



VICTORIAN CREDIT LEGISLATION BEING AMENDED

On 19 March 2008, amendments to Victorian Consumer Credit laws commenced. The amendments detailed in the *Consumer Credit (Victoria) and other Acts Amendment Act 2008* were the result of a 2005 Victorian Government review of its consumer credit laws.

In essence the proposed amendments relate to the powers of the Director of Consumer Affairs Victoria and a general toughening up of the Victorian credit provider registration regime.

IMPACT ON MAINSTREAM CREDIT PROVIDERS

For existing mainstream credit providers these proposed changes to the law will have an impact in two main areas:

1. All credit providers will be required to be a member of and participate in an approved external dispute resolution scheme and notify accordingly; and
2. All credit providers will be required to increase the amount of information needed to obtain and maintain registration as a credit provider.

Other significant changes to be brought about by the amending legislation include:

- The Director of Consumer Affairs will have the power to bring proceedings in a Court rather than the Victorian Civil and Administrative Tribunal. The additional power gives added flexibility to the Director if it is in the public interest and the matter may be more appropriately dealt with by a Court.
- The Business Licensing Authority ("Authority") will have added powers to review and investigate applications for registration as a credit provider as well as investigate registration of existing credit providers.
- The requirements for the contents of the Register of Credit Providers maintained by the Authority will be enhanced.
- Provision for automatic cancellation of registration as a credit provider in certain circumstances, such cancellation to take place thirty (30) days after the occurrence of the defined event.
- Allow credit providers whose registration would otherwise be automatically cancelled to apply to extend registration post the 30 day period.
- New provisions permitting credit providers to review decisions of the Authority which adversely affect them.
- Allow the Director of Consumer Affairs to institute and continue proceedings (on behalf of Consumers), on certain conditions.

The amending legislation also re-enacts (with amendments) certain provisions in dealing with:

- Fair reporting under the *Fair Trading Act 1999* (Vic);
- Rent/Buy contracts under the *Residential Tenancies Act 1997* (Vic);
- Terms contract provisions under the *Sale of Land Act 1962* (Vic) and various minor amendments to other legislation.

The amendments to the *Residential Tenancies Act 1997* (Vic) and the *Sale of Land Act 1962* (Vic) are not scheduled to commence until 1 July 2009.

The long term impact of the new legislation will result in the Government having more power to intervene in the registration and regulation of credit providers and in dealings with individual consumers and classes of consumer.

The amending legislation is part of a raft of legislative changes being implemented by both individual States and Federally to toughen up regulation of credit providers and extend the scope of the Uniform Consumer Credit Code.

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BE CAUTIOUS ABOUT OVER 50S LIFESTYLE DEVELOPMENTS

The following case study illustrates why you need to be cautious when property in Over 50s Lifestyle Developments is proposed as security.

In early 2008 a borrower signed a contract to buy a unit. The contract was conditional upon a sub-lessor consenting to the assignment of the sub-lease. No further information was given to the lender about the nature of the lease arrangements.

The solicitors documenting the transaction did not identify the nature of the security and lost valuable time seeking termination of the sub-lease.

The loan did not proceed and the borrower is now claiming:

- reimbursement of \$6,500 in legal fees and loss of deposit; and
- a right of indemnity for damages by the vendor if these crystallise on re-sale of the unit.

Nothing in the initial valuation indicated the property was in an Over 50s Lifestyle Development.

SO WHAT'S WRONG WITH AN OVER 50S LIFESTYLE COMPLEX?

In this case there were two rent free leases for 99 years.

The first lease (the *head lease*) was to a manager, and had no terms and conditions which would cause it to terminate early. It effectively stripped the owner of ownership benefits for 99 years.

The second lease (the *sub-lease*) restored those rights subject to a number of conditions, including:

- restrictions on how long visitors under 18 years old can stay; and
- age restrictions on who can live in the unit.

Breach of any condition allowed the manager to evict the owner (the sub-lessee) and terminate the sub-lease. In effect a grandparent living in this development could be evicted for having a grandchild visit for the school holidays.

If the sub-lease terminated, the owner would retain all the costs of ownership of the property (rates, insurance, maintenance) but lose most of the benefits of the property (including rents).

Merely taking a mortgage over this property would have left the lender with a security that had little or no value.

By stripping the owner of ownership rights the head lease prevents those rights being mortgaged. It is likely the security was worthless or had a negative value even though the property itself had value, the Lender would not have been able to sell the property as a going concern.

To get an effective security the mortgagee would have needed to:

- mortgage the property plus the sub-lease; and
- enter into a specially drafted tripartite agreement with the manager in relation to the head lease.

There is no reason why the manager would agree to such an agreement.

This is why properties with these arrangements are of no value as security to mainstream home loan lenders or for inclusion in a securitisation pool.

It is important to identify unusual features as early as possible, preferably before the finance provision of the sale contract expires.

This gives the parties as much time as possible to come to grips with the relevant issues and protect their position.

In this case, had the nature of the security been identified when the loan was applied for the loan would have been declined.

Make sure any approval letter makes it clear that the loan can be withdrawn if material information has not been disclosed to the Lender.

This will minimise the risk of being sued if the loan is withdrawn.

Not all Over 50s arrangements the same.

We have seen several different structures allowing Over 50s Lifestyle Developments to restrict ownership and use of the property. The example described above is by far the most onerous arrangement we have reviewed to date.

The ownership restrictions in each type of arrangement we have reviewed have made all of the relevant properties unpalatable to our clients as security for a home loan.

If a borrower mentions anything unusual about the property - check it out.

- Require copies of covenants and any leases that are to remain on title after settlement.
- Describe these arrangements in the loan application.
- Better still, send copies with the loan application.

Early detection is the key to avoiding grief with unusual securities.

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S U C C E S S F U L



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