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ASIC Dons its Hat as Credit Regulator – Finance Brokers in Trouble

On 11 June 2010, ASIC announced it has commenced proceedings in the Federal Court of Australia against Australian Lending Centre Pty Ltd and Sydney Lending Centre Pty Ltd, two finance brokers.

ASIC alleges that:

- the brokers contravened the Australian Securities and Investments Commission Act by falsely representing that certain loan contracts were provided wholly or predominantly for business or investment purposes rather than for personal, household or domestic use;
- a company associated with the finance brokers engaged in unconscionable conduct in entering the loan transactions; and
- the sole director of all three companies aided and abetted the contraventions by two of the companies in relation to one particular loan transaction.

ASIC is seeking declarations that the contraventions occurred and orders restraining the relevant parties from making business purposes representations in circumstances where loans are sought for personal, household or domestic purposes.

The *Uniform Consumer Credit Code* (**UCCC**) provides a range of protections for borrowers who take out loans for personal, household or domestic purposes; the same protection is not afforded to borrowers who take out loans for wholly or predominantly business or investment purposes.

The UCCC will be replaced by the *Consumer Credit Protection Act 2009* (**Act or New Credit Code**), which comes into force on 1 July 2010. The New Credit Code is more stringent than the UCCC in a number of areas such as licensing requirements and information disclosure. ASIC has been given 'front line' national responsibility for consumer credit and finance broking under the Act.

Clause 5 of the New Credit Code provides the key details of the transactions it is designed to regulate. The clause states that credit provided or intended to be provided wholly or predominantly:

(i) for personal, domestic or household purposes; or

(ii) to purchase, renovate or improve residential property for investment purposes; or

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(iii) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes,

are regulated transactions for the purposes of the Act.

The business or 'pure investment' borrowing 'carve out' remains a feature of the New Credit Code. This can be seen clearly from Clause 13 of the New Credit Code.

Clause 13 of the New Credit Code provides as follows:

"(2) It is presumed for the purposes of this Code that credit is not provided or intended to be provided under a contract wholly or predominantly for any or all of the following purposes (a ***Code purpose***):

(a) for personal, domestic or household purposes;

(b) to purchase, renovate or improve residential property for investment purposes;

(c) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes;

if the debtor declares, before entering the contract, that the credit is to be applied wholly or predominantly for a purpose that is not a Code purpose, unless the contrary is established.

(3) However, the declaration is ineffective if, when the declaration was made, the credit provider or a person (the prescribed person) of a kind prescribed by the regulations:

(a) knew, or had reason to believe; or

(b) would have known, or had reason to believe, if the credit provider or prescribed person had made reasonable inquiries about the purpose for which the credit was provided, or intended to be provided, under the contract;

that the credit was in fact to be applied wholly or predominantly for a Code purpose.

(4) If the declaration is ineffective under subsection (3), paragraph 5(1)(b) is taken to be satisfied in relation to the contract.

(5) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.

(6) A person commits an offence if:

(a) the person engages in conduct; and

(b) the conduct induces a debtor to make a declaration under this section that is false or misleading in a material particular; and

(c) the declaration is false or misleading in a material particular.

Criminal penalty: 100 penalty units, or 2 years imprisonment, or both.

(7) Strict liability applies to paragraph (6)(c)."

The sting in the tail, however, is this: Clause 13(3) places the onus on the credit provider not to take at face value statements by borrowers that the purpose for which they require credit is not a Code purpose – ie, a business or non residential property investment purpose – or take comfort from a borrower's willingness to sign a declaration to that effect. Greater 'due diligence' in this regard will now be required by credit providers before credit is extended.

A failure to do so will have serious civil and potentially criminal ramifications. The proceedings taken by ASIC referred to in this note should be treated as a 'first shot across the bow' for credit providers and finance brokers, with potentially more to come if they do not strictly adhere to the requirements of the New Credit Code.

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