

CREDIT (FINANCE BROKERS) ACT, 1984, No. 96

NEW SOUTH WALES.



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CREDIT (FINANCE BROKERS) ACT, 1984, No. 96

New South Wales



ANNO TRICESIMO TERTIO

ELIZABETHÆ II REGINÆ

Act No. 96, 1984.

An Act relating to the conduct of the business of finance brokers. [Assented to, 28th June, 1984.]

Credit (Finance Brokers).

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 (Finance Brokers) 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), the several provisions of this Act shall commence on such day or days 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.

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Interpretation.

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

“body corporate” does not, except in the case of a finance broker that is a body corporate, include—

- (a) a body corporate constituted under the Strata Titles Act, 1973, by the proprietor or proprietors of lots within the meaning of that Act; or
- (b) a company owning an interest in land and having memorandum or articles of association conferring on owners of shares in the company the right to occupy certain parts of a building erected on the land,

all, or the majority, of which lots or parts as the case may be are intended to be occupied as dwellings;

“commercial vehicle” has the same meaning as it has in the Credit Act, 1984;

“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;

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

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

“farm machinery” has the same meaning as it has in the Credit Act, 1984;

“finance broker” means a person who, whether or not carrying on any other business, carries on the business of finance broking;

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“finance broking” means negotiating, or acting as intermediary to obtain, credit for persons other than an employer or principal of the person so negotiating or acting;

“housing loan” means credit the whole or any part of which is, or is intended to be, applied for the purpose of—

- (a) enabling the debtor to acquire a private dwelling-house or land on which to erect a private dwelling-house;
- (b) providing the debtor with funds for the erection of a private dwelling-house or for the provision of additional accommodation in, or the carrying out of structural alterations to, a private dwelling-house;
- (c) discharging the liability of the debtor in respect of credit referred to in paragraph (a) or (b); or
- (d) discharging the liability of the debtor under a credit contract that is one of a series of 2 or more credit contracts, where—
 - (i) the series commenced with a contract referred to in paragraph (c);
 - (ii) the debtor under each contract in the series is the same; and
 - (iii) credit is 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,

except where—

- (e) the debtor is a person who carries on a business as a building contractor;
- (f) the debtor is a person whose business involves or includes the erection of private dwelling-houses or the carrying out of alterations or additions to private dwelling-houses; or
- (g) the debtor is a person whose business involves or includes the acquisition or disposal of land,

and the credit is, or is intended to be, used for the purpose of that business or in the course of carrying on that business;

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“private dwelling-house” means—

- (a) a building that is designed, or is designed principally, as a separate residence for one family or person; or
- (b) an apartment, flat or other part of a building that is so designed;

“record” includes any book, account, document, paper or other source of information compiled, recorded or stored in written form, or on microfilm, or by electronic process, or in any other manner or by any other means;

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

“regulation” means a regulation under this Act;

“this Act” includes the regulations;

“Tribunal” means the Commercial Tribunal of New South Wales.

(2) This Act applies to and in respect of a finance broker only in so far as credit to which the business of the finance broker relates is, or includes, credit to be provided—

- (a) under a regulated contract;
- (b) by way of a housing loan; or
- (c) for the purchase of a commercial vehicle or farm machinery.

(3) This Act does not apply to or in respect of a finance broker who, pursuant to section 7 (3) of the Credit (Administration) Act, 1984, is not required to be licensed under that Act.

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PART II.

REGULATION OF FINANCE BROKERS.

Advertising by finance brokers.

5. A finance broker shall not publish, or cause to be published, whether in a newspaper or otherwise, an advertisement relating to or in connection with his business as a finance broker without specifying therein—

- (a) a name appearing in the Register of Licensed Finance Brokers kept under the Credit (Administration) Act, 1984, being the name of the finance broker or a name under which the finance broker carries on business; and
- (b) the address of a place of business in respect of that name.

Penalty: 20 penalty units.

Finance broker to keep records.

6. (1) A finance broker shall, not later than the time that is immediately after entering into a transaction as a finance broker, make, or cause to be made, a record containing full particulars of that transaction.

(2) A finance broker shall preserve a record made under subsection (1) for a period of at least 3 years after the date of the transaction to which the record relates.

(3) Any record kept at a place of business of a finance broker shall, unless the contrary is proved, be presumed to have been made by, or with the authority of, the finance broker.

Penalty: 10 penalty units.

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Payment of commission to finance broker.

7. (1) A finance broker shall not demand, receive or accept any commission in respect of negotiating, or acting as intermediary for the obtaining of, credit on behalf of another person unless the engagement or appointment to act as a finance broker—

- (a) is in writing signed by the person charged, or to be charged, with the payment of the commission; and
- (b) contains particulars of the amount of the credit to be obtained, the term of the credit and the maximum amount of interest or other charges to be paid in respect of the credit.

(2) A finance broker shall not—

- (a) demand, receive or accept any commission not authorised by the regulations in respect of negotiating, or acting as intermediary for the obtaining of, credit on behalf of another person;
- (b) demand, receive or accept any commission before securing the credit in respect of which the commission is charged; or
- (c) demand, receive or accept any commission in respect of any credit that—
 - (i) is for an amount less than the amount specified in the terms of the written engagement or appointment as a finance broker;
 - (ii) is at a rate of interest, or for a charge, greater than the rate or charge specified in the terms of the written engagement or appointment as a finance broker; or
 - (iii) is for a term less than the term specified in the written engagement or appointment.

(3) In any proceedings for an offence arising under subsection (1) or (2) the court may, if it finds the finance broker guilty of the offence and whether or not it proceeds to conviction, order the finance broker to refund any amount received or accepted by him in contravention of subsection (1) or (2) together with interest at such rate as is fixed by the court, not exceeding the prescribed rate, from the time of the receipt or acceptance of the amount until the time it is refunded.

Penalty: 20 penalty units.

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Valuation fees.

8. Nothing in section 7 prohibits a finance broker who has been engaged or appointed in writing to act as a finance broker from demanding, receiving or accepting at any time an amount equal to the estimated cost (estimated on the basis of the fees, if any, prescribed as the maximum fees for valuations) of obtaining a valuation of any security offered for any proposed credit and any amount so paid shall be held in trust by the finance broker to pay the costs of that valuation and to repay the balance of any such amount to the person who paid the amount.

Penalty for false statements, etc.

9. A finance broker shall not by any false, misleading or deceptive statement, representation or promise or by any dishonest concealment of material facts induce, or attempt to induce, a person to enter into an agreement or contract for or with respect to the provision of credit.

Penalty: 50 penalty units.

Defence to certain proceedings.

10. It is a defence to proceedings for a contravention of a provision of this Act and to proceedings under section 11, if it is proved that the defendant, in the case of proceedings for such a contravention, or the finance broker in the case of proceedings under section 11, did not know that, had no reason to believe that, and had made reasonable inquiries as to whether, the credit to which the proceedings relate was, or included, credit referred to in section 4 (2).

Excessive commission.

11. (1) Where—

- (a) proceedings are taken in a court by a finance broker for the recovery of money in respect of a transaction entered into by him in the course of a business as a finance broker; or

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- (b) a person who has entered into a transaction with a finance broker, in the course of the business of the finance broker as such, applies to a court in which proceedings might be taken for the recovery of an amount not exceeding the amount of the commission of the finance broker in the course of the transaction,

and it appears to the court that the commission charged by the finance broker in respect of the transaction is excessive, the court may re-open the transaction.

(2) A court re-opening a transaction under this section may, notwithstanding any statement or settlement of account or any contract purporting to close previous dealings and create a new obligation, re-open an account already taken by the parties to the transaction and relieve the person liable under the contract to pay the commission and any guarantor of that person of any liability in excess of such amount as the court adjudges to be fairly and reasonably payable for the services rendered or to be rendered by the finance broker (including any expenses reasonably and necessarily incurred) and may—

- (a) set aside either wholly or in part or revise or alter any agreement or contract made or security given in connection with the transaction;
- (b) give a verdict or judgment for any party for such amount as, having regard to the relief, if any, that the court thinks fit to grant, is justly due to that party; and
- (c) make such other orders as the court thinks necessary or proper for the purposes of this section.

(3) A reference—

- (a) in subsection (1) (b) to a court in which proceedings might be taken for the recovery of an amount not exceeding the amount of the commission of a finance broker includes a reference to the Tribunal; and
 - (b) in subsection (2) to a court includes a reference to the Tribunal.
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PART III.

MISCELLANEOUS.

Variation in application of Act.

12. (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.

(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 this section, including an order that is varied under this section, has effect according to its tenor.

(4) A person to whom an order under this section applies, including an order that is varied under this section, shall comply with the terms and conditions (if any) to which the operation of the order is subject.

Penalty: 50 penalty units.

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Penalty units.

13. A reference in this Act or the regulations 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.

General penalty.

14. (1) A person who contravenes or fails to comply with a provision of this Act is guilty of an offence against this Act.

(2) A person who is guilty of an offence against this Act for which a specific penalty is not prescribed by a provision of this Act other than this subsection is liable to a penalty not exceeding 10 penalty units.

Limitation.

15. 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.

16. Where an offence against this Act committed by a body corporate is proved to have been committed with the consent or connivance of a person who is 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.

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Who may take proceedings for offences.

17. (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 appear in person, or by counsel or attorney, or by an agent authorised in writing.

Disposal of proceedings.

18. Proceedings for an offence against this Act shall be disposed of summarily before a court of petty sessions constituted by a stipendiary magistrate sitting alone.

Regulations.

19. (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.

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- (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
 - (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.
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