Table of Defences

for use in negotiations and making or defending claims in credit and debt matters

This table sets out the most common defences and rights of your client under the relevant legislation. Given the recent amendments to legislation, it sets out both the current provisions and the parallel provisions in the old legislation. The old legislative provisions will be relevant if the contract was entered into under the old regime and any authority regarding the old provisions will be relevant to the parallel provisions in the new legislation.

In this table:

- **ACL** means the Australian Consumer Law, Schedule 2 to the *Competition and Consumer Act 2010* (Cth).
- **ASIC Act** means the *Australian Securities and Investment Commission Act 2001* (Cth);
- **Code** means the National Credit Code at Schedule 1 to the NCCPA;
- **FTA** means the *Fair Trading Act 1999* (Vic), which now enacts the provisions of the ACL in Victoria;
- **NCCP Regulations** means the National Consumer Credit Protection Regulations 2010;
- **NCCPA** means the *National Consumer Credit Protection Act 2009* (Cth);
- **TPA** means the *Trade Practices Act 1974* (Cth), which has been renamed as the *Competition and Consumer Act 2010* (Cth);
- **UCCC** means the Uniform Consumer Credit Code, which has been replaced by the Code;
- **VCA** means the Victorian Credit Act i.e. the *Consumer Credit (Victoria) Act 1995*.

Refer also to [Electing Small Claims Proceedings for Credit Matters](#) for details of provisions that may be available as cross-claims or defences to action by creditors under the National Credit Act and the Code.

<table>
<thead>
<tr>
<th>DEFENCE</th>
<th>RELEVANT LEGISLATION</th>
<th>OLD LEGISLATION</th>
<th>WHAT TO CONSIDER</th>
<th>POTENTIAL OUTCOME</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statute barred</td>
<td><em>Limitation of Actions Act 1958 (Vic), s 5(1)(a)</em></td>
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<td>If the client has not made a payment on a debt for more than six years and has not acknowledged the debt in writing for more than six years, this debt may be statute barred.</td>
<td>If the creditor commences legal action in relation to an old debt, the fact that the debt is statute barred can be used as a defence (provided that the creditor cannot show that the debt is not statute barred) and the debt</td>
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<td>RELEVANT LEGISLATION</td>
<td>OLD LEGISLATION</td>
<td>WHAT TO CONSIDER</td>
<td>POTENTIAL OUTCOME</td>
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| Invalid business purpose declaration | Code, s 13           | UCCC, s 11      | Has the client signed a document stating that the loan or mortgage is for use in business (i.e. that it is not consumer credit)? Under the Code:  
- it is an offence to procure a false business purpose declaration;  
- the onus is on the creditor to establish that the Code does not apply;  
- the business purpose declaration must be in the form prescribed by regulation 68 of the National Consumer Credit Protection Regulations 2010 (NCCP Regulations).  
Find out what circumstances the client made the declaration in – did the lender have reason to believe that the loan was for personal, household or domestic purposes or would they have known if they’d made reasonable enquiries? | The business purpose declaration will be invalid and the Code and its protections will apply.  
If the creditor procures a false business purpose declaration, the creditor has committed an offence under the Code, punishable by a fine of up to $11,000 or 2 years in jail, or both. |
<p>| Misleading and                   | Code, s 154          | FTA, s 9        | There are legislative prohibitions on false and misleading and deceptive or unconscionable under the ACL.                                                                                           | A breach of section 154 of the Code carries a criminal penalty of up to $11,000 or 2 years in jail, or both. |</p>
<table>
<thead>
<tr>
<th>DEFENCE</th>
<th>RELEVANT LEGISLATION</th>
<th>OLD LEGISLATION</th>
<th>WHAT TO CONSIDER</th>
<th>POTENTIAL OUTCOME</th>
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<td>deceptive conduct</td>
<td>ACL, s 18</td>
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<td>misleading representations about a matter that is material to a person's decision to enter into a consumer or consumer credit contract. Was there advertising or any conversation between the vendor and the client at the point of sale which misled or deceived the client? Has a debt collector engaged in misleading and deceptive conduct (for example, by representing that they will take legal action when no right or instructions to do so exist)?</td>
<td>penalty and the affected consumer can seek compensation for any loss. Part 11 of the FTA sets out the remedies available under the ACL in Victoria.</td>
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<td>Unconscionable</td>
<td>ACL, ss 20–22</td>
<td>FTA, ss 7 and 8</td>
<td>Does the client have a special disadvantage or does the vendor have an unfair advantage? Were there any other unfair practices in the transaction? Section 21(2) of the ACL (and section 12CB(2) of the ASIC Act) lists a number of considerations that the court may have regarding to in determining unconscionability. These include: * the respective bargaining strengths of the parties; * whether the consumer was required to comply with conditions not reasonably necessary for the protection of the other party; * whether the consumer understood documents relating to the transaction;</td>
<td>The regulator may require that claims made by the vendor be substantiated. The regulator may issue a public warning notice. Section 224 of the ACL sets out the maximum pecuniary penalties that may be applied where this provision is contravened. However, preference is given to victim compensation over pecuniary fines. The affected consumer may seek compensation for any loss via civil proceedings.</td>
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<td>conduct</td>
<td>ASIC Act, ss 12CA, 12CB and 12CD</td>
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ACL - Australian Consumer Law
ASIC Act - Australian Securities and Investments Commission Act
FTA - Fair Trading Act
<table>
<thead>
<tr>
<th>DEFENCE</th>
<th>RELEVANT LEGISLATION</th>
<th>OLD LEGISLATION</th>
<th>WHAT TO CONSIDER</th>
<th>POTENTIAL OUTCOME</th>
</tr>
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| Unjust transactions | Code, ss 76 and 77 | UCCC, s 70      | Refer to unjust transactions in [What to Look Out](#) For more information, including the circumstances which the court will have regard to in determining whether a transaction is unjust.  
An application under section 76 of the Code must be made within two years of the relevant credit contract being rescinded, discharged or otherwise brought to an end.  
“Unjust” is defined to include unconscionable, harsh or oppressive. You should consider any unjustice in the form or terms of the contract and in the conduct of the creditor prior to the time the transaction being entered into. For example, at the time of entering the credit contract, did the credit provider know (or could they have ascertained by reasonable inquiry), that the debtor couldn’t comply with the contract terms without substantial hardship? | The contract may be “re-opened”.  
The client may be released from liability under the loan.  
Under section 77 of the Code, a court has a discretionary power to make any one or more of the following orders upon reopening a transaction under section 76:  
• reopen an account already taken between the parties;  
• relieve the debtor from payment of any amount over what the court thinks is reasonably payable;  
• set aside either wholly or in part or revise or alter an agreement made in connection with the transaction;  
• give judgment for or make an order in favour of a party for an amount the court thinks is... |
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<th>DEFENCE</th>
<th>RELEVANT LEGISLATION</th>
<th>OLD LEGISLATION</th>
<th>WHAT TO CONSIDER</th>
<th>POTENTIAL OUTCOME</th>
</tr>
</thead>
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| Exceeding interest rate cap or excessive fees and charges | VCA, s 39 Code, s 78 | VCA, s 39 UCCC, s 72 | Section 39 of the VCA provides that a regulated credit contract is unenforceable if the annual percentage rate exceeds 48% (this percentage does not include fees and charges). Section 78 of the Code also enables consumers to apply to have the following changes, charges or fees reduced or annulled as unconscionable:  
- a change in the annual percentage rates;  
- an establishment fee or charge; | Under the VCA, if the interest rate cap is exceeded, the relevant credit contract will be unenforceable. Actions under section 78 of the Code are difficult to run successfully because of the high threshold of establishing unconscionability when faced with arguments from creditors about their costs, risks and other relevant calculations. There may be a slightly greater likelihood of success in EDR, where good industry practice and fairness can be considered (this might include consideration of the fact that the fee is not clearly disclosed in the contract or that the fee has |
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<th>DEFENCE</th>
<th>RELEVANT LEGISLATION</th>
<th>OLD LEGISLATION</th>
<th>WHAT TO CONSIDER</th>
<th>POTENTIAL OUTCOME</th>
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| Unfair contract terms | ACL, ss 23–28, ASIC Act, ss 12BF–12BM | FTA, ss 32W and 32Y (applies to both general consumer and consumer credit contracts but only applies to the latter if the contract was entered into between 11 June 2009 – 1 July 2010) | Section 25 of the ACL (and section 12BH of the ASIC Act) sets out a non-exhaustive “grey list” of examples of the kinds of terms of a consumer contract that may be unfair. These include terms that:  
• permit one party (but not the other) to avoid or limit performance of the contract;  
• permit one party (but not the other) to terminate the contract;  
• penalise one party (but not the other) for a breach or termination of the contract;  
• permit one party (but not the other) to vary the terms of the contract;  
• permit one party (but not the other) to renew or not renew the contract;  
• permit one party to vary the upfront price payable without the right of the other to terminate the contract;  
• permit one party unilaterally to vary the characteristics of the goods or services to be supplied, the interest in land to be sold or | If a term in a standard form consumer contract is unfair, the term can be held to be void and that term will be treated as if it never existed. The contract as a whole will continue to bind parties if it is capable of operating without the unfair term.  
These provisions can be used:  
• as a defence to debt collection or contract enforcement actions;  
• to commence an action to enforce the client’s rights or to recover loss or damage incurred for breach of the unfair contracts laws; or  
• by the ACCC, ASIC or CAV to apply to a court for a declaration that a term of a contract is an unfair term. If a court makes such a declaration, it may also:  
  o order an injunction;  
  o make an order prohibiting payment or transfer of moneys or other property; |
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<th>DEFENCE</th>
<th>RELEVANT LEGISLATION</th>
<th>OLD LEGISLATION</th>
<th>WHAT TO CONSIDER</th>
<th>POTENTIAL OUTCOME</th>
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<td>Code, ss 16 and</td>
<td>UCCC, s 15</td>
<td>granted, or the financial products or services to be supplied;</td>
<td>o make an order to provide redress to non-party consumers; or</td>
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<td>• permit one party unilaterally to determine whether the contract has been breached or to interpret its meaning;</td>
<td>o make any other order that it thinks appropriate.</td>
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<td>• limit one party’s vicarious liability for its agents;</td>
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<td>• permit one party to assign the contract to the detriment of the other without the other’s consent;</td>
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<td>• limit one party’s right to sue another party;</td>
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<td>• limit the evidence one party can adduce in proceedings relating to the contract; and</td>
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<td>• impose the evidential burden on one party in proceedings relating to the contract.</td>
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Consumer contracts are presumed to be standard form contracts (i.e a contract prepared by one party with little or no opportunity for the other party to negotiate) – it is up to the party seeking to rely on the disputed term (usually the creditor) to prove that the contract is not in a standard form.

The factors that the court will consider in determining whether the contract is in a standard form are set out in Things To Look Out For above.

Before a credit contract is entered into, the creditor must

If this information is not disclosed, a penalty of
<table>
<thead>
<tr>
<th>DEFENCE</th>
<th>RELEVANT LEGISLATION</th>
<th>OLD LEGISLATION</th>
<th>WHAT TO CONSIDER</th>
<th>POTENTIAL OUTCOME</th>
</tr>
</thead>
</table>
| disclosure | 17 (precontractual statement and information statement) NCCPA s 126 (credit guide) | provide the debtor with a precontractual statement (this may simply be a copy of the proposed contract) containing certain information, including:  
- the amount of credit to be provided or the credit limit and who it is to be paid to (s 17(3)(a) and (b));  
- the annual percentage rate or rates (s 17(4));  
- the method of calculation and the frequency of interest charges (s 17(5));  
- the total amount of interest if the contract is to be paid out within seven years (s 17(6));  
- the amount of repayments and how this amount is calculated (s 17(7)(a)(i));  
- when the first repayment is due and the frequency of repayments (s 17(7)(a)(iv));  
- the credit fees and charges to be paid (s 17(8));  
- how you are to be informed about changes to the contract (for example if the annual percentage rate or the amount or frequency of payment of credit fees, charges or instalments change) (s 17(9));  
- the frequency of account statements (s 17(10));  
- any default rate of interest and how this is forfeiture all or some of the interest charges under the contract may be imposed (Part 6 of the Code). | Part 6 of the Code holds credit providers liable to make payment of a civil penalty to the debtor, or to a government fund, in respect of a failure to disclose a key requirement in a credit contract document. The full list of key requirements under the Code is set out in section 111. The payments are penalties because they are punitive not compensatory and Part 6 does not require that any loss be suffered by a debtor in respect of a contravention of a key requirement. However, unlike most penalties, they may be paid to an individual, i.e. the debtor under the credit contract. Section 112 of the Code grants standing to apply to a court for an order under Part 6 to:  
- a party to a credit contract;  
- a guarantor; and  
- ASIC. | Seeking orders under Part 6 is a two-stage process. The court will be required to determine whether:  
- a contravention of a key requirement has been established (s 113(1) of the Code); and  
- the contravention ought to give rise to a |
Section 126 of the NCCPA requires credit providers to give consumers a credit guide (for contracts entered into after 1 April 2011) as soon as practicable after it becomes apparent that the consumer is likely to enter into a credit contract. The credit guide must:

- be in writing;
- specify the credit provider’s name, contact details and Australian credit license number;
- include details regarding complaint handling, including contact details of internal and external dispute resolution processes;
- calculated (for example, from a published reference rate) (s 17(11));
- a statement that the client may be liable for enforcement expenses if they default (s 17(12));
- information about whether a mortgage or guarantee applies and, if a mortgage applies, a description of the property that is subject to the mortgage (s 17(13));
- details of relevant commission charges (s 17(14)); and
- details of credit related insurance financed under the contract (s 17(15)).

Section 114(1) of the Code provides that the amount of a penalty payable to a debtor or guarantor is limited to the total amount of interest charges payable under the credit contract. However, section 114(2) provides that, if the debtor has suffered a loss, the court may impose a greater penalty that shall be not less than the amount of the loss.
<table>
<thead>
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<th>DEFENCE</th>
<th>RELEVANT LEGISLATION</th>
<th>OLD LEGISLATION</th>
<th>WHAT TO CONSIDER</th>
<th>POTENTIAL OUTCOME</th>
</tr>
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| Unsuitable credit contracts | NCCPA, ss 128–133   | NA              | • disclose the credit provider's obligations to provide upon request a written copy of an assessment of the suitability of any proposed credit contract; and  
• advise that the credit provider is prohibited from entering, or increasing the credit limit under, a credit contract that is unsuitable for the consumer.  
Section 16 of the Code also requires the credit provider to provide the potential debtor with an information statement (this must be in the form of Form 5 contained in the Regulations) setting out the debtor's statutory rights and obligations. | The client can request a copy of the credit provider's or broker's assessment of the suitability of the contract for the client (section 132 of the NCCPA). Note that there is no obligation on a credit provider or broker to provide this until after 1 April 2011.  
If a credit provider has not met the requirements under the NCCPA and has entered into an unsuitable contract with your client, your client is entitled to seek compensation under section 178 of the NCCPA (only for contracts entered into after either 1 July 2010 or 1 January 2011, depending on whether the creditor is an Authorised Deposit Taking Institution (ADI) or not – a list of ADIs is available on the Australian |

See also ASIC Regulatory Guide 209 – Credit Licensing: Responsible Lending Conduct
<table>
<thead>
<tr>
<th>DEFENCE</th>
<th>RELEVANT LEGISLATION</th>
<th>OLD LEGISLATION</th>
<th>WHAT TO CONSIDER</th>
<th>POTENTIAL OUTCOME</th>
</tr>
</thead>
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| Non-compliance with default notice requirements or repossession procedures | Code, ss 88 and 108 | UCCC, s 80 | Section 88 of the Code sets out requirements that must (in most circumstances) be met before:  
- enforcement proceedings can be commenced against a debtor; or  
- a mortgage can be enforced through repossessing and selling a property.  
These requirements are set out in detail under What Stage is the Matter At and Secured Loans and Mortgage Arrears.  
In short, enforcement cannot be commenced unless:  
- the client is in default under the contract or mortgage;  
- the creditor has given the client a default notice containing the information prescribed in section 88(3) of the Code; | If the default notice requirements are not met in relation to a credit contract, you should immediately bring this to the company’s attention with a view to putting a hold on enforcement. You may also use External Dispute Resolution to do this. The client may also be eligible for compensation for non-compliance.  
In relation to mortgages, your client may be able to apply to regain possession of mortgaged goods if the credit provider took possession of those goods without complying with the requirements of Part 5 – Division 2 (Default Notices) or Part 5 – Division 4 (Procedures for taking possession of mortgaged goods).  
A court may make any ancillary or consequential orders that it considers appropriate including that the credit provider pay the mortgagor compensation. |
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<tr>
<th>DEFENCE</th>
<th>RELEVANT LEGISLATION</th>
<th>OLD LEGISLATION</th>
<th>WHAT TO CONSIDER</th>
<th>POTENTIAL OUTCOME</th>
</tr>
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|         |                      | VCA, s 40       | • the default notice gave the client at least 30 days from the date of the notice to rectify the default; and
• the default has not been remedied within that period. |                   |
| Excessive interest rates on mortgages | VCA, s 40       | VCA, s 40       | Section 40 of the VCA provides that any mortgage relating to a regulated credit contract is void if the annual percentage rate exceeds 30% (this percentage does not include fees and charges). | The relevant mortgage will be void. |
| Excessive enforcement expenses   | Code, s 107      | UCCC, s 99      | For regulated loans, a creditor can only recover enforcement costs for expenses that they reasonably incurred. Excessive enforcement expenses may include costs that have been unjustifiably or vexatiously incurred by the creditor so as to impose an unwarrantable burden on the mortgagor. | Enforcement costs will not be payable. |
| Incapacity                        | *Supreme Court Act* 1986 (Vic). s 49<br>Gibbons v Wright (1954) 91 CLR 423 | *Supreme Court Act* 1986 (Vic). s 49<br>Gibbons v Wright (1954) 91 CLR 423 | Was the client under 18 years of age or affected by a mental illness at the time of the entering the contract? | Minors – the following contracts entered into by a minor are void:
• contracts for the repayment of money lent or to be lent;
• contracts for payment for goods supplied or to be supplied, other than necessaries;
• accounts stated.
No proceeding can be brought in relation to a contract entered into by a minor. |
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<tr>
<th>DEFENCE</th>
<th>RELEVANT LEGISLATION</th>
<th>OLD LEGISLATION</th>
<th>WHAT TO CONSIDER</th>
<th>POTENTIAL OUTCOME</th>
</tr>
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<td>Administration order</td>
<td>Guardianship and Administration Act 1986 (Vic), s 52</td>
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<td>Section 52(1) of the Guardianship and Administration Act 1986 (Vic) provides that, where a person is under an administration order, that person is “deemed incapable of dealing with, transferring, alienating or charging her or his money or property or becoming liable under any contact” without an order of VCAT or the written consent of the administrator.</td>
<td>Mental illness or impairment – the capacity required is relative to the transaction being entered – what is the capacity of the party to understand the nature of the transaction when explained? Lack of capacity will render the contract voidable.</td>
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<td>Under section 52(2), if a person who is under an administration order enters into a contract relating to money or property, without an order of VCAT or the written consent of the administrator, the transfer or contract will have no legal effect. You will need to overcome section 52(4) of the Guardianship and Administration Act 1986 (Vic), which provides that the dealing or transfer will not be invalid if the third party proves that “she or he acted in good faith and did not know or could not reasonably have known that the person was not a represented person”.</td>
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