

[Act 1995 No 7]



New South Wales

Consumer Credit (New South Wales) 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 regulate the provision of consumer credit.

General Outline

Objectives of the Bill

The objectives of the Bill are to provide laws that apply equally to all forms of consumer lending and to all credit providers, and that are uniform in all jurisdictions in Australia.

The legislation is based on the principle of truth-in-lending which will allow borrowers to make informed choices when purchasing credit.

The Bill applies rules that regulate the credit provider's conduct throughout the life of a loan, but without restricting product flexibility and consumer

choice. The policy of the legislation is to rely generally on competitive forces to provide price restraint but to provide significant redress mechanisms for borrowers in the event that credit providers fail to comply with the legislation.

The Bill is designed to apply to a deregulated credit market and provide standards for the provision of credit that will not be overtaken by changes in the financial marketplace.

Reasons for the Bill

Current consumer credit legislation is outdated and overly prescriptive. It applies only to a small percentage of the consumer credit market. It regulates the form of credit contracts and has a monetary ceiling of \$40,000. Credit unions and building societies are not covered by the legislation. The laws were made for a regulated credit market where a limited number of products were available. They are no longer appropriate for a deregulated finance industry and a regulatory environment that favours minimum intervention in the market.

The Legislative Scheme

The Bill forms part of a legislative scheme that involves the enactment of legislation by the States and Territories. The scheme is based on the *Uniform Credit Laws Agreement 1993* of the States and Territories.

The uniform scheme relies on the enactment by Queensland of a uniform *Consumer Credit Code*. The Code is enacted and applied as the law of Queensland by the *Consumer Credit (Queensland) Bill 1994* enacted by the Queensland Parliament on 2 September 1994. Under the Agreement, the other States and Territories may either apply the Code (as in force from time to time) as the law of the State or Territory or enact a law that is consistent with the Code. Under the Agreement, the approval of a Ministerial Council of the States and Territories will be required to any changes to the Code by the Queensland Parliament. In this State, the Code (as in force from time to time) is to be applied as a law of the State.

Outline of provisions

Provisions of this Bill—Application of Consumer Credit Code as law of New South Wales

Part 1 Preliminary

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

Clause 2 provides for the commencement of the proposed Act by proclamation.

Clause 3 defines expressions used in the proposed Act.

Clause 4 makes it clear that explanatory notes in the text (eg the note setting out the initial text of the Code) do not form part of the proposed Act.

Part 2 Consumer Credit (New South Wales) Code and Regulations

Clause 5 provides that the *Consumer Credit Code* set out in the Appendix to the Queensland Act (as in force for the time being) applies as a law of New South Wales and may, as a law of New South Wales, be referred to as the *Consumer Credit (New South Wales) Code*.

Clause 6 provides that the regulations made by the Queensland Governor-in-Council under Part 4 of the Queensland Act apply as regulations for the purposes of the Code and may be referred to as the *Consumer Credit (New South Wales) Regulations*. Those regulations will be the uniform regulations for the purposes of the Code.

Clause 7 defines some general expressions used in the Code for the purposes of its application as a law of New South Wales.

Part 3 Conferral of judicial and administrative functions

Clause 8 provides that the judicial functions under the New South Wales Code are to be exercised in New South Wales by the Commercial Tribunal and, in some cases, also by the ordinary courts.

Clause 9 specifies the Commissioner for Consumer Affairs as the officer having the functions of the Government Consumer Agency under the New South Wales Code.

Part 4 Miscellaneous

Clause 10 specifies the financial counselling trust fund established under the *Credit Act 1984* as the fund into which civil penalties payable by credit providers under the Code are to be paid. Civil penalties under the *Credit Act 1984* are at present paid into that fund.

Clause 11 is a special provision that will allow New South Wales to prescribe by regulation a maximum annual percentage rate for consumer credit contracts made in New South Wales. The *Uniform Credit Laws Agreement* acknowledges that a State or Territory may wish to enact such a special provision.

Clause 12 provides for a Local Court to deal with summary offences against the Code.

Clause 13 declares that the proposed Act binds the Crown.

Clause 14 authorises the making of special savings and transitional regulations for New South Wales.

Clause 15 is the general regulation-making power.

Clause 16 is a formal provision that gives effect to Schedule 1.

Clause 17 requires the Minister to review the proposed Act after 5 years.

Schedule 1 contains consequential amendments to the *Credit Act 1984* and other Acts. Generally speaking, the *Credit Act 1984* will cease to apply to continuing credit contracts, but will continue to apply to other credit contracts made before the commencement of the Code.

Notes on Consumer Credit Code

The Appendix to the Queensland Act sets out the current provisions of the Consumer Credit Code which is to be part of the law of New South Wales. The Code is applied as a law of Queensland by the Queensland Act and will be applied as the law in force in other participating States or Territories or a law that is consistent with the Code will be enacted in other participating States or Territories.

The current provisions of the Code are as follows:

The Consumer Credit Code

Part 1 Preliminary

Clause 1 sets out the short title of the Code.

Clause 2 states that the Code is to commence in accordance with the proclamation under the Queensland Act.

Clause 3 states that Schedule 1 contains the principal definitions of words and expressions used in the Code and that Schedule 2 contains other miscellaneous provisions relating to the interpretation of the Code.

Clause 4 defines “credit” as the deferral of the payment of debt or the incurring of deferred debt and defines the “amount of credit” as the amount of debt actually deferred.

Clause 5 defines “credit contract” as a contract under which credit to which the Code applies is or may be provided.

Clause 6 sets out the circumstances in which the Code will apply to the provision of credit (and to credit contracts and related matters). The debtor must be a natural person ordinarily resident in the jurisdiction or a strata corporation formed in the jurisdiction, the credit must be provided wholly or predominantly for personal, domestic or household purposes, a charge must be made for the credit and the credit provider must provide credit as part of a business.

Clause 7 sets out kinds of credit to which the Code will not apply. These include short term credit, credit without prior agreement, credit provided under bill facilities, credit provided by pawnbrokers and certain employee loans, as well as certain other specified kinds of credit.

Clause 8 applies the Code to mortgages given by natural persons or strata corporations which secure obligations under a credit contract or related guarantee, but only to the extent that they do so.

Clause 9 applies the Code to guarantees given by natural persons or strata corporations which guarantee obligations under a credit contract, but only to the extent that they do so.

Clause 10 provides for the application of the Code to a contract for the hire of goods under which a hirer has a right or obligation to purchase the goods and where the hiring charge and other amounts payable under the contract are more than the cash price of the goods. In this case, the Code assumes a sale of the goods and the provision of credit.

Clause 11 sets out presumptions relating to the application of the Code to credit contracts, mortgages and guarantees. In particular, it will enable conclusive declarations to be made that credit is not provided for personal, domestic or household purposes.

Part 2 Credit contracts

Division 1 Negotiating and making credit contracts

Clause 12 requires a credit contract to be in writing signed or otherwise adopted by the parties to the contract.

Clause 13 enables the regulations to authorise other methods of making a credit contract.

Clause 14 requires the credit provider to make pre-contractual disclosures to the proposed debtor. The disclosures are to comprise the matters that are required to be included in the contract document by clause 15 and an information statement of the debtor's statutory rights and obligations. The disclosures may include the comparison rate.

Clause 15 sets out the matters that must be included in a credit contract document.

Clause 16 deals with the form and expression of contract documents.

Clause 17 provides that any alteration to a contract document after it is signed by the debtor must be signed or initialled by the debtor.

Clause 18 provides for a copy of the contract document to be provided to the debtor.

Clause 19 enables the debtor to terminate a credit contract before credit is provided.

Clause 20 makes it an offence to contravene the requirements of the Division (maximum penalty \$10,000).

Division 2 Debtor's monetary obligations

Clause 21 prohibits the imposition of monetary liabilities on the debtor that are not consistent with the Code and the imposition of charges not authorised by the contract.

Clause 22 makes it an offence for a credit provider to impose such a prohibited monetary liability or to accept or demand money in respect of such a prohibited monetary liability (maximum penalty \$10,000).

Clause 23 requires the credit provider to make a loan in full in cash or money's worth without deducting interest. The regulations may authorise such a deduction of interest in the case of the first payment of interest charges.

Clause 24 deals with the acceptance of early payments and the crediting of payments under the contract.

Division 3 Interest charges

Clause 25 defines relevant expressions used in the Division.

Clause 26 limits the amount of interest charges under a contract to the amount derived by applying the daily percentage rate to unpaid daily balances.

Clause 27 prohibits a credit provider from requiring payment of (or debiting) interest in advance.

Clause 28 prohibits a higher rate of interest on default except when the debtor is in default in payment, in respect of the amount in default and while the default continues.

Division 4 Fees and charges

Clause 29 enables the regulations to prohibit particular credit fees or charges.

Clause 30 deals with fees or charges passed on to other parties.

Division 5 Credit provider's obligation to account

Clause 31 requires the credit provider to provide the debtor with statements of account and specifies the frequency at which they are to be provided.

Clause 32 specifies the information to be contained in a statement of account.

Clause 33 provides that the opening balance of a statement of account must not exceed the closing balance of the previous statement.

Clause 34 deals with the provision by the credit provider to a debtor or guarantor on request of statements of amounts owing and certain other matters.

Clause 35 enables the Court to order the credit provider to provide a statement required under the Division.

Clause 36 deals with disputed accounts.

Division 6 Certain transactions not to be treated as contracts

Clause 37 provides that the requirements for making new contracts do not apply to the provision of credit by authorised deferrals or waivers of money due under a contract or by authorised changes to the contract.

Part 3 Related mortgages and Guarantees

Division 1 Mortgages

This Division applies to a mortgage (under which the mortgagor is a natural person or a strata corporation) which secures obligations under a credit contract or related guarantee.

Clause 38 deals with the form of mortgages.

Clause 39 requires the credit provider to provide the mortgagor with a copy of the mortgage.

Clause 40 prohibits mortgages over all the property of the mortgagor.

Clause 41 restricts mortgages over future property.

Clause 42 deals with the mortgage of goods supplied under a continuing credit contract.

Clause 43 deals with all accounts mortgages.

Clause 44 prohibits third party mortgages.

Clause 45 specifies the maximum amount that may be secured under a mortgage.

Clause 46 prohibits certain securities as a mortgage security, such as employees' remuneration or superannuation or cheques issued by the debtor.

Clause 47 requires the consent of the credit provider or the Court to the assignment or disposal of mortgaged property by the mortgagor.

Clause 48 sets out the conditions that a credit provider may impose on the consent to any such assignment or disposal of mortgaged property.

Clause 49 makes it an offence for the credit provider to contravene the Division (maximum penalty \$5,000).

Division 2 Guarantees

This Division applies to a guarantee (under which the mortgagor is a natural person or a strata corporation) which secures obligations under a credit contract or related guarantee.

Clause 50 deals with the form of guarantees.

Clause 51 requires the credit provider to make pre-contractual disclosures to the proposed guarantor. The disclosures are to comprise the credit contract (containing the matters that are required to be included in the contract document by clause 15) and an information statement of the guarantor's statutory rights and obligations.

Clause 52 requires the credit provider to provide the guarantor with a copy of the guarantee and related credit contract.

Clause 53 enables the guarantor to withdraw from the guarantee before credit is first provided and in certain other cases.

Clause 54 deals with the extension of a guarantee.

Clause 55 imposes limits on the liability of a guarantor.

Clause 56 deals with increases in the liability of a guarantor.

Clause 57 makes it an offence for the credit provider to contravene the Division (maximum penalty \$5,000).

Part 4 Changes to obligations under credit contracts, mortgages and guarantees

Division 1 Unilateral changes by credit provider

The Division sets out procedures for the notice that must be given by credit providers of unilateral changes by credit providers to credit contracts, mortgages and guarantees and other requirements relating to such changes.

Clause 58 applies the Division to unilateral changes by credit providers to credit contracts, mortgages and guarantees. It makes it clear that it will not apply to specified changes to annual percentage rates, repayments, the terms of credit contracts and other changes made under Division 3. The Division does not confer any additional power to unilaterally change a credit contract.

Clause 59 sets out notice procedures for notice by credit providers of changes to annual percentage rates and changes in the manner in which interest is calculated or applied under credit contracts. Notice of changes in annual percentage rates must be given not later than when the change concerned takes effect. Notice of changes in the manner in which interest is calculated or applied must be given at least 30 days before the change concerned takes effect. It will be an offence not to comply with the appropriate procedure (maximum penalty \$10,000).

Clause 60 sets out notice procedures for notice by credit providers of changes relating to repayments under credit contracts. Notice of any such changes must be given at least 30 days before the change concerned takes effect. It will be an offence not to comply (maximum penalty \$10,000).

Clause 61 sets out notice procedures for notice by credit providers of changes relating to credit fees or charges under credit contracts. Notice of any such changes must be given at least 30 days before the change concerned takes effect. It will be an offence not to comply with the appropriate procedure (maximum penalty \$10,000).

Clause 62 provides for the effect of a decision by a credit provider not to provide any further credit under a continuing credit contract. Notice of the decision must be given by the credit provider to the debtor as soon as practicable after the decision is made, as well as after any decision to reduce the credit limit. It will be an offence not to comply with the appropriate procedure (maximum penalty \$10,000). A credit provider may not increase a credit limit under a continuing credit contract unless the debtor has requested it or consented to it in writing.

Clause 63 sets out notice procedures for notice by credit providers of other unilateral changes by credit providers to credit contracts, mortgagees and guarantees. Notice of any such changes must be given at least 30 days before the change concerned takes effect. It will be an offence not to comply with the appropriate procedure (maximum penalty \$10,000).

Clause 64 prohibits charges payable on early termination of a credit contract or on prepayment of an amount under a credit contract from being unilaterally increased by a credit provider if the annual percentage rate under a contract is currently fixed for a specified term (including the whole term) of the contract.

Division 2 Changes by agreement of parties

Clause 65 sets out notice procedures for credit providers of changes agreed by the parties to credit contracts, mortgagees and guarantees. Notice of any such changes must be given not later than 30 days after the agreement. It will be an offence not to comply with the appropriate procedure (maximum penalty \$10,000). A credit provider must also give the debtor a written notice containing the information required by the regulations if the parties agree to increase the credit provided under a credit contract (maximum penalty \$10,000).

Division 3 Changes on grounds of hardship and unjust transactions

Clause 66 entitles a debtor to seek the credit provider's agreement to changes to the period of a credit contract together with postponement or reduction of repayments, or postponement of repayments under the contract, if the debtor is unable reasonably, because of illness, unemployment or other reasonable cause to meet obligations under the contract. The provision and the other provisions of the Division apply if the maximum possible amount of credit under the contract is not more than \$125,000.

Clause 67 sets out notice procedures for a credit provider of changes agreed by the parties after any such application by the debtor. Notice of any such changes must be given not later than 30 days after the agreement. It will be an offence not to comply with the appropriate procedure (maximum penalty \$5,000).

Clause 68 empowers the Court by order to change the terms of the credit contract on the application of the debtor if a credit provider refuses an application for changes under clause 66. The Court is empowered to stay enforcement proceedings and to make other orders until it determines the application.

Clause 69 enables a credit provider to apply to the Court to vary an order for changes or an associated or interim order.

Clause 70 empowers the Court to re-open transactions giving rise to a contract, mortgage or guarantee or a change to a contract, mortgage or guarantee, if satisfied that, in the circumstances when it was entered into or changed, it was unjust. The matters which the Court is required to consider and which it may consider are set out. Circumstances which were not reasonably foreseeable may not be considered but subsequent conduct of the parties may be considered.

Clause 71 lists the actions that the Court may take if it re-opens a transaction.

Clause 72 empowers the Court to annul or reduce a change to the annual percentage rate or rates under a credit contract, or to annul or reduce an establishment fee or charge or a fee or charge payable on early termination of a credit contract or for prepayment of an amount under a credit contract, if satisfied that it is unconscionable. The only circumstances in which a change to the annual percentage rate or rates or a fee or charge payable on early termination or for prepayment of an amount is unconscionable are set out. Matters to be considered in determining whether an establishment fee is unconscionable are also set out.

Clause 73 limits the time within which applications may be made under the Division.

Clause 74 enables the Court to join as parties to proceedings additional persons who have an interest in the profits of a credit contract or mortgage, or a beneficial interest in a credit contract or mortgage, and to make orders affecting the persons if the Court holds the credit contract or mortgage to be unjust.

Part 5 Ending and enforcing credit contracts, mortgages and guarantees

Division 1 Ending of credit contract by debtor

Clause 75 sets out the right of a debtor or guarantor to pay out a credit contract, at any time and the amounts which make up the total required to pay out a credit contract.

Clause 76 requires the credit provider to provide a statement of a pay out figure on request by a debtor or guarantor and sets out the requirements for such a statement. It will be an offence not to comply (maximum penalty \$5,000).

Clause 77 empowers the Court to determine the amount of a pay out figure if it is not provided by the credit provider. The credit contract may be discharged by the tender of the amount.

Clause 78 sets out the procedures to be followed by a credit provider and a debtor where the debtor wishes to return, and have the credit provider sell, goods bought under a sale of goods by instalments or subject to a mortgage. It will be an offence for a credit provider not to comply (maximum penalty \$5,000).

Clause 79 gives the debtor or mortgagor and a mortgagee under a previous mortgage the right to apply to the Court for an order for compensation or payment by a credit provider. The Court may make an order if it is not satisfied that the credit provider complied with the procedures for the sale of surrendered goods.

Division 2 Enforcement of credit contracts, mortgages and guarantees

Clause 80 sets out the default notice procedures to be followed by a credit provider before the credit provider can begin enforcement proceedings against a defaulting debtor or mortgagor. It is in addition to any other law relating to the enforcement of real property mortgages.

Clause 81 provides for the right of a debtor or mortgagor to remedy a default within the period specified in a default notice and the effect of doing so.

Clause 82 sets out the procedures to be followed by a credit provider before the credit provider can enforce a judgment against a guarantor. It will be an offence not to comply (maximum penalty \$5,000).

Clause 83 prevents a credit provider from repossessing mortgaged goods if the amount owing is less than 25% of the amount of credit or \$10,000 (whichever is the lesser). It will be an offence to do so (maximum penalty \$10,000).

Clause 84 defines "acceleration clause".

Clause 85 sets out the only circumstances in which an acceleration clause in a credit contract may operate. It is in addition to any other law relating to the enforcement of real property mortgages.

Division 3 Postponement of enforcement proceedings

This Division sets out procedures relating to the postponement of enforcement proceedings, related action, and the operation of acceleration clauses against debtors, mortgagors or guarantors, where the maximum amount of credit under the credit contract is \$125,000. The regulations may prescribe a higher amount.

Clause 86 sets out the right to negotiate a postponement.

Clause 87 provides for the postponement to have effect, subject to specified requirements being complied with.

Clause 88 confers a right on a debtor, mortgagor or guarantor to apply to the Court for a postponement if unable to negotiate a postponement with the credit provider. The Court is empowered to stay enforcement proceedings and to make an order for postponement and other orders.

Clause 89 enables a credit provider to apply to the Court to vary an order for postponement or an associated order.

Division 4 Enforcement procedures for goods mortgaged

Clause 90 enables a credit provider to require a mortgagor under a goods mortgage to give the credit provider information about the location of the mortgaged goods. It will be an offence not to comply (maximum penalty \$5,000).

Clause 91 states the circumstances in which a credit provider may enter residential premises to take possession of mortgaged goods under a goods mortgage. It will be an offence not to comply (maximum penalty \$5,000).

Clause 92 gives the Court power to authorise a credit provider to enter residential premises to take possession of mortgaged goods under a goods mortgage.

Clause 93 gives the Court power to order the delivery of mortgaged goods under a goods mortgage to a credit provider and to vary any such order. It will be an offence to contravene an order (maximum penalty \$3,000).

Clause 94 sets out the notice procedures to be followed by a credit provider that has taken possession of mortgaged goods. It will be an offence not to comply (maximum penalty \$5,000).

Clause 95 enables a mortgagor to nominate a purchaser for mortgaged goods of which the credit provider has taken possession. It will be an offence for a credit provider not to offer to sell the goods to the nominated purchaser (maximum penalty \$5,000).

Clause 96 sets out the procedures to be followed by a credit provider for the sale of mortgaged goods of which the credit provider has taken possession. It will be an offence not to comply (maximum penalty \$5,000).

Clause 97 lists the kinds of deductions which the credit provider may make from the proceeds of sale of mortgaged goods.

Clause 98 gives the debtor or mortgagor and a mortgagee under a previous mortgage the right to apply to the Court for an order for compensation or payment by a credit provider. The Court may make an order if it is not satisfied that the credit provider complied with the procedures for the sale of mortgaged goods.

Division 5 Enforcement expenses

Clause 99 prohibits a credit provider from recovering any more than reasonable enforcement expenses from a debtor, mortgagor or guarantor and imposes a civil penalty if the credit provider does not comply.

Part 6 Civil penalties for defaults of credit providers

Division 1 Civil penalties for breach of key disclosure and other requirements

The Division sets out a regime for the imposition of civil penalties for breaches by credit providers of key requirements of the Code in relation to credit contracts and related matters.

Clause 100 sets out the provisions of the Code that contain the key requirements of the Code for breaches of which the provisions of the Division impose liability for civil penalties.

Clause 101 confers on parties to credit contracts, guarantors and the Government Consumer Agency the right to apply to the Court for an order under the Division. It also limits the rights of debtors or guarantors to make an application if a contravention of a key requirement is or has been subject to an application for such an order.

Clause 102 sets out the procedure for applications to the Court to ascertain whether a credit provider has contravened a key requirement and empowers the Court to make an order requiring a civil penalty to be paid by a credit provider if the Court is of the opinion that there has been such a contravention. Matters which are to be taken into account by the Court in determining an application are listed. The Court may suppress publication of an application.

Clause 103 prescribes the maximum amount of civil penalty that may be imposed for a contravention of a key requirement if the application for an order is made by a debtor or guarantor.

Clause 104 provides for the way in which a civil penalty may be paid if the application is made by a debtor or guarantor, that is, either set off against any amount due or becoming due to the credit provider or recovered as a debt due to the debtor or guarantor by the credit provider. The Court may make orders as to payment.

Clause 105 prescribes the maximum amount of civil penalty that may be imposed for a contravention of a key requirement if the application for an order is made by a credit provider or the Government Consumer Agency. The amount is to be calculated on the basis of an upper limit of a total civil penalty of \$500,000 for all contraventions of a key requirement disclosed by a credit provider in Australia.

Clause 106 requires an amount of civil penalty payable after an application for an order by a credit provider or the Government Consumer Agency to be paid into a fund established under another Act for that purpose or, if there is no such fund, to the Government Consumer Agency.

Clause 107 enables a debtor or guarantor to apply for an order for compensation for loss arising from a contravention of a key requirement.

Clause 108 provides for the recognition and registration of orders, and the giving effect to orders, made in other jurisdictions under provisions equivalent to clauses 102 and 105.

Clause 109 gives the Court a discretion to refuse to hear an application on the ground that it is more appropriate that it be determined in another specified jurisdiction and corresponding legislation.

Clause 110 sets out general provisions relating to the number of credit contracts that may be covered by, and notice to be given of, applications for orders by credit providers or the Government Consumer Agency.

Clause 111 gives the Government Consumer Agency standing to become a party to proceedings under the Division.

Clause 112 empowers the Court to make directions to protect the interests of a debtor or guarantor who has made an application for an order and makes it clear that, apart from any relevant directions, the application does not prevent enforcement action from being taken by the credit provider.

Clause 113 makes it clear that the Division does not affect any liability for an offence against the Code or regulations.

Division 2 Other civil penalties

Clause 114 empowers the Court to make an order for restitution or compensation against a credit provider if the credit provider contravenes a requirement of or made under the Code. This does not apply if another civil effect is provided for.

Part 7 Related sale contracts

Division 1 Interpretation and application

Clause 115 defines “sale contract”.

Clause 116 describes sale contracts to which the Part applies.

Clause 117 defines “linked credit provider”, “tied continuing credit contract” and “tied loan contract”.

Division 2 Liability of credit providers for suppliers’ misrepresentations

Clause 118 makes a credit provider liable for representations, warranties or statements made by a supplier of goods or services to a debtor in relation to a relevant tied loan contract or tied continuing credit contract. The credit provider is entitled to be indemnified by the person who made the representation, warranty or statement and any person on whose behalf it was made.

Division 3 Liability of credit providers in relation to goods

The provisions of this Division are generally in the same terms as the provisions of section 73 of the *Trade Practices Act 1974* of the Commonwealth, except that they also apply to unincorporated credit providers.

Clause 119 establishes the joint liability of a credit provider (together with a supplier) for loss or damage suffered by a debtor as a result of misrepresentation, breach of contract or failure of consideration in relation to a contract for the supply of goods or services if it was financed by a linked credit provider. The provision also sets out the credit provider’s defences to proceedings arising out of the liability.

Clause 120 contains provisions about the limits on the debtor’s right of action against the linked credit provider under clause 119. The debtor may set off the credit provider’s liability under that provision in proceedings. The

rights of the debtor to bring proceedings solely against the credit provider are limited as is the amount of the liability of the credit provider. Procedures for enforcement of judgments against the credit provider in relation to the liability are also set out.

Clause 121 establishes the liability of the supplier to the linked credit provider for the loss suffered by the credit provider as a result of liability under clause 119.

Clause 122 empowers a court to award interest in proceedings under clause 119.

Clause 123 subrogates a linked credit provider found liable in proceedings under clause 119 (to the extent that the judgment is enforced against the credit provider) to the rights that the debtor would have had against the supplier or any other person but for the judgment as a result of the cause of the liability.

Division 4 Termination of related transactions

Clause 124 confers on a purchaser of goods or services a right to terminate a sale contract if the purchaser fails to obtain credit on reasonable terms, where the purchaser makes it known to the supplier that the credit is required. The resulting rights of the purchaser and supplier are also set out.

Clause 125 entitles a debtor to terminate a tied loan contract or a tied continuing credit contract if the related sale contract is rescinded or discharged. The resulting termination of any related guarantee or mortgage and the resulting rights of the credit provider, debtor, mortgagor and guarantor are also set out. It will be an offence for a supplier not to notify a linked credit provider that a sale contract has been rescinded or discharged (maximum penalty \$5,000).

Clause 126 entitles a debtor to terminate a sale contract to supply maintenance services, and to recover a proportionate rebate of consideration, if a related tied loan contract or tied continuing credit contract is rescinded or discharged before the end of the sale contract. It will be an offence for a credit provider not to notify a debtor of the debtor's rights on any such rescission or discharge (maximum penalty \$5,000).

Clause 127 requires an entitlement to terminate a sale contract or credit contract under the Part to be exercised in writing.

Clause 128 enables the Court to make orders about the termination of a contract under the Part.

Clause 129 states that Part 5 does not apply to the termination of a contract under the Part.

Division 5 Other provisions

Clause 130 prohibits a supplier from requiring a purchaser of goods or services to apply for, or obtain, credit from a particular credit provider (maximum penalty \$10,000).

Clause 131 prohibits a supplier from demanding or accepting payment for goods or services in the form of a post-dated bill of exchange or promissory note with a face value of more than the cash price of the goods or services (maximum penalty \$10,000).

Part 8 Related insurance contracts

Clause 132 defines “credit-related insurance contract”.

Clause 133 prohibits a credit provider or supplier from requiring a debtor or guarantor to take out insurance, or to pay for insurance taken out or arranged by the credit provider or supplier, unless it is compulsory insurance, mortgage indemnity insurance, insurance over mortgaged property or other prescribed insurance (maximum penalty \$10,000). The clause also prohibits a credit provider or supplier from requiring a debtor or guarantor to take out insurance with a particular insurer, or making any unreasonable requirements about insurance terms, in relation to a credit contract or a sale contract in relation to which there is a tied loan contract or tied continuing credit contract (maximum penalty \$10,000). A civil effect is also provided for.

Clause 134 prohibits a credit provider from knowingly providing credit for a premium for insurance over mortgaged property for more than a 1 year period, or from knowingly debiting the premium from the debtor’s account more than 30 days before the beginning of the period of insurance (maximum penalty \$10,000). A civil effect is also provided for.

Clause 135 limits the amount of commission for consumer credit insurance taken out by a debtor which may be paid to or accepted by a credit provider, a supplier under a sale contract in relation to which there is a tied loan contract or tied continuing credit contract, or the agent of the credit provider or supplier (maximum penalty \$10,000). A civil effect is also provided for.

Clause 136 sets out the requirements for copies of insurance policies for credit-related insurance contracts financed by credit contracts to be given by insurers to debtors and for prescribed particulars of credit-related insurance contracts entered into by credit providers and so financed to be given to debtors. It will be an offence not to comply (maximum penalty \$10,000).

Clause 137 sets out procedures to be followed when an insurer rejects a proposal for credit-related insurance to be financed by a credit contract. It will be an offence not to refund or credit in full any amount paid by the debtor (maximum penalty \$10,000).

Clause 138 provides for the termination of a relevant consumer credit insurance contract on the termination of a credit contract and for the results of the termination of the insurance contract.

Clause 139 entitles a debtor to terminate a relevant credit-related insurance contract over mortgaged property on the termination of a credit contract and for the results of the termination of the insurance contract. It will be an offence for a credit provider not to notify a debtor of the debtor's rights on any such termination of a credit contract (maximum penalty \$5,000).

Part 9 Advertising and related conduct

Clause 140 prohibits advertising the availability of credit unless the advertisement complies with certain requirements (particularly in relation to the cost of the credit) (maximum penalty \$10,000). Any reference to the cost of credit must contain the annual percentage rate or rates and any fees or charges that are payable. It may contain the comparison rate.

Clause 141 sets out the circumstances in which a person will be taken to have caused an advertisement to be published and, accordingly, will be liable for any contravention of the advertising requirements.

Clause 142 provides that a printer, publisher or proprietor of a newspaper, a licensee of a broadcasting or television station, an exhibitor of a film or any person acting with the authority of such a person is not liable for a contravention of the credit advertising requirements unless the person suspected or had reason to suspect the advertisement would constitute an offence.

Clause 143 prohibits the disclosure of any interest rates other than the annual percentage rate or the comparison rate (maximum penalty \$10,000).

Clause 144 prohibits the making of false or misleading representations in relation to a matter which is material to entry into a credit contract or related transaction or in attempting to induce a person to enter such a contract or transaction (maximum penalty \$5,000).

Clause 145 prohibits a credit provider or supplier harassing a person in attempting to get that person to apply for credit or enter into a credit contract or related transaction (maximum penalty \$10,000).

Clause 146 prohibits a credit provider visiting a person's residence for the purpose of inducing the person to apply for or obtain credit, except by prior arrangement with the person (maximum penalty \$10,000). This does not apply where the person is visiting the other person's residence for the purpose of offering goods or services for sale and offers credit to finance the sale.

Part 10 Consumer leases

Division 1 Interpretation and application

Clause 147 defines "consumer lease" as a contract for the hire of goods by a natural person or strata corporation where the hirer does not have a right or obligation to purchase the goods.

Clause 148 defines the circumstances in which Part 10 applies to a consumer lease. The basic elements of a consumer lease to which Part 10 applies are as follows:

- the lessee is connected with the jurisdiction concerned
- the goods are hired wholly or predominantly for personal, domestic or household purposes
- a charge is or may be made for the hiring of the goods and the charge, together with any other amount payable under the consumer lease, exceeds the cash price of the goods
- the lessor hires the goods as part of a business.

Clause 149 provides that Part 10 does not apply to leases for a fixed period of 4 months or less or for an indefinite period, employment-related leases or any other leases specified in the regulations as being excluded.

Clause 150 contains presumptions relating to the application of Part 10. In particular, it will be presumed that goods are hired for business (rather than domestic) purposes if the lessee makes a declaration to that effect before hiring the goods (accordingly Part 10 will not apply to the lease).

Division 2 Form of and information to be included in consumer leases

Clause 151 requires a consumer lease to be in the form of a written document signed by the lessee and containing the information required by Division 2 or the regulations. It is an offence for a lessor to enter into a consumer lease in contravention of the requirements (maximum penalty \$10,000).

Clause 152 sets out the matters that a consumer lease must contain (if ascertainable). These include a description of the goods, the amount of any charges payable (including government charges), the amount of each rental payment, the number of payments required, details as to when the payments are due and information as to when the lease may be terminated.

Clause 153 requires a lessor to give the lessee a copy of the consumer lease, together with a copy of a statement in the prescribed form explaining the rights and obligations of the lessee (maximum penalty \$5,000).

Clause 154 provides that the provision of further goods under a consumer lease or a change in a consumer lease is not necessarily to be treated as creating a new consumer lease or a credit contract.

Division 3 Other provisions applicable to consumer leases

Clause 155 applies specific provisions in the Code (relating to credit contracts) to consumer leases.

Clause 156 requires a lessor to give 30 days' written notice of an intention to repossess goods the subject of a consumer lease (maximum penalty \$5,000). It also contains exceptions to this requirement.

Clause 157 allows a lessee to end a consumer lease at any time by returning the goods hired and provides for the determination of the amount payable on such termination.

Part 11 Miscellaneous

Division 1 Tolerances and assumptions

Clause 158 sets out certain assumptions that may be made in relation to disclosures required by the Code. It also gives power for regulations to be made providing for further assumptions.

Clause 159 gives power for regulations to be made providing for tolerances within which interest, fees and other charges will be taken to comply with the Code.

Clause 160 allows the regulations to vary or provide for further assumptions.

Division 2 Documentary provisions

Clause 161 relates to the form of notices. It includes a power to make regulations in relation to the form of any notice required under the Code.

Clause 162 requires a credit provider to ensure that any credit contract, guarantee or notice given by the credit provider under the Code is easily legible, conforms with any regulations concerning the print or type of the document and is clearly expressed.

Clause 163 requires a credit provider to provide, at the written request of a debtor, mortgagor or guarantor, copies of certain documents in accordance with the requirement set out in the clause (maximum penalty \$3,000).

Clause 164 relates to the signing of documents by a person other than the person required to sign.

Division 3 General provisions

Clause 165 provides that the Code binds the Crown.

Clause 166 provides that the Code applies to a person who is assigned the rights of a credit provider under a contract.

Clause 167 provides that the Code applies for the benefit of a person who is assigned the rights of a debtor, mortgagor or guarantor under a credit contract, mortgage or guarantee.

Clause 168 requires a credit provider to comply with any direction by a debtor who is liable to the credit provider for more than one credit contract as to which contract a payment by the debtor should be applied.

Clause 169 prevents contracting out of the Code.

Clause 170 provides that a credit contract, mortgage or guarantee is not illegal, void or unenforceable, merely because of a contravention of the Code, unless the Code contains an express provision to that effect.

Clauses 171–173 relate to the giving of notice and other documents under the Code.

Clause 174 enables the Court to extend the time for doing things under the Code.

Clause 175 relates to Court orders.

Clause 176 contains provisions relating to acting on behalf of another person. The conduct of an officer, agent or employee of a credit provider acting within his or her actual or ostensible authority will be imputed to the

credit provider. A credit provider or person associated with a credit provider is also prohibited from purporting to act as an agent of a debtor, mortgagor or guarantor in entering into a credit contract, mortgage or guarantee.

Clause 177 gives power for regulations to be made providing for the cross-vesting of administrative and judicial powers conferred by the Code among the participating States and Territories.

Division 4 Provisions relating to offences

Clauses 178 and **179** deal with penalties.

Clause 180 provides that offences against the Code are punishable summarily.

Clause 181 prevents double jeopardy.

Clause 182 makes it an offence to aid, abet or attempt the commission of an offence against the Code.

Clause 183 makes a director or person concerned in the management of a corporation liable for a contravention of the Code by the corporation if the person knowingly authorised or permitted the contravention.

Clause 184 provides for a 3 year limitation period for the bringing of proceedings for an offence against the Code or the regulations. The period may be extended with the consent of the Attorney General.

Schedules

Schedule 1 Principal definitions

Schedule 1 contains definitions of terms used in the Code.

Schedule 2 Miscellaneous provisions relating to interpretation

Schedule 2 contains uniform interpretation provisions of a kind which are usually contained in the Interpretation Act of a State or Territory.