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UNSUITABLE LENDING UNDER THE *CONSUMER CREDIT PROTECTION ACT 2009 (CTH)*

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UNSUITABLE LENDING UNDER THE *NATIONAL CONSUMER CREDIT PROTECTION ACT 2009 (CTH)*

1. Whilst statutory obligations for the suppliers of goods, in the form of the consumer protection rule that goods should be fit for their stated purpose, can be traced back to the mid 19th century¹, the proposition that lenders are correspondingly obliged to supply loans to borrowers that are fit their purpose or in the words of the legislature, “*not unsuitable*”, is remarkably novel.²
2. The *National Consumer Credit Protection Act 2009 (Cth)* (“*National Credit Act*” or “*Act*”)³ contains responsible lending obligations for credit licensees. These obligations apply to both *credit providers* (lenders, such as banks, credit unions and finance companies) and *credit assistance providers* (mortgage and finance brokers) and have now been in operation since, at least, 1 January 2011.⁴
3. A breach of the *National Credit Act* has criminal and civil consequences. Not only will a breach of the responsible lending obligations expose credit licensees to orders for compensation, but also civil penalties of up to \$220,000.⁵ Breaches of other sections of the *Act* may also attract civil penalties to the same amount or 2 years imprisonment, or both.
4. This paper briefly outlines the obligations of credit licensees under the *Act*, with an emphasis on the responsible lending obligations, the views and expectations of ASIC as to how the banking and lending industry should comply with the *Act* and examines some practical issues that may arise when litigation, surrounding the responsible lending obligations under the *Act*, ultimately occurs.⁶

¹ See the UK *Sale of Goods Act 1893*, which had its origins in the United Kingdom’s *Royal Commission into Mercantile Law* (1854) and also the *Indian Contract Act 1872*. See also Pearson, Gail “*Reading Suitability against Fitness for Purpose: The Evolution of a Rule*” [2010] SydLawRw 15; (2010) 32(2) Sydney Law Review 311.

² It should be noted that the Financial Services Industry has had reasonable advice obligations to its clients for some time. See for example section 945A of the *Corporations Act* where financial services licensees are obliged to provide their clients with appropriate investment advice.

³ The *National Credit Act* transfers responsibility for the regulation of consumer credit from the states to the Commonwealth and takes over from the state based *Uniform Consumer Credit Codes*.

⁴ The responsible lending conduct obligations for brokers and some lenders have applied from 1 July 2010. This includes registered persons as well as credit licensees. For the remaining lenders (i.e. authorised deposit-taking institutions and registered finance corporations), the obligations apply from 1 January 2011.

⁵ 2000 penalty units at \$110 per unit. See section 4AA of the *Crimes Act 1914* and the definition of a *penalty unit*.

⁶ See sections 121(1) (2) and 132(1) (2) of the *National Credit Act*

The objective of the responsible lending obligations

5. The stated objective of the responsible lending obligations is to ensure that credit licensees do not suggest, assist with or provide a credit contract or lease to a consumer that is unsuitable for the consumer. According to the *Explanatory Memorandum to the National Consumer Credit Protection Bill 2009*, ("**Explanatory Memorandum**") the responsible lending provisions are intended to:
 - (a) introduce standards of conduct to encourage prudent lending and leasing, and impose sanctions in relation to irresponsible lending and leasing; and
 - (b) curtail undesirable market practices, particularly where intermediaries are involved in lending.
6. Credit licensees must not enter into a credit contract with a consumer, suggest a credit contract to a consumer or assist a consumer to apply for a credit contract if the credit contract is unsuitable for the consumer.
7. In addition, if the consumer requests it, a credit licensee must be able to provide a consumer with a written copy of the preliminary assessment or final assessment made by the credit licensee in relation to a credit application. This obligation remains extant for 7 years but only arises if credit assistance is provided or a credit contract is entered into.
8. Credit licensees are obliged to determine how they will meet their responsible lending obligations. To that end, ASIC has published a Regulatory Guide⁷, as to when and how it will exercise specific powers under the *Act*, explaining how ASIC interprets the law describing the principles underlying ASIC's approach and giving practical examples of how regulated entities may decide to meet their obligations under the *Act* ("**Regulatory Guide**").

The responsible lending obligations

9. The primary obligation of a credit licensee under the *National Credit Act* is to assess a credit application by the consumer and determine whether that credit contract or lease is '*not unsuitable*' for the consumer.⁸ A credit licensee must assess that the credit contract will be unsuitable for the consumer if:
 - (a) it does not meet the consumer's requirements and objectives; or

⁷ ASIC Regulatory Guide 209: *Credit licensing: Responsible lending conduct*, March 2011

⁸ See sections 115, 116, 117, 128, 129, 130, 140 and 153 of the *National Credit Act*

(b) the consumer will be unable to meet the repayments, either at all or only with substantial hardship.⁹

10. Under sections 118(3) and 131(3) of the *Act* it is presumed that, if the consumer could only comply with the consumer's financial obligations under the credit contract by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.¹⁰

11. Whilst the obligation to assess unsuitability arises at the time of assessment, it seems reasonable to expect argument before the Courts, based on subsequent events, where a consumer has failed to meet his or her repayment obligations under a credit contract. In other words, where a consumer falls into default under a credit contract, all other things being equal, it may be that that fact of itself provides some evidence of the unsuitability of the credit contract at the time it was entered into.

12. The *National Credit Act* requires three steps to be undertaken by credit licensees before a credit contract is entered into. To meet its responsible lending obligations a credit licensee is required to:

(a) make reasonable inquiries about the consumer's financial situation, and their requirements and objectives;

(b) take reasonable steps to verify the consumer's financial situation; and

(c) make a preliminary assessment (if providing credit assistance) or final assessment (if a credit provider) about whether the credit contract is 'not unsuitable' for the consumer (based on the inquiries and information obtained in the first two steps).

13. The positive obligations placed upon credit licensees under the *Act* may shift the burden of proof when it comes proving that a credit licensee acted reasonably when providing credit or assisting in the provision of credit to a consumer. In other words, if a defaulting debtor alleges a loan made was unsuitable by reason of certain facts on a *prima facie* basis, it would appear that the burden of proof will shift to the credit licensee to show that the steps taken by it were reasonable and thus not in breach of the *Act*.

⁹ See sections 118 and 131 of the *National Credit Act*

¹⁰ See here for example *Perpetual Trustee Company Ltd v Khoshaba* [2006] NSWCA 41 at [83] and Basten JA at [128] on the practice of asset lending, "To engage in pure asset lending, namely to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default, is to engage in a potentially fruitless enterprise, simply because there is no risk of loss. At least where the security is the sole residence of the borrower, there is a public interest in treating such contracts as unjust, at least in circumstances where the borrowers can be said to have demonstrated an inability reasonably to protect their own interests"

Reasonable inquiries about a consumer's financial situation

14. According to ASIC's *Regulatory Guide* the obligation to make reasonable inquiries, and to take reasonable steps to verify information, is scalable and will vary depending on the circumstances. What inquiries should be made? The *Regulatory Guide* says that, depending on the circumstances, reasonable inquiries about a consumer's financial situation may include inquiries about:

- (a) the consumer's current amount and source of income or benefits (this would include the nature and length of their employment e.g. full-time, part-time, casual or self-employed);
- (b) the extent of the consumer's fixed expenses (such as rent, repayment of existing debts, child support and recurring expenses such as insurance);
- (c) the consumer's variable expenses (and drivers of variable expenses such as dependants and any particular or unusual circumstances);
- (d) the extent to which any existing debts are to be repaid from the credit advanced;
- (e) the consumer's credit history;
- (f) the consumer's circumstances, including their age (particularly where they may be a minor) and the number of dependants;
- (g) the consumer's assets, including their nature (such as whether they produce income) and value.
- (h) any significant changes to the consumer's financial circumstances that are reasonably foreseeable (such as a change in repayments for an existing home loan due to the ending of a 'honeymoon' interest rate period, or changes to the consumer's employment arrangements such as seasonal employment or impending retirement and plans to fund retirement, e.g. from superannuation or income-producing assets);
- (i) geographical factors, such as remoteness, which may require consideration of specific issues (such as potentially higher living costs compared to urban areas); and
- (j) indirect income sources (such as income from a spouse) where that income is reasonably available to the consumer, taking into account the history of the relationship and the expressed willingness of the earning person to meet repayment obligations.

Reasonable inquiries about a consumer’s requirements and objectives

15. The *Regulatory Guide* says that, depending on the circumstances, reasonable inquiries about a consumer’s requirements and objectives could include inquiries about:
- (a) the amount of credit needed or the maximum amount of credit sought (for example, the desired limit for a credit card);
 - (b) the timeframe for which the credit is required;
 - (c) the purpose for which the credit is sought and the benefit to the consumer; and
 - (d) whether the consumer seeks particular product features or flexibility, and understands the costs of these features and any additional risks.¹¹

Factors relevant to the scalability of the reasonable inquiries and verification obligations

16. The *Regulatory Guide* sets out some relevant factors surrounding the concept of scalability, in relation to the obligation to make reasonable inquiries.

Relevant Factor	Effect on the obligations
Potential impact on the consumer of entering into an unsuitable credit contract	More extensive consumer inquiries are likely to be necessary where the potential negative impact on the consumer is likely to be relatively serious if the credit contract is unsuitable—for example, if the size of the loan is large <i>relative</i> to the consumer’s capacity to repay the loan. This is because, if a consumer is on a low income, even a small loan can cause financial difficulties for them, and therefore, in this situation, ASIC expects that a credit licensee will need to make more inquiries in order to meet its responsible lending obligations
Complexity of the credit contract	Less extensive inquiries are likely to be necessary where the credit contract has relatively simple terms that most consumers can easily understand. More extensive inquiries are likely to be necessary where the credit contract has complex terms
Capacity of the consumer to understand the credit contract	More inquiries about the consumer’s requirements and objectives are likely to be necessary where it is evident to the credit licensee that: <ul style="list-style-type: none"> • the consumer has limited capacity to understand the credit contract; • the consumer has conflicting objectives; • the consumer is confused about their objectives (or has difficulty articulating

¹¹ *Regulatory Guide* 209.28

	them); or <ul style="list-style-type: none"> • there is an apparent mismatch between the consumer's objectives and the product being considered by the consumer.
Whether the consumer is an existing customer of a credit provider or a new customer	Where the consumer is an existing customer and the credit licensee already holds information about the consumer, a credit provider may be able to make less extensive inquiries about the consumer, and take less extensive steps to verify information. More extensive inquiries and verification will be required for new customers.

Processes to ensure that reasonable inquiries are made

17. ASIC has told us that credit licensees are expected to be able to demonstrate that they have adequate processes in place to ensure that reasonable inquiries have been made about the consumer. If appropriate processes are not in place, it will be difficult for credit licensees to show that are meeting their responsible lending obligations.¹²
18. Many credit providers already have product specific processes in place to assess new consumers for different credit products. Undoubtedly, it is good industry practice to make more detailed inquiries in relation to offering a home loan compared with the inquiries made for a small personal loan.¹³
19. It should be noted that where a credit provider fails to comply with its own internal lending manuals and guidelines this fact may be used against the lender as evidence of the credit provider's failure to meet their responsible lending obligations under the Act.¹⁴

Processes in relation to face-to-face and internet applications

20. ASIC's guidance to credit licensees is technology neutral but, depending on the channel credit licensees' use, credit licenses have been asked to adjust their processes to ensure compliance. ASIC considers that a credit licensee may be able to meet their responsible lending obligations using an online or face-to-face approach. That said, the fact that a credit application can be made online does seem to present difficulties in justifying the provision of credit without ever having met or spoken to the borrower. One wonders how a credit licensee could determine the capacity of the consumer to understand a credit contract if

¹² *Regulatory Guide 209.30*

¹³ *Regulatory Guide 209.31*

¹⁴ See for example, in a proceeding, inter alia, under the *Contracts Review Act 1980 (NSW)*, the recent decision of *CBA v Munro* [2011] NSWSC 128

that person has not been spoken to by the credit assistance provider or the credit provider in relation to the credit application.

Verification of information provided by a consumer

21. To a certain degree, self-interest by a lender necessitates verification by the credit licensee before a loan is made or suggested. Why else lend money if it cannot be repaid? That said it is only when a loan is in default that issues about the positive obligations of a credit licensee will be called into question. It would seem pointless for a credit licensee to later argue that the fact that a loan was made, given the hypothesis that lenders do not lend money without an expectation of repayment, is in itself proof of compliance with the responsible lending obligations under the *Act*.
22. A credit licensee is obliged to take reasonable steps to verify a consumer's financial situation. Generally, this will require some positive steps to verify the information provided by the consumer. What constitutes taking 'reasonable steps to verify' information is again scalable, and what amounts to reasonable verification will depend on the information and resources that the credit licensee has access to and the facts and circumstances of each case.
23. The verification obligation differs between credit assistance providers (who make the preliminary assessments) and credit providers (who make the final assessment).
24. The *Regulatory Guide* advises that this fact does not diminish a credit assistance provider's responsibilities with regard to verification; however, ASIC recognises that a credit assistance provider may not have access to some information that is available to a credit provider. Credit providers generally have access to a wider range of information than credit assistance providers (e.g. via credit reports, or account information for existing customers).¹⁵
25. ASIC also recognises that, in certain circumstances, credit providers will be able to verify a consumer's financial situation without receiving information from the consumer. Banks can look at a consumer's regular deposited salary, the timing of credit card payments, and the payment of other expenses.¹⁶ Banks may also rely on sophisticated automated systems and tools for testing the reliability of information about income provided by an intending borrower to satisfy the requirements to take reasonable steps to verify such information.

¹⁵ See the *Explanatory Memorandum*, para 3.67

¹⁶ *Regulatory Guide* 209.40

However in the end it is the responsibility of credit licensees to satisfy themselves that the use of any such system is adequate and appropriate for verifying information provided by a consumer about their financial situation, in relation to the credit being applied for.¹⁷

What constitutes ‘reasonable steps to verify’ where a consumer provides inconsistent information?

26. In some circumstances, taking reasonable steps to verify information should involve making additional inquiries about the consumer where:
- (a) the information that a consumer provides is inconsistent with other information that you hold about the consumer (e.g. in a credit report or account information for existing customers); and/or
 - (b) the information that a consumer provides is outside the standard range for the consumer (e.g. the income stated is far greater than would be expected for the type of work the consumer undertakes, as indicated by benchmarks).¹⁸

Can credit providers take into account information provided by a credit assistance provider or other third parties?

27. The purpose of a preliminary assessment is to ensure that credit assistance provider:
- (a) does not suggest a credit contract to a consumer that the provider does not reasonably believe meets the consumer’s requirements and objectives; and
 - (b) reasonably believes that the consumer has the capacity to repay the contract without substantial hardship.¹⁹
28. Whilst credit providers will be provided with information about the consumer by a credit assistance provider, credit providers are, however, still bound by the reasonable inquiries and verification obligations, as well as the general obligations such as to act efficiently, honestly and fairly.²⁰ ASIC expects that reasonable and prudent credit providers will have processes in place to ensure the reliability of any information collected by third parties, including information contained in a preliminary assessment. This may include a combination of approaches such as:

¹⁷ *Regulatory Guide 209.41*

¹⁸ *Regulatory Guide 209.42*

¹⁹ *Regulatory Guide 209.45*

²⁰ See sections 47(1)(a), 130 and 153

- (a) conducting 'spot checks' and re-verifying some of the information provided by the credit assistance provider;
- (b) ensuring that the credit provider only uses preliminary assessment information from intermediaries that have robust compliance arrangements in place; and
- (c) having processes to actively discourage inappropriate practices (e.g. ensuring that any incentives offered to intermediaries encourage, rather than discourage, appropriate information collection practices).²¹

Objective/subjective determination of what is reasonable in the circumstances

29. It seems fairly clear that a Court will look at the objective facts in determining whether a credit licensee made reasonable inquiries and obtained verification before a credit assessment was made or before a credit contract was entered into, and whether a breach of the *Act* has occurred. The subjective assessment of a credit licensee as to the reasonableness of their inquiries does not appear helpful to the task at hand.

What happens if the credit licensee gets it wrong under the *National Credit Act*?

30. Experience tells us that it is only when a loan goes sour and a lender attempts to call in the loan, or exercise its rights as a secured lender, that shortcomings in the lending process are exposed. In the past, plaintiff lenders would be subject to claims of unconscionable conduct in equity²² and under statute²³, *non est factum*²⁴, *in personam* claims to the indefeasibility of a title of the mortgagor²⁵ and misleading and deceptive conduct claims under the consumer

²¹ *Regulatory Guide* 209.47

²² *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462 per Mason J; *Blomley v Ryan* (1956) 99 CLR 263 at 405 per Fullagar J; *Louth v Diprose* (1992) 175 CLR 621; *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2000] FCA 1376 at [122] per French J; *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd* (No 3) [2012] FCA 43 (3 February 2012)

²³ The preponderance of authority is that the concept of unconscionability in statutory provisions such as section 12CB of the *ASIC Act* is a wider concept than the concept of unconscionability in equity reflected in cases such as *Commercial Bank of Australia Ltd v Amadio* see *Hurley v McDonalds Australia Ltd* [1999] FCA 1728; *Dai v Telstra Corporation Ltd* (2000) 171 ALR 348; *ACCC v Simply No Knead (Franchising) Pty Ltd* (2000) 104 FCR 253; *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246; *Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759; *Attorney-General (NSW) v World Best Holding Ltd* (2005) 63 NSWLR 557; *ASIC v National Exchange Pty Ltd* (2005) 148 FCR 132 at [43]

²⁴ *Petellin v Cullen* (1975) 132 CLR 355; *Ford v Perpetual Trustees Victoria Ltd* [2009] NSWCA 186; see also *Commonwealth Bank of Australia v Munro & Anor* [2011] NSWSC 128 and *Child v Commonwealth Development Bank of Australia* [2000] NSWCA 256

²⁵ See recently the case of *Perpetual Trustees Australia Limited v Schmidt* [2010] VSC 67, J. Forrest J set aside a mortgage which was entered into with the borrower through a mortgage originator and broker on the basis that the mortgage originator had acted unconscionably and in breach of the general law, section 51AC of the *Trade Practices Act* and section 12 CB of the *Australian Securities and Investments Commission Act*. The

protection provisions of the *Australian Securities and Investments Commission Act 2001*, or the *Australian Consumer Law*²⁶, and/or the *Corporations Act* by way of defence to the legality of the loan. Now, no doubt, allegations of unsuitable lending will be made, and will form part of the existing defensive armoury of a defaulting borrower under a loan.²⁷

Injunctive relief

31. Under section 177 of the *National Credit Act*, if on the application of ASIC or any other person, the Court is satisfied that a person has engaged or is proposing to engage in conduct that constitutes or would constitute:
- (a) a contravention of this Act; or
 - (b) attempting to contravene this Act; or
 - (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
 - (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
 - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
 - (f) conspiring with others to contravene this Act;
- the Court may grant an injunction on such terms as the Court considers appropriate.
32. Arguably any application by a mortgagor for an injunction to prevent enforcement of a mortgage by a mortgagee, on the basis of an alleged breach of the *National Credit Act* by a

mortgage originator was held to be the agent of the lender and therefore the lender's mortgage was set aside, even though it had had very little to do with the transaction.

²⁶ Formerly the *Trade Practices Act 1974*, now the *Competition and Consumer Act 2010*

²⁷ This reminds me of the so called *Bunker Hunt Defence*. The Hunt Brothers, Bunker and William, were Texan oil billionaires who attempted in the late 1970's to corner the world silver market. In the last nine months of 1979, the Hunt brothers profited by an estimated \$2 billion to \$4 billion in silver speculation, with estimated silver holdings of 100 million ounces global market. During the Hunt brothers' accumulation of silver, prices of silver futures contracts and silver bullion rose from \$11 an ounce in September 1979 to \$50 an ounce in January 1980. Silver prices ultimately collapsed to below \$11 an ounce two months later. When the banks called in their margin loans, the Hunts responded and filed a \$1.5 billion lending-fraud lawsuit, the then biggest of its kind, against 22 United States and foreign banks. The Hunts accused the banks of having had a secret agenda to bankrupt them by lending them money they couldn't possibly repay, and then take over their business at fire-sale. The banks denied the charge and asked "Why would a bank knowingly loan money to somebody who couldn't pay it back? Bunker Hunt later filed for bankruptcy under Chapter 11 of the *US Federal Bankruptcy Code* in September 1988, largely due to lawsuits incurred as a result of his silver speculation. In 1989 in a settlement with the United States Commodity Futures Trading Commission, Nelson Bunker Hunt was fined US\$10 million and banned from trading in the commodity markets as a result of civil charges of conspiring to manipulate the silver market stemming from his attempt to corner the market in silver. This fine was in addition to a multimillion-dollar settlement to pay back taxes, fines and interest to the US Internal Revenue Service for the same period.

lender, would invoke the rule in *Inglis v Commonwealth Trading Bank of Australia*²⁸, to the effect that all principal and interest due under the mortgage would need to be paid into Court as the price of obtaining the injunction.

Compensation and other orders

33. Under section 178 of the *National Credit Act* a Court may order a person to compensate another person (the plaintiff) for loss or damage suffered by the plaintiff if:
- (a) the defendant has contravened a civil penalty provision or has committed an offence against this Act (other than the *National Credit Code*); and
 - (b) the loss or damage resulted from the contravention or commission of the offence.
34. In addition, under section 179 of the *National Credit Act* the Court may make orders including:
- (a) an order declaring the whole or any part of a contract, deed or arrangement made between the defendant and the plaintiff to be void and, if the Court considers it appropriate, to have been void from the time it was entered or at all times on and after a specified day before the order is made; and
 - (b) an order varying such a contract, deed or arrangement in such manner as is specified in the order and, if the Court considers it appropriate, declaring the contract, deed or arrangement to have had effect as so varied on and after a specified day before the order is made; and
 - (c) an order refusing to enforce any or all of the terms of such a contract, deed or arrangement; and
 - (d) an order directing the defendant to refund money or return property to the plaintiff; and
 - (e) an order directing the defendant to pay to the plaintiff the amount of loss or damage the plaintiff suffered; and
 - (f) an order directing the defendant, at the defendant's own expense, to supply specified services to the plaintiff.
35. The above would seem to offer the Court the ability to cut through the vexed questions as to indefeasibility of title, which predominate in applications by lenders to obtain possession of

²⁸ (1971) 126 CLR 161; [1972] ALR 591. See also *Parry v Grace* [1981] 2 NZLR 273 at 279-80; *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309; *Altarama Ltd v Camp* (1980) 5 ACLR 513; *Nicholas John Holdings Pty Ltd v ANZ Banking Group Ltd* [1992] 2 VR 715; *Allfox Building Pty Ltd v Bank of Melbourne Ltd* (1992) NSW Cony R 55-634; BC9201895.

land under irregular registered mortgages. Readers are no doubt aware of the argument that where the covenant to pay under a mortgage is dependent upon a document extraneous but referred to in a registered document, and that extraneous document is unenforceable, the protection of indefeasibility is illusory.

36. The leading authority for this principle is *PT Ltd v Maradona Pty Ltd*²⁹, which has been followed in a long line of NSW decisions including *Yazgi v Permanent Custodians Ltd*³⁰; *Provident Capital Ltd v Printy*³¹; *Chandra v Perpetual Trustees Victoria Ltd*³²; *Vella v Permanent Mortgages Pty Ltd*³³; *Robinson v Nishtom Pty Ltd*³⁴; *Perpetual Trustees Victoria Ltd v Cipri*³⁵; *Permanent Custodians Ltd v Ali*³⁶; *Perpetual Trustees Victoria Ltd v Tsai*³⁷; *Small v Tomassetti*³⁸.
37. The recent decisions of the New Zealand Supreme Court in *Westpac Banking Corporation v Clark*³⁹ and the NSW Court of Appeal in *Perpetual Trustees Victoria Limited v English & Anor*⁴⁰ have expressly rejected the contra reasoning to *Maradona* in *Solak v Bank of Western Australia Ltd & Ors*⁴¹.

Restitution and equity

38. On any successful order for compensation or for rescission of a credit contract under the *National Credit Act*, a Court will still need to administer equity. The equitable maxim that those seeking equity must do equity will apply.
39. Restitution would need to be made by the credit consumer for any benefits received by a borrower if a transaction was unwound.

²⁹ (1992) 25 NSWLR 643

³⁰ [2007] NSWCA 240

³¹ [2008] NSWCA 131

³² [2007] NSWSC 5

³³ [2008] NSWSC 505

³⁴ [2009] NSWSC 36

³⁵ [2008] NSWSC 1128

³⁶ [2008] NSWSC 1264

³⁷ [2004] NSWSC 745

³⁸ [2001] NSWSC 1112

³⁹ [2009] NZSC 73

⁴⁰ [2010] NSWCA 32

⁴¹ [2009] VSC 82

Case law

40. To date there has been no superior Court decisions concerning the question of the reasonableness of a credit licensee's conduct in entering into credit contract.⁴²

Observations

41. My expectation is that the responsible lending obligations under the *National Credit Act*, will not overly trouble the first tier lending organisations, especially where loans are made without credit assistance providers in the loan procurement chain. First tier lenders have well regulated processes which anticipate their obligations under the *National Credit Act*. Where I expect litigation to arise is in and around the increased use of mortgage and finance brokers by both first tier and lesser tier lenders and in cases of subprime loans or "low documents" loans made to consumers who cannot obtain finance from major lenders or who have little or no supporting documentation to enable income verification. As stated in the *Explanatory Memorandum*, the *National Credit Act* is intended to curtail undesirable market practices, particularly where intermediaries are involved in lending.

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⁴² Cases to date have centered on section 72 of the *National Credit Code*, being Schedule 1 to the *National Credit Act*, in relation a debtor's right to seek changes to a credit contract, where because of illness, unemployment or other reasonable cause, the debtor is unable to meet their obligations under a credit contract and there is a reasonable expectation that the debtor will to be able to discharge their obligations if the terms of the contract were changed. See for example *RHG Mortgage Corporation Ltd v Sava* [2011] QSC 372 (8 November 2011), *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd* (No 3) [2012] FCA 43 (3 February 2012)