

## NEW CONSUMER CREDIT CODE AND CODES OF PRACTICE

### — How are the Lenders Adapting?

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This paper deals with a number of aspects of the *Consumer Credit Code* ("CCC") which have been identified as issues causing concern to lenders in implementation of the CCC. In the context of the implementation process it identifies some of the areas where there are differences between the CCC and the *Code of Practice* which have potential to cause duplication/difficulties for credit providers. It also examines another major issue for credit providers, namely, the transitional provisions for dealing with existing contracts under the CCC.

The specific matters dealt with are:

- the threshold question to application of the CCC - when is credit provided "wholly or predominantly for personal domestic or household purposes"?
- how changes to credit contracts are effected under the CCC and notification requirements for those changes;
- the transitional provisions; and
- differences in application between the CCC and the *Code of Banking Practice* - to the extent that this has not been dealt with by earlier papers in this section.

#### A. INTRODUCTION

This paper is offered subject to the following:

1. At the time of writing regulations containing transitional provisions are not available - the comments in this paper are based on the second exposure draft (December 1995);
2. At the time of writing final regulations are not available - the comments in the paper are based on the exposure draft released in December 1994 and the further comments released in March 1995;
3. Whilst the issues addressed are significant they are also to a large extent in uncharted territory. There is no case law directly on point;

4. Reference has, where possible, been made to case law about relevant similar provisions in the *Credit Acts*;
5. Reference has also been made to the explanatory memorandum accompanying the CCC, to the Ministers second reading speech and to Hansard for guidance in some areas. On the whole those sources have failed to shed light on what are some very fundamental issues to lenders;
6. Much of the analysis of the CCC is based on first principles and represents no more than my view of how the CCC might, in the future, be interpreted. Others will have different views. These comments are offered simply as my observations.

## **B. "WHOLLY OR PREDOMINANTLY FOR PERSONAL, DOMESTIC OF HOUSEHOLD PURPOSES"**

### **Relevant sections**

#### *Section 6(1)*

*"This Code applies to the provision of credit ... if when the credit contract is entered into or ... is proposed to be entered into -*

- a. ...
  - b. *the credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes; and*
  - c. ...
  - d. ...
- (4) *For the purposes of this section, investment by the debtor is not a personal, domestic or household purpose.*
- (5) *For the purposes of this section, the predominant purpose for which credit is provided is -*
- (a) *the purpose for which more than half of the credit is intended to be used; or*
  - (b) *if the credit is intended to be used to obtain goods or services intended to be used for more than one purpose, or the goods are intended to be used for more than one purpose, the purpose for which the goods or services are intended to be most used."*

#### *Section 11*

*11(1) In any proceedings (whether brought under this Code or not) in which a party claims that a credit contract, mortgage or guarantee is one to which this Code applies, it is presumed to be such unless the contrary is established.*

*(2) Credit is presumed conclusively for the purposes of this Code not to be provided wholly or predominantly for personal, domestic or household purposes if the debtor declares, before entering into the credit contract, that the credit is to be applied wholly or predominantly for business or investment purposes (or for both purposes).*

...

## Explanatory notes

*Clause 6 sets out the circumstances in which the Code will apply to the provision of credit (and to credit contracts and related matters). The debtor must be a natural person ordinarily resident in the jurisdiction or a strata corporation formed in the jurisdiction, the credit must be provided wholly or predominantly for personal, domestic or household purposes, a charge must be made for the credit and the credit provider must provide credit as part of a business.*

## Second reading speech

*"As I have said, the legislation applies, basically, to all forms of consumer credit. Business credit is not regulated and this stands in contrast to the existing law which attempts to regulate credit provided for the purchase of farm machinery and commercial vehicles."*

*"The credit must be provided or intended to be provided wholly or predominantly for personal, domestic or household purposes.*

*A predominant purpose is defined to include a purpose for which more than one half of the credit is intended to be used, or if the credit is intended to be used to obtain goods and services for different purposes, the purpose for which the goods or services are intended to be most used.*

*One example of the different purpose is where credit is obtained to purchase a vehicle which may be used partly for personal and partly for business activities. If the vehicle is most used for business purposes the transaction is not regulated by the Code, whereas if the vehicle is most used for personal purposes it is regulated."*

It is trite to say that the starting point for a credit provider in implementing a compliance system is to decide whether a loan is regulated.

The question as to whether credit is provided wholly or predominantly for personal, domestic or household purposes is fundamental to that threshold question.

As will be seen from the discussions to follow the question will not always be clear. The decision about whether a loan is regulated will be made by an officer of the lender. That officer cannot be expected to make some of the fine distinctions and judgements which may be required. Credit providers must look to put in place a system which, so far as possible, removes any subjectivity from the decision making process.

## The starting point - a presumption of application

The starting point for any consideration of the meaning of the words is the presumption in section 11 that the CCC applies to transactions. Any consideration of the phrase and any compliance system must proceed from the basis that the CCC applies unless it can be clearly shown that it does not.

## Business purposes declaration

The CCC itself provides one means of rebutting the presumption, namely the use of the declaration provided for by section 11(2). If the declaration is obtained the presumption is reversed - the credit is presumed **conclusively** not to be provided wholly or predominantly for personal, domestic or household purposes. About that declaration:

- it must be in the form provided by the regulations - regulation 9 is the relevant one;

- section 11(3) says that the declaration is ineffective if the credit provider (or any person who obtained the declaration from the debtor) knew, or had reason to believe, at the time the declaration was made that the credit was to be applied wholly or predominantly for personal, domestic or household purposes;
- a credit provider cannot therefore simply bury its head in the sand and rely on the declaration;
- the relevant time for determining the credit provider's knowledge is the time the declaration is made, not the time credit is provided. After acquired knowledge will not therefore affect the presumption;
- the credit provider is directly responsible for actions of its agents including their actions in obtaining the declaration;
- the credit provider does not know or have reason to believe anything merely because an officer, agent or employee of the credit provider knows or has reason to believe something unless the knowledge was acquired by the officer, agent or employee acting in that capacity and in connection with the loan concerned (section 176(5));
- that protection may not be offered to the credit provider in relation to knowledge which is acquired by an employee of an agent;
- the credit provider is responsible for the actions of any third party who obtains the declaration - irrespective of any agency or authority arrangement. No protection is offered if that person is not an officer, agent or employee of the credit provider. Credit providers must not rely on declarations obtained by third parties unrelated to them. For example, a credit provider should not rely on a declaration obtained by one of two joint borrowers.
- to what extent must the credit provider inquire if a declaration is offered by the debtor? Similar wording appeared in the sections dealing with a business exemption under existing credit legislation and some guidance can be obtained from discussions about those sections. In the writer's opinion, the better view is:
  - the section does not impose an obligation to make enquiries to validate the declaration beyond the usual enquiries about the loan proposal;
  - if there is no evidence which reasonably creates a concern that the declaration was not correct, a credit provider is entitled to rely on the declaration;
  - the test to be applied is an objective one - what would a reasonable credit provider confronted with the knowledge actually acquired in connection with the transaction or which should have been obtained in connection with the transaction, believe?

(See *Luff v Custom Credit Corporation* Supreme Court of Victoria unreported 27 November, 1990.)

### **Personal, domestic or household purposes - some meanings**

The expression "personal, domestic or household purposes" should not cause difficulties.

Some guidance as to the meaning of the expression can be gained from decisions on similar terms used in trade practices and sales tax legislation. However, the test which applies in that legislation is whether particular goods are "ordinarily used" for household purposes. The CCC deals with actual use. Some of the decisions must therefore be treated with caution.

*"personal"* - "Of, pertaining to, concerning or affecting the individual person or self, individual; private; one's own". (*The Shorter Oxford English Dictionary*)

"domestic" - "Of or belonging to the home, house or household". (*The Shorter Oxford English Dictionary*)

In *Metropolitan Water Board v Colley's Patents Limited* ([1911] 2 KB 38) water supplied to a factory for use for drinking, washing by employees and to supply lavatories was held to be domestic supply although no one lived on the premises.

"In my opinion, the term 'domestic' carries its usual significance of pertaining to the home. I refer to only one dictum, that of Phillimore J in *Metropolitan Water Board v Colley's Patents Limited* ... at page 40: '... "domestic" does not mean civilised or domesticated or something appertaining to man, but means something to do with man as occupying or using a house or dwelling ...'." (*Jillawarra Grazing Co v John Shearer Ltd* (1984) ATPR 40-441)

"household" - "of or belonging to a household; domestic". (*The Shorter Oxford English Dictionary*)

"The use of the adjective 'household' suggests that the intention has been to distinguish the particular goods in question from similar goods that have uses outside a domestic establishment. I have already made reference to commercial and industrial uses to which the goods can be put and I think that in broad terms this is the intention of using the words 'ordinarily used for household purposes'." (*F of T v Sherwood Overseas Pty Ltd* (1985) 75 FLR 474 Olney J at 478-9)

In *Kentucky Fried Chicken Pty Ltd & Ors v F of T* ((1986) 17 ATR 1039) Yeldham J adopted Olney J's comments - "household" describes articles used in or about a dwelling house for household purposes.

"Household" has a broad meaning - "the inmate of the house", or a narrow meaning - "a domestic establishment, the house and its affairs, a place where one holds house, his home". (*Muir v Royal Insurance Co* (1981) 125 DLR (3d) 172)

"The concept of a household encompasses the ordinary household environs." (*O R Cormack Pty Ltd v FCT* (1992) 92 ATC 4121 at 4125)

"In my view, a purpose may be a household purpose even if not exclusively or principally pursued in situ a dwelling." (*Hygienic Lilly Ltd v FCT* (1987) 13 FCR 396 Gummow J at 400)

"personal, domestic or household" - "When one is characterising goods for the purpose of an item such as this, one gives the words their application in ordinary parlance, not adopting a technical, scientific approach, but rather looking at the words and weighing them up. One asks, do the goods fit within this description and are these goods fairly described by these ordinary words of the English language. That is to ask whether the goods have the essential character specified and that is the same point.

In my view, you approach the interpretation of this item in a straightforward way, not by moving artificially from word to word but by weighing up all the words used." (*Diethelm Manufacturing Pty Ltd v FCT* (1992) 92 ATC 4762 Davies J at 4762-4763)

"a kind ordinarily acquired for personal, domestic or household use or consumption ... - that is, consumer goods." (*Re George Zaravinos and Dairy Farmers Cooperative Limited* (1985) ATPR 40-559)

The phrase must be given its ordinary meaning. That best achieves the intention of the legislation. There is no overriding principle here that would lead to any other interpretation being adopted. The Minister in his second reading speech referred to credit regulated by the Code as consumer credit. It is credit related to the personal activities of borrowers as opposed to business activities. The distinction to be drawn is between business and non business activities. That is consistent with the wording in section 11(2) and the declaration provided for in the draft regulations. I would be surprised if the application of common sense principles to interpretation did not mean that in most

cases it will be clear whether purposes are personal, domestic or household. The problems of interpretation which have troubled the courts in relation to the Trade *Practices Act* and sales tax legislation will not occur because most of those problems have stemmed from the use of the term "ordinarily used" rather than from an interpretation of what is personal, domestic or household. Other problems resulting from the use of a purpose test will arise. Problems may also arise because the tests in industry codes are different to the test in the CCC. Those issues are dealt with later in this paper.

### **What are not personal, domestic or household purposes?**

In the absence of section 6(4) all personal lending would be included, including investment. Section 6(4) expressly provides that investment loans are not loans for personal, domestic or household purposes.

Investment is not defined in the CCC.

*"investment"* - "the investing of money or capital; an amount of money invested in some species of property".

*"invest"* - "to employ (money) in the purchase of anything from which interest or profit is expected; to make an investment". (*The Shorter Oxford English Dictionary*)

Deciding what loans are investment loans will not be difficult. However, the CCC does not exclude investment loans. It merely provides that "investment" purposes are not personal, domestic or household purposes. Therefore difficulties will still arise, for example, where credit is provided to buy a beach house purchased in part for investment and in part for personal use. The difficulty arises because of the dual nature of the asset rather than from difficulties in determining whether some part of it is "investment". This is dealt with in more detail later in this paper. The main point is that the fact that a component of the loan is "investment" does not avoid the need to apply the tests provided by the CCC to decide whether loans for multiple purposes are regulated.

The decision as to whether a particular activity is an investment activity or not should not cause significant difficulties. Again ordinary meanings must apply. If a profit or gain is expected (whether capital or income, whether short or long term) and is the prime reason for the loan or for buying the property acquired with the loan, then it must be regarded as an investment loan. A basic test may simply be to ask whether the debtor is deducting interest paid on the loan from its income tax. If it is, the loan supports an investment. If it is not, further enquiries may be necessary but, those enquiries should start from the presumption that the loan is probably regulated. The predominant purpose tests provided in the CCC remove the possibility that because capital gain might be expected on the family home, it should be regarded as an investment.

In practical terms one would generally expect that an investment proposal to a credit provider would be submitted and structured differently - eg in the case of investment property the application will no doubt mention rental income, return after taking into account the tax benefits of the investment etc. It is likely that the rates will also be different. The credit provider should, of course, in all those cases where it decides the loan is for investment purposes obtain the declaration provided for in section 11 of the CCC.

## Intention

Intention becomes relevant in two areas.

- (1) Section 6(1)(b) provides that the CCC only applies if credit is provided or *intended to be provided* wholly or predominantly for personal, domestic or household purposes.
- (2) Section 6(5) says that the predominant purpose for which credit is provided is:
  - the purpose for which more than half of the credit is *intended to be used*, or
  - if the credit is *intended* to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services *are intended to be most used*.

In the first case the intention relates to the **provision** of the credit - not the use of the credit. The credit provider is the party providing the credit. Therefore the relevant intention should be that of the credit provider. The question to be asked is did the credit provider intend that the credit be provided wholly or predominantly for personal, domestic or household purposes? This should be determined on an objective test.

The second case involves a consideration of the use to which the loan is to be put. The loan is being used by the debtor. In that case, it is the debtor's intention that is relevant. The test here is entirely subjective. This only becomes relevant where loans are for mixed purposes and it is necessary to consider whether the credit is predominantly for personal, domestic or household purposes. The credit provider is in all cases the party making the decision but based on the debtor's intention. The credit provider's application forms and procedures must therefore be directed at obtaining enough information to allow that decision to be made.

In the majority of cases the credit provider will have no difficulty in deciding whether the loan is regulated or not. Those are cases where the loan is wholly for personal purposes, for example, the provision of credit to buy a home which is to be used for nothing other than as the permanent residence of the debtor. The credit provider could not in those circumstances, seek to say, apart from all of the facts, that its intention was that the loan be provided for business purposes.

The real difficulty arises when it becomes necessary to consider the application of the purpose tests in those cases where credit is provided for mixed uses.

The CCC provides two separate tests for deciding what the predominant purpose of provision of credit is. The first deals with situations where the credit provided is intended to be used for different purposes. I refer to that test in this paper as the money test. The second situation deals with the situation where the credit provided is to be used to acquire goods and services which will themselves be used for different purposes. I refer to that as the asset test.

It is, therefore, directly necessary to consider the question of the debtor's intention in determining whether the CCC applies or not. This leads to some nice questions of interpretation and provides difficulties for credit providers. Those difficulties were foreshadowed in another context (section 13(4) of the *Credit Act*) by Duggan, Begg and Lanyon in *Regulated Credit - The Credit and Security Aspects*:

"Whatever the merits of this supposition, there is a fundamental defect in a purpose test, namely that it confronts the credit provider with the choice between complying with the legislation in all cases or developing reliable procedures for ascertaining the debtors purposes before entering into the transaction. Where the credit provider only occasionally provides credit for an exempted purpose, the effort is unlikely to be worthwhile, and it will be cheaper to comply with the legislation in all cases. In other circumstances, however, the choice confronting the credit provider may be harder. It involves weighing the cost of enquiries in each case against the cost of the credit provider of either:

1. complying with the Act in all cases, whether the compliance is in fact required or not; or
2. not complying with the Act at all, even in those cases where compliance is in fact required.

The problem is that full scale enquiries are likely to be very expensive.”

That is the position that now confronts credit providers under the CCC.

The difficulties associated with the purpose test provided include:

1. It is possible to envisage a situation where the application of the two tests leads to differing results, ie that the transaction is regulated by one test but not another. The answer to that is simple.

The tests are not cumulative, they are alternative. If either leads to the transaction being regulated, then it is regulated. It is not necessary to comply with both. It is, however, necessary to ensure that any system implemented is adequate to consider both tests in one application.

2. The CCC does not give any guidance as to the timing of the debtor's intention. In my view, the relevant intention should be that at the day the loan is written. Section 11 says that a business declaration is effective if given before the loan is made. If a declaration is obtained in circumstances where the credit provider did not know or had no reason to know that the loan would in fact be regulated and after the date of that declaration, the intention of the debtor changes, the declaration having been correct at the date the credit provider obtained it, the credit provider does not have to reinvestigate with the debtor whether its intention has changed before the provision of credit. It may be different if the debtor comes back to the credit provider and indicates that its intention has changed and that the transaction should therefore now be regulated. In those circumstances, the transaction must be re-documented before proceeding. Presumably credit providers will build into their documentation some protection:
  - (a) to enable an offer of loan to be withdrawn and the loan re-documented as a regulated loan in those circumstances; and
  - (b) to cover its costs of re-documentation.

In suggesting that, I have not lost sight of the fact that if the transaction is in fact regulated, the debtor can withdraw from the transaction at any time before credit is drawn down. However, the original transaction about which the declaration was given and on the basis of which the credit provider proceeded to document an unregulated loan was in fact a separate unregulated agreement, which is being replaced by a regulated loan. Therefore, a credit provider can build into its commercial documentation the ability to recover costs of re-documentation if the loan does not proceed and those costs are not regulated by the CCC.

3. When is the debtor's future intention relevant? The reference to intention in the two tests can have a number of meanings. It can mean either:
  - (a) the immediate intention for immediate use of the loan or of the property which is being acquired; or
  - (b) the debtor's present intention for the future use of the loan at any time during the term of the loan; or
  - (c) the debtor's present intention for the future use of the property being acquired with the credit throughout the likely life of the property.

The three possible meanings give three different results.

### Example

A debtor seeks an investment loan to buy a residential property. During the course of discussions with the credit provider the debtor indicates that although the property will initially be acquired as an investment in due course after the debtor has been able to reorganise its finances and to sell its existing property (which the debtor anticipates will take twelve to eighteen (12-18) months) the debtor intends to move into the property as a home. The term of the loan is 15 years.

Does that mean that the intention is to use the property principally for personal, domestic or household purposes and that therefore the loan should be written as a regulated loan? The application of the three interpretations referred to above produces different results:

- if the relevant intention is the intention over the whole of the life of the property then using the asset test, the loan should be written as a regulated loan;
- if the purpose of the loan itself is examined, then at the time it is written it might be regarded as either an investment loan or a house loan for household purposes;
- if the correct meaning is immediate intention for immediate use then clearly the loan should be unregulated.

Given the presumption in favour of the CCC applying and in view of the uncertainty as to which interpretation should be applied, I suggest that most credit providers will treat that loan as regulated.

However, that may not be what the debtor in this case requires. It may be that in a given set of circumstances the rates applicable to an investment loan are more favourable than the housing loan rate that or that the terms on which the credit is available (for example, the availability of an interest only facility) may only be available for investment loans. The customer might want to prepay interest for taxation purposes. For any of those reasons the debtor may prefer that the loan be treated as unregulated. The credit provider should, applying the tests as they stand, refuse to approve the commercial loan and offer instead a regulated product even though that does not suit the debtor's needs. The debtor may offer a declaration that the loan is for business purposes, but the credit provider is, by that stage, in the position of having known or had reason to believe that the declaration would be incorrect and cannot accept it. In short, the debtor's needs are not satisfied.

That position is highlighted by another example.

### Example

Assume the debtor is an accountant nearing retirement. The debtor borrows to buy a beach house as an investment. The debtor's intention is to rent the property until retirement (which is five (5) years away) and then retire to the property as a residence. The term of the loan is fifteen (15) years. For tax reasons, the debtor wants to prepay a year's interest.

The credit provider cannot meet the debtor's needs because the loan is, applying the tests above, regulated, and the Code does not permit payment of interest in advance. Of course, if the loan is a new one the credit provider can document the transaction as two (2) loans - an investment loan for the first five (5) years and then rewrite it as a regulated loan. If the loan is existing and the debtor asks to prepay in only one (1) year of the term that cannot be accommodated.

In my opinion there is some comfort in being able to say that the meaning adopted should be immediate intention for immediate use. If the test that is applied is the intention over the

whole of the loan or for the whole of the life of the property that leads to uncertainty for the credit provider in applying the test. It can also lead to unintended results. It may also not be within the spirit of the legislation. The legislation does not contemplate that the character of a loan can come and go or change during the course of the loan. It is regulated or it is not. However, given the presumption that the Code applies, the more likely result is that the credit will be regarded as regulated if it is regulated on any of the three tests.

### Example

To look at another example, a debtor applies for a thirty (30) year home loan and indicates that it intends to live in the property for ten (10) years and thereafter to lease it for twenty (20) years. Obviously, at the time the loan is written the debtor can only hope to be able to achieve the intended move and could not, for example, say with any certainty that the refinancing will take place, or how the loan will be refinanced. The debtor may never achieve its intention. The intention, however, is that this house will simply be one of many and that after a short period the property will be retained and refinanced and a second property acquired. Applying the same test in the same way that it was applied in the previous example, the use of the property is for ten (10) years as a residence and for twenty (20) years for investment. The predominant purpose over the term of the loan is for investment. On that basis, the loan would be an unregulated loan.

It would be a brave credit provider who, in those circumstances, applied that test and treated the loan as unregulated. Perhaps the short answer is that if the transaction is regulated on any of the three interpretations then it is regulated.

4. Another issue that arises from those examples is whether there is a need to draw a distinction between a genuine intention and a mere wish on the part of the debtor. Presumably, for the debtor's intention to be relevant, it must be an actual intention not a vague wish that something might happen in the future. If that distinction is drawn the second example might be regarded as a case where the debtor's intention is no more than a wish and the predominant purpose is therefore residence, not investment and the loan is therefore, correctly, regulated. Is it appropriate, however, to require credit providers to make those judgments? If that is the case it means that credit providers are placed in the position, when writing a loan, of having to make a decision about the ability or capacity of the debtor to give effect to its intention at some time in the future.

The CCC contemplates that it should be interpreted according to its ordinary meaning unless the use of the ordinary meaning leads to a result not intended under the legislation. I have some difficulty thinking that the legislature intended the uncertainty that will attach to the use of a test other than a test of immediate intention for immediate use. The reality, however, is that, given the presumption that the CCC applies unless the presumption is upset, where there is any uncertainty in interpretation, the credit provider must err on the side of caution and adopt the interpretation which leads to the transaction being regulated not unregulated. It is therefore my view that a prudent credit provider must adopt the view that if, on any of the three possible meanings the loan is regulated then it should be treated as regulated but occasionally may be forced to temper that view with subjective judgments in appropriate cases.

5. The two tests may overlap.

### Example

A credit provider is providing funds to allow the debtor to:

- (a) refinance a housing loan;
- (b) acquire a car to be used in part for business and in part for personal use;

- (c) reduce the overdraft associated with a family owned business.

Assume that one-third of the loan will be used for each purpose and that the car is used 50/50 for business/personal use.

Applying the money test, one-third of the funds will be used for personal use and one-third will be used for business use (in respect of items (a) and (c)). Determining the predominant use of the motor vehicle involves an application of the asset test. The use of that asset is 50/50 business/personal. On that basis, the presumption is not upset. Therefore, applying the tests to the three components, the purpose for which the loan is to be most used is in fact for non-business purposes. The assessment needs to be made in two stages. The asset test must be applied to that part of the loan which is being used to acquire the vehicle to allow the money test to be applied overall.

6. The term "most used" may cause problems. In that context, the question to be addressed is, whether the word "purposes" in the section 6(5)(b) refers simply to business as opposed to non-business purposes as a class or whether it refers to the **actual** purposes for which the credit is provided.

### Example

A loan is being used to acquire a property. Both husband and wife run small businesses and will continue to run those businesses from the property being acquired. It will also be used as a residence. The debtor estimates that the approximate use is 40% as a residence and 30% to each of the businesses. If the reference to "purposes" in the test means a reference to business or non-business purposes, then in this case 60% of the use of the property is business and 40% is non-business. Therefore the property is most used for business purposes. The loan is unregulated. If however, it is a reference to the specific purposes for which the property is used, 40% is being used for residence and 30% is being used for each of the two businesses. Does this mean that because the residential purpose outweighs any single or other purpose it is therefore the purpose for which the property is most used and the loan is regulated?

The answer to the example in point 5 above is probably that separate loans will be written. Where it may have been the case in the past that a single facility could be offered for all loans, it will now be the case that credit providers will insist on the loan being divided and the housing component treated as a separate regulated loan. The debtor may, of course, be called upon to pay establishment fees and account maintenance fees in respect of each of the loans and may lose any benefit of being able to reduce rates or charges by increasing borrowings or by amalgamating loans.

That option is not available on the facts in the example in point 6. I do not really have an answer to that other than to say that the CCC presumes that it applies and it will take much to upset that presumption. Fortunately those types of cases will be few and far between.

The examples highlight that there will be some nice questions of interpretation which arise from the application of the tests predominant purpose. They are questions which would challenge lawyers and are not the type of interpretations that officers of financial institutions in charge of writing loans should be called upon to make on a day-to-day basis.

The definition should be clarified (perhaps by use of examples) to relieve credit providers of that responsibility and to ensure uniformity and ease of application.

## Trusts

The CCC does not apply to corporations other than strata corporations. Where the trustee of a trust is a corporation, the CCC will not apply.

However, where the trustee of a trust is an individual does the CCC apply?

The *Code of Banking Conduct* provides that it applies only where credit is provided **for the customer's** private use.

The CCC on the other hand simply provides that it applies where credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes. It does not specify that those purposes need be the purposes of the borrower.

Where an individual is the trustee of a trust, and the trust acquires property for the maintenance or advancement of a beneficiary it is arguable that credit provided to that trust is regulated because:

- (a) the borrower is an individual, (even though it borrows as a trustee); and
- (b) the purpose of the loan is personal, household or domestic, although the relevant purpose is not that of the borrower but of the beneficiary.

The argument to the contrary is that any borrowing by a trustee must be associated with an investment by the trust and that therefore the investment exclusion applies. However:

- (a) it is difficult to regard a borrowing, for example, simply for educational purposes of a beneficiary, or to enable a beneficiary to reside in a home (particularly if the beneficiary does not pay rent) as an investment; and
- (b) if it is investment, it is not automatically the case that the credit is not regulated. It simply becomes credit which is provided in part for investment and in part for personal, domestic or household purposes. It is then necessary to apply one of the two tests in section 6(5) to decide whether it is predominantly for investment purposes or predominantly for personal, domestic or household purposes. Given that the trust will probably not be receiving a return from investments of that type, it is likely that the predominant purpose will be associated with the personal, domestic or household purposes of the beneficiary and not with investment by the trust and that the loan will be regulated.

I do not know the answer to the position in relation to trusts. It is something that should be addressed before the CCC is implemented.

## Partnerships

In the same way that trusts may have difficulties associated with acquisitions for personal, household or domestic purposes of beneficiaries partnerships may have similar problems. If a partnership which operates a business borrows to acquire a property for an employee's personal, domestic or household use, is that to be treated as regulated loan?

If a partnership makes available to partners in that partnership credit cards in circumstances where the credit cards are intended to be used for business purposes, but are, in general, used by the partners for all purposes and not simply business purposes, is the continuing credit contract which comes into existence regulated or unregulated? Must the credit provider analyse the percentage use of the cards to come to a decision? In those circumstances, the purpose test needs to be applied and may have the effect that the continuing credit contracts are regulated.

The separation of personal, domestic or household purposes from the borrower is similar to the position considered in *Metropolitan Water Board v Colley's Patents, Limited* (supra). In that case, the water supply to a factory was held to be used for "domestic" purposes of the employees, even though they were in attendance at work and only because of the business being conducted. If that same logic is applied to a situation where, for example, a partnership borrowed to acquire a house for an employee being relocated, that loan should be treated as a regulated rather than unregulated. That is not, presumably, the intended result of the CCC's draftpersons.

Both that difficulty and that associated with trusts are overcome if the definition in section 6(1)(b) is amended to require a link to the debtor. The amendment can be achieved without effecting the purpose of the CCC but would significantly clarify its operation.

### **Credit providers response**

Having examined some of the difficulties that arise, the question is how lenders are dealing with them.

I previously indicated that the first step in implementing any compliance program is to put in place a system which allows decisions of this type can be made with consistency. The difficulty is that officers of lenders, in writing loans, although expected to be familiar with the CCC, are not expected to have any technical knowledge of it which would enable them to draw some of the fine distinctions that have to be made.

The compliance system implemented therefore should be designed:

- (a) to extract sufficient information necessary to enable a decision to be made. This will involve going beyond the current application forms and including requests for information as to the debtors future intention about the loan and any property acquired with the loan. The application form will presumably need a warning of some sort to indicate that what is required is an actual intention and not merely a vague idea as to what might happen in the future; and
- (b) to incorporate a credit checking system to make a decision on those loans which clearly are either regulated or unregulated. Those financiers with whom I am working on compliance programmes are developing a system of point scoring similar to a credit assessment which will, to the greatest extent possible, automate those decisions;
- (c) to identify those loans where a further decision must be taken;
- (d) to incorporate a hierarchy of managerial review - where the decision is difficult the decision making must be moved to a higher level.

The system must incorporate a procedure for the debtor to declare to information provided as the basis for the decision. This may give the credit provider the potential for recourse if the information is incorrect. The effectiveness of that type of declaration must be queried (see *Considine v Citicorp Ltd* ([1981] NSWLR 657) - although the declaration does not go so far as an indemnity for loss). Even if the potential for recourse against the debtor is limited the declaration will be the basis of a strong argument by the credit provider against loss of charges or against civil penalties if a loan is inadvertently documented as unregulated when it should have been regulated but in reliance upon information that the debtor supplied.

Credit providers must review their practices about loans being used for a number of purposes and may need to develop products to allow loans to be split into regulated and unregulated loans but without any increased costs to debtors by way of additional charges or establishment costs.

Most financial institutions will proceed on the basis that, because of the presumption that the CCC applies, when in doubt treat the loan as regulated.

## C. CHANGES TO CREDIT CONTRACTS

One of the areas which caused significant difficulties under the existing *Credit Acts* was the area of variations to contracts.

In particular, difficulties were encountered in relation to:

- deferring obligations under section 71;
- variations to contracts by agreement under section 70;
- re-documentation of credit contracts (section 36(1)(b) in paragraph 1(e) of Schedule 4, section 36(2)(c), section 69 and section 73);
- hardship variations (section 74 - the difficulty arose here because of difficulties in compliance when read together with the other sections);
- variation of unregulated credit contracts and the potential for these to become regulated as a result of the variation.

Those difficulties will not arise under the CCC.

Section 37 of the CCC specifically provides that the provision of credit as a result of a change in an existing credit contract or a deferral or waiver under the existing contract does not create a new credit contract.

Part 4 of the CCC sets out in detail provisions regarding changes to credit contracts. The credit provider must only comply with those requirements to ensure that it does not encounter any difficulties in the variation process.

The principal difficulties that will be encountered are:

- (a) the CCC contains different notice provisions for different variations. For example, the notice required for a change to interest rates need only be given by the day the change takes effect and can be done by newspaper advertising. However, variations to repayments require written notice to the debtor and must be on thirty (30) days notice. As a general rule, an interest rate change to a variable rate home loan will also lead to a change in the amount of repayments. It is therefore inappropriate for a credit provider simply to look at the interest provisions and give the notice required under those sections. A change in rates without a change in repayments may reduce or extend the term of the loan. An increase in the term because of a rate change does not require notice. A decrease arguably does. Where the changes have a flow on effect that must also be considered and full notice sufficient to comply with both sections given for any changes;
- (b) there will be some interpretation difficulties. For example, are the particulars required of changed repayments under clause 60 merely notification of the amount of the new repayment or details of all repayments to the end of the loan even though those repayments will change again, when next the interest rate changes?

The changes are dealt with under three headings:

1. unilateral changes; and
2. changes by agreement; and
3. changes as a result of hardship.

## Unilateral changes and changes by agreement

In relation to unilateral changes, the following table is a summary of the CCC provisions effecting those areas.

The following applies to unilateral variations.

Type of Change	Information required	When notified	How Notified
annual percentage rate - if new rate and when it takes effect are ascertainable under contract	no requirement	no requirement	no requirement
increase in repayments - if specified by contract and amount of increase and when it takes effect are ascertainable from the contract	no requirement	no requirement	no requirement
increase in term - if occurs only because of increase in interest rates	no requirement	no requirement	no requirement
annual percentage rates (excluding reductions)	new rate or rate; any information required by regulations (none proposed)	no later than day on which change takes effect	written notice - may be by publication and notification in next statement of account
reference rate	no requirement	no requirement	requirements only do not apply if notice of change in reference rate is published in newspaper before change takes effect
interest charges: change in method of calculation (other than changes which reduce the debtors obligations)	particulars of change; information required by regulations - none yet proposed	30 days before change takes effect	written notice to debtor
repayment changes: amount, frequency, time for payment, method of calculation other than of the type listed in the next heading	particulars of change; information required by regulations - none yet proposed	30 days before change takes effect	written notice to debtor

Type of Change	Information required	When notified	How Notified
repayment changes: if reduce debtor's obligations or extend time for payment	particulars of change	next statement of account after change takes effect	written notice in statement of account
changes in fees and credit charges other than reductions	particular of change	before change takes effect	publication and in next statement of account
fees and charges: reducing obligations or extending time for payment	particular of change	before or when next statement of account is forwarded to debtor after the change takes effect	next statement of account
other unilateral changes - if reduces obligations of debtor or extends time for repayment	particulars of change	before or when next statement of account is forwarded to debtor after the change takes effect	next statement of account
other unilateral changes by credit provider (applies to contracts, mortgages and guarantees)	particulars of change; information prescribed by regulations (none yet proposed)	no less than 30 days before change takes effect	written notice to debtor
changes which increase or allow for an increase in a guarantors obligations	particulars of the change AND written acceptance of changes to be obtained from guarantor	before guarantor is liable	written notice to debtor

The following is a summary of the provisions affecting changes by agreement:

### Changes to credit contracts - changes by agreement

#### Changes other than:

*Hardship*

*changes which defer or reduce obligations for no longer than ninety (90) days*

*increases in the amount of credit (section 65).*

**Note:** Notification of these changes must be given to any guarantor and a written acceptance of liability received from the guarantor before the guarantor will be liable for the increased liabilities.

- How given:
  - written notice.
- When given:
  - within thirty (30) days after the date of the agreement to change (if it is not in writing, the date agreement was reached).
- Information required:
  - particulars in the change in the terms of the agreement; and
  - information prescribed by the regulations (none yet prescribed).

**Changes increasing the amount of credit (Section 65(3)):**

**Note:** Notification of these changes must be given to any guarantor and a written acceptance of liability received from the guarantor before the guarantor will be liable for the increased liabilities.

- How given:
  - written notice.
- When given:
  - before the agreement is made.
- Information required:
  - particulars in the change; and
  - information prescribed by the regulations (see regulation 21).

**Changes on the grounds of hardship (Division 3 of Part 4):**

- How given:
  - written notice.
- When given:
  - within thirty (30) days after the date of the agreement.
- Information required:
  - particulars in the change in the terms of the contract; and
  - information prescribed by the regulations (none yet prescribed) (section 67).

**Changes to mortgages and guarantees (section 65):**

- How given:
  - written notice.

- When given:
  - within thirty (30) days after the date of the agreement to change (if it is not in writing, the date agreement was reached).
- Information required:
  - particulars in the change in the terms of the agreement; and
  - information prescribed by the regulations (none yet prescribed).

**Credit provider response:**

The principal actions credit providers must take in response to those provisions are:

1. the implementation of systems to ensure that notice is given within the time required. This involves not only a consideration of a change of systems to give the appropriate notice but also a review of all procedures leading up to the relevant change, to ensure that those changes are made within the time-frame provided by the legislation. This will be particularly relevant in times of rapid interest rate movement. The structure for determining changes in interest rates must be reviewed to ensure that decisions about changes are made in sufficient time to give the appropriate notices required under the legislation;
2. all procedures for dealing with changes must be considered by credit providers. For example, because of the need to give thirty (30) days written notice of repayments to debtors a credit provider may decide not to change the amount of repayments on every occasion when interest rates rise.
3. notification procedures to third parties must be reviewed. The CCC imposes an obligation to advise the guarantor of certain changes. An appropriate response by credit providers is to ensure that notification is always given to guarantors and to ensure that appropriate authorities exist within the terms of the documentation to enable the guarantor to be kept informed without any questions arising about breaches of banker/customer confidentiality. This is consistent with a credit provider's obligations under the various codes of practice.

**Imposed changes:**

Division 3 of Part 4 contains provisions enabling changes to be imposed upon credit providers.

**Changes on grounds of hardship:**

**66(1) General Principle.** A debtor who is unable reasonably, because of illness, unemployment or other reasonable cause, to meet the debtor's obligations under a credit contract and who reasonably expects to be able to discharge the debtor's obligations if the terms of the contract were changed in a manner set out in sub-section (2) may apply to the credit provider for such a change.

**(2) Changes.** An application by a debtor must seek to change the terms of the contract in one of the following ways:

- (a) extending the period of the contract and reducing the amount of each payment due under the contract accordingly (without a change being made to the annual percentage rate or rates);
- (b) postponing during a specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates);

- (c) extending the period of the contract and postponing during a specified period the dates on which payments are due under the contract (without a change being made on the annual percentage rate or rates).

(3) **Application.** This section and sections 67 and 69 do not apply to a credit contract under which the maximum amount of credit that is to be provided is more than \$125,000 (or such other amount as may be prescribed by the regulations).

**About these applications:**

The debtor may apply to the credit provider to change the credit contract if:

- (a) the maximum amount of credit is \$125,000 or less; or
- (b) the debtor is unable reasonably to meet its commitments because of:
  - illness;
  - unemployment; or
  - other reasonable cause;
- (c) the debtor reasonably expects to be able to discharge its obligations if the terms of the contract are changed;
- (d) the only changes available are:
  - (i) extending the time and reducing the amount of each payment; or
  - (ii) postponing payments for a period; or
  - (iii) extending the term and postponing payment for a periodin each case without changing the annual percentage rates.
- (e) the provision is similar to that contained in section 64 of the *Credit Act* of some States and decisions on requests under that section will no doubt be of assistance here;
- (f) on the face of it the section should be limited to relief from short-term financial difficulties. However, the decision in *Celano v Westpac Savings Bank Ltd* ([1987] ASC 55-581) indicates that it may be extended to cases involving ongoing financial troubles. In that case relief was granted to enable the debtor time to payout the contract in full even though the debtor's financial difficulties were of an ongoing and not of a temporary nature;
- (g) if the credit provider makes an agreement it must, within thirty (30) days after the date of the agreement, give the debtor and any guarantor a written notice:
  - (i) setting out particulars of change; and
  - (ii) giving any prescribed information.

The current draft of the regulations does not prescribe any information.

- (h) the obligation to give other notices may continue. For example, if the amount of credit increases, notice under section 65(3) will also be required.

### Application to court:

If the credit provider does not agree to change the contract, the debtor may apply to the court for an order that the contract be changed.

The court may order the contract varied in the way set out in section 66 and make such other orders as it thinks fit.

The power to make additional orders will include, for instance, at least a power to stay enforcement proceedings to give effect to any change (that power is expressly provided in subsection 3 for the period **up to** a determination).

One issue which arises is the extent to which the court can make other orders varying the contract outside those set out in section 66.

In *Wicks v Wicks* ([1987] ASC 55-547) a tribunal held that it had power to vary the contract in ways other than those set out in section 74 of the *Credit Act*. That decision has been criticised. However, it may be that under section 68 of the CCC a court will have that additional power. The wording of the previous section 74 empowered a tribunal to order: "a variation of a contract to which the application relates and, where it orders such a variation ... make such other orders as it thinks fit."

The wording of section 68 empowers the court to: "change the credit contract in a manner set out in section 66 and make such other orders as it thinks fit."

The difference in wording means that the courts are presented with a broader scope to make other orders under the Code than under existing credit legislation.

If the court orders a change to the contract the credit provider may apply for a variation of that change (section 69). This is intended to give the credit provider the opportunity to revisit the matter if the debtor's financial circumstances change. It is presumably not intended as simply offering the opportunity to consistently revisit what is regarded as an unsatisfactory decision.

### Effect on credit providers:

The impact of the section on credit providers is probably less difficult for those coming from an environment where the procedure for variation already existed. No equivalent of section 74 was included in the Queensland *Credit Act*. My understanding of the effect of the section in either jurisdictions is that it has encouraged credit providers to take a reasonable view when dealing with debtors rather than to undergo the court or tribunal process. There is no reason to expect that position to change, particularly as the jurisdiction in other states will continue to be exercised by tribunals and not by the courts. The response by credit providers should simply be to ensure that, in dealing with applications of this type, the credit provider adopts a reasonable stance.

### Reopening

Section 70 gives the court power to reopen the contract.

The application may be made by the debtor, a mortgagor or guarantor.

The court must be satisfied that the contract, mortgage or guarantee was unjust. Unjust **includes** unconscionable, harsh or oppressive (cf section 70(c)(6) of the existing *Credit Act* - a transaction is unjust if it is unconscionable, harsh or oppressive).

The power does not apply to:

- changes in interest rates or establishment fees and charges which may be reviewed under clause 72 (as opposed to unconscionable interest rates); and

- changes to contracts under Division 3 of Part 4.

The relevant time for determining whether the contract is unjust is when it is entered into or changed. However, the court may, in making that decision, have regard to the parties conduct since the contract was entered into or changed (sub-section 70(5)).

In making its decision the court

**must** have regard to:

- the public interest; and
- all circumstances of the case; and

**may** have regard to:

- the matters listed in sub-section 2(a) to (o) and

**must not** have regard to injustice arising from circumstances not reasonably foreseeable when the contract, mortgage or guarantee was entered into or changed (sub-section 70(4)).

The provision is similar to sections 145 and following of the existing *Credit Acts*. Decisions on those sections (and on the *Contracts Review Act* (NSW)) will offer some assistance.

The following propositions can be stated:

- "harsh and unconscionable" means more than simply imposing hard terms. There must also be "circumstances which enable the lender to impose such terms, something in the nature of ... oppression and abuse of power ..."; and (*W F Lean Ltd v Dale* (1936) 39 WALR 22)

Query whether this is still the case given the inclusive definition of "unjust" or whether the use of the inclusive definition is an opportunity to extend the definition of "unjust" beyond that.

- the matters stated in sub-section 2(a) to (o) must be considered subject to the overriding public interest requirement. There are conflicting public interest issues in matters of this type. The public interest in enforcing consumer protection legislation must be balanced against the public interest considerations of requiring parties to meet their bargains. In relation to the corresponding provisions of the *Credit Act*, the authors of *Regulated Credit - The Security Aspects* (supra) said (at p. 552):

"The public interest component of the common law doctrine of restraint of trade has been watered down by the courts to the extent that if a contract is found to be contrary to interests of the parties, then ipso facto it will be against the public interest. The reference to the public interest in section 147(1) is presumably intended to have a broader significance than this, because otherwise it need not have been included. Arguably it is to be read as a reminder to the tribunal or court of the value of upholding contracts. In *West v AGC (Advances) Ltd* it was held that the corresponding reference in the *Contracts Review Act* 1980 (NSW) 'points to the necessity in determining whether the contract is unjust to consider the position and rights of the party against whom relief is claimed'. On this basis, the reference functions more as a counter-weight to the factors listed in section 147(2) than as a corollary of them".

- The factors listed in sub-section 2(a) to (o) must also be considered having regard to all of the circumstances of the case (*Esanda Finance Corporation Ltd v Murphy & Anor* [1989] ASC 55-703:

“Just because the circumstances of a particular case fall within the wording of one or more of the criteria stated by section 147(2) does not mean that the contract must thereupon be found to be unjust”.)

- The existence of any one factor may therefore not of itself be sufficient to establish that the contract was “unjust”.
- A contract may be unjust even though none of the factors listed in sub-sections 2(a) to (o) exist.
- The matters listed in sub-section 2(a) to (o) are:
  - (a) the consequences of compliance, or non-compliance with all or any of the provisions of the contract, mortgage or guarantee;
  - (b) the relative bargaining power of the parties - query whether, in any housing loan or consumer credit transaction, the bargaining power is ever “equal”;
  - (c) whether or not, at the time the contract, mortgage or guarantee was entered into or changed, its provisions were the subject of negotiation - note that this refers to negotiations “at the time the contract, mortgage or guarantee was entered into or changed.”

On the face of it, pre-contractual negotiations should not be considered, however, these will undoubtedly be considered by courts and whatever weight the court considers necessary put on those negotiations if, on no other basis, under sub-clause (o);

- (d) whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the contract, mortgage or guarantee. Again it is unlikely that in the context of the usual lending transaction, a credit provider's documentation so far as it relates to substantive terms is subject to negotiation. This may require a change of procedures on the part of credit providers to make that opportunity available. It appears from the case law that what is required is a fair negotiation in relation to the terms and the opportunity for the debtor, if it chooses to and is unhappy with the terms offered to reject those terms and to seek alternative finance. Certainly it is the case that where specific terms directed at an individual debtor (as opposed to terms applicable to all loans of that type) are included, the opportunity to negotiate must be offered;
- (e) whether or not any of the provisions of the contract, mortgage or guarantee impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the contract, mortgage or guarantee - this reflects the necessity to “tailor” documents to particular types of loans. It is presumably, in this environment, no longer acceptable to have a document which seeks to address every possible alternative. For example, therefore, a mortgage which is intended principally to secure housing loans should be limited to those clauses which are necessary for the purposes of the housing loan and can therefore be more concise than a document seeking to secure a significant commercial transaction. The existence of clauses which, although they may never be used, make documents more complicated, will be a factor to be considered;
- (f) whether or not the debtor, mortgagor or guarantor or a person who represented the debtor, mortgagor or guarantor was reasonably able to protect the interests of the debtor, mortgagor or guarantor because of his or her age or physical or mental condition - as to the person representing the debtor, mortgagor or guarantor see sub-section 70(3). This is defined as a person who “represented the debtor, mortgagor or guarantor or assisted the debtor, mortgagor or guarantor to a significant degree in the

negotiations process prior to or at the time the credit contract, mortgage or guarantee was entered into or changed”.

Physical or mental disabilities have long been a basis for attacking contracts and most credit providers will now have in place systems, particularly directed to guarantors to ensure that the contract is unable to be upset for reasons of this type. At the most, it is likely that some of those safeguards and protections will need to be extended beyond guarantors;

- (g) the form of the contract, mortgage or guarantee and the intelligibility of the language in which it is expressed - this is one of the CCC's "plain English" provisions.

There is authority (*Morlend Finance Corporation (Vic) Pty Ltd v Wesdendor P & Ors* [1993] ASC 56 200) for the proposition that it may be difficult to upset a transaction simply on the basis of this requirement.

The test as to whether the documentation is intelligible should be an objective one and the fact, for example, that English is not the debtor's first language, should not enter into the consideration. However, it will become relevant under other heads which deal with the debtor's understanding of the transaction or under any other relevant factor. It is therefore an issue which cannot be ignored by credit providers and again it is an issue about which some systems need to be put in place to safeguard the credit provider's position when financial facilities are being made available to borrowers who for one reason or another have difficulty understanding documentation. The application form may be used as a method of ascertaining whether the credit provider should insist upon the debtor seeking some additional explanation from advisers to avoid the possibility of a contract being upset for this reason (*Tirant v LNS Autos Pty Ltd* [1986] ASC 55-470);

- (h) whether or not, and if so when, independent legal or other expert advice was obtained by the debtor, mortgagor or guarantor - most credit providers have in place requirements for the provision of independent legal advice to guarantors and it may be that in some circumstances this needs to be extended to other parties to the transaction. The question will be one of degree in each case. The application form can be used to ascertain whether additional legal or accounting advice should be required.

Independent advice must be independent of the parties. Therefore, if the "independent" legal adviser acts as solicitor for both borrowers and there is inequality in the bargaining position between the parties, that advice may not be sufficient (*Sharman v Kunert* [1985] ASC 55-425).

It may also be the case that in appropriate circumstances further and other expert advice is required, for example, accounting advice.

Most credit providers have already addressed these issues in some areas and it will simply be a matter of extending some of the steps now taken in relation to guarantors to the debtors themselves;

- (i) the extent to which the provisions of the contract, mortgage or guarantee and their legal and practical effect were accurately explained to the debtor, mortgagor or guarantor, and whether or not the debtor, mortgagor or guarantor understood those provisions and their effect - note that this refers to the debtor, mortgagor or guarantor and not to the person representing them. In those circumstances where the credit provider chooses to explain the effect or require that advice be given to the person representing the debtor, mortgagor or guarantor it must also take steps to ensure that information has been properly conveyed to the debtor, mortgagor or guarantor;

- (j) whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor, mortgagor or guarantor and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics - this highlights the need for the credit provider to enquire beyond the immediate relationship with the debtor and, where joint debtors are involved or where there is potentially a relationship of influence, to insist upon independent advice. The credit provider must satisfy itself, either at the time the documents are executed or by means of independent legal and accounting advice, that no undue influence has been brought to bear.
- (k) whether the credit provider took measures to ensure that the debtor, mortgagor or guarantor understood the nature and implications of the transaction and, if so, the adequacy of those measures - most credit providers have had to address similar issues in relation to guarantees. I expect that this provision will lead to an expansion of explanatory notes associated with documentation;
- (l) whether at the time the contract, mortgage or guarantee was entered into or changed the credit provider knew or could have ascertained by reasonable enquiry of the debtor at the time, that the debtor could not pay in accordance with its terms and not without substantial hardship - note that the enquiries are only required to be made **of the debtor** and not otherwise. Protection is offered to the credit provider under section 176(5) for knowledge obtained by its employees, agents and officers. This sub-section may require that credit providers:
  - (i) review lending policies in relation to loans of a specific monetary type;
  - (ii) review types of loans. Security based lending is clearly not an option under this provision. The classic case is the situation of a young couple needing to purchase their first home where the capacity to repay is border line. In those circumstances, if the credit provider resolves the difficulty which confronts it by taking a guarantee from the parents, the contract could potentially be re opened. The requirement for additional security from the parents, makes it clear that the credit provider was aware that there was a likelihood that the borrowers could not repay. Credit providers must review lending procedures to accommodate this type of situation. In the particular case referred to the difficulty is probably overcome if the parents become co-borrowers rather than simply guarantors. The capacity of the borrower to repay is then not in question.
- (m) the terms of the transaction or the conduct of the credit provider is justified in light of the risks undertaken by the credit provider;
- (n) the terms of other comparable transactions involving other credit providers and, if the injustice is alleged to result from excessive interest charges, the annual percentage rate or rates payable in comparable cases - presumably the section takes its character from the first part and the reference to comparable cases in the second half of the clause is a reference to comparable cases in the industry. It is anticipated that given the intention of the CCC to encourage competition, and to regulate products in that way, minor variations between credit providers in interest rates would not regarded as unjust for the purposes of the clause. Significant variations may well be and variations in the interest rates charged by a credit provider to one type of customer as opposed to other types of customers for the same products may also bring the transaction within this sub-section;
- (o) any other relevant factor.

- If the court reopens the transaction under the provision it may, notwithstanding any settlement between the credit provider and the debtor:
  - (a) reopen any account that has already been taken;
  - (b) relieve payments;
  - (c) set aside agreements made or mortgages given;
  - (d) order the mortgagee to take steps as are necessary to discharge a mortgage;
  - (e) give a judgment in favour of a party in an amount it thinks is justly due under the contract;
  - (f) give a judgment or make an order against a person for delivery of goods;
  - (g) make ancillary or consequential orders.

The *Credit Act* experience indicates that it is unlikely that an order under this section would completely relieve the debtor of an obligation to repay principal (*Esanda Finance Corporation Ltd v Murphy & Anor* [1980] ASC 55-703 (supra) (Hunt J at 58-358)).

### Review of changes to rates and of fees

Under sub-section 72 the court is given the ability, on the application of a debtor or a guarantor, to annul or reduce changes to interest rates or any fees or charge if that change or charge is held to be unconscionable.

A change to an annual percentage rate will be regarded as unconscionable if **and only if** the court decides that:

- (a) the change in interest rate has taken place in a manner that is unreasonable having regard to any advertised rate or other representations made by the credit provider before or at the time the contract was entered into, the period of time since the contract was entered into and any other consideration the court thinks relevant. This is presumably directed towards stopping any practice of attracting custom by exceptionally low interest rates for a period of time and then increasing the rates in one line; or
- (b) the change discriminates unjustifiably against the debtor when the debtor is compared to other debtors of the credit provider under similar contracts.

The factors to be taken into account in determining whether an establishment fee or charge is unconscionable are set out in sub-section (3). The court must have regard to whether the amount of the fee or charge is equal to the credit providers reasonable costs of determining an application for credit and the initial administrative costs of providing the credit or is equal to the credit providers average reasonable costs of those things in respect of that class of contract. Although under sub-section 2 and sub-section 4 the court is directed to hold something unconscionable "if and only if" the circumstances in those sections are established, the wording of sub-section (3) in relation to fees and charges is different and requires only that the court have regard to certain factors. Presumably the court is at liberty to have regard to such other factors as it thinks fit.

Sub-section (4) sets out the circumstances in which an early termination fee will be unconscionable. That section provides that a charge will be unconscionable **if and only if** it appears to the court that it exceeds a reasonable estimate of the credit provider's loss arising from the early termination or prepayment, including the credit providers average reasonable administrative costs in respect of such determination or prepayment.

Most credit providers have reacted to these sections simply by reviewing charges and procedures to ensure that fees and charges represent a reasonable estimate of costs. Interestingly enough in most cases they do.

### **Time limits**

An application under section 70 must be brought within two (2) years after the credit contract is rescinded or discharged or the credit provider writes off the relevant debt.

An application under section 72 must be brought no more than two (2) years after the change takes effect or the fee is charged or the credit provider writes off the relevant debt.

### **Third parties**

If the court is satisfied that some person other than the credit provider has shared in the "profits" of conduct which it regards as unjust or unconscionable, the court may make an order affecting that third party. Before doing so the court is obliged to join the third party as a party to the proceedings and give it an opportunity to be heard. In order for the court to join a party in those circumstances, it must be satisfied that the party has shared in the profits of or has a beneficial interest in the credit contract or mortgage. Although the section on its face is broad, the requirement to share in profits significantly limits its potential application.

### **Impact on credit providers**

The effect of the hardship provisions on credit providers is:

- (a) credit providers need to review lending policies about loans of a class which can be effected by hardship claims and;
  - change those lending policies to minimise potential cases; and
  - weigh up the commercial benefits of continuing with loans of that type against the potential for claims under the sections.
- (b) credit providers must approach negotiations with debtors who are in a position to avail themselves of the hardship provisions reasonably. That does not mean that credit providers must accept any proposal put to them by debtors. However, it may be that credit providers need to put in place a different set of credit requirements for determining whether or not an application by a debtor under the hardship provisions should be accepted. It is likely that application of the credit provider's usual credit criteria to such a proposal would not be regarded favourably by a court considering the same application.

In relation to the reopening provisions credit providers need to review their procedures in line with the comments made above. In particular, the provisions of section 72 require that the credit provider:

- implement an effective compliance program; and
- undertake a full review of lending, documentation and execution procedures

to minimise the risk of reopening of a transaction under these sections. Provided that those reviews are undertaken and appropriate procedures put in place, it must be considered unlikely that mainstream financiers would have significant difficulties in avoiding problems arising from "unjust" transactions.

## D. TRANSITIONAL PROVISIONS

As at the date of writing this paper, the transitional provisions have not been finalised. Two proposals for the transitional provisions have been published, one in September 1994 and one in December, 1994. Those proposals adopt the format of identifying classes of "problem contracts" and dealing with those classes of contracts separately.

The existing *Credit Acts* will not be repealed but will continue to apply to some types of contracts.

The drafting notes identify three categories of contracts which need to be addressed:

1. contracts made before the CCC commences;
2. contracts made after the CCC commences but as the result of an acceptance of an offer made before the CCC commences; and
3. contracts made within one month after the commencement of the CCC which do not comply with the CCC but which would have been governed by, and would have complied with, the relevant *Credit Act* or other relevant consumer legislation if the contract had been made immediately before the CCC commenced.

The drafting notes also include transitional provisions to deal with mortgages and guarantees given before the CCC commenced.

In relation to contracts the drafting instructions differentiate between fixed sum contracts and continuing credit contracts. "Continuing credit contract" has the same meaning as in the CCC. "Fixed sum contracts" are any other contracts.

In general, the drafting instructions propose that the CCC not apply to fixed sum contracts and that the existing law will be continued. This is so even if the contract is varied. The existing law will continue to apply to a variation although:

- (a) there are provisions for information statements similar to that required by the CCC to be given if there is a variation; and
- (b) there is an appropriate provision in the drafting notes to ensure that the provisions of section 73 of the *Credit Act* do not apply to, in effect, continue the application of the *Credit Act* in perpetuity where existing regulated contracts are paid out and replaced by a fresh contracts.

Continuing credit contracts on the other hand are to be brought within the CCC requirements. The CCC will apply to continuing credit contracts within a period after its commencement, (the maximum time contemplated is three (3) months) and the credit provider will be required to give certain information to the debtor once the CCC applies to the contract.

The following is a summary of the transitional provisions.

### Continuing credit contracts

1. ***Contracts which are unregulated under the existing law but would be regulated if made after the CCC (Case 1 Contracts - for example, bank overdrafts)***

#### Application of CCC:

The CCC will have application to anything done or omitted to be done in relation to a contract on and from the first day of the first statement period which commences after the CCC has commenced but does not apply before that day.

**Existing law:**

No application.

**Specific terms:**

Timing of commencement.

The statement period that commences before the commencement of the CCC is deemed to end three (3) months from the commencement of the CCC if it does not end sooner. Because some contracts of this type will not have statement period a fixed contract is deemed to have a statement period which commenced immediately before the CCC comes into effect and ends three (3) months from the commencement of the CCC or such earlier date as selected by the credit provider if the contract does not provide for a specified statement period.

The CCC does not apply if:

- (a) the debt has been written off; or
- (b) the debtor is in default and enforcement proceedings commenced; or
- (c) the debtor is in default and the credit provider has exercised a right not to provide further credit.

The CCC does not apply whilst a default continues but if the situation is remedied applies after a further thirty (30) days have elapsed.

Presumably a credit provider who has instituted proceedings under a contract of this type, will proceed under the existing legislation until the CCC applies.

*Section 11:* There will be provision for a business purposes declaration to be provided in relation to a case 1 contract, if appropriate. The declaration may be given before the CCC commences.

If a declaration is not obtained, the usual tests which apply under the CCC in relation to personal or domestic or household purposes, will apply to this type of contract as at the date on which the CCC commences.

*Section 14(1)(a) - Pre-contractual Statements:* The credit provider will be required to provide a statement of the matters referred to in section 15 to the extent applicable at the date of the statement. That statement must be given no later than three (3) months after the date the CCC commences, but:

1. up to twelve (12) months will be allowed for the provision of information as to a description of mortgaged property; and
2. the information may be given before the CCC commences.

There is to be a specific provision that information relating to credit fees and charges need only be disclosed in relation to fees and charges payable after the date of the section 15 statement.

It is unclear as to whether disclosure will be required of other matters which have occurred before the statement is given and which are not ongoing (for example, insurance commissions).

*Section 14(1)(b):* The prescribed information must be given no later than three (3) months after the CCC commences. Whilst there is no specific provision this presumably could be given before the CCC commences in conjunction with the statement required to comply with section 14(1)(a).

*Section 21:* Any provision in a Case 1 contract which imposes a monetary obligation which is prohibited by section 21 of the Code does not apply once the CCC commences. The credit provider will be prohibited from enforcing the provision but will be entitled to recover any amounts which fell due before the CCC began to apply to the contract.

It may be that the application of section 21 will change the contract to an extent that it is necessary to re-write the contract to vary the way charges are levied under the contract. If so, before the CCC takes effect. Any insurance commissions or other charges which are prohibited or limited under the CCC will be limited from that date and to the extent that any arrangements with other parties require re-negotiation to accommodate that, credit providers will have to ensure those re-negotiations are completed before the CCC takes effect.

*Section 26:* The limitation on the method of charging interest contained in the CCC will apply to Case 1 contracts from the first day in the first statement period governed by the CCC. Again any variations necessary to the contract to accommodate this change should probably be effected before the CCC applies.

*Section 33(1):* The regulations will provide that the requirements of section 33(1) will not apply to the first statement given after the CCC applies.

*Part 2, Division 2 and 3:* The transitional provisions will enable the credit provider to unilaterally amend the contract to the extent necessary to achieve compliance with Divisions 2 and 3 of Part 2 of the CCC but not to:

- (a) increase the annual percentage rate; or
- (b) amend the contract in a way that is more onerous on the debtor.

If the power to vary already exists in the contract, credit providers might consider making those amendments (including whatever alterations are necessary to annual percentage rates) before the CCC takes effect. To the extent that the power does not already exist, credit providers must review their existing product lists to ascertain what amendments of this type will be required before the CCC commences.

*Part 4 Division 3:* The hardship provisions of the CCC will apply irrespective of whether the event giving rise to the hardship occurs before or after the application of the CCC.

The re-opening provisions of the CCC will apply to a Case 1 contract or related mortgage or guarantee subject to the qualification that if the provisions of the contract, mortgage or guarantee are varied after the commencement of the CCC, section 70 **will** apply but:

- (a) no order must be made under section 70 which would affect the operation of the contract before the date of the variation; and
- (b) the court must only have regard to injustices attributable to the variation.

Relief for debtors is probably available in respect of harsh or unconscionable transactions under other legislation in any event.

*Part 5:* Part 5 of the CCC (in relation to enforcement) will apply (to the contract and any pre-existing mortgage and guarantee) other than the rules set out in Division 2 which will not apply to the extent that enforcement proceedings were already commenced when the CCC began to apply to the contract.

Again, credit providers might consider it appropriate to ensure that, at the date of commencement of the CCC, whatever enforcement proceedings can then be taken, have been instituted.

*Civil Penalties:* The key requirements will not be breached if:

- (a) there is a failure to include any of the information referred to in a section 15 statement in the statement provided under the transitional provisions; or
- (b) there is a breach of section 21(1) because the contract "imposes" a monetary liability which is prohibited under the CCC.

Query whether these transitional provisions go far enough and whether in fact the transitional provisions should also relieve the credit provider from any liability for civil offences.

*Part 7 - Related Sale Contracts:* The provisions of this Part will only apply in respect of matters which occur after the commencement of the CCC.

2. ***Contracts made after the CCC commences as a result of an offer made before the CCC commences (Case 7 - for example Credit Card Contract where offer sent but card not used until after the CCC commences).***

***As for Case 1 but the time for compliance will be three (3) months after formation of the contract. Again, the relevant notices can be given before the CCC commences.***

3. ***Continuing credit contracts regulated under the existing law and regulated by the CCC (Case 2 - for example, credit cards).***

#### **Application of Code:**

As for a Case 1 contract except that a credit provider who has given a default notice under section 107 of the previous Act is not required to give a further notice under the Code for the same default.

#### **Existing law:**

Existing laws continue to apply to anything done or omitted to be done before the CCC commences. The CCC applies to events which occur after it commences to the exclusion of the existing legislation. The existing law does not apply to any statement period which commences after the CCC commences.

4. ***Continuing credit contracts which are regulated under the existing law but not regulated by the Code (Case 5 - for example, credit cards where the purpose is predominantly business).***

#### **Application of CCC:**

The CCC will not apply.

#### **Existing law:**

The existing law will continue to apply.

#### **Specific provisions:**

There will be a savings provision to provide that a refinancing of a Case 5 contract is not subject to section 73 of the *Credit Act*. This avoids ongoing regulated credit contracts under the *Credit Act*.

## **Fixed sum contracts**

5. *Fixed sum contract not regulated by existing law but regulated by the CCC if made after the commencement of the CCC (Case 3 - for example, loans over \$20,000 in NSW, \$40,000 in Qld).*

### **Application of CCC:**

The CCC does not apply except that if the contract is varied by agreement, and further credit is provided, the credit provider must give the debtor equivalent information to that required under section 65(3).

### **Specific provisions:**

The transitional provisions will specifically state that the provision of further credit after the CCC commences is not otherwise to be regarded as a provision of credit to which the CCC applies, thus preserving those contracts for the life of the contract.

6. *Fixed sum contracts which are regulated by the existing law and which would be subject to the CCC if made after the commencement of the CCC (Case 4 - for example, loans under \$20,000 in NSW, under \$40,000 in Qld).*

### **Application of Code:**

The CCC will not apply in relation to these contracts.

### **Existing law:**

The existing law will continue to apply.

### **Specific provisions:**

The credit provider will be given an option to comply with some of the provisions of the CCC in lieu of complying with the corresponding provisions of the existing legislation.

Those include:

Section 34 - Statement of Amount Owing and other matters

Section 35 - Court may order statements to be provided

Sections 66-69 - Changes on the grounds of hardship

Part 5 - except section 75-77 - Relating to enforcement (dealing with payout figures)

Section 163 - Copies of contracts and the documents

Section 171 - Notices

Section 172 - Manner of Giving Notice

Section 173 - Date of Notice.

Once that option is taken up, compliance with those provisions will be sufficient compliance with the provisions of the existing law. This should be welcomed by credit providers as it gives credit providers the opportunity to run contracts under the existing law and the CCC in conjunction without the necessity to maintain two separate systems.

The transitional provisions will specifically provide that the protection that is offered by section 112(1)(b) or equivalent of the CCC will remain and that, to preserve the current position under the *Credit Act* rules, if a debtor makes an application under sections 68(1) or 88(1) that is supported by the Government Consumer Agency, a stay automatically arises.

Refinancing of a Case 4 contract will not give rise to another contract regulated under the existing legislation.

- 7. *Fixed sum contracts which are regulated by the existing law but would not be subject to the CCC if made after the commencement of the CCC (Case 6 - for example, predominantly business loan contracts, commercial vehicle loans).***

**Application of CCC:**

The CCC will not apply.

**Existing law:**

The existing law will continue to apply.

**Specific provisions:**

The credit provider will have the same option as that offered under paragraph 2 above.

A refinancing of that contract will not amount to a new regulated contract.

- 8. *Fixed sum contracts made after the CCC commences to which the CCC applies because of an offer made before the CCC commenced (Case 8 - for example, housing loan contract where the offer was sent before the Code but not accepted until after the Code).***

**Application of CCC:**

The Code will not apply.

**Existing law:**

If the contract would not have been regulated under the existing law then the position as in paragraph 5 above applies.

If the contract would have been regulated under the existing law then the position is as for paragraph 6 above.

The existing law will apply for the life of the contract.

- 9. *Fixed sum contracts made within one (1) month after the CCC commences which do not comply with the CCC but which would have been governed by the Credit Act and would have complied with it if the contract had been made immediately before the CCC.***

**Application of CCC:**

The CCC does not apply.

**Existing law:**

The existing law will continue to apply.

**Specific provisions:**

This is a catch-all provision. The option provided in relation to contracts listed in paragraph 6 above will apply here. A refinancing does not result in another regulated loan.

There are three further proposed transitional provisions:

**1. Mortgages and guarantees.**

The CCC will apply but only to the extent to which the mortgage or guarantee secures or guarantees obligations under a regulated contract.

Part 3 (form of mortgages, etc.) and Divisions 1 and 2 of Part 4 (the requirement for giving of notice to guarantors in the event of variations) will not apply to those mortgages or guarantees.

The right to make application under section 66 in relation to a mortgage applies irrespective of when the enabling event occurred.

Section 70 will apply but in the same way as for a Case 1 contract, ie in respect of changes and then only for injustice arising after the CCC took effect.

The existing law will continue to apply to mortgages and guarantees to the extent that it secures or guarantees obligations under contracts to which the existing law also applies. The first set of drafting instructions contains provisions enabling mortgages and guarantees to be treated under an option similar to that provided for Case 4 contracts but that proposal does not appear in the latest drafting instructions.

**2. Interest in advance - securitized contracts.**

The drafting instructions for the transitional regulations allow a credit provider under a credit contract to charge interest up to fourteen (14) days in advance where the contract is made within twelve (12) months of the commencement of the CCC and is part of a securitization arrangement as defined in the *Privacy Act*.

The regulation is made pursuant to clause 11(3)(a) which enables regulations to be made permitting the charging of interest **for a period of time**. Interestingly, the drafting instructions do not specify a period of time. As they currently stand, presumably the entitlement to interest would continue for the life of the loan.

**3. A regulation will be made allowing pre-determined credit charges to be charged under credit contracts made within twelve (12) months after the CCC commences provided that on termination of the contract a re-calculation is made of the interest that would have been payable under the contract had it complied with section 26 of the CCC and the balance is refunded to the debtor.**

## E. VARIATIONS WITH CODE OF PRACTICE

The following table summarises the variations. I would like to acknowledge the assistance of my partner Gillian Brown who prepared the table.

BANKING CODE OF PRACTICE	CONSUMER CREDIT CODE
<b>APPLICATION</b>	
<p><b>When:</b> Voluntary. Compliance expected by 1 December, 1994</p> <p><b>To Whom it Applies:</b> Banks which have adopted it. <u>BS Code</u> - Building Societies <u>CU Code</u> - Credit Unions Similar codes are proposed for building societies and credit unions).</p> <p><b>Transactions Affected</b> All "<i>Banking Services</i>" - deposit, loan or other banking facility provided by a Bank. Bill facilities excluded. Unauthorised credit excluded.  To: Individuals  <u>BS Code and CU Code</u> - excludes also: Insurance or Financial Planning Services, Travel Services</p> <p><b>Purpose:</b> Wholly and exclusively for the Customer's private or domestic use. <u>BS and CU Code</u> - Wholly and exclusively for the Customer's personal, domestic or household purposes.</p> <p><b>Presumed Exclusion:</b> Written statement to the Bank that the service will not be used wholly and exclusively for private or domestic use. Bank not obliged to enquire. <u>CU Code</u> - Presumed exclusion does not apply.</p>	<p><b>When:</b> Compulsory. Act will commence 1 September, 1995</p> <p><b>To Whom it Applies:</b> All financiers and any party providing credit as part of or incidental to a business (some minor exceptions for trustees and pawnbrokers).</p> <p><b>Transactions Affected</b> "<i>Credit</i>" - a deferred payment to a credit provider Bill facilities excluded. Unauthorised credit excluded.  To: Natural persons or strata title corporations</p> <p><b>Purpose:</b> Wholly or predominantly for personal, domestic or household purposes (no link to customer). Investment specifically excluded.</p> <p><b>Presumed Exclusion:</b> Declaration by debtor that credit applied wholly or predominantly for business or investment purposes UNLESS credit provider or person obtaining the declaration knew or had reason to believe at the time the declaration was made that credit was for personal, domestic or household purposes.</p>

BANKING CODE OF PRACTICE	CONSUMER CREDIT CODE
<b>PRE CONTRACTUAL DISCLOSURE</b>	
<p><b>Documents Required:</b></p> <ol style="list-style-type: none"> <li>1. Written Terms and Conditions applying to any ongoing Banking Service;</li> <li>2. Standard Fees and Charges;</li> <li>3. General descriptive information regarding Banking Services;</li> <li>4. Cheque accounts - general descriptive information as to cheques;</li> <li>5. Joint accounts - general descriptive information and warning (if subsidiary card issued);</li> <li>6. Foreign currency loans - general warning;</li> </ol> <p><b>BS Code</b></p> <p>No provision for foreign currency loans.</p> <ol style="list-style-type: none"> <li>7. General descriptive information about <i>Financial Transaction Report Act 1988</i> (C'wlth) and tax file legislation.</li> </ol> <p><b>Contents of Statement</b></p> <ul style="list-style-type: none"> <li>- a statement that information on current interest rates and fees and charges is available on request;</li> <li>- fact that more than one interest rate may apply (if applicable);</li> <li>- method of calculation of interest and frequency with which interest will be credited or debited;</li> </ul>	<p><b>Documents Required:</b></p> <p>The credit provider must provide the debtor with:</p> <ol style="list-style-type: none"> <li>1. An information statement in the form required by the regulations setting out the debtor's statutory rights and obligations, and :</li> <li>2. A statement setting out information required by Section 15.</li> </ol> <p><b>Contents of Statement</b></p> <ul style="list-style-type: none"> <li>- credit provider's name;</li> <li>- amount of credit, or credit limit;</li> <li>- if credit is provided for sale of land or goods by instalments, a description of the land or goods and the price;</li> <li>- annual percentage rate or rates under the contract;</li> <li>- if more than one interest rate, how each rate applies;</li> <li>- if applicable, a statement that a higher percentage rate may be charged where payments are in default and how the higher rate is to be applied;</li> <li>- method of calculating interest charges payable and the frequency of payment of interest;</li> <li>- total amount of interest charges payable and the frequency of payment of interest;</li> </ul>



BANKING CODE OF PRACTICE	CONSUMER CREDIT CODE
<b>PRE CONTRACTUAL DISCLOSURE</b>	
<p><b>Contents of Statement (cont'd):</b></p> <ul style="list-style-type: none"> <li>- in the case of term deposits the manner of payment of interest, how funds may be dealt with at maturity and the nature of any change or variation to an interest rate resulting from withdrawal of deposit before maturity.</li> <li>- details of any application fee and whether it is refundable;</li> </ul> <p><b>Form:</b></p> <ul style="list-style-type: none"> <li>• none prescribed</li> <li>• must not be a marketing document</li> <li>• likely to be a separate document</li> </ul> <p><b>Drafting:</b></p> <ul style="list-style-type: none"> <li>• in English or other language Bank considers appropriate</li> <li>• clearly expressed</li> </ul>	<p><b>Contents of Statement (cont'd):</b></p> <ul style="list-style-type: none"> <li>- must disclose application fee as a fee or charge - can only be non refundable if contract provides for it.</li> </ul> <p><b>Form:</b></p> <ul style="list-style-type: none"> <li>• some parts prescribed;</li> <li>• can be loan contract;</li> <li>• can be more than one document (if contains appropriate warnings)</li> </ul> <p><b>Drafting:</b></p> <ul style="list-style-type: none"> <li>• no specific requirement</li> <li>• easily legible</li> <li>• clearly expressed</li> <li>• type face to be regulated</li> </ul>

BANKING CODE OF PRACTICE	CONSUMER CREDIT CODE
<b>CONTINUOUS DISCLOSURE</b>	
<p><b>Statements of Account</b></p> <p><i>Frequency:</i></p> <p>Statements on <u>deposit</u> accounts at least every 6 months unless:</p> <ul style="list-style-type: none"> <li>(a) passbook account;</li> <li>(b) no transactions on account during past six months; or</li> <li>(c) account can be accessed by combined use of a PIN and EFT card, in which case requirements as to statements of accounts in Electronic Funds Transfer Code of Conduct apply.</li> </ul> <p><i>Contents:</i></p> <p>Contents of statements are not prescribed other than all transactions since previous statement.</p>	<p><b>Statements of Account</b></p> <p><i>Frequency:</i></p> <p>Statements at least every 6 months except in the case of a continuing credit contract where period is:</p> <ul style="list-style-type: none"> <li>- 40 days (where credit obtained by use of a card);</li> <li>- 40 days - 3 months as agreed by debtor and credit provider (for any other type of continuing credit contract).</li> </ul> <p><i>Contents:</i></p> <ul style="list-style-type: none"> <li>- beginning and end dates of the statement period;</li> <li>- opening and closing balances;</li> <li>- particulars of each amount of credit provided during statement period;</li> <li>- amount of interest debited to account during statement period and date when debited and annual percentage rate;</li> <li>- payments to or from the account;</li> <li>- continuing credit contract - identity of supplier if goods or cash acquired with credit;</li> <li>- if appropriate, a statement of minimum amount payable and date by which it is due;</li> <li>- particulars of fees and charges debited;</li> <li>- if payment of an insurance premium is made, the name of the insurer, the amount debited, the kind of insurance and amount of any commission (if not previously disclosed);</li> <li>- any correction made to a previous statement;</li> <li>- any other information required by regulation.</li> </ul>

BANKING CODE OF PRACTICE	CONSUMER CREDIT CODE
<b>CONTINUOUS DISCLOSURE</b>	
<p><b>Other Information:</b></p> <p><u>BS Code</u> To: Customers</p> <p><u>Banking Code</u> To: Customers or potential customers.</p> <p>On request:</p> <ul style="list-style-type: none"> <li>- interest rates;</li> <li>- fees and charges;</li> <li>- descriptive information regarding banking services;</li> <li>- general descriptive information regarding cheques;</li> <li>- terms and conditions of specific banking services;</li> <li>- general descriptive information about dispute resolution.</li> </ul>	<p><b>Other Information:</b></p> <p>On request:</p> <ul style="list-style-type: none"> <li>- current balance of account;</li> <li>- amounts credited or debited during a specified period;</li> <li>- amounts overdue and when each amount became due;</li> <li>- any amount payable and the date on which it became due;</li> <li>- payout figure.</li> </ul>

BANKING CODE OF PRACTICE	CONSUMER CREDIT CODE
<b>CHANGES TO FORMS</b>	
<p><b>By Agreement:</b></p> <p>No requirements.</p> <p><b>Unilateral Changes:</b></p> <p>Interest rate:</p> <ul style="list-style-type: none"> <li>- notify by publication or in writing by effective date.</li> </ul> <p>Interest - Method of Calculation or Debiting or Crediting:</p> <ul style="list-style-type: none"> <li>- 30 days written notice.</li> </ul>	<p><b>By Agreement:</b></p> <p>Credit provider must notify particulars of agreement within 30 days.</p> <p><b>Unilateral Changes:</b></p> <p>Interest Rate:</p> <ul style="list-style-type: none"> <li>- notification by publication and in next statement of account - before or when next statement of account issues.</li> </ul> <p>Interest - Any Other Changes</p> <ul style="list-style-type: none"> <li>- 30 days written notice.</li> </ul>

BANKING CODE OF PRACTICE	CONSUMER CREDIT CODE
<b>CHANGES TO FORMS</b>	
<p><b>Unilateral Changes (cont'd):</b></p> <p>New Fees and Charges (not government charges):</p> <ul style="list-style-type: none"> <li>- 30 days written notice.</li> </ul> <p>Changes to Fees and Charges:</p> <ul style="list-style-type: none"> <li>- publication <u>or</u> written notification by effective date.</li> </ul> <p>New or Changed Government Charges:</p> <ul style="list-style-type: none"> <li>- notification by publication or in writing (unless otherwise publicised by Government).</li> </ul> <p><u>BS Code and CU Code</u></p> <ul style="list-style-type: none"> <li>- notification by publication or in writing notwithstanding publicised by Government</li> </ul> <p><u>BS Code and CU Code</u></p> <p>Changed results in reduction of obligations of Customers (eg reduction in fees)</p> <ul style="list-style-type: none"> <li>- no notification required prior to change taking effect</li> </ul> <p>Other Changes:</p> <ul style="list-style-type: none"> <li>- publication or written notice by effective date.</li> </ul> <p><b>Related Guarantees</b></p> <p><b>Application</b></p> <p>By individuals securing a debtor other than:</p> <ul style="list-style-type: none"> <li>(i) public companies;</li> <li>(ii) companies in which guarantor is an officer or shareholder;</li> <li>(iii) a trustee where guarantor is a beneficiary of the trust; or</li> <li>(iv) a partner, co-owner, agent, consultant or associate of the guarantor or of the entities referred to in (ii) and (iii).</li> </ul>	<p><b>Unilateral Changes (cont'd):</b></p> <p>New Fees and Charges:</p> <ul style="list-style-type: none"> <li>- 30 days written notice <u>or</u> publication <u>plus</u> statement of account.</li> </ul> <p>Changes to Fees and Charges:</p> <ul style="list-style-type: none"> <li>- 30 days written notice <u>or</u> publication <u>plus</u> statement of account.</li> </ul> <p>Repayments:</p> <ul style="list-style-type: none"> <li>- generally, 30 days written notice</li> </ul> <p>Other Changes:</p> <ul style="list-style-type: none"> <li>- 30 days written notice to debtor, <u>mortgagor</u> and <u>guarantor</u>.</li> </ul> <p><b>Related Guarantees</b></p> <p><b>Application</b></p> <p>Guarantees given by natural persons or strata corporations to the extent to which guarantee secures obligations under a credit contract.</p>

BANKING CODE OF PRACTICE	CONSUMER CREDIT CODE
<b>GUARANTEES AND MORTGAGES</b>	
<p><b>Related Guarantees (cont'd)</b></p> <p><b><i>Guarantee must be limited</i></b></p> <p>A Bank may only accept a guarantee if the amount of the guarantor's liability is limited to, or is in respect of, a specific amount plus other liabilities (eg interest and costs) that are described in the guarantee.</p> <p><u>BS Code and CU Code</u></p> <p>Guarantee may contain a provision that makes credit provided under a future contract subject to the guarantee provided copy of future credit contract is given to guarantor and guarantor gives written acceptance of extension of guarantee.</p> <p><b><i>All Moneys</i></b></p> <p>No specific prohibition but probably not possible given clause 17.2 (limitation to <u>specific amounts</u>)</p> <p><b><i>Disclosure - Pre Execution</i></b></p> <p>Bank must:</p> <ul style="list-style-type: none"> <li>- deliver a written warning about the possibility of the guarantor becoming liable instead of, or as well as, the debtor;</li> <li>- recommend that the guarantor obtain independent legal advice;</li> <li>- subject to debtor's consent, deliver a copy of or summary of the contract guaranteed; and</li> <li>- notice that, either: <ul style="list-style-type: none"> <li>• if the debtor consents, the Bank will provide the guarantor with any formal demand given to the debtor and a copy of the most recent statements of account given to the debtor or,</li> <li>• that the debtor has not consented to that information being supplied.</li> </ul> </li> </ul>	<p><b>Related Guarantees (cont'd)</b></p> <p><b><i>Guarantee must be limited</i></b></p> <p>A guarantee cannot secure an amount greater than the debtor's liability under the credit contract and the reasonable expenses of enforcing the guarantee.</p> <p>A guarantor of a continuing credit contract may limit liability to the amount of credit previously granted to the debtor and such further amount as the guarantor agrees.</p> <p><b><i>All Moneys</i></b></p> <p>A guarantee may secure performance of a future credit contract if the credit provider gives the guarantor a copy of the future credit contract and the guarantor gives his or her written acceptance of the extension of the guarantee.</p> <p><b><i>Disclosure - Pre Execution</i></b></p> <p>Credit provider must give the guarantor a copy of the (proposed) credit contract and a document in the prescribed form explaining the rights and obligations of the guarantor.</p>

BANKING CODE OF PRACTICE	CONSUMER CREDIT CODE
<b>GUARANTEES AND MORTGAGES</b>	
<p><b>Related Guarantees (cont'd)</b></p> <p><b><i>Copies of Documents</i></b></p> <p>If the debtor does consent the Bank must send the guarantor a copy or summary of the contract, a copy of any formal demand given to the debtor and, on request by the guarantor, a copy of the latest statements of account provided to the debtor.</p> <p><b><u>CU Code</u></b></p> <p>In addition to above, CU will send to guarantor copy of any variation to terms and conditions of credit contract.</p> <p><b><i>Withdrawing from Guarantee</i></b></p> <p>A guarantor can extinguish his or her liability to the Bank under a guarantee by paying to the Bank the then outstanding liability of the debtor or the amount to which the guarantee is limited or by making other arrangements satisfactory to the Bank for the release of the guarantee.</p> <p><b>Related Mortgages</b></p> <p>No specific application, but guarantee provisions will apply if guarantee contained in mortgage.</p>	<p><b>Related Guarantees (cont'd)</b></p> <p><b><i>Copies of Documents</i></b></p> <p>A copy of the completed guarantee and credit contract it secures to be given to the guarantor not later than 14 days after the guarantee is signed.</p> <p><b><i>Withdrawing from Guarantee</i></b></p> <p>A guarantor may by written notice to the credit provider withdraw from the guarantee at any time before credit is first provided if the credit contract made differs in some material respect from the proposed credit contract given to the guarantor.</p> <p><b><i>Other Restrictions</i></b></p> <ul style="list-style-type: none"> <li>- A guarantee cannot limit a guarantor's right of indemnity from the debtor or postpone or otherwise limit the guarantor's right to enforce the indemnity.</li> <li>- Generally, a guarantor's liability is not increased if the terms of the credit contract are varied unless the credit provider gives the guarantor a written notice setting out the variation to the credit contract and the guarantor gives his or her written acceptance to the extension of the guarantee to those increased liability.</li> <li>- some restrictions on method of enforcement.</li> </ul> <p><b>Related Mortgages</b></p> <p>Regulated mortgages given by natural persons or strata-title corporations to secure obligations under credit contracts or related guarantees.</p>

BANKING CODE OF PRACTICE	CONSUMER CREDIT CODE
<b>ADVERTISING</b>	
<p><b>General Requirements</b></p> <p>Advertising and promotional literature relating must not be misleading or deceptive.</p> <p><b>Interest Rates</b></p> <p>References to interest rates must include an indication whether other fees and charges will apply and notify that full details of relevant terms and conditions are available on application.</p>	<p><b>General Requirements</b></p> <p>A person must not make false or misleading representations in relation to a matter that is material to entry into a credit contract. It is an offence to show that the person making the false or misleading representation reasonably believed that the representation was not false or misleading.</p> <p><b>Interest Rates</b></p> <p>An advertisement must not contain a statement of interest charges or the cost of credit other than a statement that refers to the cost of credit, annual percentage rates and, if any fees or charges are payable, a statement to that effect. Comparison rate may be used if calculated in accordance with the regulations and accompanied by prescribed warnings.</p> <p>A person must not disclose an interest rate:</p> <ul style="list-style-type: none"> <li>- in an advertisement that states or implies that credit is available;</li> <li>- or to a debtor before the debtor enters into a contract</li> </ul> <p>unless the interest rate is the annual percentage rate or the comparison rate (calculated in accordance with the regulations and accompanied by the warnings in the regulations).</p>
<b>RESOLUTION OF DISPUTES</b>	
<p>A free and readily accessible internal dispute resolution process for handling a dispute between the Bank and a Customer.</p> <p>A free external and impartial process (not arbitration) for resolution of a dispute.</p>	<p>If debtor disputes a particular liability in writing, the credit provider must give the debtor written notice explaining the liability and cannot begin enforcement proceedings until at least 30 days after the notice is given.</p>