

CREDIT (HOME FINANCE CONTRACTS) ACT, 1984, No. 97

NEW SOUTH WALES.



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CREDIT (HOME FINANCE CONTRACTS) ACT, 1984, No. 97

New South Wales



ANNO TRICESIMO TERTIO

ELIZABETHÆ II REGINÆ

Act No. 97, 1984.

An Act to provide for the relief of certain cases of hardship in relation to home finance contracts. [Assented to, 28th June, 1984.]

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BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

PART I.

PRELIMINARY.

Short title.

1. This Act may be cited as the "Credit (Home Finance Contracts) Act, 1984".

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Certain rights, etc., saved.

3. Except to the extent that this Act expressly provides otherwise, nothing in this Act modifies or excludes a right or remedy that a person would have had if this Act had not been enacted.

Interpretation.

4. In this Act, except in so far as the context or subject-matter otherwise indicates or requires—

"Commissioner" means the Commissioner for Consumer Affairs appointed under section 13 of the Consumer Protection Act, 1969, and any person appointed under section 14 of that Act to act as Commissioner;

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“contract of guarantee” means a contract of guarantee or indemnity that relates to a home finance contract;

“credit” includes any form of financial accommodation other than any transaction prescribed as being a transaction that is not credit within the meaning of this Act;

“credit contract” has the same meaning as it has in the Credit Act, 1984;

“credit provider” means, in relation to a home finance contract—

- (a) the person who provided the credit under the contract; and
- (b) any person to whom the rights under the contract of the person referred to in paragraph (a) pass, whether by operation of law or otherwise;

“debtor” means, in relation to a home finance contract—

- (a) a natural person to whom the credit was provided under the contract; and
- (b) any natural person to whom the obligations under the contract pass, whether by operation of law or otherwise;

“guarantor” means a natural person who enters into a contract of guarantee in respect of the performance by a debtor of the obligations of the debtor under a home finance contract;

“home” means principal place of residence of the debtor under a home finance contract, being—

- (a) a building that is used, or is used principally, as a separate residence; or
- (b) an apartment, flat or other part of a building that is so used;

“home finance contract” means a contract under which credit not exceeding \$67,500 (or, where some other amount is prescribed, that other amount) was provided—

- (a) for the acquisition or erection of the debtor's home;

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- (b) for the provision of additional accommodation in, or the carrying out of structural alterations to, the debtor's home;
- (c) for the acquisition of land on which to erect that which is to become the debtor's home;
- (d) to discharge the liability of the debtor under a contract referred to in paragraph (a), (b) or (c); or
- (e) to discharge the liability of the debtor under a credit contract that was one of a series of 2 or more credit contracts, where—
 - (i) the series commenced with a contract referred to in paragraph (d);
 - (ii) the debtor under each contract in the series was the same; and
 - (iii) credit was provided under the later or latest contract in the series to discharge the liability of the debtor under the immediately preceding contract in the series;

"land" has the same meaning as it has in the Conveyancing Act, 1919;

"mortgage" has the same meaning as it has in the Conveyancing Act, 1919;

"Supreme Court" means the Supreme Court of New South Wales;

"this Act" includes regulations made under this Act;

"Tribunal" means the Commercial Tribunal of New South Wales.

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PART II.

RELIEF IN RELATION TO HOME FINANCE CONTRACTS.

Variation of commitments (home finance contract).

5. (1) Where the debtor under a home finance contract by reason of illness, unemployment, increase of an interest rate under the contract or other reasonable cause is unable reasonably to discharge any obligations under the contract, the debtor may, where the debtor reasonably expects to be able to meet any periodic commitments under the contract—

- (a) if the term of the contract were extended and the amount of each payment due under the contract accordingly reduced (without a change being made to the interest rate);
- (b) if the dates on which payments due under the contract during a specified period were postponed (without a change being made to the interest rate); or
- (c) if the term of the contract were extended and the dates on which payments due under the contract during a specified period were postponed (without a change being made to the interest rate),

apply to the credit provider for a variation of the contract.

(2) Where a credit provider to whom application is made under subsection (1) refuses to vary a home finance contract in accordance with the application, the debtor may apply to the Commissioner for assistance in negotiating a variation of the contract.

(3) Where an application is made under subsection (2), the Commissioner shall seek the views of the debtor, credit provider, any guarantor, any mortgagor and any other person who, in the opinion of the Commissioner, might be affected by a variation of the home finance contract to which the application relates and, after giving them a reasonable opportunity to be heard and making such other inquiries as the Commissioner thinks fit, determine whether or not to seek to arrange with the credit provider a variation of the home finance contract and, where the Commissioner seeks such a variation and is unable to reach agreement with the credit provider, the Commissioner shall refer the application to the Tribunal.

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(4) The Tribunal may, where it receives an application referred to it under subsection (3) and has given the persons whose views were sought by the Commissioner under that subsection an opportunity to be heard, order, or refuse to order, a variation of the home finance contract to which the application relates (subject to the duration of any postponement of payments under such a variation not exceeding 6 months) and, where it orders such a variation, may make such other orders as it thinks fit.

(5) Without limiting the matters that the Tribunal may take into account in determining whether or not to make an order under subsection (4), the Tribunal shall take into account the relative hardship, as between the debtor and the credit provider, that would result from the making of such an order.

(6) Where an order of the Tribunal under subsection (4) is in force, the credit provider, or the debtor, under the home finance contract to which the order relates may apply to the Tribunal for a variation of the order.

(7) The Tribunal may, where it receives an application under subsection (6), vary the order to which the application relates as it thinks fit or refuse to vary the order.

(8) An order in force under this section, and such an order as varied from time to time, has effect according to its tenor.

(9) Where the Commissioner and the credit provider are unable to reach agreement under subsection (3) in relation to a home finance contract, the credit provider shall not institute proceedings, or exercise a right, under the contract, or a mortgage or contract of guarantee that relates to the contract, before the Tribunal has made or refused an order under subsection (4).

(10) Where the Tribunal exercises its jurisdiction under this section, it shall make no order as to costs.

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Variation of commitments (guarantee relating to a home finance contract).

6. (1) Where the guarantor under a contract of guarantee, by reason of illness, unemployment or other reasonable cause, is unable reasonably to discharge any obligations under the contract, the guarantor may, where the guarantor reasonably expects to be able to discharge those obligations—

- (a) if the time for making a payment under the contract were postponed; or
- (b) if a payment required to be made under the contract were able to be made by instalments,

apply to the credit provider under the home finance contract to which the contract of guarantee relates for a variation of the contract of guarantee for that purpose.

(2) Where a credit provider to whom application is made by a guarantor under subsection (1) refuses to vary a contract of guarantee in accordance with the application, the guarantor may apply to the Commissioner for assistance in negotiating a variation of the contract.

(3) Where an application is made under subsection (2), the Commissioner shall seek the views of the credit provider and any other person who, in the opinion of the Commissioner, might be affected by a variation of the contract of guarantee to which the application relates and, after giving them a reasonable opportunity to be heard and making such other inquiries as the Commissioner thinks fit, determine whether or not to seek to arrange with the credit provider a variation of the contract of guarantee and, where the Commissioner seeks such a variation and is unable to reach agreement with the credit provider, the Commissioner shall refer the application to the Tribunal.

(4) The Tribunal may, where it receives an application referred to it under subsection (3) and has given the persons whose views were sought by the Commissioner under that subsection an opportunity to be heard, order, or refuse to order, a variation of the contract of guarantee to which the application relates and, where it orders such a variation, may make such other orders as it thinks fit.

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(5) Where an order of the Tribunal under subsection (4) is in force in relation to a contract of guarantee, the credit provider under the home finance contract to which the contract of guarantee relates, or the guarantor, may apply to the Tribunal for a variation of the order.

(6) The Tribunal may, where it receives an application under subsection (5), vary the order to which the application relates as it thinks fit or may refuse to vary the order.

(7) An order in force under this section, and such an order as varied from time to time, has effect according to its tenor.

(8) Where the Commissioner and the credit provider are unable to reach agreement under subsection (3) in relation to a contract of guarantee, the credit provider shall not institute proceedings, or exercise a right, under the contract before the Tribunal has made or refused an order under subsection (4).

(9) Where the Tribunal exercises its jurisdiction under this section, it shall make no order as to costs.

Notice by credit provider.

7. (1) A credit provider under a home finance contract shall not institute proceedings, or exercise a right, under the contract, or a mortgage or guarantee that relates to the contract (being proceedings that may be instituted, or a right that may be exercised, as a consequence of a default under the contract) until after the expiration of one month after service in accordance with subsection (2) of a notice in the prescribed form that specifies the proceedings or right.

Penalty: In the case of a body corporate—100 penalty units or, in any other case—50 penalty units.

(2) A notice referred to in subsection (1) that relates to a home finance contract is served in accordance with this subsection if it is served on—

- (a) the debtor; and
- (b) the guarantor under any contract of guarantee that relates to the home finance contract.

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(3) Where a credit provider fails to comply with subsection (1), a court or the Tribunal may, on the application of the debtor, order the credit provider to compensate the debtor for any loss suffered by the debtor as a result of that failure.

(4) Where there is a mortgage relating to a home finance contract and the provisions of any other Act require the mortgagee to give notice to the mortgagor before instituting proceedings, or exercising a right, under the contract or mortgage—

- (a) nothing in this Act derogates from the requirement to give the notice under the other Act; and
- (b) a notice required by this Act to be given before the proceedings are instituted, or the right exercised, does not fail to comply with this Act by reason only that it includes matter required to be specified in a notice required by the other Act to be given before the proceedings are instituted or the right exercised.

PART III.**MISCELLANEOUS.****Variation of application of Act.**

8. (1) The Governor may, by order published in the Gazette, declare that the provisions of this Act, or such of those provisions as are specified in the order—

- (a) do not have effect in relation to a specified person or to a specified class of persons;
- (b) have effect in relation to a specified person or to a specified class of persons to such extent as is specified;
- (c) do not have effect in relation to a specified transaction or matter or class of transactions or matters;
- (d) have effect in relation to a specified transaction or matter or class of transactions or matters to such extent as is specified;
- (e) do not have effect in relation to a specified transaction or class of transactions entered into by a specified person or specified class of persons or in relation to specified associated matters; or
- (f) have effect in relation to a specified transaction or class of transactions entered into by a specified person or specified class of persons, or in relation to specified associated matters, to such extent as is specified.

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(2) An order made under subsection (1)—

- (a) may specify the period during which the order shall remain in force; and
- (b) may provide that its operation is subject to such terms and conditions as are specified in the order.

(3) An order in force under subsection (1), and such an order as altered or varied from time to time, has effect according to its tenor.

(4) A person to whom an order under subsection (1) applies, or to whom an order as altered or varied from time to time applies, shall comply with the terms and conditions (if any) to which the operation of the order is subject.

Penalty (subsection (4)): 50 penalty units.

Penalty units.

9. A reference in this Act to a number (whether fractional or whole) of penalty units shall be deemed to be a reference to an amount of money equal to the amount obtained by multiplying \$100 by that number of penalty units.

“Contracting-out” of Act prohibited.

10. (1) A provision in any agreement (whether in writing or not) under which the operation of a provision of this Act is excluded, modified or restricted is void.

(2) A credit provider or mortgagee shall not enter into an agreement that includes a provision that, by reason of subsection (1), is void.

Penalty: 50 penalty units.

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Limitation.

11. Notwithstanding anything in any Act, proceedings for an offence against this Act may be brought within the period of 3 years that next succeeds the commission of the offence or, with the consent of the Attorney General, at any later time.

Offence by body corporate.

12. Where an offence against this Act committed by a body corporate is proved to have been committed with the consent or connivance of any person, being a director, manager, secretary or other officer of the body corporate, the person, as well as the body corporate, shall be deemed to have committed that offence and is liable to be proceeded against and punished accordingly.

Who may take proceedings for offences.

13. (1) Proceedings for an offence against this Act or for a breach of the regulations may be taken and prosecuted by any person acting with the authority of—

- (a) the Minister; or
- (b) a prescribed officer.

(2) An authority to prosecute purporting to have been signed by the Minister or a prescribed officer is evidence of that authority without proof of the signature of the Minister or the prescribed officer.

(3) In proceedings for an offence against this Act or for a breach of the regulations, the informant may conduct his or her case personally, or by counsel or attorney, or by an agent authorised by the informant in writing.

Disposal of proceedings.

14. (1) Proceedings for an offence against this Act shall be disposed of summarily before—

- (a) a court of petty sessions constituted by a stipendiary magistrate sitting alone; or
- (b) with the written consent of the Minister—the Supreme Court in its summary jurisdiction.

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(2) Proceedings for a breach of the regulations shall be disposed of summarily before a court of petty sessions constituted by a stipendiary magistrate sitting alone.

(3) A monetary penalty imposed by a court of petty sessions for an offence against this Act shall not exceed 50 penalty units notwithstanding that, but for this subsection, the maximum monetary penalty that could be imposed would exceed 50 penalty units.

Notices to be served on all parties.

15. Where a credit provider serves a notice under section 7 on a debtor or guarantor constituted by 2 or more persons, the credit provider shall be deemed not to have served the notice on the debtor or guarantor, as the case may be, unless it is served on each of the persons constituting the debtor or guarantor.

Service of notice.

16. (1) A notice under section 7 may be served on a person by serving it personally on the person or by sending it by post to the person at the person's usual or last known place of abode or business.

(2) Where the rights and obligations of a person under this Act have been assigned or have passed by operation of law to another person, a notice served on the first-mentioned person at the usual or last known place of abode or business of that person shall be deemed to have been served on the second-mentioned person unless the person serving the notice had before serving the notice been given notice in writing that the rights and obligations of the first-mentioned person had been assigned or had so passed to the second-mentioned person.

Service by post.

17. For the purposes of this Act, where a notice is properly addressed, prepaid and posted to a person as a letter, the notice shall, unless the contrary is proved, be deemed to have been served on the person at the time at which the letter would be delivered in the ordinary course of post.

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Legibility of notice.

18. (1) A notice under section 7 shall be readily legible.

(2) For the purposes of this section, a notice shall be deemed to be readily legible if it is—

- (a) in clear hand writing; or
- (b) in print or type, or otherwise reproduced in a form, that complies with the prescribed requirements.

Restriction on form of notice.

19. Where the form of a notice under section 7 used by a credit provider is, in the opinion of the Tribunal—

- (a) written or printed in a colour, or on paper of a colour, that detracts from the legibility of the notice; or
- (b) written or printed in a style or manner that detracts from the legibility of the notice,

the Tribunal may direct the credit provider not to use a notice in that form.

Approval of form of notice.

20. Where a credit provider submits to the Tribunal for its opinion a form of notice intended to be used for the purposes of section 7 by the credit provider, the credit provider shall not, by reason only that a notice is served in that form, be guilty of an offence under section 21 if the Tribunal, before the notice is served, determines that, in its opinion, the form of the notice is—

- (a) readily legible; or
- (b) written or printed—
 - (i) in a colour and on paper of a colour; and
 - (ii) in a style or manner,that does not detract from the legibility of the notice.

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Offence.

21. A credit provider shall not—

- (a) serve a notice under section 7 that is not readily legible; or
- (b) use a form of notice in contravention of a direction under section 19.

Penalty: 20 penalty units.

Defence to certain proceedings.

22. It is a defence to proceedings for a contravention of this Act in relation to a home finance contract if it is proved that the defendant did not know that, had no reason to believe that, and had made reasonable inquiries as to whether, the contract to which the proceedings relate was a home finance contract.

Regulations.

23. (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed, or that is necessary or convenient to be prescribed, for carrying out or giving effect to this Act.

(2) A regulation may impose a penalty not exceeding 5 penalty units for a breach of the regulation.

(3) A provision of a regulation may—

- (a) apply generally or be limited in its application by reference to specified exceptions or factors;
- (b) apply differently according to different factors of a specified kind;
or

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(c) authorise any matter or thing to be from time to time determined, applied or regulated by a specified person or body, or may do any combination of those things.
