



Submission to:

**Uniform Credit Code Management
Committee**

**Credit & Financial Services: Solicitor
Lending, Instalment Contracts, and
the Consumer Credit Code
Consultation Package**

**Centre for Credit and
Consumer Law, Griffith University**

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About the Centre for Credit and Consumer Law

The Centre for Credit and Consumer Law is an academic centre, hosted by Griffith University Law School.

The Centre for Credit and Consumer Law was established in March 2004 to be a source of expertise, and a centre of excellence, on credit and consumer law issues, and it has the overall objective of promoting the attainment of a fairer, safer, and more efficient marketplace, particularly for low income and vulnerable consumers.

The Centre for Credit and Consumer Law is funded by the Queensland Government's Consumer Credit Fund (administered by the Office of Fair Trading) and Griffith University.

About this Submission

The Centre for Credit and Consumer Law (CCCL) welcomes the opportunity to provide a submission in relation to the proposed amendments to the Uniform Consumer Credit Code (the Code) involving solicitor lending, instalment contracts and 'tiny terms' contracts.

The proposed amendments are limited in scope aiming simply to find a way to capture the above transactions within the legislative framework of the Code. Other consumer protections required to curb power imbalances associated with the provision of fringe credit also need to be addressed within the framework of the Code. However, this submission will focus on the suggested amendments. In particular, this submission focuses on the proposed amendments that seek to capture solicitor lending, and sale of goods by instalment and 'tiny terms' contracts.

Proposed Amendments – Solicitor Lending

Solicitor lending involves the situation where a solicitor will arrange a loan on behalf of a lender, who is often an individual lender not in the business of providing credit, or where the loan is provided by the legal practice itself. Although such loans comprise a small proportion of consumer loans they 'can cause severe problems for consumer borrowers'.¹

The proposed amendments seek to capture solicitors who arrange credit loans on behalf of investors or clients. The proposed provisions deem the law practice to be the credit provider despite the fact that the money is coming from an investor. This has been done to ensure that the solicitor who arranges the loans becomes responsible for ensuring compliance with the provisions of the Code, particularly those relating to disclosure.

¹ Nicola Howell (2004) *Solicitor lending to consumers: a study of interest only loans and asset based lending practices in Victoria*, for Consumer Credit Legal Service Inc (Vic), available <http://www.ccls.org.au/Copy%20of%20pdfs/summary.pdf>, p ii.

- Will the proposed amendments cover the practice of solicitor lending to consumers? If not, how can the proposals be improved?

The *Uniform Credit Code: Post Implementation Review* recommended that the preferred way to deal with solicitor lending transactions in order that consumers are guaranteed the protections available under the Code was to make the party who arranges the credit on behalf of an investor and who ultimately deals with the debtor, the party that is captured by the Code.² This party would be, in solicitor lending type transactions, the solicitor.

The proposed amendments will capture the situation where funds are given to the law practice for credit financing and where the law practice does not normally engage in the business of credit financing. This resolves any doubt about whether or not such law practices are considered to be in the business of providing credit. Without such an amendment, solicitor lending would in many instances fall outside the Code.

There is a danger that by making the solicitor the credit provider, solicitors will stop providing such a service or will set up a separate company to become the intermediary thereby removing themselves from the transaction and from the obligations under the Code. One way around this would be to make any intermediary, whether a solicitor or not, the credit provider. This is explored further in the next dot point.

- Should other service providers that facilitate lending (such as accountants) be included? If so, which occupations and why?

There are other service providers, apart from solicitors who arrange loans on behalf of an individual lender and who are not in a business of providing credit. For example, accountants and brokers have been noted as arranging such loans, but many currently fall outside the ambit of the Code because they are not themselves the credit provider. It is unclear why such service providers should not be subject to the obligations imposed by the Code. The CCCL would therefore support an amendment that captures other service providers that facilitate lending.

If the Uniform Consumer Credit Code Management Committee ultimately makes the intermediary the credit provider (and not the lending arrangement) then the CCCL supports the proposal made by the Consumer Credit Legal Service Inc (Vic) in their 2004 report to insert the following sub-section in section 6 of the Code:

Section 6(1)(e) – the person arranging the credit arranges the credit in the course of a business of arranging credit or as part of, or incidentally to, any other business of the person arranging the credit.³

Such a provision is sufficiently general to capture other service providers that facilitate lending.

² Ministerial Council on Consumer Affairs (1999) *Uniform Credit Code: Post Implementation Review*, Tasmania – Department of Justice and Industrial Relations, pp 59-60.

³ Nicola Howell (2004) *Solicitor lending to consumers: a study of interest only loans and asset based lending practices in Victoria*, for Consumer Credit Legal Service Inc (Vic), available <http://www.ccls.org.au/Copy%20of%20pdfs/summary.pdf>, p 97.

- Will the proposed amendments pose significant problems for solicitors in complying with the Code's provisions? If so, why? How can the provisions be improved?

Considering that most credit providers would engage solicitors to ensure that they are in compliance with the Code's provisions, it should not pose significant problems for solicitors to be the entity that must comply with the Code's provisions. Solicitors are in fact the group with most legal literacy skills and they should not find it difficult to arrange their affairs so that they comply with the obligations imposed under the Code. Solicitors that are currently arranging loans on behalf of an investor, should be retaining adequate documentation and accounts, and should be concerned with ensuring that the disclosure requirements imposed under the Code are followed. Therefore formalising their inclusion as credit providers should not give rise to any significant problems for solicitors.

- Do you think that the proposal outlined in the Drafting Note is a better alternative? If so, how can compliance with the Code's obligations be secured if the lender were to be the credit provider?

The draft amendment acknowledges that the deeming provision may cause some concern to legal practitioners and it therefore requests further submissions from law practices as to how such a provision could be reworded to make the relevant lending arrangements the provision of credit to which the Code applies rather than making the law practice the credit provider. Such lending arrangements may be captured by amending section 6(1)(d) of the Code as follows:

the credit provider provides the credit

- (i) in the course of a business of providing credit, or
- (ii) as part of or incidentally to any other business of the credit provider, or
- (iii) through an intermediary whether or not it is in the course of a business of providing credit or as part of or incidental to any other business of the credit provider.

This would exclude the situation where a person lends money directly to a family member or friend as a private arrangement (since it would not be through an intermediary and it would not be in the course of a business of providing credit or as part of or incidental to any other business). However, if a person lends money to a friend or family member through an intermediary it raises an assumption that it is a business rather than a private arrangement, which should therefore be subject to the provisions of the Code. It would also exclude a situation where a person requests a solicitor to simply prepare the relevant documentation for the provision of credit since such a situation does not engage the services of an 'intermediary' but is rather the use of professional advice.

- Other comments

The Post Implementation Review of the Code reported that one of the main problems associated with solicitor lending was that there was little or no investigation of a

borrower's capacity to repay the loan.⁴ Often the loans are interest only, with the principal to be repaid at the end of the loan. Without a proper plan for repayment of the principal, borrowers find it difficult to find the money to repay the principal at the end of the loan. The amendments proposed under the current review do not include new requirements to investigate a borrower's capacity to repay the loan and to assist borrowers with a repayment plan. The CCCL would recommend including such a requirement as part of the current review and amendments.

Proposed Amendments – Sales of Goods by Instalment and Tiny Terms Contracts

- Do the proposed amendments succeed in bringing conditional sale of goods and tiny terms under the Code? If not, how can they be improved?

Conditional sale of goods contracts are currently not captured by the Code because it is argued that the payments made under such contracts do not represent a deferral of debt as required by section 4(1) of the Code but rather the payments are made when an instalment falls due. Similarly, payments due under tiny terms contracts are construed as not being a provision of credit since there is no charge imposed. The proposed amendments attempt to clarify certain matters when determining whether conditional sale of goods and tiny terms contracts are credit contracts under the Code.

Section 9B(1) defines contracts to which the new section 9B will apply. Section 9B(2) sets out how to define the parties involved in the contract and the charge for providing the credit for the purposes of section 6 of the UCCC. The introductory part of section 9B(2) is unclear and we propose that it be amended to read as follows:

For the purpose of deciding whether the contract is a credit contract, and if it is a credit contract, of applying this Code (including part 6) to the contract ...

Paragraph (d) of section 9B(2) states that the charge for providing the credit to be the amount by which the total cost to purchase the goods exceeds the cash price. It includes 'any other amount payable under the contract'. Although this phrase is quite general, we believe that this is preferable to a provision that limits the types of ancillary payments that would be included as part of the 'charge'. By making *all other amounts* payable under the contract it leaves no room for exclusion based on interpretation.

However, the requirement of using a cash price to calculate the charge may lead to difficulties in determining the value of the charge. At present 'cash price' is defined in Schedule 1 of the Code as:

“cash price” of goods or services to which a credit contract relates means the lowest price (unaffected by any discount between the credit provider and the supplier) that a cash purchaser might reasonably be expected to pay for them (either from the supplier or, if not available for cash from the supplier, from another supplier).

⁴ Ministerial Council on Consumer Affairs (1999) *Uniform Credit Code: Post Implementation Review*, Tasmania – Department of Justice and Industrial Relations, p 58.

This definition needs to be clarified to avoid the situation where a supplier inflates their cash price on the basis that they are more skilled at selling than others. If suppliers were able to use such an argument, the 'charge' under section 9B(2)(d) would not reflect the actual cost of the credit but would in fact be much less than the actual cost under a conditional sale of goods or tiny terms contract. In order to avoid such a situation, the definition of 'cash price' in Schedule 1 of the Code should be amended so that it equates to a market average cash price.

- Will the proposed amendments enable the credit providers to provide disclosures required under section 15 of the Code?

In order to ensure that credit providers falling under section 9B are capable of disclosing the information required under section 15 of the Code there needs to be further clarification of certain terms used in section 15 and under the proposed new section 9B.

Firstly, there needs to be clarification of how a credit provider under section 9B is to calculate the interest rate for the purposes of s15(C). Such a definition should state that the charge as defined under s9B(2)(d) should be the amount used to calculate the interest rate.

Secondly, the word 'charge' in section 9B(2)(d) should be changed to 'interest charge' otherwise the reference to 'charge' in section 9B may be construed as a credit *fee and charge* under s15(G). This would preclude such a charge from being used to calculate the interest rate for the purposes of disclosure. One of the main problems with 'tiny terms' contracts is that consumers are told there is no interest rate associated with the sale when in fact it is hidden in the difference between the total amount payable and the cash price. It is therefore important that credit providers be made to provide this information to consumers and that the disclosure provisions define terms in a way that makes this possible.

Although the amendments may result in credit providers having to make the disclosures under section 15 of the Code, there is no obligation on credit providers to adhere to the information they have disclosed to the debtor. Indeed one of the main problems encountered with credit contracts, particularly those obtained from fringe credit providers, is that although disclosure regarding the calculation and frequency of credit charges is made according to section 15(D), credit providers often debit an loan account for the credit charges at different intervals to those disclosed.⁵ There is currently nothing in the Code that prevents this from occurring. Credit providers should therefore be prevented from inserting clauses in credit contracts, which allow them to alter the information provided, particularly information provided under section 15.

⁵ This information was obtained from a compliance officer from the Office of Fair Trading, Queensland.

Contact for further information

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