

Linked Credit Disputes

Use this Fact Sheet if:

- You have purchased goods or services on finance; AND
- The finance was arranged by the person who sold you those goods or services; AND
- The loan contract is regulated by the *Consumer Credit Code*

Linked Credit Disputes (Related Sale Contracts)

In many cases it is the supplier such as a car dealer or door-to-door sales person, who misrepresents the contents of an agreement or pressures someone into a sale. This may give the customer the right to cancel the sale contract. However if the customer has entered into a credit contract to buy the goods and services, he or she will still be left with obligations under the credit contract, unless both the sale contract *and* the credit contract can be cancelled.

At common law, the fact that a remedy can be established against the supplier of goods or services, does not usually mean that a customer will have a remedy against a lender who has given credit to buy goods and services,

However legislation can provide a remedy against the lender as well as against the supplier if there is a business link between the lender and the supplier.

The Consumer Credit Code- Part 7

The Code regulates the conduct of a supplier who is 'linked' to the lender. A link can be shown by a contract between the supplier and the lender. It can also be shown by regular referral of business from the supplier to the lender, or by the fact that the supplier keeps on its premises the lender's application forms and other forms to give to its customers.

Where this link is established:

- the lender will be liable for any misrepresentation made by the supplier about the credit contract;
- in certain circumstances the liability for damages arising out of the sale contract is extended to the lender; and
- termination of either the sale contract or loan contract may give rise to a right to terminate the related contract.

This part does not apply to contracts for sale of land.

If you have a right to get out of a sale contract, you will also have a right to get out of a tied loan contract with a linked credit provider.

If you have a right to damages against a supplier, you will be able to claim those damages jointly and severally from the linked credit provider.

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Linked Credit Disputes

A drawback of Part Seven is that, unlike agency relationships, *you cannot impute the knowledge of the supplier to the lender*. This means that you cannot argue, for example, that a credit contract is unjust under s 70 of the Code because the *supplier* took advantage of a debtor's mental disability or other special disadvantage. Such an argument will only succeed if the lender itself can be shown to have *directly* known of such matters.

Linked credit under the Trade Practices Act 1974

If the credit contract is not regulated under the Code, it may be possible to rely upon similar linked credit provisions enshrined within s 73 of the *Trade Practices Act 1974*, which are not limited to dealing only with contracts for personal, domestic or household purposes.

FOR CONSUMER ADVISORS: PROVING A CREDIT PROVIDER IS LINKED IN THREE EASY STEPS

Step One: Does the Credit Code apply?

Check the contract, and your client's instructions, to determine whether the loan is a credit contract regulated by the Code, and thus whether your client can seek relief under Part Seven of the Code. If the contract is excluded from Code coverage because it is for business or investment purposes, section 73 of the *Trade Practices Act 1974* may assist.

Step Two: Is the credit provider linked to the supplier?

- Firstly, are the goods or services supplied under the sale contract financed (either wholly or partly) by the credit contract in question?
- Secondly, does the supplier have an arrangement with the credit provider whereby:
 - o the credit provider finances purchases of goods or services from the supplier; **OR**
 - o the supplier regularly refers persons for the purpose of obtaining credit to the credit provider; **OR**
 - o the credit provider's contracts or application forms are made available to customers by the supplier; **OR**
 - o contracts or applications with or to the credit provider may be signed by customers at the premises of the supplier?

If the answer is yes to the above questions, the lender will be *linked* to the supplier. Step Two is generally not difficult to satisfy for car dealership disputes, because the dealership will normally give the lender's application form to the debtor. In most cases you will assume that it is satisfied and let the lender try and prove you wrong.

Step Three: Is the contract a tied loan contract?

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Linked Credit Disputes

Did the credit provider know, or ought reasonably to have known, that the debtor entered into the credit contract wholly or partly for the purposes of payment for the goods or services supplied by the supplier?

If yes, the loan contract your client signed will be a *tied loan contract* under Part Seven of the Code. Again, for car dealership disputes you can generally assume that Step Three will be satisfied, as the contracts and application forms will disclose the reason the debtor seeks the credit.

Remedies Under the Linked Credit Provisions

Now it is established that the supplier and the lender are linked, of what benefit is this to the debtor? There are a number of remedies available under the linked credit provisions of Part Seven of the Code. Here are the three most important ones:

Misrepresentations about the credit contract: section 118

Sometimes a supplier may mislead a debtor about the nature or terms of a credit contract, usually in an effort to close a sale that relies upon finance. For example, the supplier may tell the debtor that the interest rate is lower than it actually is, or that the debtor has an unconditional right to cancel the credit contract at a later stage.

At common law, in this circumstance the debtor would not have a right to rescind the credit contract as a result of the misrepresentation because it was not made by the lender or its agent. However, under s 118 of the Code, any representation made by a supplier to the debtor in relation to a tied loan contract gives the debtor the same rights against the lender as the debtor would have had if it had been made by the lender.

Thus, using s 118, the debtor can claim damages for misleading and deceptive conduct against the lender arising out of the representation of the supplier.

Right to damages against both credit provider and supplier: section 119

If the debtor suffers loss or damage as a result of misrepresentation, breach of contract, or failure of consideration in relation to the sale contract, under s 119 of the Code, the debtor can sue the supplier and the lender jointly and severally for damages. Section 119 is limited in that it will only be of use to a debtor who can claim loss under one of the three causes of action above. Additionally, the lender has a statutory defence to a s 119 claim.

The due diligence defence

Under s 119(2)(b), a lender may successfully defend a s 119 claim if it can show that, prior to entering into a linked credit arrangement with the supplier, it undertook a due diligence process regarding the financial standing and business conduct of the

Linked Credit Disputes

supplier, and had no cause to suspect that the debtor might be able to make out a s 119 claim.

Right to terminate linked credit contract: section 125

If the debtor has a right – under common or statutory law - to rescind or discharge the sale contract (on any grounds, such as misrepresentation, fundamental breach of a term of the contract, or contravention of any number of statutory provisions), the debtor will have the right under s 125 of the Code to terminate any linked credit contract. This provision has *advantages over s 119 damages claims in that:*

- it aims to entirely relieve the debtor from liability (whereas damages under s 119 may only partially set off liability under the credit contract), and
- defences available to a lender under s 119(2) do not apply to s 125 actions.

The limitations of s 125 are that it will only assist a debtor who has a right to rescind or discharge the sale contract. These rights only accrue in certain situations: not every instance of misrepresentation or breach of contract, for example, will be so fundamental as to allow a debtor to get out of the sale contract entirely.

Rescinding the sale contract

Before exercising a right to terminate under s 125, the debtor must have already rescinded the sale contract. This will need to be done by writing a letter to the supplier setting out the basis upon which the debtor rescinds the contract. It is not necessary that the supplier accept the rescission.

Terminating under s 127

A right under s 125 must be exercised by sending a written notice to the lender. Section 127. Case law indicates that such a notice must be sent within a reasonable time, although what is reasonable will vary greatly depending upon the circumstances. The notice can be a brief letter along the following lines:

Dear Sir/Madam

Re: Loan Contract No. [#] (the Credit Contract)

We act for [client] in relation to the above matter.

By letter dated [date], our client rescinded the sale contract entered into on [date] with [supplier]. We enclose a copy of that letter for your attention.

The Credit Contract is a tied loan contract within the meaning of Part Seven of the Consumer Credit Code (the Code).

Accordingly, we hereby terminate the Credit Contract under s 125 of the Code.

Yours sincerely,

[etc]

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Linked Credit Disputes

Make sure however that your client's actions do not contradict the purported termination by, for example, continuing to make payments under the contract.

Seeking an order under s 128

If the lender does not accept your letter of termination, your client will need to issue proceedings in the Credit List of the Victorian Civil and Administrative Tribunal under s 128 of the Code, seeking a declaration that the termination was valid.

Further information and assistance

For consumer and credit-related enquiries, members of the public, community and public sector caseworkers and lawyers can obtain advice from our web-based advice service at www.consumeraction.org.au, or they can telephone us Monday to Friday, on 03 9629 6300 or 1300 881 020

Members of the public can also obtain advice and assistance regarding consumer disputes from Consumer Affairs Victoria by calling 1300 55 81 81.

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