

## **PRESENTERS**

### ***Rob McInnes, Crengle Shreves & Ratner, Wellington***

A substantial part of Rob's practice in the last two decades has comprised advice to financiers on loan and security documents and Credit Contracts Act advice. Rob was involved in making submissions to Parliament on the bill that became the Credit Contracts and Consumer Finance Act, and is already involved in advising lenders on its implications.

### ***Stuart Walker, Anderson Lloyd Caudwell, Dunedin***

Stuart practises in the areas of commercial and banking law, and lectures in banking law at the University of Otago. He is a consulting editor to Butterworths' Conveyancing Bulletin and is a New Zealand editor for the Australian Journal of Banking and Finance Law and Practice.

### ***Acknowledgements***

The presenters would like to acknowledge the help given by the following people with this seminar: Nick McBride of the Ministry of Consumer Affairs for providing information and comments about the CCCFA; Liz Dippie for her research in connection with the seminar, Sarah Robertson of Anderson Lloyd Caudwell for her invaluable help in researching and preparing parts of this booklet, and Doon Woods of Anderson Lloyd Caudwell for typing the manuscript.

*The statements and conclusions contained in this booklet are those of the author(s) only and not those of the New Zealand Law Society. This booklet has been prepared for the purpose of a Continuing Legal Education course. It is not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such. If advice on the law is required, it should be sought on a formal, professional basis.*

# CONTENTS

<b>1. INTRODUCTION.....</b>	<b>1</b>
Purpose.....	1
What this seminar covers .....	1
The need for legislative change .....	1
The reform process .....	3
<b>2. POLICY OBJECTIVES OF THE CCCFA.....</b>	<b>5</b>
Objectives .....	5
Principal objectives.....	5
<b>3. COMMENCEMENT OF THE CCCFA AND TRANSITIONAL PROVISIONS.....</b>	<b>7</b>
When does the CCCFA apply? .....	7
Opting-in .....	7
Nominee companies.....	8
Risks of opting-in.....	8
Default interest provision.....	9
Declaration.....	9
<b>4. WHAT DOES THE CCCFA APPLY TO?.....</b>	<b>11</b>
Consumer credit contracts.....	11
Credit contracts .....	11
The meaning of credit .....	12
<i>Credit contract</i> .....	13
Consumer leases and buy-back transactions.....	14
CCCFA may apply to transactions not governed by New Zealand law .....	14
What is a “consumer credit contract”? .....	14
<i>Debtor must be a “natural person”</i> .....	15
<i>“Personal, domestic, or household purposes”</i> .....	16
<i>Guidelines</i> .....	16
<i>Section 12 – investment purposes</i> .....	17
<i>Section 13 – presumption in favour of consumer credit contracts</i> .....	17
<i>Section 14 – declarations as to purpose</i> .....	18
<i>Section 14 – qualification</i> .....	18
<i>Issues for consideration</i> .....	19
Are interest charges or credit fees payable? .....	20
Does the credit contract involve a “security interest”?.....	20
<i>Agreement to mortgage</i> .....	21
<i>Security interest</i> .....	21
Creditor must be acting in the course of a business.....	21
<i>Leases as consumer credit contracts</i> .....	22
Statutory exceptions from the definition of consumer credit contract.....	22
Differences from the Credit Contracts Act – some examples.....	23
<b>5. IMPLICATIONS OF THE CCCFA FOR BUSINESS TRANSACTIONS.....</b>	<b>25</b>
Specific provisions of the CCCFA applicable to business finance .....	25
Substantial deregulation of business finance .....	25
<i>Business regulation</i> .....	26

Examples of the effect of deregulation of business finance .....	28
Early settlements in respect of business finance transactions following 1 April 2005 .....	29
How will business financiers behave after 1 April 2005? .....	29
<i>Restricting availability of products</i> .....	29
<i>Voluntary compliance</i> .....	29
<i>Systems</i> .....	30
<i>Application</i> .....	30
<i>Form of documentation</i> .....	30
<b>6. KEY CONCEPTS AND REQUIREMENTS OF THE CCCFA.....</b>	<b>33</b>
Interest charges .....	33
<i>Annual interest rate</i> .....	33
<i>Contract must specify “annual interest rate”</i> .....	33
<i>How interest is to be calculated</i> .....	34
<i>Methods of charging interest</i> .....	34
<i>How interest is to be charged</i> .....	35
<i>End of day</i> .....	35
<i>Debiting of interest charges</i> .....	36
<i>Compounding interest</i> .....	36
<i>Comparison with Credit Contracts Act</i> .....	36
Penalty Rates.....	37
<i>History</i> .....	37
<i>The present law</i> .....	37
<i>New law s 40 CCCFA</i> .....	38
<i>Consumer credit contracts</i> .....	39
28 <i>Default interest</i> .....	39
<i>Lordsvale Finance</i> .....	40
<i>What does s 40(2) permit a creditor to do?</i> .....	41
<i>Non-consumer credit contracts</i> .....	41
Payments .....	42
<i>Dating and adjustment of account entries</i> .....	43
<i>Uniform Consumer Credit Code</i> .....	43
<i>Prepayments</i> .....	45
<b>7. MATTERS TO BE TAKEN INTO ACCOUNT IN DOCUMENTING A CONSUMER CREDIT CONTRACT .....</b>	<b>47</b>
Required disclosures .....	47
How disclosures made and disclosure standards .....	47
Disclosure must be “in writing” .....	48
Disclosure standards – generally .....	48
Should disclosure be made in a separate document? .....	49
Model disclosure forms .....	49
How disclosure is made .....	50
<i>Disclosure for the purposes of cancellation and enforcement</i> .....	50
Initial disclosure – what is to be disclosed .....	51
Schedule 1 requirements – comparison with Credit Contracts Act.....	51
<i>Summary</i> .....	51
<i>Differences</i> .....	53
Disclosure of cash price .....	54
<i>Interest-free terms</i> .....	54

Credit insurance .....	56
Disclosure assumptions.....	56
Initial disclosure – consumer leases and buy-back transactions.....	56
Continuing disclosure – when required .....	57
Continuing disclosure – frequency .....	58
Continuing disclosure – what required .....	59
Cancellation rights .....	59
Contracts that cannot be cancelled.....	60
Effect of cancellation .....	60
How must the debtor give notice of cancellation?.....	61
Statement of right to cancel .....	61
<b>8. MATTERS TO BE TAKEN INTO ACCOUNT IN CHANGING A CONSUMER CREDIT CONTRACT .....</b>	<b>63</b>
Disclosure of agreed changes.....	63
Disclosure following exercise of a power by a creditor .....	63
<i>Disclosure by publication</i> .....	64
<b>9. MATTERS TO BE TAKEN INTO ACCOUNT IN RESPECT OF GUARANTEES OF CONSUMER CREDIT CONTRACTS .....</b>	<b>67</b>
Disclosure of guarantee.....	67
Disclosure of changes to guarantors .....	67
<i>Two key elements</i> .....	68
<i>Disclosure</i> .....	68
<i>Particulars of changes</i> .....	69
Oppression .....	69
<b>10. MATTERS TO BE TAKEN INTO ACCOUNT WHEN A DEBTOR OR GUARANTOR REQUESTS DISCLOSURE .....</b>	<b>71</b>
Request disclosure .....	71
<i>What needs to be disclosed</i> .....	71
<i>When is compliance not required?</i> .....	71
Relationship between request disclosure and enforcement .....	72
<b>11. FEES AND INSURANCES .....</b>	<b>73</b>
Treatment of fees under the Credit Contract Act.....	73
Credit fees .....	73
<i>Definition</i> .....	73
<i>Consequences</i> .....	73
<i>Two limbs to the definition</i> .....	75
<i>Definition is unclear</i> .....	75
<i>Costs of complying with creditor’s requirements</i> .....	75
<i>Fees payable to third parties</i> .....	76
<i>Costs the debtor would have incurred anyway</i> .....	76
<i>Illustrations</i> .....	76
<i>Policy objectives</i> .....	78
<i>Third party charges passed on by creditor to debtor</i> .....	79
Unreasonable fees .....	79
<i>What is “unreasonable”?</i> .....	79
<i>The Court will decide what is unreasonable</i> .....	81
Fees or charges passed on by creditor .....	82

Prepayments.....	82
<i>Part prepayments</i> .....	82
<i>Full prepayments</i> .....	83
<i>Section 81(2) of the Property Law Act 1952</i> .....	85
Rule of 78.....	85
<i>Use of the Rule of 78</i> .....	86
<i>What is the Rule of 78?</i> .....	86
<i>Why the Rule of 78 is unfair to consumers</i> .....	87
<i>The CCCFA</i> .....	88
Other CCCFA provisions relating to credit insurance.....	89
<b>12. CONSUMER LEASES.....</b>	<b>93</b>
The definition of consumer lease.....	93
Leases deemed to be credit contracts.....	93
Disclosure.....	94
Amount payable on termination.....	95
<b>13. BUY-BACK TRANSACTIONS.....</b>	<b>97</b>
Impact of the CCCFA on buy-back transactions entered into before 13 October 2003....	97
Initial disclosure and independent advice.....	99
Non-compliance with initial disclosure and independent advice requirements.....	99
Variation and request disclosure.....	100
<b>14. RE-OPENING CREDIT CONTRACTS – OPPRESSION AND</b>	
<b>HARDSHIP.....</b>	<b>101</b>
The CCCFA.....	101
When a contract may be reopened.....	102
The meaning of oppressive.....	102
Deciding whether to reopen a contract.....	103
Illustrative case notes.....	105
<i>Greenbank New Zealand Limited v Haas [2000] 3 NZLR 341</i> .....	105
<i>Raptorial Holdings Limited (in receivership) v Elders Rural Finance</i>	
<i>New Zealand Limited [2001] 1 NZLR 178</i> .....	106
Time limits.....	107
Standing.....	108
Costs.....	108
Oppression in relation to hardship.....	108
Changes on the grounds of unforeseen hardship.....	109
<i>Introduction</i> .....	109
<i>The CCCFA (Part 2, subpart 8)</i> .....	109
<i>Key aspects</i> .....	113
<i>What a debtor cannot apply for</i> .....	115
<i>Australian position</i> .....	115
<i>Australian cases</i> .....	116
<i>General</i> .....	118
<i>Cost to credit provider</i> .....	118
<i>New Zealand applications</i> .....	119
<i>General</i> .....	119

<b>15. ENFORCEMENT .....</b>	<b>121</b>
Prohibited enforcement .....	121
<i>Cancellation</i> .....	122
Statutory damages .....	122
Offences .....	124
Prohibition on certain creditors, lessors, transferees, and buy-back promoters .....	126
Orders, injunctions and prohibited enforcement.....	127
Compliance .....	130
Reduction of statutory damages.....	130
<i>Reasonable mistake defence</i> .....	130
<i>Compliance programmes</i> .....	131
The Courts' powers : a colourful illustration.....	131
<i>Background</i> .....	132
<i>Was the lending for personal, domestic or household purposes?</i> .....	132
<i>Orders</i> .....	133
<i>Appeal</i> .....	134
General.....	135
<b>16. COMMERCE COMMISSION.....</b>	<b>137</b>
Introduction.....	137
The CCCFA (Part 4, subpart 7): role and functions of the Commerce Commission ..	138
Application of Commerce Act 1986 .....	139
Powers of the Commission .....	140
Class actions.....	141
Injunctions.....	142
General.....	143
<b>APPENDIX 1. SCHEDULE 1 OF CCCFA .....</b>	<b>145</b>
<b>APPENDIX 2. SCHEDULE 2 OF CCCFA .....</b>	<b>149</b>
<b>APPENDIX 3. SCHEDULE 3 OF CCCFA .....</b>	<b>151</b>
<b>APPENDIX 4. MODEL DISCLOSURE STATEMENT – NON-REVOLVING CREDIT CONTRACT .....</b>	<b>153</b>
<b>APPENDIX 6. PERMITTED ASSUMPTIONS.....</b>	<b>161</b>
<b>APPENDIX 7. ADLS TERM LOAN CONTRACT.....</b>	<b>163</b>
<b>APPENDIX 8. ADLS MORTGAGE – FIXED SUM.....</b>	<b>171</b>
<b>APPENDIX 9. CCCFA FLOW DIAGRAM.....</b>	<b>179</b>
<b>APPENDIX 10. EXAMPLES OF FULL REPAYMENT FORMULAE FROM THE CCCF REGULATIONS 2004 .....</b>	<b>183</b>
<b>APPENDIX 11. EXAMPLES OF RELATIONSHIP BETWEEN CCCFA AND CREDIT CONTRACTS ACT.....</b>	<b>193</b>
<b>APPENDIX 12. SELECTED BIBLIOGRAPHY .....</b>	<b>195</b>