

Credit (Commonwealth Powers) Act 2010 No 6

[2010-6]



New South Wales

Status Information

Currency of version

Historical version for 21 June 2011 to 30 June 2013 (accessed 22 November 2024 at 16:58)

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Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Does not include amendments by**

Cl 8 of Sch 3 to this Act (cl 8 of Sch 3 repeals Division 2 of Part 2 of Sch 3 on 1.7.2013 (2013 (300) LW 21.6.2013))

Cl 9 (3) of Sch 3 to this Act (cl 9 (3) of Sch 3 repeals cl 9 of Sch 3 by proclamation)

Authorisation

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New South Wales

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Credit (Commonwealth Powers) Act 2010 No 6



New South Wales

An Act to adopt the *National Consumer Credit Protection Act 2009* of the Commonwealth and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* of the Commonwealth, and to refer certain matters relating to the provision of credit and certain other financial transactions to the Parliament of the Commonwealth, for the purposes of section 51 (xxxvii) of the *Commonwealth Constitution*; and for other purposes.

1 Name of Act

This Act is the *Credit (Commonwealth Powers) Act 2010*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

adoption means the adoption under section 4 (1).

amendment reference means the reference under section 6 (1).

Commonwealth Credit instrument means any instrument (whether or not of a legislative character) that is made or issued under the National Credit legislation.

express amendment of the National Credit legislation means the direct amendment of the text of the National Credit legislation (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by another Commonwealth Act or by an instrument under a Commonwealth Act, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the National Credit legislation.

National Credit legislation means:

- (a) the *National Consumer Credit Protection Act 2009* of the Commonwealth, and
- (b) the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* of the Commonwealth,

and as in force from time to time.

referred credit matter means a matter relating to either of the following:

- (a) credit, being credit the provision of which would be covered by the expression “provision of credit to which this Code applies” in the relevant version of the National Credit Code,
- (b) consumer leases, being consumer leases each of which would be covered by the expression “consumer lease to which Part 11 applies” in the relevant version of the National Credit Code.

relevant version of the National Credit Code means the text of Schedule 1 to the [National Consumer Credit Protection Act 2009](#) of the Commonwealth as originally enacted, and as later amended by the [National Consumer Credit Protection Amendment Act 2010](#) of the Commonwealth.

relevant version of the National Credit legislation means:

- (a) the [National Consumer Credit Protection Act 2009](#) of the Commonwealth as originally enacted, and as later amended by the [National Consumer Credit Protection Amendment Act 2010](#) of the Commonwealth, and
- (b) the [National Consumer Credit Protection \(Transitional and Consequential Provisions\) Act 2009](#) of the Commonwealth.

(2) Notes included in this Act do not form part of this Act.

4 Adoption of existing legislation

- (1) The relevant version of the National Credit legislation is adopted within the meaning of section 51 (xxxvii) of the [Commonwealth Constitution](#).
- (2) The adoption has effect for a period:
 - (a) beginning when this section commences, and
 - (b) ending at the end of the day fixed under section 5 as the day on which the adoption is to terminate,

but no longer.

5 Termination of adoption

- (1) The Governor may, at any time, by proclamation published on the NSW legislation website, fix a day as the day on which the adoption is to terminate.
- (2) The Governor may, by proclamation published on the NSW legislation website, revoke a proclamation published under subsection (1), in which case the revoked

proclamation is taken (for the purposes of section 4) never to have been published.

- (3) A revoking proclamation has effect only if published before the day fixed under subsection (1).
- (4) The revocation of a proclamation published under subsection (1) does not prevent publication of a further proclamation under that subsection.

6 Reference of matters

- (1) Subject to section 7, any referred credit matter is referred to the Parliament of the Commonwealth, but only to the extent of the making of laws with respect to such a matter by making express amendments of the National Credit legislation.
- (2) The reference of a matter under subsection (1) has effect only:
 - (a) if and to the extent that the matter is not included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under section 51 (xxxvii) of the [Commonwealth Constitution](#)), and
 - (b) if and to the extent that the matter is included in the legislative powers of the Parliament of the State.
- (3) Despite any other provision, the reference has effect for a period:
 - (a) beginning when this section commences, and
 - (b) ending at the end of the day fixed under section 8 as the day on which the reference is to terminate,but no longer.

7 Matters excluded from reference

- (1) A matter referred by section 6 (1) does not include:
 - (a) the matter of making provision with respect to the imposition or payment of State taxes, duties, charges or other imposts, however described, or
 - (b) the matter of making provision with respect to the general system for the recording of estates or interests in land and related information, or
 - (c) the matter of providing for the priority of interests in real property, or
 - (d) the matter of making a law that excludes or limits the operation of a State law, to the extent that the State law makes provision with respect to the creation, holding, transfer, assignment, disposal or forfeiture of a State statutory right.
- (2) In this section:

forfeiture means confiscation, seizure, extinguishment, cancellation, suspension or any other forfeiture.

State law means:

- (a) any Act of the State or any instrument made under such an Act, whenever enacted or made and as in force from time to time, or
- (b) the general law, being the principles and rules of common law and equity to the extent that they have effect in the State from time to time.

State statutory right means a right, entitlement or authority that is granted by or under any Act of the State or any instrument made under such an Act, whenever enacted or made and as in force from time to time, other than a right, entitlement or authority that relates to:

- (a) credit covered by paragraph (a) of the definition of **referred credit matter** in section 3, or
- (b) a consumer lease covered by paragraph (b) of that definition.

8 Termination of reference

- (1) The Governor may, at any time, by proclamation published on the NSW legislation website, fix a day as the day on which the amendment reference is to terminate.
- (2) The Governor may, by proclamation published on the NSW legislation website, revoke a proclamation published under subsection (1), in which case the revoked proclamation is taken (for the purposes of section 6) never to have been published.
- (3) A revoking proclamation has effect only if published before the day fixed under subsection (1).
- (4) The revocation of a proclamation published under subsection (1) does not prevent publication of a further proclamation under that subsection.

9 Amendment of Commonwealth law

For the avoidance of doubt, it is the intention of the Parliament of the State that:

- (a) the National Credit legislation may be expressly amended, or have its operation otherwise affected, at any time after the commencement of this section by provisions of Commonwealth Acts the operation of which is based on any legislative powers that the Parliament of the Commonwealth has on account of a reference of any matters, or the adoption of the relevant version of the National Credit legislation, under section 51 (xxxvii) of the [Commonwealth Constitution](#), and
- (b) the National Credit legislation may be expressly amended, or have its operation otherwise affected, at any time after the commencement of this section by provisions

of Commonwealth Acts the operation of which is based on any legislative powers that the Parliament of the Commonwealth has apart from a reference of any matters, or the adoption of the relevant version of the National Credit legislation, under section 51 (xxxvii) of the [Commonwealth Constitution](#), and

- (c) the National Credit legislation may have its operation affected, otherwise than by express amendment, at any time by provisions of Commonwealth Credit instruments.

10 Effect of termination of amendment reference before termination of adoption of Commonwealth Acts

- (1) If the amendment reference is terminated but the adoption of the relevant version of the National Credit legislation is not terminated, the termination of the amendment reference does not affect:
 - (a) laws that were made under the amendment reference (but not repealed) before that termination (whether or not they have come into operation before that termination), or
 - (b) the continued operation in this State of the National Credit legislation as in operation immediately before that termination or as subsequently amended or affected by:
 - (i) laws referred to in paragraph (a) that come into operation after that termination, or
 - (ii) provisions referred to in section 9 (b) or (c).
- (2) Accordingly, the amendment reference continues to have effect for the purposes of subsection (1) unless the adoption is terminated.
- (3) Subsection (1) does not apply to or in relation to an amendment of the National Credit legislation that is excluded from the operation of this section by the proclamation that terminates the amendment reference.
- (4) For the purposes of subsection (1):
 - (a) the laws referred to in subsection (1) (a) include Commonwealth Credit instruments, and
 - (b) the reference in subsection (1) (b) to the National Credit legislation as in operation immediately before the termination of the amendment reference includes that legislation as affected by Commonwealth Credit instruments that have come into operation before that time.

Schedules 1, 2 (Repealed)

Schedule 3 Savings, transitional and other provisions

Part 1 General

1 Definitions

In this Schedule:

ASIC means the Australian Securities and Investments Commission.

former consumer credit legislation means any of the following (as in force immediately before its repeal by Schedule 1 to this Act):

- (a) the *Consumer Credit (New South Wales) Act 1995* (including the *Consumer Credit (New South Wales) Code* and the *Consumer Credit (New South Wales) Regulations*),
- (b) the *Consumer Credit Administration Act 1995*,
- (c) the *Consumer Credit Administration Regulation 2002*,
- (d) the *Consumer Credit (New South Wales) Special Provisions Regulation 2007*.

Note—

This definition is relevant for the carrying forward of certain provisions (including investigation and enforcement powers) for the purposes of the application in NSW, on a transitional basis, of a maximum annual percentage rate for credit contracts, the regulation of finance broking and certain other matters.

National Credit Code means the *National Credit Code* as set out in Schedule 1 to the *National Consumer Credit Protection Act 2009* of the Commonwealth.

National Credit legislation means:

- (a) the *National Consumer Credit Protection Act 2009* of the Commonwealth, and
- (b) the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* of the Commonwealth.

pre-Credit Code legislation means any of the following (as in force immediately before its repeal by Schedule 1 to this Act):

- (a) the *Credit Act 1984*,
- (b) the *Credit (Home Finance Contracts) Act 1984*,
- (c) the *Credit (Savings and Transitional) Regulation 1984*,
- (d) the *Credit (Home Finance Contracts) (Savings and Transitional) Regulation 1984*.

2 Regulations

- (1) The Governor may make regulations containing provisions of a savings or transitional nature consequent on:
 - (a) the enactment of this Act, or
 - (b) the transition from the application of the provisions of the former consumer credit legislation to the application of the provisions of the National Credit legislation, or
 - (c) the enactment of the *Credit (Commonwealth Powers) Amendment (Maximum Annual Percentage Rate) Act 2011*.
- (2) If such a regulation so provides, it has effect despite any other provision of this Schedule.
- (3) A provision of a regulation made under this clause may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (4) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.
- (5) Without limiting subclause (1), the regulations under that subclause may make provision for or with respect to matters of a savings or transitional nature consequent on the repeal of Division 2 of Part 2 of this Schedule and clause 9. Those matters include (but are not limited to) providing for the continuing application, with any necessary modifications, of that Division and clause after their repeal to any or all of the contracts to which they applied immediately before their repeal.

Part 2 Provisions consequent on enactment of this Act

Division 1 Financial counselling trust fund

3 Continuation of fund

- (1) The financial counselling trust fund established in accordance with the regulations under the *Credit Act 1984* (as in force immediately before its repeal by Schedule 1 to this Act) is continued.

Note—

The trust fund was established by a trust deed executed on 6 August 1993 by the Minister for Consumer Affairs. A copy of the trust deed is available for inspection on the Department's website.

- (2) Any money in the trust fund is to be applied for the following purposes:
- (a) the provision of funding to community based non-profit organisations that operate in New South Wales to provide financial counselling or train persons in financial counselling,
 - (b) the provision of funding to non-profit organisations that operate within New South Wales which, or persons who, satisfy the trustees of the fund that they can educate the public of New South Wales in any matter related to the management of personal finances.

Division 2 Maximum annual percentage rate for new credit contracts

4 Definition and application of Division

- (1) In this Division, ***annual percentage rate, associated, continuing credit contract, credit contract, credit fees and charges, credit provider*** and ***debtor*** have the same meanings as in the National Credit Code.
- (2) This Division applies in relation to credit contracts entered into on or after the commencement of this Division.

5 Credit contracts must not exceed maximum annual percentage rate

- (1) **Offence provision** A credit provider must not enter into a credit contract if the annual percentage rate in respect of the credit contract exceeds 48% (the ***maximum annual percentage rate***) as calculated in accordance with clause 7.
- Maximum penalty: 100 penalty units.
- (2) **Civil effect** Any provision of a credit contract that imposes an annual percentage rate that exceeds the maximum annual percentage rate is void to the extent that it does so.
- (3) If an amount prohibited by subclause (1) is paid, it may be recovered as a debt.
- (4) Interest charges and all credit fees and charges imposed or provided for under a credit contract are to be included in calculating the maximum annual percentage rate under the contract.
- (5) For the purposes of subclause (4), credit fees and charges imposed or provided for under a credit contract are taken to include the following, whether or not payable under the contract:
- (a) a fee or charge payable by the debtor to any person for an introduction to the credit provider,

- (b) a fee or charge payable by the debtor to any person for any service if the person has been introduced to the debtor by the credit provider,
 - (c) a fee or other charge payable by the debtor to the credit provider for any service relating to the provision of credit, other than a service referred to in paragraph (b).
- (6) For the purposes of subclause (5) (a) and (b), it does not matter whether or not there is an association between the person and the credit provider.
- (7) Despite subclause (4), any credit fees or charges arising from the establishment or maintenance of a temporary credit facility are not required to be included for the purposes of calculating the maximum annual percentage rate if:
- (a) the credit provider is an authorised deposit-taking institution, and
 - (b) the debtor has or had an existing credit contract or debit account with the authorised deposit-taking institution at the time the temporary credit facility is or was established, and
 - (c) the temporary credit facility is related to the existing credit contract or debit account.
- (8) For the purposes of subclause (7), a **temporary credit facility** includes, but is not limited to, an overdraft facility and a short term extension of the total amount of credit available under an existing credit contract.

6 Enforcement of maximum annual percentage rate

- (1) The provisions of the former consumer credit legislation that:
- (a) confer jurisdiction on the Consumer, Trader and Tenancy Tribunal, or on a State court, with respect to the contravention of an obligation involving the maximum annual percentage rate imposed under the former consumer credit legislation, and
 - (b) relate to the enforcement of that rate,
- apply, despite the repeal of those provisions by Schedule 1 to this Act, to and in respect of the maximum annual percentage rate imposed under this Division with such modifications as are necessary.
- (2) For the purposes of subclause (1), the provisions of the former consumer credit legislation that relate to the enforcement of the maximum annual percentage rate under that legislation include, without limitation, provisions relating to the following:
- (a) powers of investigation (including for supervisory purposes),
 - (b) the bringing of any proceedings, or the taking of any other action, with respect to that rate,

(c) the imposition of a civil penalty for contravening an obligation involving that rate.

7 Calculation of maximum annual percentage rate

- (1) For the purposes of calculating the maximum annual percentage rate under a credit contract to which this Division applies, the rate must be calculated as a nominal rate per annum, together with the compounding frequency, in accordance with this clause.
- (2) The maximum annual percentage rate is given by the following formula:

$$i = nr100\%$$

where:

n is the number of repayments per annum to be made under the credit contract annualised, except that:

- (a) if repayments are to be made weekly or fortnightly—**n** is to be 52.18 or 26.09, respectively, and
- (b) if the contract does not provide for a constant interval between repayments—**n** is to be derived from the interval selected for the purposes of the definition of **j** mentioned below.

r is the solution of the following:

$$\sum_{j=0}^t \frac{A_j}{(1+r)^j} = \sum_{j=0}^t \frac{R_j + C_j}{(1+r)^j}$$

where:

j is the time, measured as a multiple (not necessarily integral) of the interval between contractual repayments that will have elapsed since the first amount of credit is provided under the credit contract, except that if the contract does not provide for a constant interval between repayments an interval of any kind is to be selected by the credit provider as the unit of time.

t is the time, measured as a multiple of the interval between contractual repayments (or other interval so selected), that will elapse between the time when the first amount of credit is provided and the time when the last repayment is to be made under the contract.

A_j is the amount of credit to be provided under the contract at time **j** (the value of **j** for the provision of the first amount of credit is taken to be zero).

R_j is the repayment to be made at time **j**.

C_j is the fee or charge (if any) payable by the debtor at time **j** (**j** is taken to be zero for

any such fee or charge payable before the time of the first amount of credit provided) in addition to the repayments R_j , being a credit fee or charge that is ascertainable when the annual percentage rate is calculated.

- (3) The maximum annual percentage rate must be correct to at least the nearest one hundredth of 1% per annum.
- (4) In the application of the above formulae, reasonable approximations may be made if it would be impractical or unreasonably onerous to make a precise calculation.
- (5) The tolerances that would apply under section 181 of the National Credit Code in relation to the calculation of an amount of interest for the purposes of that Code are taken to apply in relation to the calculation of the maximum annual percentage rate for the purposes of this Division.
- (6) If the credit contract is a continuing credit contract, the following assumptions also apply to the calculation of the maximum annual percentage rate:
 - (a) that the debtor has drawn down the maximum amount of credit that the credit provider has agreed to provide under the contract,
 - (b) that the debtor will pay the minimum repayments specified in the contract,
 - (c) if credit is provided in respect of payment by the credit provider to a third person in relation to goods or services or cash supplied by that third person to the debtor from time to time—that the debtor will not be supplied with any further goods or services or cash,
 - (d) if credit is provided in respect of cash supplied by the credit provider to the debtor from time to time—that the debtor will not be supplied with any further cash.
- (7) For the purposes of the maximum annual percentage rate:
 - (a) the amount of credit is to be the amount (or the maximum amount) required by the debtor, and
 - (b) the term for which credit is provided is to be the term (or the maximum term) required by the debtor.

8 Repeal of Division

The Governor may, by proclamation published on the NSW legislation website, repeal this Division.

Division 3 Other provisions

9 Continuation of maximum annual percentage rate—existing credit contracts

- (1) In this clause:

existing credit contract means a credit contract to which the former consumer credit legislation applied immediately before its repeal by Schedule 1 to this Act.

- (2) The provisions of the former consumer credit legislation that relate to the maximum annual percentage rate under an existing credit contract (including, without limitation, provisions relating to the enforcement of that rate, any powers of investigation with respect to that rate, including for supervisory purposes, and the taking of any proceedings or other action against a credit provider with respect to that rate) continue to apply as if those provisions had not been repealed by Schedule 1 to this Act.
- (3) The Governor may, by proclamation published on the NSW legislation website, repeal this clause.

10 Provision of information and assistance to ASIC

- (1) The Director-General of the Department of Services, Technology and Administration, or a person authorised in writing by the Director-General, may, on the Director-General's or authorised person's own initiative or at the request of ASIC:
 - (a) provide ASIC with such documents and other information in the possession or control of the Director-General that is reasonably required by ASIC in connection with the performance or exercise of its functions under the National Credit legislation, and
 - (b) provide ASIC with such other assistance as is reasonably required by ASIC to perform or exercise a function or power under the National Credit legislation.
- (2) This clause has effect despite any other Act or law.

11 ASIC has certain functions and powers

- (1) The Minister, or a person authorised in writing by the Minister, may enter into an agreement or arrangement with ASIC for the performance of functions or the exercise of powers by ASIC as an agent of the State, even if those functions or powers are or may be conferred on another person or body by or under a law of the State.
- (2) An agreement or arrangement of a kind referred to in subclause (1) has effect by force of this clause despite any provision of a law of the State with respect to any function or power that is the subject of the agreement or arrangement.

12 Pending proceedings before CTTT

Any proceedings relating to any matter arising under the provisions of the former consumer credit legislation or the pre-Credit Code legislation that were commenced in the Consumer, Trader and Tenancy Tribunal before the commencement of this clause, but were not finally determined as at that commencement, may continue to be dealt with or otherwise determined (including for the purposes of any appeal or rehearing in relation to

those proceedings) as if those provisions had not been repealed by Schedule 1 to this Act.

13 (Repealed)

14 Regulation of pre-Credit Code contracts

(1) In this clause:

pre-Credit Code contract means a contract to which the *Credit Act 1984* or the *Credit (Home Finance Contracts) Act 1984* applied immediately before their repeal by Schedule 1 to this Act.

(2) The provisions of the former consumer credit legislation and the pre-Credit Code legislation (including, without limitation, provisions relating to enforcement, any powers of investigation, including for supervisory purposes, and the taking of any proceedings or other action) continue to apply to and in respect of a pre-Credit Code contract as if those provisions had not been repealed by Schedule 1 to this Act.

15 Construction of references to former consumer credit legislation

(1) In any document:

(a) a reference to any former consumer credit legislation extends to the National Credit legislation, and

(b) a reference to a provision of any former consumer credit legislation extends to the corresponding provision (if any) of the National Credit legislation.

(2) In this clause, **document** means any Act (other than this Act) or statutory instrument, or any other instrument, or any contract or agreement.