

[Act 1995 No 69]



New South Wales

Consumer Credit Administration Bill 1995

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to provide for the administration of certain consumer credit legislation (including the *Consumer Credit (New South Wales) Act 1995* and the *Credit Act 1984*). In particular, the Bill:

- establishes a procedure for the discipline of credit providers and finance brokers who engage in unjust conduct,
- empowers the Commercial Tribunal (or a person appointed by the Minister) to inquire into credit related matters,
- sets out the functions of the Director-General of the Department of Fair Trading in relation to certain court proceedings about the provision of credit and the conduct of participants in the credit industry.

The Bill will replace the *Credit (Administration) Act 1984*. Under that Act, credit providers and finance brokers were required to be licensed. Licences will no longer be required. Instead, the Bill creates a scheme for monitoring the conduct of credit providers and finance brokers and for dealing with any unjust conduct.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides that the proposed Act will commence on a day or days to be appointed by proclamation.

Clause 3 defines certain terms used in the proposed Act. *Consumer credit* is defined so as to make it clear that the proposed Act applies to the provision of credit whether it is regulated under the *Credit Act 1984* or the *Consumer Credit (New South Wales) Code*. *Unjust conduct* is defined to include conduct that involves the contravention of any of the consumer credit legislation.

Clause 4 provides that the conduct of an officer, employee or agent of a credit provider or finance broker will be imputed to the credit provider or finance broker, and taken to be their conduct, if the agent is acting with their actual or ostensible authority.

Part 2 Supervision of the provision of consumer credit

Clause 5 provides that the powers of entry and inspection contained in the proposed Part may only be exercised for the purpose of determining whether or not a credit provider or finance broker has engaged in, or is engaging in, unjust conduct in relation to the provision of consumer credit or finance broking. The powers can be used to investigate the conduct of any person (including an employee or agent of a credit provider or finance broker), even though the disciplinary powers in proposed Part 3 can only be used against a credit provider or a finance broker.

Clause 6 empowers an official (who is authorised by the Director-General) to require a person to answer questions or produce documents for the purposes of the proposed Part. An official may also inspect any document, or remove it for the purposes of examining or copying it.

Clause 7 provides that failure to give information, or to furnish a document, in response to a demand is an offence. The giving of information that is false or misleading in a material particular is also an offence.

Clause 8 empowers an official authorised by the Director-General to enter and inspect premises for the purposes of the proposed Part.

Clause 9 provides for an official to apply for the issue of a search warrant to empower an official to enter premises (including premises used for residential purposes).

Clause 10 imposes limitations on the exercise of the powers of entry and inspection contained in the proposed Part.

Part 3 Discipline for unjust conduct

Division 1 Complaints

Clause 11 sets out the object of the proposed Part.

Clause 12 provides that any person may make a complaint to the Director-General about the conduct of a credit provider or finance broker.

Clause 13 makes it clear that the Director-General may use the investigative powers set out in proposed Part 2 to investigate a complaint against a credit provider or finance broker.

Division 2 Disciplinary action

Clause 14 provides that, if it appears to the Director-General that a credit provider or finance broker has engaged in, or is engaging in, unjust conduct, the Director-General may request the credit provider or finance broker to give certain undertakings about its conduct.

Clause 15 sets out the action that the Director-General may take if an undertaking has not been, or would not be, effective in stopping unjust conduct. The proposed section requires the Director-General to give a credit provider or finance broker a chance to avoid further disciplinary action.

Clause 16 gives a credit provider or finance broker an opportunity to make a written submission in response to a notice to show cause why further disciplinary action should not be taken.

Clause 17 empowers the Director-General to conduct investigations in relation to the matters to which the notice relates or any submission made by the credit provider or finance broker in response to the notice.

Clause 18 provides that, after considering any submission or the results of any investigation made, the Director-General may reprimand the credit provider or finance broker or may order the credit provider or finance broker to take certain action, including action to rectify the consequences of the unjust conduct.

Division 3 Prohibition orders

Clause 19 provides for the issue of a prohibition order, that is, an order that a credit provider not be involved in providing consumer credit or that a finance broker not be involved in finance broking. The order may be permanent, or may operate for a specified time only. A prohibition order may be made only if the Director-General is satisfied that a credit provider or finance broker has engaged in, or is engaging in, unjust conduct.

Clause 28 empowers a credit provider or finance broker to make an application for the variation or revocation of any prohibition order.

Clause 21 permits a credit provider or finance broker to take certain action, in relation to existing credit contracts, despite being the subject of a prohibition order.

Clause 22 provides a civil penalty for contravention of a prohibition order by a credit provider or finance broker. If a credit provider provides consumer credit in contravention of a prohibition order the debtor will generally not be liable to pay any amount under the credit contract. Similarly, if a finance broker is involved in finance broking in contravention of a prohibition order, a person the party to any contract entered into for that purpose is not liable to pay any amount under the contract.

Clause 23 sets out the maximum criminal penalty for the contravention of a prohibition order.

Division 4 Administration

Clause 24 requires the Director-General to notify a credit provider or finance broker of any disciplinary action taken in relation to the credit provider or finance broker.

Clause 25 requires the Director-General to keep a register of disciplinary action taken.

Clause 26 provides for the awarding of costs against a credit provider or finance broker who has been found to have engaged in unjust conduct.

Clause 27 creates a right to appeal to the Commercial Tribunal against a disciplinary order.

Part 4 Inquiries

Clause 28 provides that the Minister may appoint the Commercial Tribunal, or any person, to inquire into matters relating to the provision of consumer credit or the consequences of the provision of consumer credit, or both.

Clause 29 requires the Tribunal to give public notice of the inquiry.

Clause 30 gives any person with a substantial interest in the matter the subject of a Tribunal inquiry the right to appear at the inquiry.

Clause 31 sets out the procedure at a Tribunal inquiry.

Clause 32 sets out the powers of the Tribunal at an inquiry, including the power to issue a summons, administer an oath and take evidence on oath.

Clause 33 creates an offence of failure to appear at a Tribunal inquiry after having been summoned.

Clause 34 creates an offence relating to the refusal to be sworn at a Tribunal inquiry and the refusal to produce a document or to answer a question.

Clause 35 empowers the Tribunal or an authorised person to require a person to give information, or answer any question, in relation to the subject matter of an inquiry.

Part 5 Functions of Director-General in relation to proceedings

Clause 36 provides that the Director-General may represent a debtor or another person in any proceedings before the Tribunal.

Clause 37 empowers the Director-General to take or defend certain proceedings for another person.

Clause 38 provides for the Director-General to have the conduct of those proceedings.

Clause 39 provides for the intervention of the Minister, or the Director-General, in any proceedings arising under the consumer credit legislation before a court or the Tribunal where the Minister or Director-General thinks it is in the public interest to intervene.

Clause 48 provides for the investigation of certain applications made to the Tribunal relating to the imposition of civil penalties on credit providers.

Part 6 Offences

Clause 41 provides that if a corporation commits an offence, each officer of the corporation is taken to have committed the offence if the officer knowingly authorised or permitted the contravention.

Clause 42 provides for the taking of proceedings for an offence against the proposed Act.

Clause 43 provides for the disposal of proceedings for an offence against the proposed Act by a Local Court or, with the consent of the Minister, by the Supreme Court.

Clause 44 imposes a 3 year limitation period on the commencement of proceedings for an offence under the proposed Act.

Part 7 Miscellaneous

Clause 45 imposes an obligation on certain persons to keep secret certain information concerning the affairs of a person if acquired for the purposes of the consumer credit legislation.

Clause 46 provides for the service of documents.

Clause 47 provides that the Crown is to be bound by the proposed Act.

Clause 48 empowers the Governor to make regulations.

Clause 49 repeals the *Credit (Administration) Act 1984* and the regulation made under that Act.

Clause 50 gives effect to the Schedule of consequential amendments to other Acts.

Clause 51 gives effect to the Schedule of savings and transitional provisions.

Clause 52 provides for the review of the proposed Act 5 years after its date of assent.

Schedules

Schedule 1 makes consequential amendments to certain Acts regulating consumer credit.

Schedule 2 makes savings and transitional provisions consequent on the repeal of the *Credit (Administration) Act 1984*.