
NCCP responsible lending and advertising

Leonie Chapman *LAWYAL SOLICITORS*

Background

The National Consumer Credit Protection Act 2009 (Cth) (NCCP Act) prohibits credit providers from making unconditional representations to potential customers that the customer is eligible to enter into a credit contract with them, or that a credit limit of a credit contract will be able to be increased, unless the credit provider has conducted a credit assessment that the new credit is “not unsuitable” for the customer.¹ Banking and finance lawyers should be mindful that this has a real impact on the way credit providers are able to market credit products to customers upfront, as well as the prohibition under Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) from engaging in conduct that is misleading or deceptive, or likely to mislead or deceive customers of financial services (including the provision of credit). These provisions have an impact on the way credit providers are able to market credit products to customers upfront, and so advertising and promotional material should be reviewed carefully before being published; particularly given is an area where Australian Securities and Investments Commission (ASIC) is currently paying some attention.

Misrepresenting that credit is guaranteed

The practical implication in credit providers not being permitted, under the NCCP Act, to making unconditional representations to potential customers about eligibility to enter into a credit contract or credit limit increase, before conducting a credit assessment,² is one of timing. Given that the credit assessment cannot be made until the credit provider makes reasonable inquiries about the customer’s financial situation and requirements and objectives, and has taken reasonable steps to verify the customer’s financial information,³ and then taking into consideration the findings of those inquiries and objectives, made an assessment that the credit contract or credit limit increase is “not unsuitable” for the customer, then any upfront marketing that suggests a customer can take out credit must be carefully disclaimed with a statement that any decision to lend is subject to credit assessment. This particularly impacts website and social media advertising, customer borrowing capacity letters and online calculators, indicative approval letters and any verbal statements made by the credit provider.

In these documents, Australian credit licensees should be careful not to guarantee approval until the assessment has been made that the loan is “not unsuitable”, given that the NCCP Act requires an individualised assessment process for each customer once an application and all supporting documentation is received. Further, in any online quotes, estimates or calculator tools, credit providers should not imply in advertisements that a more individualised assessment has in fact been carried out, when in fact it has not. Credit providers should make it clear to customers that they only “may” qualify or find the product suitable.

In Regulatory Guide 234,⁴ ASIC provides an example of an advertisement representation about “guaranteed” finance that should be avoided. The example describes advertisements for personal finance that stated that finance was “guaranteed” and said “no application refused”, which in ASIC’s view were either incorrect and misleading claims, because responsible lending obligations would prevent credit from being provided if it was unsuitable, or, if correct, demonstrated poor and potentially unlawful lending practices.⁵

Misrepresenting speed and ease of credit assessment

Banking and finance lawyers should also carefully consider certain promotional claims about the speed or ease of the credit assessment process in credit provider advertising claims, where such claims are either misleading or reflect practices that do not comply with the NCCP Act responsible lending obligations. This is not to say that in the current financial technology (FinTech) space, with the use of technology and carefully designed and compliant processes, a credit assessment cannot currently be achieved quickly. It can, however, where a business makes such a claim it must ensure that it can be substantiated by fact. This risk is not limited to credit providers and extends to white label credit assistance providers who represent themselves as offering a branded home loan or other credit product, who must be careful both from an NCCP Act perspective and contractually with their funders, that they do not falsely represent that credit can be provided without a credit assessment being conducted.

False claims that a credit assistance provider or credit provider’s credit assessment process can be achieved

without the necessary steps being taken, including verification by the credit assistance provider and credit provider of the customer's financial situation, may attract negative attention from ASIC and dispute by customers. In particular the new FinTechs currently disrupting the consumer credit market with new technology are being watched carefully by ASIC to ensure their marketing claims can be substantiated in relation to exactly how fast and how easy the assessment process really is, and should be.

As a credit provider's unsuitability assessment must be based on inquiries about a consumer's requirements and objectives and financial situation, and verification of the customer's financial situation, it is ASIC's view that this process takes time (including often conducting credit checks and valuations), and ASIC has therefore given guidance⁶ that credit providers should carefully consider whether promoting "instant" or "very fast approvals" are misleading or reflect practices that do not comply with the responsible lending obligations.⁷ In general, advertisements should not state or imply that a credit product is suitable for a particular class of consumers unless a credit provider has actually assessed the suitability of the product for the particular consumers targeted by the advertisement. The terms "guaranteed acceptance" or "pre-approved" might not be appropriate in promotions, given the need to conduct an individualised assessment process when an application is received from a customer.

Misrepresenting products, benefits and distribution

In preparing any advertising, marketing or promotional material that mentions the possibility of refinancing existing debts or debt consolidation, banks and their in-house teams should be mindful that the advertisement does not mislead customers into any overall cost savings given generally over the extended loan period the overall cost could be higher. Further, for products that may result in possible tax deductions (for example, investment loans) credit providers should be careful not to misrepresent the benefits and must particularly avoid providing any taxation benefits advice to customers. ASIC has also provided guidance that Australian credit licensees should carefully consider whether promotional claims about "no-doc" type products given the need for them to verify financial situation, as well as claims that approval can be given with "no credit checks". To ASIC, these could be either misleading or they could reflect practices that do not comply with responsible lending obligations.

It is advisable to take care when publishing advertisements for products that can be acquired directly from the credit provider when in fact it can only be acquired

through an adviser, broker or intermediary. ASIC states in Regulatory Guide 234 on this point, that "advertisements should not rely on a third party to fill in any gaps to correct a misleading impression created in the advertisement itself".⁸ Further, where a product is overly complex, an advertisement should be drafted simplistically enough that it is capable of explaining sufficiently what that product is about.⁹ If a product is particularly complex, in terms of structure and the ability for customers to understand the product risks, then care must be taken by banking and finance legal teams to ensure that the advertisement is written in plain English to avoid creating misleading impressions about the product. What is also relevant to in-house teams is the limited space sometimes available in credit advertising, where it might be inappropriate and misleading to advertise a complex product on, for example, an internet banner advertisement, signs in public venues or on a 30-second television or radio commercial.

Reliance on disclaimers

Often credit providers will add a disclaimer to the following effect: "Our provision of credit is subject to the credit provider being satisfied with the suitability of the [credit product] in light of your financial situation and requirements." While this may help explain to customers (and ASIC) that any representation is subject to a credit assessment, the usefulness of the disclaimer depends on its size, positioning and the representation being made in the content being disclaimed. When relying on disclaimers, banking and finance lawyers should be mindful about ASIC's guidance in Regulatory Guide 234 that "the headline claim must not itself be misleading".¹⁰ The use of terms such as "conditions apply" or "find out if you qualify" may not always be sufficient to warn consumers that the advertised product may not be suitable for, or made available to them.

Conclusion

Consumer credit advertising laws can often be frustrating for banking and financial institutions, including their marketing and in-house teams, that frequently have to navigate around multiple regulations including the NCCP Act and ASIC Act when it comes to advertising credit products. With the constantly evolving credit assessment process and the arrival of new FinTechs in the consumer credit market, the credit assessment processes are now being challenged in terms of how quickly and easily responsible lending can be complied with, and in turn, now a credit product and credit approval process can be advertised. As each advertisement, credit provider and process of approval will be unique, it is important that banking and finance in-house teams carefully scrutinise each publication to ensure that

statements are not misleading and do not make false claims about credit being guaranteed, immediate or without credit assessment. This approach to marketing approvals may help mitigate a credit provider's risk of negative attention from ASIC, something that is definitely worth avoiding.



Leonie Chapman
Principal Lawyer and Director
LAWyal Solicitors
leonie.chapman@lawyal.com.au

About the author

Leonie Chapman's experience extends to banking and finance, consumer credit and mortgage lending, contract negotiation, trade practices and fair trading legislation, intellectual property and trade marks, corporate and financial services. After completing her Bachelor of Laws and Bachelor of Commerce in 2002, Leonie went on to work both in private practice and as senior

in-house lawyer supporting a specialist lender and then for six years, Macquarie Bank Limited. Having achieved a Master of Laws in 2009 specialising in banking and finance law, Leonie's main focus now as Principal of LAWyal Solicitors is on regulation and compliance for banking and financial institutions.

Footnotes

1. NCCP Act, s 128.
2. Above n 1.
3. Above n 1, s 130.
4. ASIC Regulatory Guide 234 Advertising financial products and services (including credit): good practice guidance (November 2012) at example 45.
5. Above n 4.
6. Above n 4.
7. Above n 4, at [234.110]–[234.114].
8. Above n 4, at [234.115].
9. Above n 4, at [234.116].
10. Above n 4, at [234.47].