



## HIGH COURT OF AUSTRALIA

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### AUSTRALIAN FINANCE DIRECT LIMITED v DIRECTOR OF CONSUMER AFFAIRS VICTORIA

A credit provider's failure to disclose to borrowers information concerning "holdbacks" contravened credit disclosure laws, the High Court of Australia held today.

Australian Finance Direct (AFD) is a credit provider within the meaning of the *Consumer Credit (Victoria) Code* and offered loans to people wishing to attend financial seminars provided by National Investment Institute Pty Ltd (NII) and two related companies, Capital Holdings Group (NSW) Pty Ltd and Capital Holdings Group (Vic) Pty Ltd. When people wishing to attend the seminars required funding from AFD, they would sign the seminar enrolment form and credit contract documentation. The amount of the loan from AFD was the seminar fee charged by NII or Capital. In a typical credit contract, NII's seminar fee was \$15,340, plus interest of \$4,781.12, totalling \$20,121.12, repayable in 48 monthly instalments of \$419.19. However, the Director of Consumer Affairs alleged that the amount payable by AFD to NII was not \$15,340, but a lesser figure after a "holdback" was retained by AFD. The holdback was not disclosed to the borrower and the statement of the amount paid to NII was incorrect. The standard holdback was typically 10 per cent of the loan amount. Where customers did not meet the normal credit criteria, a further 40 per cent high-risk holdback was retained by AFD. Where there was only a standard holdback, NII would receive \$13,806 of the \$15,340 seminar fee from AFD. If there was also a high-risk holdback, NII would receive half, \$7,670.

The Director of Consumer Affairs brought proceedings against AFD, alleging that it had breached section 15(B) of the Code. An object of section 15(B)(a) is to ensure that, where the provision of credit takes the form of payment by the credit provider to a supplier of goods or services to the debtor, the debtor is fully informed of the amount of the deferred debt, the details of the person or persons to whom the credit provider is to pay the advance, and the amounts payable to each person. The Victorian Civil and Administrative Tribunal, the Supreme Court and the Court of Appeal, by majority, held that AFD had contravened disclosure requirements in section 15(B). AFD appealed to the High Court.

The Court unanimously dismissed the appeal and held that the credit contracts did not comply with section 15(B) of the Code. It held that the holdbacks should have been disclosed. Section 15(B) required disclosure of the persons, bodies or agents, including the credit provider, to whom the credit was to be paid and the amounts payable to each of them. AFD argued that section 15(B) was concerned only with the credit contract, and the contract between AFD and NII relating to holdbacks was irrelevant. The Director of Consumer Affairs submitted that the term "amounts payable" was not confined to the obligations of AFD and borrowers under the credit contract to the exclusion of other contractual arrangements between AFD and NII. The Court held that the statement that \$15,340 was to be paid to NII was incorrect. The holdback was not irrelevant to the requirements of section 15(B), which had not been met.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*