

BANKING SERVICES ALERT

NEW NATIONAL CONSUMER CREDIT LEGISLATION

On 1 July 2010 the National Consumer Credit Protection Act 2009 (Clth) ("NCCP") commences operation. As from 1 April 2010 the registration process started under Transitional legislation.

The NCCP is a new National Consumer Credit Protection Code which is the result of an agreement between the States and Territories and the Commonwealth Government for the Commonwealth Government to take over responsibility in the area of consumer lending.

The NCCP imposes new licensing and other obligations to businesses that engage in "credit activities".

WHAT ARE CREDIT ACTIVITIES?

Credit activities involve:

- Lending money under a credit contract or consumer lease
- Providing a credit service or credit assistance to a consumer in respect to consumer credit (eg. Finance Brokers)
- Acting as an intermediary in the chain between the borrower and lender
- Holding a benefit of a mortgage or guarantee relating to a consumer credit contract.

Basically the new NCCP applies to all businesses operating in the consumer credit space.

WHAT DOES THE NCCP REQUIRE?

The new NCCP requires all businesses operating in the consumer credit space to

- Be licensed or appointed a Credit Representative (subject to certain exceptions)
- Comply with the new National Consumer Credit Code ("NCCC")
- Engage in responsible lending practices.

WHAT TYPE OF BUSINESSES WILL BE SUBJECT TO THE NEW NCCP?

The new NCCP will of course apply to banks, credit unions and finance companies. But, it will also apply to mortgage and finance brokers.

Importantly, the new NCCP also catches other entities that are involved in the credit space incidental to another part of their business, and who either provide credit assistance or act as intermediary in the chain between the borrower and the lender. Some examples of these other organisations include:

- Financial planning groups
- Accounting firms
- Estate Agents

and other similar type organisations.

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In order to determine whether the activities of these types of organisations are caught by the new NCCP one has to first look at what the organisation does. If advice is given about particular loan products then this will amount to credit assistance. Reference to loan products generally of a lender is not sufficient: it must be about a particular loan product of that lender. Even though credit assistance, as defined, may not be given, the organisation may still be acting as an intermediary.

Because of the wide scope of the NCCP, there are various exemptions that have been granted, either in total or for a limited period of time. Exemptions include:

- Lawyers
- Registered Tax Agents
- Point of Sale retailers
- Financial counseling agencies
- Debt collectors until April 2011.

Importantly “mere referrers” are also exempt.

MERE REFERRER EXEMPTION

Were it not for the “mere referrer exemption”, even giving someone the name and contact details of a person who could assist in providing credit would make the referrer caught by the new NCCP if the referrer was found to either be providing “credit assistance” or acting as an “intermediary”.

Most referrers will not be providing credit assistance because it is unlikely they will be commenting on particular loan products, as opposed to loan products generally. But chances are they will be acting as an intermediary.

The “mere referrer exemption” allows existing referral networks to continue to operate, even though technically the mere referrer would be classed as an intermediary in the chain between the borrower and the ultimate lender. But, the mere referrer exemption has limitations. The legislation states that it only applies where a referrer (eg. Estate Agent, Financial Planner or Accountant)

- **informs** a potential borrower that they may be able to obtain credit through a particular person;
- **gives** the potential borrower information on how to contact that person; and
- **discloses** to the potential borrower the fees or other benefits the referrer may receive.

Hopefully, the mere referrer exemption also extends to the “tick and flick” situation permitted under AFSL. Clarification from ASIC in this regard is expected.

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SO WHAT CAN REFERRER'S DO WITHOUT NEEDING TO BE APPOINTED A CREDIT REPRESENTATIVE?

In our view and assuming ASIC confirms that "tick and flick" is permitted:

- Referrers can give customers the contact details of a finance provider; and
- Referrers can give customer contact details to finance providers;

But, referrers cannot:

- Give out application forms;
- Talk about particular loan products;
- Do those types of things which a finance broker normally does.

This means that referrers can still carry on their existing business, without being subject to the full force of the NCCP.

Remembering also to disclose any commissions you may be entitled to receive - at the time of making or discussing a referral - in the same fashion as the referral is made. For example, if discussing a broker with a client, the reference to commission would only need to be verbal.

WHAT DO YOU NEED TO DO IF YOU ARE CAUGHT BY THE NEW NCCP AND NOT EXEMPT?

If you are caught by the NCCP and not exempt, you will need to:

- Obtain a licence to operate; or
- Be appointed in writing as a Credit Representative for a licensee.

and

- Not deal with an unlicensed person; and
- Comply with the responsible lending provisions.

HOW DO YOU GET A LICENCE?

The licence application involves a two step process.

First, you must register online with ASIC between 1 April 2010 and 18 June 2010 your interest in becoming a licensee; and

Second, by 31 December 2010 you must make formal application for a credit licence.

If you decide you will be a Credit Representative and not a licensee, then you need to be appointed in writing as a Credit Representative by a licensee no later than 30 June 2010 in order for you to be able to operate in the consumer credit space after that date.

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RESPONSIBLE LENDING PROVISIONS

The responsible lending provisions differ depending on whether you are acting as a lender or credit assistant. Lenders are only required to comply with 2 of the 4 requirements, namely to give a Credit Guide and make a Loan Assessment.

There are four basic responsible lending provisions and these require:

- When you first meet with a potential borrower you give them a **Credit Guide** setting out your contract and other details.
- When it becomes clear that a borrower wants to consider applying for a loan, you need to hand them a **Credit Disclosure Document** (much like the current finance broking contract being used in most states today);
- When the potential borrower decides to apply for a particular loan, you need to conduct a detailed **Loan Assessment** to make sure that the loan will not be “unsuitable” for them.
- At the same time as conducting the credit assessment, you need to give the potential borrower a **Credit Proposal Document** setting out the fees and charges applicable to the loan, the net loan proceeds and the commission earned on the deal.

Most of these provisions become operational on 1 January 2011, but for mortgage and finance brokers and lenders which are not “Approved Deposit Taking Institutions” or RFC’s the obligation not to recommend a loan that is “unsuitable” to the borrower becomes operational from 1 July 2010.

For **legal advice** or for further **information about our services**, please contact Richard Williams on 03 8622 2711.

Richard Williams
Level 2
535 Bourke St
MELBOURNE, 3000
Email: richardw@macgillivrays.com.au



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