if s/he did not pay the debt immediately, the Sheriff would come around and take his/her possessions (including her car to pay the debt). My client has since found out there is no court judgment against her/him that would enable the sheriff to seize his/her possessions.

Example 4:

You told my client that you would not consider a repayment arrangement until a significant up front payment was made. This is a breach of the Debt Collection Guideline.

I demand that the harassment of my client detailed above stop immediately.

I request that all future correspondence in this matter be in writing to me as an authorised representative of my client.

Yours faithfully,

Sample letter: Confirming a repayment arrangement

Date

Credit provider

(Write to the IDR contact person for the credit provider available at www.fos.org.au or www.cosl.com.au. – use search for members)

Address

Dear,

RE: client name alleged debt to (name of creditor)

Reference no.

I am assisting (client name) in relation to the above loan account.

I refer to the telephone conversation with (person's name) of your office on / / .

In that telephone conversation, you agreed to the following repayment arrangement:

For example

1. Repayments of \$200 per month commencing on / / .
2. The repayments to be increased to \$300 per month after three months.
3. Any arrears to be capitalised and the term of the loan extended

As this is an agreed variation to the contract, no further default fees or interest should be charged. It is also my understanding that if my client defaults on this arrangement a further default notice under s. 88 of the *National Credit Code* (being Schedule 1 of the *National Consumer Credit Protection Act*).

Yours faithfully,

How to Guide: Car repossession

There are two parts of car repossession that consumers come to get help with:

1. Trying to stop repossession
2. Trying to get the car back after it has been repossessed

🔑 *Important. You always need to act quickly in car repossession matters! The car is at risk and it can be costly to get the car back.*

If the consumer is in financial hardship

(See How to Guide: Financial hardship – credit cards and personal loans and associated sample letters.)

Step 1 Is the consumer going to be able to repay the loan?

Can't pay

If the consumer cannot make the loan repayments and probably will not be able to afford the repayments in the foreseeable future, it may be best to get permission to sell the car for best available price, or just surrender the car or let it be repossessed. As cars usually depreciate, this will mean there will be a shortfall.

If there is a shortfall, the consumer has three options:

1. Negotiate a repayment arrangement on the shortfall (see How to Guide: financial hardship)
2. Do nothing. It is likely the debt will be sold to a debt collector and court proceedings and enforcement may follow.
3. Compassionate grounds/long term financial hardship waiver/release
4. Consider bankruptcy

Financial hardship

The consumer may be able to pay in the future. Then the aim is to make a repayment arrangement with the credit provider so the car is not at risk of repossession.

Step 2 Work out where the repossession is up to. Has:

- A default notice issued?
- The default notice expired?
- A repossession agent turned up to try to repossess the car?

The car cannot be repossessed if:

- A default notice has not been sent (s. 88 of NCC).
- Default notice has been sent but the time given to rectify the default (at least 30 days) has not expired
- The default has been paid BEFORE the default notice time expires (including any repayment due in the default notice period)
- The amount owing is 25% (or less) of the amount of credit or \$10,000 whichever is the lesser (s. 91 of the NCC). For example, if the amount of credit was \$30,000 if the current loan balance is \$7,500 or less, then the credit provider cannot repossess the car without a court order.
- The car is on private residential property (without a court order or written consent from the consumer)

There are some minor exceptions to the above rules (for example, fraud) and advice should be obtained immediately if the credit provider is seeking to rely on an exception.

If a default notice has not been issued or has been issued and not expired you should aim to have a repayment arrangement in place BEFORE the default notice expires.

If the default notice has expired then it is time to move fast!

Remember once the default notice has expired (and the default has not been fixed):

- The whole loan is payable and
- The credit provider can commence proceedings and/or repossess the car at any time

Step 3 EDR is an important tool when the car is under threat of repossession.

An application to EDR will stop the credit provider taking the car while the matter is in EDR.

A suggested process if the car is under threat of imminent repossession:

- Ask the credit provider not to repossess and request hardship
- If they refuse, file in EDR and request hardship
- The consumer should leave the car on private residential property while negotiating for hardship

If the car is under threat of repossession soon:

- Send a letter or make a phone call requesting hardship.
- Follow up the letter with a call to the credit provider to ask–
 - › That they got the letter requesting financial hardship and
 - › That they agree not to take further action including trying to repossess the car (a stay)
 - › If the credit provider refuses to give a stay and the car is under threat of repossession (default notice expired) then file in EDR
- If the credit provider agrees to the stay, then keep a file note and confirm in writing.
- If the credit provider refuses the consumer's request for financial hardship–
 - › Ring the credit provider to find out why. See if another arrangement can be negotiated that the consumer can afford
 - › Make an application to EDR immediately
 - › Review the consumer's situation to see if their financial position has improved, worsened, or stayed the same
- If the credit provider agrees to the application for financial hardship, you should tell the consumer to make sure–
 - › They keep to the arrangement
 - › If things have not improved seek advice BEFORE the reduced repayment term comes to an end
 - › Make sure all default fees and interest have stopped

☛ *Remember that a hardship notice will stop further action including repossession if it is the only hardship notice in the last 4 months.*

Illegal repossession

Illegal repossession of cars is uncommon. If a car is repossessed in breach of the Credit Law (see list above when a car cannot be repossessed) then:

- Immediately raise a dispute with the credit provider. Request a response within 30 days. If the car is required urgently, give seven days and give reasons as to why the return of the car is urgent.
- If the car is not returned within the time requested, a dispute should be filed in EDR immediately. (See Sample letter: Illegal car repossession.)

- Remember if the car is repossessed illegally, the consumer can claim:
- The return of the car
- Compensation for the loss of the use of the car
- Reimbursement of all enforcement charges

After repossession

After the car has been repossessed, the credit provider must send a notice within 14 days stating:

- The estimated value of the goods
- Enforcement expenses incurred to date
- A statement of the consumer's rights (See Section 3, Chapter 2 –Credit law forms, Form 14)
- The consumer has 21 days from the date of the notice to:
 - Negotiate with the credit provider before the car is sold
 - Pay the arrears and reasonable enforcement expenses (and the usual repayment) to get the car returned and the contract reinstated
- Pay out the loan

After 21 days of the date of the notice, the car may be sold.

So if the consumer wants to avoid the car being sold it is essential that:

- A repayment arrangement has been agreed which includes the return of the car or
- A dispute has been filed in EDR

Otherwise, the car may be sold.

The consumer is in default but they sold the car some time ago!

The loan contract states that the consumer cannot sell the car without the permission of the credit provider. If the consumer sells the car without the permission of the credit provider this is a breach of contract. It entitles the credit provider to make the whole loan payable and repossess the car and/or commence court proceedings. Your client may also be liable to the person who they sold the car to for compensation

It is recommended in this situation that the consumer negotiate to catch up the loan repayments and continue to make the loan repayments until the loan is repaid in full.

If the consumer remains in default and the credit provider becomes aware of the sale of the car then the consumer may be:

- Reported to the Police for fraud
- Unable to go bankrupt on this debt due to the possible fraud

Get advice.

Sample letter: Illegal car repossession

Date

Credit provider

(Write to the IDR contact person for the credit provider available at www.fos.org.au or www.cosl.com.au. – use search for members)

Address

Dear,

RE: Client name

Type of loan:

Account number:

I am assisting (client name) in relation to the above loan account.

Please find attached an authority to release information, signed by my client.

My client has told me that his/her/their car was repossessed in breach of the *National Credit Code* because:

Delete the options that are not applicable:

My client negotiated an agreed repayment arrangement with the credit provider on / / . This arrangement remains in place as my client has kept to the required repayments of \$ per week/ fortnight/month. As there is an agreed repayment arrangement, my client is no longer in default.

My client has not been served with a default notice under the *National Credit Code*.

My client received a default notice dated / / . The 30 days given under this notice to fix the default has not expired or my client has paid the default in full.

The amount owing on the loan is less than 25% of the amount borrowed. Under s. 91 of the *National Credit Code* my client's car cannot be repossessed without a court order.

My client's car was situated on private residential property at the time it was repossessed. My client or the owner of the property did not consent to the repossession. No court order was produced. Under s. 99 of the *National Credit Code* my client's car cannot be repossessed from private residential property without written consent or a court order.

My client's car repossession is in breach of the *National Credit Code*. My client demands:

The return of his/her/their car immediately.

All enforcement costs refunded and interest recalculated.

Compensation of \$ (increasing each week by \$) (amount of costs caused by the inconvenience of having no car).

The return of my client's car is urgently required because (eg, to get to work, take children to school, get to doctor's appointments).

Please respond by / / .

Yours faithfully,

EDR Guide: Illegal car repossession

- The contact details for both EDR schemes are:
 - › FOS ph: 1800 367 287 and www.fos.org.au
 - › CIO ph: 1800 138 422 and www.cio.org.au
 - Applying online to EDR is processed faster and confirmed quickly
 - You can apply online for your client.
 - EDR stops all legal action while the dispute is being considered
 - If court proceedings have commenced, always lodge online and make sure you get confirmation of successful lodgement and that you state in the application that court proceedings have commenced.
-

This guide This guide is for completing an application to EDR. There are a number of questions in the form but this guide concentrates on answering the problem description and the requested resolution.

Goods/car repossession and EDR

- Both EDR Schemes have the power to determine that the goods or car must be returned.

Problem description

My client has told me that his/her/their car/goods were repossessed on / / .

My client contends that the repossession was in breach of the National Credit Code because:

Delete the options that are not applicable:

- My client negotiated an agreed repayment arrangement with you on / / . This arrangement remains in place as my client has kept to the required repayments of \$ per week/fortnight/month. As there is an agreed repayment arrangement, my client is no longer in default.
- My client has not been served with a default notice under the National Credit Code.
- My client received a default notice dated / / . The 30 days given under this notice to fix the default has not expired or my client has paid the default in full.
- The amount owing on the loan is less than 25% of the amount borrowed. Under s. 91 of the National Credit Code my client's car cannot be repossessed without a court order.
- My client's car was situated on private residential property at the time it was repossessed. My client or the owner of the property did not consent to the repossession. No court order was produced. Under s. 99 of the National Credit Code my client's car cannot be repossessed from private residential property without written consent or a court order.

Requested resolution

My client requests the following resolution of his/her/their dispute:

- The return of his/her/their car immediately
- All enforcement costs refunded and interest recalculated
- Compensation of \$ (increasing each week by \$) (amount of costs caused by the inconvenience of having no car)

The return of my client's car is urgently required because (for example, to get to work, take children to school, get to doctor's appointments).

How to guide: Requesting a debt release

Sometimes, the consumer is in such a poor financial and personal situation that the only workable solution is to get a release from the debt or to go bankrupt.

This How to Guide covers when and how to ask for a release from a debt.

- *Remember: Credit providers generally don't agree to release a consumer from a debt lightly. You really need to make your case. Also, this is a request you should make carefully and only when really needed.*

When to consider requesting a release

As a guide, you should consider requesting a release of the debt when:

- The consumer cannot afford the repayments and will not be able to afford the repayments for the foreseeable future
- The consumer has a chronic and debilitating illness (or in particular, a terminal illness)
- The consumer does not have any significant assets that could reasonably be sold to repay the debt
- The consumer is facing bankruptcy and the credit provider would not get any money returned through the bankruptcy because the consumer's assets are protected (for example, household goods)

When not to request a release

As a guide, do not request a release of the debt if:

- The consumer has a possible defence to the debt (although it is possible that you may still want to request a release anyway because even if the defence was successful the amount remaining may still be impossible for the consumer to repay)
- If the debt is secured (the security needs to be surrendered first)
- A release of the debt will not assist the client because they have numerous other debts they cannot afford to repay
- They have assets or savings that could reasonably be used to repay the debt
- The consumer can afford to make some repayments on the debt
- The consumer may be able to gain employment in the foreseeable future

What information to get from the consumer

You need the following:

- Evidence of the consumer's current income (Centrelink receipt)
- Medical certificates
- A statement of financial position/money plan (which the consumer should sign to confirm the details are correct)

What to tell the consumer

It is important that you tell the consumer that:

- The credit provider does not have to agree to a release
- The consumer needs to be open and honest about their financial situation (which may mean obtaining further evidence of their financial or medical situation)
- If the credit provider will not agree to a release other, options will need to be considered

What if the credit provider asks for more information?

The credit provider needs to satisfy itself that the request is genuine and made in good faith. It is essential to cooperate with any requests for further information made by the credit provider.

What if the credit provider says no?

You could ask the credit provider to review its decision and provide further information.

It may be necessary to look at other options.

- ***DON'T FORGET: Say 'Thank you' if the credit provider agrees to a release of the debt. It is a big deal!***

Sample letter: Requesting a debt release

Date

Credit provider

(Write to the IDR contact person for the credit provider available at www.fos.org.au or www.cio.org.au. – use search for members)

Address

Dear,

RE: Client name

Type of loan:

Account number:

I am assisting (client name) in relation to the above loan account.

Please find attached an authority to release information, signed by my client.

My client requests that you consider releasing my client from the above debt on compassionate grounds.

My client's circumstances

My client instructs me that:

Example only of matters to mention

1. My client's sole source of income is Centrelink benefits since 1996. My client receives the Disability Support Pension. Evidence of my client's income is attached.
2. My client has a number of chronic illnesses (details. My client has significant medical costs for his health conditions.).
3. My client is 59 years old.
4. My client does not own a home. His rental costs are \$ per week/fortnight/month. He has a car worth \$3,000, with which he needs to get to medical appointments.
5. See attached money plan, which shows that my client cannot reasonably afford to make repayments to the debt.
6. My client's financial situation is unlikely to change.

Request for a release from the debt

As can be seen from the above information, my client is unable to repay the above debt and will not be able to repay the debt in the foreseeable future.

My client requests that s/he be released from the debt given her/his poor financial circumstances.

If you require any further information, please let me know.

I assume you will not take any further action against my client while you are considering the above request. If this assumption is incorrect, please advise me in writing immediately.

I look forward to your reply.

Yours faithfully,

How to Guide: What is a high cost small loan?

These loans are also known as “payday” loans or fringe lending.

The amount of these loans is up to \$2000. They are called Small Amount Credit Contracts (SACC) in the Credit Law. Loans between \$2001 and \$5000 are called Medium Amount Credit Contracts (MACC). Where it is relevant a distinction is made for the laws in relation to each type of loan.

The rate for a personal loan from the bank is around 8-14% p.a., and a payday loan interest rates can be over 100% p.a. which makes these loans extremely expensive. These are lenders of last resort. Consumers go to these lenders when they don't qualify for a credit card or personal loan from a mainstream lender, or because they have already exhausted all their other credit options.

Why are the loans so costly?

A number of justifications are given for the high cost of these loans. For example:

- Default risk – in other words, the consumers who receive the loans are at high risk of having difficulty in making the repayments.
- The overheads are high in comparison to the loan amounts. A credit provider with a shopfront for example, must make a similar outlay for premises, staff, etc, as a credit provider lending much larger amounts. This drives up the comparative cost of smaller loans. Mainstream lenders don't offer very small loans for this reason.

The other reason appears to be that there is very little (if any) competition in the market as consumers seeking these types of loans are less likely to shop around on price. The up-front costs and high interest rates are only part of the problem; the default fees are also very costly.

A debt trap

This type of loan is often a debt trap. Because of the high cost of the loan, consumers often have trouble making the repayments. This means high default fees and often the only option the consumer is given is to refinance the loan, attracting another round of costly fees.

Is the lender and/or broker registered or licensed with ASIC?

It is always worth checking whether the lender and/or brokers are licensed. Unlicensed conduct can attract penalties and compensation. If they are not licensed, EDR is unlikely to be available. Complain to ASIC in addition to raising a dispute with the parties involved.

The most common problems with high cost small loans

The most common problems are (apart from being expensive and exploitative):

- Unsuitability
- Lack of compliance with interest rate/cost caps
- Frequent loans
- High default fees (although these fees are capped for small amount credit contracts)
- Direct debit fees

Unsuitability

- *Please note that the advice below concerns loans made after 1 July 2013 when the full provisions were introduced for these loans. If the loan was granted before then get advice.*

High cost small loan credit providers often lend to consumers on low incomes such as Centrelink. Centrelink is calculated to cover the basic living expenses of a consumer. This means that there is arguably very little money left for the payment of loans.

For this reason, it is arguable that this type of lending is arguably “unsuitable” for the consumer.

There are three steps the credit provider must take in assessing in relation to responsible lending conduct:

1. Make reasonable inquiries about the consumer’s financial situation
2. Take reasonable steps to verify the consumer’s situation
3. Make an assessment that the contract is “not unsuitable”

So when it comes to high cost small loans, this should mean that:

- The credit provider gets a loan application filled out for all loans
- The credit provider asks for evidence of income and major expenses
- The credit provider must request 3 months of deposit account statements

The credit provider will probably perform the above steps so the main argument will be around whether the repayments are affordable. That is, the credit provider will argue for a very relaxed definition of affordability and you may want to argue a more conservative definition of affordability.

A common feature of these loans is how often the consumer re–uses the credit provider’s facilities. For loans \$2000 and under (small amount credit contracts) there is a presumption that the third loan in 90 days is unsuitable. This provision was added to prevent churning.

If the repayments appear unaffordable, it is worth arguing the loan is unsuitable if the loan was granted after the Credit Law commenced.

You will need the following documents (usually obtained from the credit provider) about your client’s financial situation at the time they applied for the loan:

- Any consumer savings account statements obtained by the credit provider
- Consumer proof of income
- Liabilities for other loans listed on the application form and that appear on the account statements
- A copy of the assessment

There are two parts of unsuitability:

1. Whether your client could afford to pay the loan without substantial hardship
2. Whether the loan met your client's requirements and objectives.

Working out whether your client could afford the loan

All calculations are at the time your client entered into (signed) the loan

Your client's income (after tax)	\$
LESS rent or mortgage payments	\$
LESS other debt repayments	\$
LESS repayments for the loan	\$
Equals amount left for living expenses	\$

Then you need to check the following:

- Is the amount left for basic living expenses less than the amount your client spends on basic living expenses according to the spending on their account statements?
- Is the amount left for basic living expenses less than the amount specified in the Henderson Poverty Index plus a buffer of 20% for the relevant quarter (not including housing)?

If the answer to both of the above questions is yes then it is arguable that your client could not afford to make the loan repayments without substantial hardship then the loan is unsuitable.

Requirements and objectives

It is worth checking what your client needed the loan for. What was the purpose? Did the credit provider ask about the purpose. Was the loan suitable for that purpose?

If the purpose was not clear or inappropriate this should be noted as an additional argument on why the loan is unsuitable.

Consumers on Centrelink as their main source of income (over 50% of their income)

If the consumer is on centrelink as their main source of income, a credit provider must not grant a small amount credit contract where the total loan repayments for all of their SACC loans exceeds 20% of their income.

See Sample letter: *High cost small loans*.

Consumers in default of a previous SACC or already have 2 other SACCs

If a consumer:

1. Is in default of an existing SACC at the time of getting the loan and/or
2. Has had two outstanding SACCs in the previous 90 days

Then the loan is presumed to be unsuitable. This means the credit provider has to prove it was affordable and met the requirements of the consumer.

If the loan is unsuitable what is the likely outcome?

The likely outcome is that your client is liable for the benefit received (the amount of the loan) less any payments made. If the payments made are more than the amount received then your client should get a refund.

You should also request that any adverse listing on your client's credit report is removed as part of any settlement.

Breaching the interest rate/costs cap

Small Amount Credit Contracts

- establishment fee cannot be more than 20% of the loan amount
- the monthly fee cannot be more than 4% per month

Medium Amount Credit Contract

- establishment fee cannot be more than \$400 of the loan amount.
- the interest rate cannot be more than 48% p.a.

High default fees

For small amount credit contracts all fees are capped (including default fees) so that the maximum amount payable is 200% (or twice) the original loan amount..

There is no cap on default fees for medium amount credit contracts. You may be able to argue that default fees are an unfair term or a penalty at common law. Get legal advice

Hardship

These loans are subject to the same hardship provisions as any other contract covered by the Credit Law. It is important to assist your client to use these provisions to restructure their loan if necessary, rather than constantly refinancing and accumulating added costs. See *Chapter 3 – Financial Hardship and How to Guide: Financial hardship – credit cards and personal loans*.

Direct debit fees

Credit providers will often take a direct debit from the client to ensure repayments are met. If the consumer has insufficient funds in their account, they will often be charged a fee by the credit provider AND their bank. If the client cannot meet the repayments, or you are negotiating lower repayments on grounds of hardship, then the client should cancel the direct debit directly with their bank (or credit union/building society). A sample letter for this purpose can be found at www.financialrights.org.au. You will still need to deal with the default on the loan as a separate issue. You might also assist or advise the client to find an account that does not charge these fees for direct debit dishonours, or only charges minimal fees.

Sample letter: High cost small loans

Date

Credit provider

(Write to the IDR contact person for the credit provider available at www.fos.org.au or www.cio.org.au. – use search for members)

Address

“Without prejudice” (only if making a settlement offer)

Dear,

RE: Client name

Type of loan:

Account number:

I am assisting (client name) in relation to the above loan account.

Please find attached an authority to release information, signed by my client.

My client wishes to raise a dispute about your conduct in granting my client a loan.

For example:

1. My client’s sole source of income is Newstart. My client has been unemployed for over a year. At the time the loan was granted her income was \$.
2. My client also receives family tax benefit to cover the car of her two children, being 8 and 10 years old.
3. At the time my client obtained the loan with you she had the following regular expenses:

List Expenses

4. My client has been struggling to make the repayments since the loan was granted.lending/unjustness

Irresponsible lending/unjustness

My client contends that the loan granted to her by you is unsuitable because she could not afford to repay the loan without substantial hardship. My client contends that the granting of the loan is in breach of:

1. The responsible lending conduct provisions of the National Consumer Credit Protection Act 2009 (NCCP): and
2. The unjustness provisions of the National Credit Code (s. 76).

Under the NCCP, you are required to:

1. Make reasonable inquiries about the consumer’s financial situation.
2. Take reasonable steps to verify the consumer’s situation.
3. Make an assessment that the contract is “not unsuitable”.

According to the loan application, my client did not have sufficient disposable income to cover the repayments on the loan.

Proposed settlement

1. My client offers to settle this matter in full and final settlement on the following terms:
2. All interest and fees are refunded.
3. The amount borrowed being \$ less all payments previously made is repaid at \$ per month until the balance is repaid in full.

Any default listing on my client’s credit report is removed.

If enforcement proceedings are imminent ...

I assume you will not take any further action against my client (including making an adverse listing on my client’s credit report) while you are investigating my client’s dispute. If this assumption is incorrect, please advise me in writing immediately.

Please respond by / / .

Yours faithfully,

How to Guide: Consumer leases for goods (RENTAL CONTRACTS)

What is a consumer lease?

A consumer lease is any contract for the rental or hire of goods for a term where the main purpose of the contract is for personal purposes. The consumer has no right to buy the goods in the contract. Consumer leases are regulated under the National Credit Code (see section 1 | Chapter 14 *Consumer Leases in the Credit Law Toolkit*)

The most common consumer leases are for households goods such as a:

- Cars
- Television/DVD
- Washing machine/dryer
- Computer
- Furniture

This How to Guide focuses on goods.

How to identify a consumer lease/rental contract?

- Check the heading. Some common headings for the contract are: “Consumer lease”, “Hire contract” and “Rental Agreement”.
- The goods are listed on the front page of the contract
- The contract will refer to rental or hire payments
- The consumer will have no right to buy the goods being rented.
- There will usually be a termination fee for cancelling before the end of the term of the contract

Common problems with consumer leases

There are a number of common problems consumers encounter with the consumer leases. The purpose of this How To Guide is to provide information on how to advocate for consumers with those problems.

The common problems are:

1. There is no right to buy the goods and the consumer has been told they will or can own the goods
2. Large termination fees
3. Not being able to afford the repayments at the time the lease was granted (responsible lending)
4. Financial hardship
5. Lost, pawned or stolen goods
6. High cost of rental

This chapter should be read in conjunction with “unjustness and unsuitable lending” as many of the issues will overlap

No right to buy the goods

Consumers are often told they can buy the goods at the end of the term of the lease. Sometimes, even the product name indicates a right to buy the goods, for example “rent/try/buy”. The lease will often explicitly state that the consumer does not have a right to buy the goods. In effect, the consumer is often misled about their rights to buy the goods in contradiction of what their lease contract actually states.

There is a history behind the fact that all lease contracts have an explicit term stating that the consumer has no right to buy the goods. If the consumer has a right to buy the goods then the lease is not a lease but instead is a sale of goods by instalments. This turns the lease into a credit contract with all the rights attached including full disclosure and interest rate caps..

It may be difficult to prove that a consumer has been misled about their right to buy the goods. This is because:

1. The lessor can rely on the clear written terms if the lease regarding the ownership of the goods
2. The consumer only has their testimony of what they were told.
3. EDR schemes do not take evidence on oath so the written contract terms may win over the testimony if the consumer.

There are possible arguments that can be made:

1. That the lease does not meet the needs and objectives of the consumer

The responsible lending provisions of the credit law includes a requirement that a lease must be “not unsuitable”. As part of the lessor assessing the lease as “not unsuitable” they must enquire of the consumer about their needs and objectives and consider those needs and objectives in assessing whether the lease is not unsuitable.

This means that:

- the lessor must have asked the consumer about why they needed the goods; and
- The lessor must make notes about those enquiries and the response of the consumer; and
- Provide details of those notes on request of the consumer.

So it is worth asking for this information to see whether the enquiries were made (as required) and how this was recorded. If these notes do not exist then this may assist the consumer in arguing their version of what they were told.

2. False and misleading representations

Section 179U of the National Credit Code specifically states that it is an offence to make false and misleading representations in relation to a matter that is material to the entry to a consumer lease.

3. The contract is unjust

See *Chapter 12 – Unjustness*

What to do:

If your client has been told they could own the goods then:

- Get details from the consumer about what they said and what the lessor said. Details are important.
- Look at the advertising of the financial service provider
- Ask for details about the enquiries made by the lessor about the consumer's needs and objectives
- Raise a dispute with the lessor about the consumer being misled about the ownership of the goods

Termination fees

• **Remember:** *You will need to argue about termination fees in the following circumstances:*

- The consumer needs to return the goods because they can no longer afford the lease
- The consumer could never afford the lease and the consumer is returning the goods

You may not need to specifically argue about the termination fee. You may be able to get the termination fee reduced or not charged in the process of negotiating a settlement.

Consumer leases can include very large termination fees for ending the lease early. The termination fees can be as high as paying out the whole remaining term of the lease. This type of high termination fee is arguably:

1. An unfair term under section 12BG of the ASIC Act
2. A penalty at common law

As at 1 July 2013, consumers can request an end of lease statement (section 179A of the National Credit Code) which includes the amount required to be paid to terminate the lease and how this amount is calculated. (See *Chapter 14 – Consumer Leases* in the Credit Law Toolkit)

Unfortunately, the Credit Law does not provide a specific way to challenge unconscionable termination fees for consumer leases.

However,, a termination fee will generally be an unfair term or a penalty at common law if the amount of the fee being charged exceeds the reasonable cost of the default (failing to complete the term of the lease).

In addition, the fee will arguably be an unfair term if:

- The fee is disclosed but the amount of the fee is unclear
- No information is disclosed on how the fee is calculated
- The disclosure of the fee is unclear

To commence arguing that a termination fee is excessive or unfair you need to:

1. Request a copy of the consumer lease contract
2. Read the termination fee section of the contract
3. Request details from the lessor on how the termination fee is calculated

If the rental company regularly rents second hand goods, it is arguable that they don't need a great deal of time before the goods can be rented out again to another customer. So the termination fee should not be more than 3 months of repayments at a maximum.

The main arguments on termination fees are:

- The amount claimed is excessive because it does not represent the costs of the early termination
- The termination fee was not disclosed
- The termination fee did not include any details on how it is calculated
- The termination fee is not payable at all because the loan should have been assessed as unsuitable

What to do:

- Request a copy of the consumer lease contract
- Read the termination fee section of the lease
- Request details from the lessor on how the termination fee was calculated
- Challenge the fee if it is excessive

Unsuitable lending

See Section 1 | Chapter 11 *Responsible Lending of the Credit Law Toolkit*

Consumer leases are often a last resort for consumers to get basic household goods when they cannot afford to get a credit card or a loan to buy those goods outright. As a consequence, consumer leases are often used by consumers on low incomes. For this reason, it is very likely that many of your clients could not afford the payments to rent the goods in the first place.

Under the responsible lending obligations in the credit law, lessors are required to make an assessment that the lease is not unsuitable. This involves:

- Making enquiries of the needs and objectives of the consumer
- Making enquiries about the financial position of the consumer; and
- Verifying the financial position of the consumer.

See ASIC Regulatory Guide 209 for detailed information on how those requirements are interpreted.

The first step in checking whether the consumer could afford to repay the lease is to request copies of:

- The assessment by the lessor that the loan was not unsuitable
- Copies of the documents verified by the lessor in making that assessment

Do not try to assess whether your client could or could not afford the lease until you get the above documents. You need to be able to see what information your client gave to the lessor.

When you get the documents

You will need to look at:

- Any consumer savings account statements
- Consumer proof of income
- Liabilities for other loans listed on the application form and that appear on the account statements

Working out whether your client could afford the loan

All calculations are at the time your client entered into (signed) the lease.

Your client's income (after tax)	\$
LESS rent or mortgage payments	\$
LESS other debt repayments	\$
LESS rental payments for the lease	\$
Equals amount left for living expenses	\$

Then you need to check the following:

- Is the amount left for basic living expenses less than the amount your client spends on basic living expenses according to the spending on their account statements?
- Is the amount left for basic living expenses less than the amount specified in the Henderson Poverty Index plus a buffer of 20% for the relevant quarter (not including housing)?

If the answer to both of the above questions is yes then it is arguable that your client could not afford to make the lease repayments without substantial hardship then the lease is unsuitable.

If the lease is unsuitable what is the likely outcome?

The likely outcome is that your client is not liable for:

- Any termination fee
- Any establishment fee
- Any late or dishonour fees
- Any legal costs

You need to seek instructions from your client on whether they want to keep the goods or return the goods. If the consumer is not returning the goods this needs to be factored into the calculation of the settlement.

If your client has substantially repaid the lease or paid well above the cash price of the goods, a request for a refund should be considered. You should also request that any adverse listing on your client's credit report is removed as part of any settlement.

Financial hardship

See Section 1 | Chapter 3 of the *Credit Law Toolkit and the How to Guide*.

- *Important: Only consider financial hardship in cases where there has been no possible breaches of the responsible lending provisions.*

Consumers may apply for financial hardship in relation to a consumer lease. The financial hardship provisions for consumer leases appear at section 177B of the National Credit Code.

Matters to consider in applying for financial hardship with a consumer lease:

- Any missed or reduced rental payments will need to be paid. If the consumer is unable to catch up the repayments then those missed payments can be added on to the end of the lease by extending the term
- If the consumer will not be able to make the rental payments for the foreseeable future then it is best to consider returning the goods
- Make sure the arrangement is confirmed in writing

Lost, pawned or stolen goods

A common problem is that the consumer:

- loses the goods
- the goods are stolen
- pawns the goods or
- the rented goods are stolen.

The consumer does not own the goods so this is a major problem because the consumer is liable to compensate the lessor for the value of the goods as well as any fee for the early termination of the lease.

On top of the potential liability for the consumer, they may also be referred to the police for a breach of the criminal laws.

What to do:

- If at all possible keep paying the lease and negotiate for the purchase of the goods at the end of the lease
- Get any pawned goods back by negotiating with the pawnbroker
- Negotiate for the purchase of the goods as part of another dispute (eg. responsible lending)
- Get legal advice if the lessor knows about the goods and is threatening action
- If the goods are lost or stolen check whether the rental company has some sort of insurance that covers the goods being lost or stolen.

High cost of rental

Rental contracts are very expensive. The costs to rent and buy a good can be 3 to 10 times more than the recommended retail price of the good. Unfortunately, there is no recourse for the consumer being ripped off on price, however it may be a factor that contributes to the contract being unjust or the consumer lease provider engaging in unconscionable conduct.

The high cost is relevant if you can establish that the consumer had a right to purchase. If the consumer had a right to purchase then the lease is a credit contract.

See sample letter: *Request for lease documents*

See sample letter: *Lease dispute*

Sample Letter: Dispute consumer leases

Date

Lessor

(Write to the IDR contact person for the lessor available at www.fos.org.au or www.cosl.com.au. – use search for members)

Address

(please delete and change letter as needed)

“Without prejudice” (only if making a settlement offer)

Dear,

RE: Dispute

Client name

Consumer lease/rental contract ref: .

I am assisting (client name) in relation to the above lease.

Please find attached an authority signed by my client.

Dispute

My client wishes to raise a dispute about the above lease(s).

Unsuitable Lease

My client instructs me that s/he was told that when s/he obtained the lease that s/he could definitely buy the goods at the end of the lease. My client clearly told the salesperson that s/he wanted to own the goods.

My client was told that s/he could buy the goods for \$1 at the end of the lease.

{other details including what was actually said by your client and the salesperson}

I confirm that s.140 of the National Consumer Credit Protection Act (the Act) requires the lessor to make reasonable inquiries including::

- Enquire about the requirements and objectives of my client; and
- Enquire about my client's financial position
- Verify my client's financial situation.

Requirements and Objectives

My client needed to own a (good) and clearly told the lessor about this requirement and objective. The lessor confirmed that my client could buy the (good) at the end of the lease for \$??

Accordingly, as the lease does not meet my client's requirements and it should have been assessed as unsuitable and not granted. It represents a breach s. 141 of the Act to proceed with the lease when it is unsuitable.

If you claim that the lease did meet my client's requirements and objectives please provide details of the notes verifying that discussion.

Responsible lending

I have reviewed the assessment and supporting documentation you have provided.

I contend that the lease is unsuitable because my client could not afford the payments without

substantial hardship at the time s/he entered into the lease.

My calculations based on the information you have provided appear below:

Income	\$
Rent/Home mortgage payments	\$
Other loan repayments	\$
Lease payment	\$
Amount left for living expenses	\$

I confirm that the amount left for living expenses for my client is inadequate and meant that she could not pay the rental payments without substantial hardship.

Termination Fee

I contend that the termination fee charged to my client is excessive and a penalty. I also contend that the clause that sets out the termination fee is an unfair term in breach of s. 12BG of the Australian Securities and Investments Commission Act.

The fee is excessive and unfair because:

1. It does not represent a reasonable estimate of the cost to the lessor of paying out the lease early. I confirm that you can re-rent the goods.
2. The termination clause does not disclose how the fee is calculated

If you contend that the fee is reasonable, please provide details of your reasonable costs.

Settlement offer

My client offers to settle the above dispute in full and final settlement on the following terms:

1. My client is released from any further liability to (lessor)
2. My client returns the goods being (details) OR
3. My client keeps the goods and is now the owner of the goods
4. Compensation in the amount of \$
5. No default listing on my client's credit report (if a listing has been made it must be removed)

I await your reply in writing.

Yours faithfully,

Sample letter: Financial hardship | credit law (consumer leases)

Date

Lessor

(Write to the IDR contact person for the lessor available at www.fos.org.au or www.cosl.com.au. – use search for members)

Address

Dear,

RE: Request for change on the grounds of hardship

Client name

Consumer lease/rental contract ref: .

I am assisting (client name) in relation to the above lease.

Please find attached an authority signed by my client.

My client wishes to apply to you for a variation of the above loan contract on the grounds of hardship under s. 177B of the *National Credit Code* (Schedule 1 of *National Consumer Credit Protection Act 2009*) (“NCC”).

I assume you will stay all enforcement action (including that you will not attempt to take possession of the rented goods) while you consider this application. If this is not possible, please let me/us know immediately in writing.

Section 177B of the NCC sets out the general principle that a lessee who is unable, reasonably to meet their obligations under a lease can request a change to the lease.

Hardship Notice

My client(s) have been (and are) in financial hardship because of illness and/or unemployment, and/or [examples of other reasonable causes are family breakdown, decreases in income, children’s illnesses, and/or caring responsibilities].

The details of my client’s illness/unemployment and/or other reasonable cause are as follows:

[Give Details, eg, My client was unwell with a heart condition for six months ending in February 2009. A medical certificate is attached.]

Expectation of being able to reasonably repay the loan if the variation is granted

My client(s) expect to be able to reasonably repay the lease if the requested variation below is granted.

Delete the options that are not applicable.

- My client has been paying lease repayments of \$ per fortnight/per month while s/he/they have been in hardship.
- My client has now returned to work and can now afford the scheduled lease payments. OR
- My client(s) expects to return to work on [give date or number of months] and then my client will be able to afford the scheduled lease payments.

The requested change to the lease

My client requests the following change to his/her/their lease:

A reduction of the amount of each rental payment to \$ per fortnight/month. This change is requested for [number of months] months. The missed part payments will be paid after the end of the lease and the goods are returned. AND/OR

The scheduled lease payments will be paid and any missed payments will be repaid by paying an extra \$ per fortnight/month

Further information

Please let me know if you require further information.

I assume that you will not continue to charge late fees or make an adverse listing on my client's credit report while my client(s) hardship request is being considered.

I ask that you consider this application as a matter of urgency.

I await your reply in writing within 21 days.

Yours faithfully,

Sample letter: Requesting documents (consumer lease)

Date

Lessor

*(Write to the IDR contact person for the credit provider available at www.fos.org.au or www.cio.org.au.
– use search for members)*

Address

Dear,

RE: Client name

Lease ref:

I am assisting (client name) in relation to the above lease.

Please find attached an authority signed by my client.

My client requests copies of the following documents and information:

Delete the documents not required

1. Copy of the lease.
2. Copy of the lease application form(s).
3. A copy of the assessment performed pursuant to s. 141 of the *National Consumer Credit Protection Act*.
4. Copies of the documents relied on to verify my client's financial situation
5. Any notices under the *National Credit Code* previously sent to my client.
6. Account statements for the term of the lease

Please provide the requested information by // .

If enforcement action is threatened

I assume that you will not take any legal action in relation to the above lease until 28 days after the documents and information requested above have been received. If this assumption is not correct, please advise me in writing immediately.

Yours faithfully,

How to Guide: Complaining to ASIC

This How to Guide covers making a complaint to ASIC about the conduct of a credit provider or other credit assistant (for example a finance broker or a mortgage manager).

About ASIC

The Australian Securities and Investment Commission (ASIC) is the regulator of the Credit Law in Australia.

Why complain to ASIC?

There are good reasons to complain to ASIC:

- It gives ASIC information about what is happening in relation to loans in Australia. With more information, ASIC is able to identify systemic conduct it may wish to prosecute.
- ASIC has powers under the Credit Law including—
 - › General administration of the Credit Law
 - › The ability to suspend or cancel a licence (Division 6 of the Credit Law)
 - › Banning and disqualification of persons involved in engaging in credit activities (Part 2–4 of the Credit Law)
 - › The power to intervene in proceedings (Part 4–3 Division 4 s. 209 of the Credit Law)
 - › Power to examine, investigate, inspect records and enforce decisions (Chapter 6 of the Credit Law)
 - › Enforce breaches of the Credit Law
 - › The ability to make hardship and unjustness applications in relation to credit contracts under the National Credit Code
- ASIC also has powers under the *ASIC Act* in relation to misleading and deceptive conduct, unconscionable conduct and harassment or coercion in the collection of debts arising from financial services (including credit)
- May intervene and assist your client (although this will be rare)

How do you complain to ASIC?

You can complain to ASIC online, in writing or by phone.

Online

www.asic.gov.au

Email

infoline@asic.gov.au

Phone

Australia 1300 300 630

International +61 3 5177 3777

If you need a translator, call the Telephone Interpreter Service on 131 450. They will call ASIC for you.

If you are filling in an ASIC Complaint Form you should select consumer advocate or financial counsellor in the complainant type field.

How much detail is required?

You do not have to worry about the detail. For example, you can just describe what has happened—you do not need to know which section of the Credit Law has possibly been breached. If ASIC needs more information, it can contact you or your client to get that further information.

What about my client's dispute?

The best interests of your client are paramount. Your client's best interests are more important than complaining to ASIC. However, complaining to ASIC can be in the public interest, so if it is possible to complain to ASIC and not compromise your client's best interests then it should be considered.

Some guidelines:

- Get the permission of your client to make a complaint to ASIC
- Give a copy of the complaint to the client
- If you do not wish to send the complaint on behalf of the consumer, just draft a brief complaint and give it to the consumer to send
- Make the complaint to ASIC as early as possible in the dispute process because it is difficult (and arguably unethical) to make a complaint after a good faith settlement has been reached
- It is recommended that you not inform the credit provider (or credit representative) that you are making a complaint to ASIC. This can sometimes interfere with negotiating a settlement

Disputes that are worth referring to ASIC

Although you can complain to ASIC about any aspect of the Credit Law, it is worth concentrating on the following:

- Operating unlicensed
- Avoiding the Credit Law
- Any dispute that appears to be a systemic problem—A systemic problem is when the same problem is or could be happening to a number of consumers not just your client e.g. debtor harassment
- responsible lending
- Serious problems with getting access to financial hardship (eg, failure to respond or reasonably consider)
- Fringe Lending (including payday loans)
- Rental contracts
- Lack of procedural fairness or poor decision making in EDR



OTHER USEFUL STUFF

This section includes useful reference material:

1. Credit Law forms
2. Relevant financial hardship provisions of relevant Codes of Practice

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Form 5 Information statement

paragraph 16(1)(b) of the Code regulation 70 of the Regulations

Things you should know about your proposed credit contract

This statement tells you about some of the rights and obligations of yourself and your credit provider. It does not state the terms and conditions of your contract.

If you have any concerns about your contract, contact the credit provider and, if you still have concerns, your credit provider's external dispute resolution scheme, or get legal advice.

The contract

1. How can I get details of my proposed credit contract?

Your credit provider must give you a precontractual statement containing certain information about your contract. The precontractual statement, and this document, must be given to you before—

- your contract is entered into; or
- you make an offer to enter into the contract; whichever happens first.

2. How can I get a copy of the final contract?

If the contract document is to be signed by you and returned to your credit provider, you must be given a copy to keep. Also, the credit provider must give you a copy of the final contract within 14 days after it is made. This rule does not, however, apply if the credit provider has previously given you a copy of the contract document to keep.

If you want another copy of your contract, write to your credit provider and ask for one. Your credit provider may charge you a fee. Your credit provider has to give you a copy—

- within 14 days of your written request if the original contract came into existence 1 year or less before your request; or
- otherwise within 30 days of your written request.

3. Can I terminate the contract?

Yes. You can terminate the contract by writing to the credit provider so long as—

- you have not obtained any credit under the contract; or
- a card or other means of obtaining credit given to you by your credit provider has not been used to acquire goods or services for which credit is to be provided under the contract.

However, you will still have to pay any fees or charges incurred before you terminated the contract.

4. Can I pay my credit contract out early?

Yes. Pay your credit provider the amount required to pay out your credit contract on the day you wish to end your contract.

5. How can I find out the pay out figure?

You can write to your credit provider at any time and ask for a statement of the pay out figure as at any date you specify. You can also ask for details of how the amount is made up.

Your credit provider must give you the statement within 7 days after you give your request to the credit provider. You may be charged a fee for the statement.

6. Will I pay less interest if I pay out my contract early?

Yes. The interest you can be charged depends on the actual time money is owing. However, you may have to pay an early termination charge (if your contract permits your credit provider to charge one) and other fees.

7. Can my contract be changed by my credit provider?

Yes, but only if your contract says so.

8. Will I be told in advance if my credit provider is going to make a change in the contract?

That depends on the type of change. For example—

- you get at least same day notice for a change to an annual percentage rate. That notice may be a written notice to you or a notice published in a newspaper.
- you get 20 days advance written notice for—
 - › a change in the way in which interest is calculated; or
 - › a change in credit fees and charges; or
 - › any other changes by your credit provider;

except where the change reduces what you have to pay or the change happens automatically under the contract.

9. Is there anything I can do if I think that my contract is unjust?

Yes. You should first talk to your credit provider. Discuss the matter and see if you can come to some arrangement.

If that is not successful, you may contact your credit provider’s external dispute resolution scheme. External dispute resolution is a free service established to provide you with an independent mechanism to resolve specific complaints. Your credit provider’s external dispute resolution provider is (name of external dispute resolution provider) and can be contacted at [*insert telephone number, email/website and postal address*].

Alternatively, you can go to court. You may wish to get legal advice, for example from your community legal centre or Legal Aid.

You can also contact ASIC, the regulator, for information on 1300 300 630 or through ASIC’s website at <http://www.asic.gov.au>.

Insurance

10. Do I have to take out insurance?

Your credit provider can insist you take out or pay the cost of types of insurance specifically allowed by law. These are compulsory third party personal injury insurance, mortgage indemnity insurance or insurance over property covered by any mortgage. Otherwise, you can decide if you want to take out insurance or not. If you take out insurance, the credit provider can not insist that you use any particular insurance company.

11. Will I get details of my insurance cover?

Yes, if you have taken out insurance over mortgaged property or consumer credit insurance and the premium is financed by your credit provider. In that case the insurer must give you a copy of the policy within 14 days after the insurer has accepted the insurance proposal.

Also, if you acquire an interest in any such insurance policy which is taken out by your credit provider then, within 14 days of that happening, your credit provider must ensure you have a written notice of the particulars of that insurance.

You can always ask the insurer for details of your insurance contract. If you ask in writing, your insurer must give you a statement containing all the provisions of the contract.

12. If the insurer does not accept my proposal, will I be told?

Yes, if the insurance was to be financed by the credit contract. The insurer will inform you if the proposal is rejected.

13. In that case, what happens to the premiums?

Your credit provider must give you a refund or credit unless the insurance is to be arranged with another insurer.

14. What happens if my credit contract ends before any insurance contract over mortgaged property?

You can end the insurance contract and get a proportionate rebate of any premium from the insurer.

Mortgages

15. If my contract says I have to give a mortgage, what does this mean?

A mortgage means that you give your credit provider certain rights over any property you mortgage. If you default under your contract, you can lose that property and you might still owe money to the credit provider.

16. Should I get a copy of my mortgage?

Yes. It can be part of your credit contract or, if it is a separate document, you will be given a copy of the mortgage within 14 days after your mortgage is entered into.

However, you need not be given a copy if the credit provider has previously given you a copy of the mortgage document to keep.

17. Is there anything that I am not allowed to do with the property I have mortgaged?

The law says you can not assign or dispose of the property unless you have your credit provider's, or the court's, permission. You must also look after the property. Read the mortgage document as well. It will usually have other terms and conditions about what you can or can not do with the property.

18. What can I do if I find that I can not afford my repayments and there is a mortgage over property?

See the answers to questions 22 and 23.

Otherwise you may—

- if the mortgaged property is goods — give the property back to your credit provider, together with a letter saying you want the credit provider to sell the property for you;
- sell the property, but only if your credit provider gives permission first;

OR

- give the property to someone who may then take over the repayments, but only if your credit provider gives permission first.

If your credit provider won't give permission, you can contact their external dispute resolution scheme for help.

If you have a guarantor, talk to the guarantor who may be able to help you.

You should understand that you may owe money to your credit provider even after the mortgaged property is sold.

19. Can my credit provider take or sell the mortgaged property?

Yes, if you have not carried out all of your obligations under your contract.

20. If my credit provider writes asking me where the mortgaged goods are, do I have to say where they are?

Yes. You have 7 days after receiving your credit provider's request to tell your credit provider. If you do not have the goods you must give your credit provider all the information you have so they can be traced.

21. When can my credit provider or its agent come into a residence to take possession of mortgaged goods?

Your credit provider can only do so if it has the court's approval or the written consent of the occupier which is given after the occupier is informed in writing of the relevant section in the National Credit Code.

General

22. What do I do if I can not make a repayment?

Get in touch with your credit provider immediately. Discuss the matter and see if you can come to some arrangement. You can ask your credit provider to change your contract in a number of ways—

- to extend the term of your contract and reduce payments; or
- to extend the term of your contract and delay payments for a set time; or
- to delay payments for a set time.

23. What if my credit provider and I can not agree on a suitable arrangement?

If the credit provider refuses your request to change the repayments, you can ask the credit provider to review this decision if you think it is wrong.

If the credit provider still refuses your request you can complain to the external dispute resolution scheme that your credit provider belongs to. Further details about this scheme are set out below in question 25.

24. Can my credit provider take action against me?

Yes, if you are in default under your contract. But the law says that you can not be unduly harassed or threatened for repayments. If you think you are being unduly harassed or threatened, contact the credit provider's external dispute resolution scheme or ASIC, or get legal advice.

25. Do I have any other rights and obligations?

Yes. The law will give you other rights and obligations. You should also READ YOUR CONTRACT carefully.

If you have any complaints about your credit contract, or want more information, contact your credit provider. You must attempt to resolve your complaint with your credit provider before contacting your credit provider's external dispute resolution scheme. If you have a complaint which remains unresolved after speaking to your credit provider you can contact your credit provider's external dispute resolution scheme or get legal advice.

External dispute resolution is a free service established to provide you with an independent mechanism to resolve specific complaints. Your credit provider's external dispute resolution provider is *[insert name of external dispute resolution provider]* and can be contacted at *[insert telephone number, email/website and postal address]*.

Please keep this information statement. You may want some information from it at a later date.

Form 6

Disclosure about credit contracts

subsection 17(16) of the Code subregulation 74(2) of the Regulations

IMPORTANT	
<p>BEFORE YOU SIGN</p> <ul style="list-style-type: none">▶ READ THIS CONTRACT DOCUMENT so that you know exactly what contract you are entering into and what you will have to do under the contract.▶ You should also read the information statement: 'THINGS YOU SHOULD KNOW ABOUT YOUR PROPOSED CREDIT CONTRACT'.▶ Fill in or cross out any blank spaces.▶ Get a copy of this contract document.▶ Do not sign this contract document if there is anything you do not understand.	<p>THINGS YOU MUST KNOW</p> <ul style="list-style-type: none">▶ You can withdraw this offer at any time before the credit provider accepts it. When the credit provider does accept it, you are bound by it. However, you may end the contract before you obtain credit, or a card or other means is used to obtain goods or services for which credit is to be provided under the contract, by telling the credit provider in writing, but you will still be liable for any fees or charges already incurred.▶ You do not have to take out consumer credit insurance unless you want to. However, if this contract document says so, you must take out insurance over any mortgaged property that is used as security, such as a house or car.▶ If you take out insurance, the credit provider can not insist on any particular insurance company.▶ If this contract document says so, the credit provider can vary the annual percentage rate (the interest rate), the repayments and the fees and charges and can add new fees and charges without your consent.▶ If this contract document says so, the credit provider can charge a fee if you pay out your contract early.

Form 8 Disclosure about guarantee

section 55 of the Code regulation 81 of the Regulations

IMPORTANT	
<p>BEFORE YOU SIGN</p> <ul style="list-style-type: none">➤ READ THIS GUARANTEE AND THE CREDIT CONTRACT DOCUMENT.➤ You should also read the information statement: 'THINGS YOU SHOULD KNOW ABOUT GUARANTEES'.➤ You should obtain independent legal advice.➤ You should also consider obtaining independent financial advice.➤ You should make your own inquiries about the credit worthiness, financial position and honesty of the debtor.	<p>THINGS YOU MUST KNOW</p> <ul style="list-style-type: none">➤ Understand that, by signing this guarantee, you may become personally responsible instead of, or as well as, the debtor to pay the amounts which the debtor owes and the reasonable expenses of the credit provider in enforcing the guarantee.➤ If the debtor does not pay you must pay. This could mean you lose everything you own including your home.➤ You may be able to withdraw from this guarantee or limit your liability. Ask your legal adviser about this before you sign this guarantee.➤ You are not bound by a change to the credit contract, or by a new credit contract, that increases your liabilities under the guarantee unless you have agreed in writing and have been given written particulars of the change or a copy of the new credit contract document.

Form 9 Information statement

section 56(1)(b) of the Code regulation 82 of the Regulations

Things you should know about guarantees

This information tells you about some of the rights and obligations of yourself and the credit provider. It does not state the terms and conditions of your guarantee.

Guarantees

1. What is a guarantee?

A promise by you that the person who is getting credit under a credit contract (the *debtor*) will keep to all the terms and conditions. If that person does not do so, you promise to pay the credit provider all the money owing on the contract (and any reasonable enforcement expenses) as soon as the money is asked for, up to the limit, if any, stated in the guarantee. If you do not pay, then the credit provider can take enforcement action against you which may result in the forced sale of any property owned by you such as your house.

2. How do I know how much the debtor is borrowing and how the credit charges are worked out?

These details are on the copy of the credit contract or proposed credit contract that you should be given before you sign the guarantee.

3. What documents should I be given?

Before you sign the guarantee you should get—

- the document you are reading now; and
- a copy of the credit contract or proposed credit contract.

Your guarantee is not enforceable unless you get a copy of the credit contract or proposed credit contract before you sign.

Within 14 days after you sign the guarantee and give it to the credit provider, the credit provider must give you a copy of—

- the signed guarantee (if you do not already have a copy of the guarantee); and
- the credit contract or proposed credit contract (if you do not already have a copy of the contract).

4. Can I get a statement of the amount that the debtor owes?

Yes. You can ask the credit provider at any time for a statement of the amount the debtor currently owes or any amounts credited or debited during a period you specify or any amounts which are overdue and when they became overdue or any amount payable and the date it became due.

The credit provider must give you the requested information—

- within 14 days if all the information requested related to a period 1 year or less before your request is given; or
- otherwise within 30 days.

This statement must be given to you in writing if you ask for it in writing but otherwise may be given orally.

You may be charged a fee for the statement.

You are not entitled to more than 1 written statement every 3 months.

5. How can I find out the payout figure?

You can write to the credit provider at any time and ask for a statement of the amount required to pay out the credit contract as at any date you specify. You can also ask for details of the items that make up the amount.

The credit provider must give you the statement within 7 days after you give your request to the credit provider. You may be charged a fee for the statement.

6. What other information can I get?

You can write to the credit provider and ask for a copy of—

- the guarantee; or
- any creditrelated insurance contract (such as insurance on mortgaged property) the credit provider has; or
- a notice previously given to you, the debtor or the mortgagor under the National Credit Code.

The credit provider must give you the requested copy—

- within 14 days of your written request if the contract came into existence 1 year or less before the request was given to the credit provider; or
- otherwise within 30 days.

The credit provider may charge you a fee.

Your request can be made any time up to 2 years after the end of the credit contract.

7. Can I withdraw from my guarantee?

You can withdraw from your guarantee at any time by written notice to the credit provider if the final credit contract is materially different from the proposed credit contract given to you before you signed the guarantee.

8. Can I limit my guarantee?

Yes, if it relates to a continuing credit contract (such as a credit card contract or an overdraft). In that case you can give the credit provider a notice limiting the guarantee so that it only applies to—

- credit previously given to the debtor; and
- any other amount you agree to guarantee.

9. Can my guarantee also apply to any future contracts?

No, unless the credit provider has given you a copy of the proposed new credit contract and you have given your written acceptance.

10. If my guarantee says I have to give a mortgage, what does this mean?

A mortgage means that you give the credit provider certain rights over any property you mortgage. If you default under your guarantee, you can lose that property and you might still owe money to the credit provider.

11. Should I get a copy of my mortgage?

Yes. It can be part of your guarantee or, if it is a separate document, you will be given a copy of the mortgage within 14 days after your mortgage is entered into.

12. Is there anything that I am not allowed to do with the property I have mortgaged?

The law says you can not assign or dispose of the property unless you have the credit provider's, or the court's, permission. You must also look after the property. Read the mortgage document as well. It will usually have other terms and conditions about what you can or can not do with the property.

13. What can I do if I find that I can not afford to pay out the credit contract and there is a mortgage over my property?

See the answer to question 22.

Otherwise you may —

- if the mortgaged property is goods—give the property back to your credit provider, together with a letter saying you want the credit provider to sell the property for you;
- sell the property, but only if the credit provider gives permission first;

OR

- give the property to someone who may then pay all amounts owing under the guarantee or give a similar guarantee, but only if the credit provider gives permission first.

If the credit provider won't give permission, you may contact the credit provider's external dispute resolution scheme for help. You should understand that you may owe money to the credit provider even after the mortgaged property is sold.

External dispute resolution is a free service established to provide you with an independent mechanism to resolve specific complaints. Your credit provider's external dispute resolution provider is (name of external dispute resolution provider) and can be contacted at [*insert telephone number, email/website and postal address*].

14. Can the credit provider take or sell the mortgaged property?

Yes, if you have not carried out all of your obligations under your guarantee.

15. If the credit provider writes asking me where the mortgaged goods are, do I have to say where they are?

Yes. You have 7 days after receiving the credit provider's request to tell the credit provider. If you do not have the goods you must give the credit provider all the information you have so they can be traced.

16. When can the credit provider or its agent come into a residence to take possession of mortgaged goods?

The credit provider can only do so if it has the court's approval or the written consent of the occupier which is given after the occupier is informed in writing of the relevant section in the National Credit Code.

17. If the debtor defaults, do I get any warning that the credit provider wants to take action against the debtor?

In most cases both you and the debtor get at least 30 days from the date of a notice in writing to do something about the matter. The notice must advise—

- why the credit provider wants to take action; and
- what can be done to stop it (if the default can be remedied); and
- that if the same sort of default is committed within 30 days of the date of the notice and is not remedied within that period, the credit provider can take action without further notice.

You should immediately discuss any warning notice with the debtor and consider getting independent legal advice and/or financial advice.

However, there will be no warning notice if—

- there is a good reason to think the debtor committed a fraud to persuade the credit provider to enter into the contract; or
- the credit provider has been unable to locate the debtor after making reasonable efforts to do so; or
- the court says so; or
- there is a good reason to think that the debtor has, or will, remove or dispose of mortgaged goods without the credit provider's consent, or that urgent action is necessary to protect mortgaged property.

18. When can the credit provider enforce a judgment against me?

When—

- the credit provider has judgment against the debtor and if the judgment amount has still not been met 30 days after the credit provider has asked the debtor in writing to pay it; or
- the court says so because recovery from the debtor is unlikely; or
- the credit provider has been unable to locate the debtor after making reasonable efforts to do so; or
- the debtor is insolvent.

19. If the debtor can not be found and the credit provider intends to take legal action against me do I get any warning?

You may not. See the answer to question 17.

20. Can the credit provider take action against me without first taking action against the debtor?

Yes, but the credit provider will not be able to enforce any judgement against you except in the circumstances described in the answer to question 18.

21. How much do I have to pay the credit provider if the debtor defaults?

You have to pay what the debtor owes the credit provider, subject to any limit provided in the guarantee, plus the credit provider's reasonable expenses in making you honour your contract of guarantee.

General

22. What can I do if I am asked to pay out the credit contract and I can not pay it all at once?

Talk to the credit provider and see if some arrangement can be made about paying.

If you can not come to a suitable arrangement, contact your credit provider's external dispute resolution scheme.

There are other people, such as financial counsellors, who may be able to help.

23. If I pay out money for a debtor, is there any way I can get it back?

You can sue the debtor, but remember, if the debtor can not pay the credit provider, he or she probably can not pay you back for a while, if at all.

24. What happens if I go guarantor for someone who is under 18 when he or she signs a credit contract?

You are responsible for the full debt if the contract of guarantee has a clear and obvious warning. The warning has to tell you that the courts might not let you sue the debtor if you have to pay out the credit contract for him or her.

25. Do I have any other rights and obligations?

Yes. The law does give you other rights and obligations. You should also READ YOUR GUARANTEE carefully.

If you have any doubts, or want more information, contact your credit provider. You must attempt to resolve your complaint with your credit provider before contacting your credit provider's external dispute resolution scheme. If you have a complaint which remains unresolved after speaking to your credit provider you can contact your credit provider's external dispute resolution scheme or get legal advice.

External dispute resolution is a free service established to provide you with an independent mechanism to resolve specific complaints. Your credit provider's external dispute resolution provider is *[insert name of external dispute resolution provider]* and can be contacted at *[insert telephone number, email/website and postal address]*.

Please keep this information statement. You may want some information from it at a later date.

Form 10 Information after surrender of mortgaged goods

subsection 85(3) of the Code regulation 84 of the Regulations

TO:
.....
..... (name of mortgagor)

.....
.....
..... (address of mortgagor)

.....
..... (name of credit provider)

FROM:
.....
..... (Australian credit licence number)

.....
..... (address of credit provider)

..... Date

CONTACT PERSON:
.....
.....
..... (name, telephone number and address)

You have returned mortgaged goods to the credit provider/asked the credit provider to sell the mortgaged goods.

This information tells you some of your rights and obligations and some of the options open to you.

Details you should know

Description of the goods:
.....

Date you returned the goods to the credit provider/asked the credit provider to sell the goods¹
.....

The cost of enforcing the mortgage up to the date you returned the goods to the credit provider/asked the credit provider to sell the goods is \$
.....

The cost of the goods being in the credit provider's possession is \$ per²
.....

The credit provider's estimate of the value of the goods is \$. .
.....

How to get the goods returned or not sold

You can get the goods back or stop them being sold by the credit provider if you ask the credit provider and if the repayments and other obligations under the credit contract have been met. Your request must be made in writing within 21 days of this notice being given to you.

If you do nothing, you may lose the goods.

Sale of goods

The law says that the credit provider must get the best price reasonably obtainable for the goods.

If you want to, you can introduce a buyer to the credit provider. This has to be done in writing within 21 days after the date of this notice and the buyer must be willing to pay the credit provider's estimate of the value of the goods or any greater amount for which the credit provider has obtained a written offer to buy the goods.

The credit provider must offer to sell the goods to the buyer you have introduced.

Your letter introducing the buyer has to reach the credit provider before the goods are sold. If you post the letter, it is best to send it by certified or registered mail. Then you can check that it was delivered. If you take it to the credit provider's office, you should get an employee of the credit provider to sign and date something to say that your letter has been received. Make sure you keep anything that was signed by that employee.

Once the 21 day period has expired, the credit provider must sell the goods as soon as reasonably practicable unless you and the credit provider agree on some other time for sale.

As mentioned above, the goods must be sold for the best price reasonably obtainable.

.....
1 Omit whichever is not applicable.

2 Indicate the daily, monthly or other rate at which enforcement expenses may accrue.

Finalising the contract

As soon as the goods are sold, the total amount payable under the credit contract becomes due. The credit provider must credit you with the proceeds of the sale less—

- the amount owing under your mortgage (which can not be more than the amount owing under the contract); and
- any amount owing under a prior mortgage of the goods; and
- any amount owing under a subsequent mortgage of the goods which the credit provider knows about; and
- the credit provider's reasonable expenses of enforcing the mortgage; and
- the expenses reasonably incurred by the credit provider in connection with the possession and sale of the mortgaged goods.

After the goods are sold the credit provider must give you a notice setting out certain information including—

- what the sale price was; and
- the net proceeds of the sale; and
- the amount credited to you; and
- the amount required to pay out the credit contract or the amount due under the guarantee.

General

You should discuss this matter with the credit provider as soon as possible. You should know that even after the goods are sold, you will still have to pay the credit provider any amount still outstanding. You may be able to work out some alternative arrangement about your contract if you are the debtor. For example, you could ask the credit provider—

- to extend the term of the contract and either reduce the amount of each payment accordingly or defer payments for a specified period; or
- to simply defer payments for a specified period.

The name and telephone number of the person to contact is on the front of this document.

If you can not come to a suitable arrangement with the credit provider, contact the credit provider's external dispute resolution scheme immediately. If you are the debtor and have been **unemployed**, **sick** or there is **another good reason** why you are having problems making payments under your contract, then your contract may be able to be varied under the law to meet your situation.

If you have any doubts, or want more information, contact your credit provider. You must attempt to resolve your complaint with your credit provider before contacting your credit provider's external dispute resolution scheme. If you have a complaint which remains unresolved after speaking to your credit provider you can contact your credit provider's external dispute resolution scheme.

External dispute resolution is a free service established to provide you with an independent mechanism to resolve specific complaints. Your credit provider's external dispute resolution provider is [insert name of external dispute resolution provider] and can be contacted at [insert telephone number, email/website and postal address].

Alternatively, you can seek legal advice, for example from a community legal centre or Legal Aid. There are other people, such as financial counsellors, who may be able to help.

.....
(signature of credit provider or person signing on behalf of credit provider)

.....
(name of person signing)

.....
(position of person signing)

Form 11A Direct debit default notice

subsection 87(3) of the Code regulation 85 of the Regulations

IMPORTANT

We have not received a payment because your arrangements to pay by direct debit have been dishonoured.

You need to contact us immediately

1. Is there a reason why your direct debit arrangements have failed?

There may be reasons why your direct debit may fail, and you may wish to check with your bank or financial institution. If you need to change your direct debit arrangements, contact us at *[insert telephone number or email address for dealing with variations to direct debit arrangements]*.

If you continue to fail to make the payments due under your credit contract we may take action against you.

2. Are you experiencing financial difficulty? Contact us immediately

Contact us³ *[insert telephone number or email address for dealing with financial hardship applications]* to discuss your situation. We may be able to help you to repay your debt by varying your contract (for example, changing the amount or timing of your repayments). The sooner you contact us, the easier it will be to help you.

If we refuse to change your contract, we will notify you in writing and you can seek a review of our decision by going to *[insert name of relevant external dispute resolution scheme]* by *[insert contact details and method(s) for lodging complaints]*.

If you go to *[insert name of relevant external dispute resolution scheme]*, you may have enforcement action put on hold while your complaint is considered. You are not bound by the decision that *[insert name of EDR scheme]* makes and you can still apply to a court if you are not satisfied.

☛ *External dispute resolution is a free and independent service to resolve complaints.*

3. If you are having financial difficulties you can also contact a financial counsellor on 1800 007 007 (free call)

For information about your options for managing your debts, ring 1 800 007 007 from anywhere in Australia to talk to a free and independent financial counsellor.

3

Credit providers may replace the word "us" with the name of a relevant area. For example: "Contact our Hardship Team".

Some useful tips on direct debits

Make sure you've given the right account number and there is enough money in the account to cover the direct debits.

Read your Direct Debit Request Service Agreement carefully and check your bank statements to make sure the right amount is being taken out at the right time. If there is not enough money in the account, you will be in default and may have to pay a fee for that default.

Changing or cancelling your direct debit

Contact us if you need to change the dates when the direct debit is taken out.

If you close the account, remember to change the direct debit so it comes from another account.

You can usually cancel a direct debit with us or with your bank or financial institution. You may need to do this in writing. Contact your bank or financial institution a few days after you've sent your written instruction to check that the direct debit has been cancelled.

Before you cancel a direct debit, make sure you've made other payment arrangements with us so you don't default on your payment.

Resolving a problem with your direct debit

If you have a problem with a direct debit you can complain to us or to your bank or financial institution. If you can't resolve your complaint with us, contact our external dispute resolution scheme, [*insert name of external dispute resolution scheme*], by [*insert contact details and method(s) for lodging complaints*].

For more information about direct debits, talk to your bank or financial institution.

Form 12A Information about debtor's rights after default

paragraphs 88(3)(f) and (g) of the Code regulation 86 of the Regulations

IMPORTANT

You are in default of your credit contract because you have not made a payment (alternative wording can be used if the default is not the result of failing to make a payment).

You need to contact us immediately

1. Are you in financial hardship? Contact us immediately

Contact us⁴ [*insert telephone number or email address for dealing with financial hardship applications*] to discuss your situation. We may be able to help you to repay your debt by agreeing to vary your contract (for example, changing the amount or timing of your repayments). The sooner you contact us, the easier it will be to help you.

If you do nothing **before** [*insert default notice period end date*], we can commence enforcement action against you.

If we refuse to change your contract, we will notify you in writing and you can seek a review of our decision by going to [*insert name of relevant external dispute resolution scheme*] by [*insert contact details and method(s) for lodging complaints*].

If you go to [*insert name of external dispute resolution scheme*], you may have enforcement action put on hold while your complaint is considered. You are not bound by the decision that [*insert name of EDR scheme*] makes and you can still apply to a court if you are not satisfied.

• *External dispute resolution is a free and independent service to resolve complaints.*

2. If you are having financial difficulties you can also contact a financial counsellor on 1800 007 007 (free call)

For information about your options for managing your debts, ring 1 800 007 007 from anywhere in Australia to talk to a free and independent financial counsellor.

3. Your other rights

You have other rights, including the right to ask us to postpone any enforcement action before [*insert default notice period end date*].

4
Credit providers may replace the word "us" with the name of a relevant area. For example: "Contact our Hardship Team".

Form 13 Consent to enter premises

subsection 99(2) of the Code regulation 87 of the Regulations

IMPORTANT
You have the right to refuse consent. If you do the credit provider may go to court for permission to enter the premises.

.....
Date

TO:
.....
(name of credit provider)

.....
(Australian credit licence number)

FROM:
.....
(name of occupier)

.....
(address of occupier's premises)

.....
.....
.....
(‘the premises’)

I consent to the credit provider entering the premises for the purpose of taking possession of the mortgaged goods described below.
.....

The mortgaged goods are:⁵
.....
.....

.....
(signature of occupier giving consent)

.....
(name, address and signature of credit provider’s representative by whom the consent was obtained)

.....
5 Insert brief details of the mortgaged goods.

Form 14 Notice after taking possession of mortgaged goods

paragraph 102(1)(c) of the Code regulation 88 of the Regulations

.....
Date

TO:
.....
(name of mortgagor)

.....
.....
(address of mortgagor)

FROM:
.....
(name of credit provider)

.....
(Australian credit licence number)

.....
(address of credit provider)

.....
(name, telephone and address)

This information tells you some of your rights and obligations and some of the options open to you.

Details you should know

Description of the goods:
.....

Date the goods were taken:
.....

The goods were taken because:
.....

.....
The cost of enforcing the mortgage up to the date the goods were taken is \$

.....
The cost of the goods remaining in the credit provider's possession is \$ per

.....
The credit provider's estimate of the value of the goods is \$

How to get the goods back

If you want the goods back you must do one of the things listed below as soon as possible. If you do not act within 21 days after the date of this notice, the credit provider may sell the goods. It is also possible that the goods might be sold earlier if the credit provider gets a court order.

Either

You can get the goods back if you pay \$... and there is no repetition of the default that caused the goods to be taken. This amount of \$... is calculated as follows—

Arrears	\$
.....	
Enforcement expenses	\$
.....	
TOTAL	\$
.....	

Or

You can pay out the credit contract. If you do this you can get the goods back and you do not have any further obligations.

To give you an idea of what the amount required to pay out the credit contract may be, 2 figures are given below. The first is the amount required to pay out the contract at the date of this notice. The second is the amount required calculated 21 days from that date. Any difference is the result of further payments or charges that fall due between the 2 dates.

1	Amount required to pay out the credit contract on	/	/	\$
.....				
2	Amount required to pay out the credit contract on	/	/	\$
.....				

☛ *If you do nothing, you will lose the goods.*

Sale of goods

The law says that the credit provider must get the best price reasonably obtainable for the goods.

If you want to, you can introduce a buyer to the credit provider. This has to be done in writing within 21 days after the date of the notice you receive and the buyer must be willing to pay the credit provider's estimate of the value of the goods or any greater amount for which the credit provider has obtained a written offer to buy the goods.

The credit provider must offer to sell the goods to the buyer you have introduced.

Your letter introducing the buyer has to reach the credit provider before the goods are sold. If you post the letter, it is best to send it by certified or registered mail then you can check that it was delivered. If you take it to the credit provider's office, you should get an employee to sign and date something to say that your letter has been received. Make sure you keep anything that was signed by the employee.

Once the 21 day period has expired, the credit provider must sell the goods as soon as reasonably practicable unless—

- you and the credit provider agree on some other time for sale; or
- legal proceedings have been taken which prevent the sale.

As mentioned above, the goods must be sold for the best price reasonably obtainable.

Finalising the contract

As soon as the goods are sold, the total amount payable under the contract becomes due. However, the credit provider will have to deduct from what you owe any amount the credit provider gets for the goods less—

- the amount owing under your mortgage (which can not be more than the amount owing under the contract); and
- any amount owing under a prior mortgage of the goods; and
- any amount owing under a subsequent mortgage of the goods which the credit provider knows about; and
- the credit provider's reasonable expenses of enforcing the mortgage.

After the goods are sold, the credit provider must give you a notice setting out certain information including—

- what the sale price was; and
- the net proceeds of the sale after the amounts mentioned above have been deducted; and
- the amount due under the credit contract or the amount of any surplus due to you; and
- details of any further recovery action that might be taken against you under the credit contract if you are the debtor.

General

You should discuss this matter with the credit provider as soon as possible. You should know that after the goods have been sold, you will still have to pay the credit provider any amount still outstanding. You may be able to work out some alternative arrangement about the contract and mortgage. For example, if you are the debtor, you could ask the credit provider—

- to extend the term of the contract and either reduce the amount of each payment accordingly or defer payments for a specified period; or
- to simply defer payments for a specified period.

The name, telephone number and address of the person to contact is on the front of this form.

If you can not come to a suitable arrangement with the credit provider, contact the credit provider's external dispute resolution scheme immediately. If you are the debtor and have been **unemployed, sick** or there is **another good reason** why you are having problems with your contract, then your contract may be able to be varied under the law to meet your situation.

If you have any doubts, or want more information, contact your credit provider. You must attempt to resolve your complaint with your credit provider before contacting your credit provider's external dispute resolution scheme. If you have a complaint which remains unresolved after speaking to your credit provider you can contact your credit provider's external dispute resolution scheme.

External dispute resolution is a free service established to provide you with an independent mechanism to resolve specific complaints. Your credit provider's external dispute resolution provider is *[insert name of external dispute resolution provider]* and can be contacted at *[insert telephone number, email/website and postal address]*.

Alternatively, you can seek legal advice, for example from a community legal centre or Legal Aid. There are other people, such as financial counsellors, who may be able to help.

.....
(signature of credit provider or person signing on behalf of credit provider)

.....
(name of person signing)

.....
(position of person signing)

Form 17 Information statement

subsection 175(1) of the Code regulation 105 of the Regulations

Things you should know about your consumer lease

This statement tells you about some of the rights and obligations of yourself and your lessor. It does not state the terms and conditions of your lease.

The lease

1. How can I get details of my lease?

Your lessor must give you a copy of your consumer lease with this statement. Both documents must be given to you within 14 days after the lessor enters into the consumer lease, unless you already have a copy of the consumer lease.

If you want another copy of your lease write to your lessor and ask for one. Your lessor may charge you a fee. Your lessor has to give you a copy—

- within 14 days of your written request if the contract came into existence 1 year or less before your request; or
- otherwise within 30 days.

2. What should my lease tell me?

You should read your lease carefully.

Your lease should tell you about your obligations, and include information on matters such as—

- details of the goods which have been hired; and
- any amount you have to pay before the goods are delivered; and
- stamp duty and other government charges you have to pay; and
- charges you have to pay which are not included in the rental payments; and
- the amount of each rental payment; and
- the date on which the first rental payment is due and either the dates of the other rental payments or the interval between them; and
- the number of rental payments; and
- the total amount of rent; and
- when you can end your lease; and
- what your obligations are (if any) when your lease ends.

This information only has to be included in your lease if it is possible to give it at the relevant times.

If your lease does not tell you all these details, contact your credit provider's external dispute resolution scheme, or get legal advice, for example from a community legal centre or Legal Aid, as you may have rights against your lessor.

3. Can I end my lease early?

Yes. Simply return the goods to your lessor. The goods may be returned in ordinary business hours or at any other time you and the lessor agree on or the court decides.

4. What will I have to pay if I end my lease early?

The amount the lease says you have to pay.

If you have made rental payments in advance then it is possible that your lessor might owe you money if you return the goods early.

5. Can my lease be changed by my lessor?

Yes, but only if your lease says so.

6. Is there anything I can do if I think that my lease is unjust?

Yes. You should talk to your lessor. Discuss the matter and see if you can come to some arrangement.

If that is not successful, you may contact your credit provider's external dispute resolution scheme.

External dispute resolution is a free service established to provide you with an independent mechanism to resolve specific complaints. Your credit provider's external dispute resolution provider is [insert name of external dispute resolution provider] and can be contacted at [insert telephone number, email/website and postal address].

Alternatively, you can go to court. You may also wish to get legal advice, for example from a community legal centre or Legal Aid, and/or make a complaint to ASIC. ASIC can be contacted on 1300 300 630 or through ASIC's website at <http://www.asic.gov.au>.

The goods

7. If my lessor writes asking me where the goods are, do I have to say where they are?

Yes. You have 7 days after receiving your lessor's request to tell your lessor. If you do not have the goods you must give your lessor all the information you have so they can be traced.

8. When can my lessor or its agent come into a residence to take possession of the goods?

Your lessor can only do so if it has the court's approval or the written consent of the occupier which is given after the occupier is informed in writing of the relevant section in the National Credit Code.

General

9. What do I do if I can not make a rental payment?

Get in touch with your lessor immediately. Discuss the matter and see if you can come to some arrangement.

You can ask your lessor to change your lease in a number of ways—

- to extend the term of your lease and reduce rental payments; or
- to extend the term of your lease and delay rental payments for a set time; or
- to delay rental payments for a set time.

10. What if my lessor and I can not agree on a suitable arrangement?

If the lessor refuses your request to change the rental payments, you can ask your lessor to review this decision if you think it is wrong.

If the lessor still refuses your request, you can complain to the external dispute resolution scheme that your lessor belongs to. Further details about this scheme are set out below in question 12.

11. Can my lessor take action against me?

Yes, if you are in default under your lease. But the law says that you can not be unduly harassed or threatened for rental payments. If you think you are being unduly harassed or threatened, contact your credit provider's external dispute resolution scheme or ASIC, or get legal advice.

12. Do I have any other rights and obligations?

Yes. The law will give you other rights and obligations. You should also **READ YOUR LEASE** carefully.

If you have any doubts, or want more information, contact your credit provider. You must attempt to resolve your complaint with your credit provider before contacting your credit provider's external dispute resolution scheme. If you have a complaint which remains unresolved after speaking to your credit provider you can contact your credit provider's external dispute resolution scheme or get legal advice.

PLEASE KEEP THIS INFORMATION STATEMENT. YOU MAY WANT SOME INFORMATION FROM IT AT A LATER DATE

RELEVANT FINANCIAL HARDSHIP PROVISIONS OF INDUSTRY CODES OF PRACTICE

- Section 13 of the MFAA Code of Practice
- Section 24 of the Customer Owned Banking Code of Practice
- Section 28 Code of Banking Practice

Section 13 of the MFAA Code of Practice

Hardship Applications

- 13.1 If a Member becomes aware, or is advised by a Customer, that the Customer is or may be in financial difficulties, the Member will consider in good faith whether it is reasonably appropriate to vary the payment terms of the credit facility, and if it is appropriate, suggest that the Customer contact the Credit Provider and request the Credit Provider to vary the Customer's repayment terms.
- 13.2 Where appropriate, the Member must:
- (a) have regard to the Customer's financial circumstances and consider in good faith and within a reasonable time the Customer's request to vary the payment terms; and
 - (b) suspend any action to recover any payments due under the Credit and, if it has not listed a default already, not list a credit default in respect of the Credit facility against the Customer until:
 - (i) the Member informs the Customer in writing whether or not it will vary the payment terms; and
 - (i) if the Member and the Customer agree to vary the payment terms, the Customer fails to meet the varied payment terms; and
 - (b) encourage the Customer to make payments the Customer can afford pending the Member informing the Customer of its decision; and
 - (c) (have a documented policy and procedure in place for receiving and assessing requests to vary credit contracts upon hardship grounds and must provide information about their hardship policy to a Customer on request.

- 13.3 Members must act reasonably in assessing a Customer's request to vary payment terms. Amongst other things, Members must not require:
- (a) the Customer to apply for the early release of any part of the Customer's superannuation entitlements; or
 - (b) the Customer to obtain funds from family members, friends or other third parties; prior to the Member considering whether to, or agreeing to, vary the payment terms.
- 13.4 Members who decide to vary the payment terms must promptly and in any case within twenty one calendar days give the Customer written notice setting out particulars of the varied payment terms.
- 13.5 Members who decide not to vary the payment terms must promptly and in any case within twenty one calendar days give the Customer written notice of:
- (a) its decision and the reasons for its decision; and
 - (b) the Customer's right to make a complaint to the Member's IDR and EDR schemes (providing contact details for those schemes) if the Credit falls within the jurisdiction of those schemes.

Section 24 of the Customer Owned Banking Code of Practice

If you are in financial difficulties

- 24.1 We will work with you in a constructive way if you experience genuine difficulties meeting your financial commitments to us. With your agreement and commitment, we will try to assist you to overcome those difficulties. We will do this whether or not you have a right to seek a hardship variation or change under consumer credit laws.
- 24.2 Without limiting (24.1), we will have procedures in place to ensure we:
- (a) adhere to hardship variation or change provisions of consumer credit laws
 - (b) respond promptly to any request or application made to us (we may also initiate contact to discuss your financial situation)
 - (c) genuinely consider your application or request, taking account of your situation. However, we will only be able to do this if you provide us with the financial information and documents we may reasonably need to assess your situation for ourselves
 - (d) encourage you to keep making whatever payments you can while we are considering your request • consider longer term as well as short-term financial issues when they are relevant. If you are experiencing longer term difficulties, we will try to develop an appropriate solution with you to allow you to meet your obligations
 - (e) not list your default on your credit reference file while we are considering your application or request, unless legally required to do so
 - (f) when you have made an application or request in respect of a debt, not sell that debt to a debt buy-out business while we are still considering the application or request
 - (g) suggest other options or avenues that may be available to you, if we are unable to agree to your application or request

- (h) if we are unable to assist you, advise you promptly in writing, and
- (i) refer you to a financial counselling or similar service in appropriate cases (subject to availability).

Section 28 Code of Banking Practice

If you are experiencing financial difficulties with your credit facility

- 28.1 This clause 28 applies to a credit facility you have with us.
- 28.2 With your agreement and co-operation, we will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan.
- 28.3 We will deal with you or, at your request, with your authorised financial counsellor or representative where you have given us their correct contact details. If our reasonable attempts to contact or otherwise deal with your financial counsellor or other representative are unsuccessful, we will revert to dealing with you.
- 28.4 If, in the course of our personal dealings with you, we identify that you may be experiencing difficulties in meeting your repayments under the credit facility, we may decide to contact you and invite you to discuss your situation with us and the options available to assist you in meeting your obligations in these circumstances.
- 28.5 If, at any time you consider you are, or expect to be, experiencing difficulties in meeting your repayments to us, you should make contact with us as soon as possible to discuss your situation with us and the options available to assist you in meeting your obligations.
- 28.6 We will respond promptly (for example, within the timeframes prescribed by the National Credit Code, if it applies) to any requests for assistance from you, or your authorised representative, in relation to your financial difficulties with a credit facility you have with us. We will take into account the information available to us, including the information you provide to us, about your financial situation in determining whether or not we are able to provide assistance and the nature and extent of any assistance.
- 28.7 If, when you contact us in any of the circumstances described in clauses 28.5 and 28.6 or when you discuss your situation with us as a result of an invitation described in clause 28.4, we think that the hardship provisions of the National Credit Code could apply to your circumstances, we will inform you about them.
- 28.8 We will inform you in writing of our decision whether or not to provide you with any assistance if you are in financial difficulty with a credit facility you have with us and the reasons for our decision. If we agree to provide you with assistance, we will confirm in writing the main details of the arrangements.
- 28.9 We will:
 - (a) not require you to apply for early release of your superannuation benefits to repay the whole or any part of your credit facility with us; and
 - (b) recommend that you seek independent advice on the option of applying for early release of your superannuation benefits, for example, from a financial counsellor or financial adviser.

☛ *Information on having your superannuation benefits released early is available from the Department of Human Services (www.humanservices.gov.au).*

- 28.10 We will make information about our processes for dealing with customers in financial difficulty with a credit facility available on our website (including relevant contact numbers). We will inform you at your request about how to find this information on our website and we will make this information available in another format if you tell us you do not have access to our website.
- 28.11 We will take reasonable steps to ensure that relevant staff, who are responsible for dealing with you about your financial difficulties with a credit facility you have with us, are trained in relation to the hardship provisions of this Code and the National Credit Code.

