

First print



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Current consumer credit legislation is outdated and overly prescriptive.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.



New South Wales

Consumer Credit (New South Wales) Bill 1995

Contents

	Page
Part 1 Preliminary	
1 Name of Act	2
2 Commencement	2
3 Definitions	2
4 Notes in text	2
<hr/>	
Part 2 Consumer Credit (New South Wales) Code and Regulations	
5 Application in New South Wales of the Consumer Credit Code	3
6 Application of uniform regulations under the Consumer Credit Code	3
7 Interpretation of expressions in the Consumer Credit (New South Wales) Code and the Consumer Credit (New South Wales) Regulations	3

Consumer Credit (New South Wales) Bill 1995

Contents

	Page
Part 3 Conferral of judicial and administrative functions	
8 Conferral of judicial functions	5
9 Conferral of administrative functions	5

Part 4 Miscellaneous	
10 Civil penalties payable to financial counselling trust fund	6
11 Maximum annual percentage rate	6
12 Proceedings for offences against the Code or regulations	6
13 Crown to be bound	6
14 Special savings and transitional regulations for New South Wales	7
15 Regulations generally	7
16 Consequential amendments to Credit Act 1984 and other Acts	7
17 Review of Act	7

Schedule 1 Consequential amendments to Credit Act 1984 and other Acts	8
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New South Wales

Consumer Credit (New South Wales) Bill 1995

No. , 1995

A Bill for

An Act to regulate the provision of consumer credit.

Clause 1 Consumer Credit (New South Wales) Bill 1995

Part 1 Preliminary

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Consumer Credit (New South Wales) Act 1995*.

2 Commencement

5

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

3 Definitions

(1) In this Act:

Consumer Credit (Queensland) Act means the *Consumer Credit (Queensland) Act 1994* of Queensland. 10

Consumer Credit (New South Wales) Code means the provisions applying because of section 5 of this Act.

Consumer Credit (New South Wales) Regulations means the provisions applying because of section 6 of this Act. 15

(2) Words and expressions used in this Act and also in the *Consumer Credit (New South Wales) Code* have the same meanings in this Act as they have in that Code.

4 Notes in text

Notes included in this Act are explanatory notes and do not form part of this Act. 20

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

5 Application in New South Wales of the Consumer Credit Code

The *Consumer Credit Code* set out in the Appendix to the *Consumer Credit (Queensland) Act*, as in force for the time being: 5

- (a) applies as a law of New South Wales, and
- (b) as so applying may be referred to as the *Consumer Credit (New South Wales) Code*.

6 Application of uniform regulations under the Consumer Credit Code 10

(1) The regulations in force for the time being under Part 4 of the *Consumer Credit (Queensland) Act*:

- (a) apply as regulations in force for the purposes of the *Consumer Credit (New South Wales) Code*, and 15
- (b) as so applying may be referred to as the *Consumer Credit (New South Wales) Regulations*.

(2) Schedule 2 to the *Consumer Credit (New South Wales) Code* applies in relation to any such regulation.

(3) To the extent to which a provision of any such regulation of a savings or transitional nature takes effect from a day earlier than the day of the regulation's notification in the Government Gazette of Queensland, the provision does not operate in this State to the disadvantage of a person (other than the State or a State authority) by: 20

- (a) decreasing the person's rights, or
- (b) imposing liabilities on the person. 25

7 Interpretation of expressions in the Consumer Credit (New South Wales) Code and the Consumer Credit (New South Wales) Regulations 30

(1) In the *Consumer Credit (New South Wales) Code* and the *Consumer Credit (New South Wales) Regulations*:

Clause 7 Consumer Credit (New South Wales) Bill 1995

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

Legislature of this jurisdiction means the Legislature of New South Wales.

the Code or ***this Code*** means the *Consumer Credit (New South Wales) Code*.

the jurisdiction or ***this jurisdiction*** means New South Wales. 5

(2) The *Acts Interpretation Act 1954*, and other Acts, of Queensland do not apply to:

- (a) the *Consumer Credit Code* set out in the Appendix to the *Consumer Credit (Queensland) Act* in its application as a law of New South Wales, or 10
- (b) the regulations in force for the time being under Part 4 of the *Consumer Credit (Queensland) Act* in their application as regulations in force for the purposes of the *Consumer Credit (New South Wales) Code*.

Part 3 Conferral of judicial and administrative functions

8 Conferral of judicial functions

- (1) The jurisdiction that is expressed to be exercisable by “the Court” under the *Consumer Credit (New South Wales) Code* and the *Consumer Credit (New South Wales) Regulations* is exercisable by the following: 5
- (a) in the case of any jurisdiction prescribed by the regulations for the purposes of this paragraph—only the Commercial Tribunal, 10
- (b) except in the case referred to in paragraph (a)—either the Commercial Tribunal or any court,
- (c) in the case of any jurisdiction prescribed by the regulations for the purposes of this paragraph (and without limiting paragraphs (a) and (b))—a Consumer Claims Tribunal. 15
- (2) The jurisdiction conferred on a court by this section (other than the Commercial Tribunal) is subject to the court’s general jurisdictional limits (so far as they relate to the amounts, or the value of property, with which the court may deal), but is not subject to the court’s other jurisdictional limits. 20
- (3) The regulations may make provision for or with respect to the transfer of proceedings between the Commercial Tribunal and other courts or between other courts.
- (4) In subsections (2) and (3), *court* includes a Consumer Claims Tribunal. 25

9 Conferral of administrative functions

The Commissioner for Consumer Affairs has the functions of the Government Consumer Agency under the *Consumer Credit (New South Wales) Code* and the *Consumer Credit (New South Wales) Regulations*. 30

Part 4 Miscellaneous

10 Civil penalties payable to financial counselling trust fund

The financial counselling trust fund established in accordance with the regulations under the *Credit Act 1984* is the fund into which are to be paid amounts of civil penalty payable under section 106 of the *Consumer Credit (New South Wales) Code*. 5

11 Maximum annual percentage rate

(1) The regulations may prescribe a maximum annual percentage rate for a credit contract or class of credit contracts to which the *Consumer Credit (New South Wales) Code* applies. 10

(2) Division 2 of Part 2 of that Code applies in relation to such a maximum annual percentage rate as if that rate had been prescribed by that Code.

Note. The effect of subsection (2) is that a contract is void to the extent it imposes a monetary liability prohibited under subsection (1) and that any amount paid under the contract may be recovered. In addition the credit provider is guilty of an offence for entering into such a contract. 15

(3) Nothing in this section affects the powers of the Court under Division 3 of Part 4 of the *Consumer Credit (New South Wales) Code* in relation to a contract that is not, by reason of this section, void. 20

Note. Division 3 of Part 4 allows (among other things) the Court to re-open unjust transactions.

12 Proceedings for offences against the Code or regulations

Proceedings for offences against the *Consumer Credit (New South Wales) Code* or the *Consumer Credit (New South Wales) Regulations* (that are punishable summarily) are to be dealt with by a Local Court constituted by a Magistrate sitting alone. 25

13 Crown to be bound

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament permits, the Crown in all its other capacities. 30

14 Special savings and transitional regulations for New South Wales

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or of an Act of Queensland amending the *Consumer Credit Code* set out in the Appendix to the *Consumer Credit (Queensland) Act*. 5
- (2) If such a regulation so provides, it has effect despite any provision of this Act, including the *Consumer Credit (New South Wales) Code*.
- (3) A provision of a regulation made under this section may, if the regulation so provides, take effect from the date of assent to the Act concerned or from a later date. 10
- (4) To the extent to which a provision takes effect from a date earlier than the date of the regulation's publication in the Gazette, the provision does not operate to the disadvantage of a person (other than the State or a State authority) by: 15
- (a) decreasing the person's rights, or
 - (b) imposing liabilities on the person.

15 Regulations generally

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. 20

16 Consequential amendments to Credit Act 1984 and other Acts

Schedule 1 has effect. 25

17 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act. 30
- (3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Schedule 1 Consequential amendments to Credit Act 1984 and other Acts

(Section 16)

1.1 Consumer Claims Tribunals Act 1987 No 206

Section 10 Jurisdiction

5

Insert after section 10 (4):

- (4A) If a matter relating to the provision of credit arises or could arise under the *Consumer Credit (New South Wales) Code*, that matter is not within the jurisdiction of a tribunal unless the tribunal has the jurisdiction conferred on it by or under section 8 of the *Consumer Credit (New South Wales) Act 1995*. 10

1.2 Credit Act 1984 No 94

Insert after section 19:

19A Act not to apply to new credit contracts

15

- (1) Subject to subsection (2), this Act does not apply to a credit contract made on or after the commencement of Schedule 1.2 to the *Consumer Credit (New South Wales) Act 1995*.
- (2) This Act applies to: 20
- (a) a credit contract, other than a continuing credit contract, and to a mortgage or guarantee relating to such a credit contract:
- (i) made on or after the commencement of Schedule 1.2 to the *Consumer Credit (New South Wales) Act 1995* if the offer to enter 25

-
- into it was made before that commencement, and
- (ii) to which this Act would have applied if the credit contract had been made before that commencement, and 5
- (b) a credit contract, other than a continuing credit contract, and to a mortgage or guarantee relating to such a credit contract made on or after that commencement but not later than one month after that commencement if: 10
- (i) the credit contract does not comply with the *Consumer Credit (New South Wales) Code*, and
- (ii) had the credit contract been made before that commencement, this Act would have applied to it and it would have complied with this Act. 15

19B Act to continue to apply in certain cases

- (1) Except as otherwise provided by this section, this Act continues to apply: 20
- (a) to a continuing credit contract entered into before the commencement of Schedule 1.2 to the *Consumer Credit (New South Wales) Act 1995*, but only in respect of anything done or omitted to be done before that commencement, and 25
- (b) to a credit contract of any other kind entered into before that commencement in respect of anything done or omitted to be done, whether before or after that commencement, and
- (c) to a mortgage or guarantee relating to a continuing contract referred to in paragraph (a), but only in respect of anything done or omitted to be done before that commencement, and 30

Consumer Credit (New South Wales) Bill 1995

Schedule 1 Consequential amendments to Credit Act 1984 and other Acts

- (d) to a mortgage or guarantee relating to a credit contract referred to in paragraph (b) in respect of anything done or omitted to be done, whether before or after that commencement.
- (2) If the credit provider under a contract to which this Act continues to apply acts in accordance with a provision of section 34, 35, 66 to 69, 78 to 99, 163, 171, 172 or 173 of the *Consumer Credit (New South Wales) Code*, the credit provider is taken to have acted in accordance with the corresponding provision of this Act. 5
10
- (3) Despite anything to the contrary in subsection (2), section 112 (1) (b) continues to apply in respect of goods subject to a regulated mortgage.
- 1.3 Credit (Home Finance Contracts) Act 1984 No 97**
- Insert after section 2: 15
- 2A Act not to apply to new home finance contracts**
- (1) Subject to subsection (2), this Act does not apply to a home finance contract made on or after the commencement of Schedule 1.3 to the *Consumer Credit (New South Wales) Act 1995*. 20
- (2) This Act applies to a home finance contract, and to a mortgage or guarantee relating to such a contract, made on or after the commencement of Schedule 1.3 to the *Consumer Credit (New South Wales) Act 1995* if the offer to enter into it was made before that commencement. 25
- (3) This Act continues to apply to a home finance contract entered into before that commencement, and to a mortgage or guarantee relating to such a home finance contract, in respect of anything done or omitted to be done, whether before or after that commencement. 30

1.4 Interpretation Act 1987 No 15

Section 21 Meaning of commonly used words

Insert in alphabetical order in section 21 (1):

Consumer Credit (New South Wales) Code means the provisions applying because of section 5 of the *Consumer Credit (New South Wales) Act 1995*.

5

Consumer Credit (New South Wales) Regulations means the provisions applying because of section 6 of the *Consumer Credit (New South Wales) Act 1995*.

1.5 Stamp Duties Act 1920 No 47

10

[1] Section 84EB Exemption of certain loan securities from duty

Insert at the end of paragraph (b) of the definition of "regulated contract" in section 84EB (1):

, or

(c) a credit contract within the meaning of the *Consumer Credit (New South Wales) Code*, being a contract of a class prescribed by the regulations.

15

[2] Section 98

Omit "and 19" from the definitions of *credit contract* and *credit provider* in section 98 (1).

20

Insert instead ", 19 and 19A".

Note The Consumer Credit Code

NOTE

The text of the Consumer Credit Code set out in the Appendix to the Consumer Credit (Queensland) Act 1994 of Queensland (as at the date of its enactment) is set out in the following note. That Code (as in force from time to time) is applied as a law of New South Wales. 5

NOTE—THE CONSUMER CREDIT CODE

PART 1—PRELIMINARY

PART 2—CREDIT CONTRACTS

- Division 1—Negotiating and making credit contracts
- Division 2—Debtor's monetary obligations 10
- Division 3—Interest charges
- Division 4—Fees and charges
- Division 5—Credit provider's obligation to account
- Division 6—Certain transactions not to be treated as contracts

PART 3—RELATED MORTGAGES AND GUARANTEES 15

- Division 1—Mortgages
- Division 2—Guarantees

PART 4—CHANGES TO OBLIGATIONS UNDER CREDIT CONTRACTS, MORTGAGES AND GUARANTEES

- Division 1—Unilateral changes by credit provider 20
- Division 2—Changes by agreement of parties
- Division 3—Changes on grounds of hardship and unjust transactions

PART 5—ENDING AND ENFORCING CREDIT CONTRACTS, MORTGAGES AND GUARANTEES

- Division 1—Ending of credit contract by debtor 25
- Division 2—Enforcement of credit contracts, mortgages and guarantees
- Division 3—Postponement of enforcement proceedings
- Division 4—Enforcement procedures for goods mortgaged
- Division 5—Enforcement expenses

PART 6—CIVIL PENALTIES FOR DEFAULTS OF CREDIT PROVIDERS

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

Division 2—Other civil penalties 5

PART 7—RELATED SALE CONTRACTS

Division 1—Interpretation and application

Division 2—Liability of credit providers for suppliers' misrepresentations

Division 3—Liability of credit providers in relation to goods 10

Division 4—Termination of related transactions

Division 5—Other provisions

PART 8—RELATED INSURANCE CONTRACTS

PART 9—ADVERTISING AND RELATED CONDUCT

PART 10—CONSUMER LEASES 15

Division 1—Interpretation and application

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

Division 3—Other provisions applicable to consumer leases

PART 11—MISCELLANEOUS

Division 1—Tolerances and assumptions 20

Division 2—Documentary provisions

Division 3—General provisions

Division 4—Provisions relating to offences

SCHEDULE 1—PRINCIPAL DEFINITIONS

SCHEDULE 2—MISCELLANEOUS PROVISIONS RELATING TO INTERPRETATION 25

NOTE—CONSUMER CREDIT CODE

PART 1—PRELIMINARY

Short title

1. This Code may be cited as the Consumer Credit Code.

Commencement

5

2. This Code commences as provided under section 2 of the *Consumer Credit (Queensland) Act 1994* of Queensland.

Interpretation generally

3. (1) Schedule 1 contains the principal definitions of words and expressions used in this Code.

10

(2) Schedule 2 contains other miscellaneous provisions relating to the interpretation of this Code.

Meaning of “credit” and “amount of credit”

4. (1) For the purposes of this Code, “credit” is provided if under a contract—

15

- (a) payment of a debt owed by one person (the debtor) to another (the credit provider) is deferred; or
- (b) one person (the debtor) incurs a deferred debt to another (the credit provider).

(2) For the purposes of this Code, the “amount of credit” is the amount of the debt actually deferred.

20

Meaning of “credit contract”

5. For the purposes of this Code, a “credit contract” is a contract under which credit is or may be provided, being the provision of credit to which this Code applies.

25

Provision of credit to which this Code applies

6. (1) This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered into or (in the case of pre-contractual obligations) is proposed to be entered into—

- (a) the debtor is a natural person ordinarily resident in this jurisdiction or a strata corporation formed in this jurisdiction; and

30

(b) the credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes; and	
(c) a charge is or may be made for providing the credit; and	
(d) the credit provider provides the credit in the course of a business of providing credit or as part of or incidentally to any other business of the credit provider.	5
(2) If not all the debtors under a credit contract ordinarily reside, or are strata corporations formed, in this jurisdiction, this Code applies only if credit is first provided under the contract in this jurisdiction.	
(3) If this Code applies to the provision of credit (and to the credit contract and related matters)—	10
(a) this Code applies in relation to all transactions or acts under the contract whether or not they take place in this jurisdiction; and	
(b) this Code continues to apply even though the debtor ceases to be ordinarily resident in this jurisdiction.	15
(4) For the purposes of this section, investment by the debtor is not a personal, domestic or household purpose.	
(5) For the purposes of this section, the predominant purpose for which credit is provided is—	
(a) the purpose for which more than half of the credit is intended to be used; or	20
(b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.	
Provision of credit to which this Code does not apply	25
7. (1) Short term credit. This Code does not apply to the provision of credit limited by the contract to a total period not exceeding 62 days.	
(2) Credit without prior agreement. This Code does not apply to the provision of credit without prior agreement between the credit provider and the debtor. For example, when a cheque account becomes overdrawn but there is no agreed overdraft facility or when a savings account falls into debit.	30

(3) Credit for which only account charge payable. This Code does not apply to the provision of credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided. However, this Code applies if the charge is of a nature prescribed by the regulations for the purposes of this subsection or if the charge exceeds the maximum charge (if any) so prescribed. 5

(4) Joint credit and debit facilities. This Code does not apply to any part of a credit contract under which both credit and debit facilities are available to the extent that the contract or any amount payable or other matter arising out of it relates only to the debit facility. 10

(5) Bill facilities. This Code does not apply to the provision of credit arising out of a bill facility, that is, a facility under which the credit provider provides credit by accepting, drawing, discounting or endorsing a bill of exchange or promissory note. However, the regulations may provide for the application of the Code to the provision of all or any credit arising out of such a facility. 15

(6) Insurance premiums by instalments. This Code does not apply to the provision of credit by an insurer for the purpose of the payment to the insurer of an insurance premium by instalments, even though the instalments exceed the total of the premium that would be payable if the premium were paid in a lump sum, if on cancellation the insured would have no liability to make further payments under the contract. 20

(7) Pawnbrokers. This Code does not apply to the provision of credit by a pawnbroker in the ordinary course of a pawnbroker's business (being a business which is being lawfully conducted by the pawnbroker). However, sections 70-72 (Court may re-open unjust transactions) apply to any such provision of credit. 25

(8) Trustees of estates. This Code does not apply to the provision of credit by the trustee of the estate of a deceased person by way of an advance to a beneficiary or prospective beneficiary of the estate. However, sections 70-72 (Court may re-open unjust transactions) apply to any such provision of credit. 30

(9) Employee loans. This Code (other than this Part, Division 3 of Part 4, Divisions 4 and 5 of Part 5, Part 7, Part 11 and Schedules 1 and 2) does not apply to the provision of credit by an employer, or a related body corporate within the meaning of the Corporations Law of an employer, to an employee 35

or former employee (whether or not it is provided to the employee or former employee with another person). However, for a credit provider who provides credit in the course of a business of providing credit, this subsection applies only to the provision of credit on terms that are more favourable to the debtor than the terms on which the credit provider provides credit to persons who are not employees or former employees of the credit provider or a related body corporate. 5

(10) Regulations may exclude credit. The regulations may exclude, from the application of all or any provisions of this Code, the provision of credit of a class specified in the regulations. In particular (but without limiting the generality of the foregoing), the regulations may so exclude the provision of credit if the amount of the credit exceeds or may exceed a specified amount or if the credit is provided by a credit provider of a specified class. 10

Mortgages to which this Code applies 15

8. (1) This Code applies to a mortgage if—

- (a) it secures obligations under a credit contract or a related guarantee; and
- (b) the mortgagor is a natural person or a strata corporation.

(2) If any such mortgage also secures other obligations, this Code applies to the mortgage to the extent only that it secures obligations under the credit contract or related guarantee. 20

(3) The regulations may exclude, from the application of all or any provisions of this Code, a mortgage of a class specified in the regulations.

Guarantees to which this Code applies 25

9. (1) This Code applies to a guarantee if—

- (a) it guarantees obligations under a credit contract; and
- (b) the guarantor is a natural person or a strata corporation.

(2) If any such guarantee also guarantees other obligations, this Code applies to the guarantee to the extent only that it guarantees obligations under the credit contract. 30

(3) The regulations may exclude, from the application of all or any provisions of this Code, a guarantee of a class specified in the regulations.

Goods leases with option to purchase to be regarded as sale by instalments

10. (1) For the purposes of this Code, a contract for the hire of goods under which the hirer has a right or obligation to purchase the goods, is to be regarded as a sale of the goods by instalments if the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so) exceeds the cash price of the goods. 5

Note: A contract includes a series of contracts, or contracts and arrangements (see Schedule 1). 10

(2) A debt is to be regarded as having been incurred, and credit provided, in such circumstances.

(3) Accordingly, if because of section 6 (1) the contract is a credit contract, this Code (including Part 6) applies as if the contract had always been a sale of goods by instalments, and for that purpose— 15

- (a) the amounts payable under the contract are the instalments; and
- (b) the credit provider is the person who is to receive those payments; and
- (c) the debtor is the person who is to make those payments; and
- (d) the property of the supplier in the goods passes under the contract to the person to whom the goods are hired on delivery of the goods or the making of the contract, whichever occurs last; and 20
- (e) the charge for providing the credit is the amount by which the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so), exceeds the cash price of the goods; and 25
- (f) a mortgage containing the terms and conditions set out in the regulations is taken to have been entered into in writing between the person to whom the goods are hired under the contract and the supplier as security for payment to the supplier of the amount payable to the supplier by the person to whom the goods are hired under the contract; and 30

- (g) any provision in the contract for hiring by virtue of which the supplier is empowered to take possession, or dispose of, the goods to which the contract relates is void.

(4) For the purposes of this section, the amount payable under the contract includes any agreed or residual value of the goods at the end of the hire period or on termination of the contract, but does not include the following amounts—

5

- (a) any amount payable in respect of services that are incidental to the hire of goods under the contract;

- (b) any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the hirer at the earliest opportunity.

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Note: Part 10 (Consumer leases) applies to the contracts specified in that Part for the hire of goods under which the hirer does not have a right or obligation to purchase the goods.

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Presumptions relating to application of Code

11. (1) In any proceedings (whether brought under this Code or not) in which a party claims that a credit contract, mortgage or guarantee is one to which this Code applies, it is presumed to be such unless the contrary is established.

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(2) Credit is presumed conclusively for the purposes of this Code not to be provided wholly or predominantly for personal, domestic or household purposes if the debtor declares, before entering into the credit contract, that the credit is to be applied wholly or predominantly for business or investment purposes (or for both purposes).

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(3) However, such a declaration is ineffective for the purposes of this section if the credit provider (or any other person who obtained the declaration from the debtor) knew, or had reason to believe, at the time the declaration was made that the credit was in fact to be applied wholly or predominantly for personal, domestic or household purposes.

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Note: See section 176 for the circumstances in which a credit provider is taken to have knowledge of or reason to believe something for the purposes of this Code.

(4) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.

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PART 2—CREDIT CONTRACTS

Division 1—Negotiating and making credit contracts

Credit contract to be in form of written contract document

12. A credit contract must be in the form of—
- (a) a written contract document signed by the debtor and the credit provider; or 5
 - (b) a written contract document signed by the credit provider and constituting an offer to the debtor that is accepted, if the terms of the offer provide for it, by the debtor or another authorised person accessing or drawing down credit to incur a liability or by any other act of the debtor that satisfies the conditions of the offer. 10

Other forms of contract

13. (1) The regulations may authorise other ways of making a credit contract that do not involve a written document.
- (2) In that case, the provisions of this Division apply with such modifications as are prescribed by the regulations. 15

Pre-contractual disclosure

14. (1) A credit provider must not enter into a credit contract unless the credit provider has given the debtor—
- (a) a pre-contractual statement setting out the matters required by section 15 to be included in the contract document; and 20
 - (b) an information statement in the form required by the regulations of the debtor's statutory rights and statutory obligations.
- (2) Those statements must be given—
- (a) before the contract is entered into; or 25
 - (b) before the debtor makes an offer to enter into the contract, whichever first occurs.
- (3) Before entering into a credit contract, the credit provider may inform the debtor of the comparison rate. If the credit provider does so, the comparison rate must be calculated as prescribed by the regulations and be accompanied by the warnings set out in the regulations. 30

(4) The pre-contractual statement must contain the financial information specified by the regulations in the form prescribed by the regulations.

(5) The pre-contractual statement may be the proposed contract document or be a separate document or documents.

(6) A document forming part of a pre-contractual statement consisting of more than one document when the pre-contractual statement is first given must indicate that it does not contain all of the required pre-contractual information. 5

(7) A pre-contractual statement may be varied, within the time referred to in subsection (2), by written notice containing particulars of the variation given to the debtor. 10

Matters that must be in contract document

15. The contract document must contain the following matters—

(A) Credit provider's name.

The credit provider's name. 15

(B) Amount of credit.

(a) If the amount of the credit to be provided is ascertainable, that amount and the persons, bodies or agents (including the credit provider) to whom the amount is to be paid and the amounts payable to them, to the extent that they are ascertainable. 20

(b) If the amount of the credit to be provided is not ascertainable, the maximum amount of credit agreed to be provided, or the credit limit under the contract, if any.

(c) If the credit is provided by the supplier for a sale of land or goods by instalments, a description of the land and its price or of the goods and their cash price. 25

(C) Annual percentage rate or rates.

(a) The annual percentage rate or rates under the contract.

(b) If there is more than one rate, how each rate applies. 30

(c) If an annual percentage rate under the contract is determined by referring to a reference rate—

- (i) the name of the rate or a description of it; and
 - (ii) the margin or margins (if any) above or below the reference rate to be applied to determine the annual percentage rate or rates; and
 - (iii) where and when the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and 5
 - (iv) the current annual percentage rate or rates.
- (D) Calculation of interest charges.**
- The method of calculation of the interest charges payable under the contract and the frequency with which interest charges are to be debited under the contract. 10
- (E) Total amount of interest charges payable.**
- The total amount of interest charges payable under the contract, if ascertainable (but only if the contract would, on the assumptions in sections 158 and 160, be paid out within 7 years of the date on which credit is first provided under the contract). 15
- (F) Repayments.**
- (a) If more than one repayment is to be made—
 - (i) the amount of the repayments or the method of calculating the amount; and 20
 - (ii) if ascertainable when the contract is made—the number of the repayments, the period over which they are to be paid and the total amount of the repayments; and 25
 - (iii) when the first repayment is to be paid, if ascertainable, and the frequency of payment of repayments.
 - (b) If the contract provides for a minimum repayment, the amount of that repayment, if ascertainable, but, if not, the method of calculation of the minimum repayment. 30
- (G) Credit fees and charges.**
- (a) A statement of the credit fees and charges that are, or may become, payable under the contract, and when each such fee or charge is payable, if ascertainable. 35

-
- (b) The amount of any such fee or charge if ascertainable, but, if not, the method of calculation of the fee or charge, if ascertainable.
 - (c) The total amount of credit fees and charges payable under the contract to the extent that it is ascertainable. 5
- (H) Changes affecting interest and credit fees and charges.**
- If the annual percentage rate or rates or the amount or frequency of payment of a credit fee or charge or instalment payable under the contract may be changed, or a new credit fee or charge may be imposed, a statement or statements to that effect and of the means by which the debtor will be informed of the change or the new fee or charge. 10
- (I) Statements of account.**
- The frequency with which statements of account are to be provided to the debtor (except in the case of a credit contract for which the annual percentage rate is fixed for the whole term of the contract and under which there is no provision for varying the rate). 15
- (J) Default rate.**
- (a) If the contract is a contract under which a default rate of interest may be charged when payments are in default—a statement to that effect and the default rate and how it is to be applied. 20
 - (b) If the default rate under the contract is determined by referring to a reference rate—
 - (i) the name of the rate or a description of it; and 25
 - (ii) the margin or margins (if any) above or below the reference rate to be applied to determine the default rate; and
 - (iii) when and where the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and 30
 - (iv) the current default rate.
- (K) Enforcement expenses.**
- A statement that enforcement expenses may become payable under the credit contract or mortgage (if any) in the event of a breach. 35

(L) Mortgage or guarantee.

- (a) If any mortgage or guarantee is to be or has been taken by the credit provider, a statement to that effect.
- (b) In the case of a mortgage, a description of the property subject to, or proposed to be subject to, the mortgage, to the extent to which it is ascertainable. 5

(M) Commission.

If a commission is to be paid by or to the credit provider for the introduction of credit business or business financed by the contract— 10

- (a) a statement of that fact; and
- (b) the person by whom the commission is payable; and
- (c) the person to whom the commission is payable; and
- (d) the amount if ascertainable.

Commission does not include fees payable by a supplier under a merchant service agreement with a credit provider, an amount payable in connection with a credit-related insurance contract or commission paid to employees of the credit provider. 15

(N) Insurance financed by contract.

If the credit provider knows that the debtor is to enter into a credit-related insurance contract and that the insurance is to be financed under the credit contract— 20

- (a) the name of the insurer; and
- (b) the amount payable to the insurer or, if it is not ascertainable, how it is calculated; and 25
- (c) the kind of insurance and any other particulars that may be prescribed by the regulations; and
- (d) if the credit provider knows of any commission to be paid by the insurer for the introduction of the insurance business—a statement that it is to be paid and, if ascertainable, the amount of the commission expressed either as a monetary amount or as a proportion of the premium. 30

(O) **Other information.**

Any information or warning required by the regulations.

Note: Sections 158–160 set out the tolerances and assumptions applicable to matters required to be disclosed.

Form and expression of contract document

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16. The contract document must conform to the requirements of the regulations as to its form and the way it is expressed and, subject to any such requirements, may consist of one or more separate documents.

Alteration of contract document

17. (1) An alteration of (including an addition to) a contract document by the credit provider after it is signed by the debtor is presumed to be ineffective unless, after the alteration is made, the debtor signs or initials in the margin opposite the alteration.

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(2) This section does not apply to an alteration having the effect of reducing the debtor's liabilities under the credit contract.

15

Copy of contract for debtor

18. (1) If a contract document is to be signed by the debtor and returned to the credit provider, the credit provider must give the debtor a copy to keep.

(2) A credit provider must, not later than 14 days after a credit contract is made, give a copy of the contract in the form in which it was made to the debtor.

20

(3) Subsection (2) does not apply to a credit contract the terms of which are accepted by accessing or drawing down credit to incur a liability or by the debtor satisfying the conditions of an offer.

25

When debtor may terminate contract

19. (1) Although a credit contract has been made, the debtor may nevertheless, by written notice to the credit provider, terminate the contract unless any credit has been obtained or attempted to be obtained under the contract.

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(2) Nothing in this section prevents the credit provider from retaining or requiring payment of fees or charges incurred before the termination and which would have been payable under the credit contract.

Offence for non-compliance

20. A credit provider must not—

- (a) enter into a credit contract that contravenes a requirement of this Division; or
- (b) otherwise contravene a requirement of this Division.

5

Maximum penalty—100 penalty units.

Division 2—Debtor's monetary obligations

Prohibited monetary obligations

21. (1) A credit contract must not impose a monetary liability on the debtor—

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- (a) in respect of a fee or charge prohibited by this Code; or
- (b) in respect of an amount of a fee or charge exceeding the amount that may be charged consistently with this Code; or
- (c) in respect of an interest charge under the contract exceeding the amount that may be charged consistently with this Code.

15

(2) Civil effect. Any provision of the credit contract that imposes a monetary liability prohibited by subsection (1) is void to the extent that it does so. If an amount that is prohibited by subsection (1) is paid, it may be recovered.

(3) A credit fee or charge cannot be charged in respect of a credit contract unless the contract authorises it to be charged.

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(4) Civil effect. If an amount that is prohibited by subsection (3) is paid, it may be recovered.

Offences related to prohibited monetary obligations

22. A credit provider must not—

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- (a) enter into a credit contract on terms imposing a monetary liability prohibited by section 21 (1); or
- (b) require or accept payment of an amount in respect of a monetary liability that cannot be imposed consistently with this Code.

Maximum penalty—100 penalty units.

30

Loan to be in money or equivalent

23. (1) A credit provider must not under a credit contract pay an amount to or in accordance with the instructions of the debtor unless the payment is in cash or money's worth and is made in full without deducting an amount for interest charges under the contract.

5

Maximum penalty—100 penalty units.

(2) The regulations may provide that subsection (1) does not apply to the deduction of an amount for the first payment of interest charges under the contract.

Early payments and crediting of payments

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24. (1) A credit provider must accept any payment under a credit contract that is made before it is payable under the contract unless the contract prohibits its early payment.

Maximum penalty—100 penalty units.

(2) A credit provider must credit each payment made under a credit contract to the debtor as soon as practicable after receipt of the payment.

15

Maximum penalty—100 penalty units.

(3) Despite subsection (2), a credit provider is not required to credit a payment made under a credit contract before it is payable under the contract if—

20

(a) the contract prohibits its early payment; and

(b) the credit provider informs the debtor, before accepting the payment, that the payment will not be credited to the debtor before it becomes payable under the contract.

(4) A credit contract may not, under this section, prohibit the paying out of the contract at any time under section 75.

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Division 3—Interest charges

Definitions relating to interest

25. (1) In this Code—

“annual percentage rate” under a credit contract means a rate specified in the contract as an annual percentage rate;

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“**daily percentage rate**” means the rate determined by dividing the annual percentage rate by 365;

“**default rate**” means a higher annual percentage rate permitted by section 28;

“**unpaid balance**” under a credit contract at any time means the difference between all amounts credited and all amounts debited to the debtor under the contract at that time; 5

“**unpaid daily balance**” for a day under a credit contract means the unpaid balance under the contract at the end of that day.

(2) A credit contract may specify, for the purposes of payments under the contract, when a day ends. 10

Limit on interest charges

26. (1) The maximum amount of an interest charge that may be imposed or provided for under a credit contract is—

(a) where only one annual percentage rate applies to the unpaid balances under the contract—the amount determined by applying the daily percentage rate to the unpaid daily balances; or 15

(b) in any other case—the sum of each of the amounts determined by applying each daily percentage rate to that part of the unpaid daily balances to which it applies under the contract. 20

(2) However, an interest charge under a credit contract for a month, a quarter or half a year may be determined by applying the annual percentage rate or rates, divided by 12 (for a month), by 4 (for a quarter) or by 2 (for half a year), to the whole or that part of the average unpaid daily balances to which it applies. The regulations may provide for the calculation of unpaid daily balances in these circumstances. 25

(3) This section does not prevent the imposition of a default rate of interest permitted by section 28.

Early debit or payment of interest charges prohibited

27. (1) A credit provider must not, at any time before the end of a day to which an interest charge applies, require payment of or debit the interest charge. 30

(2) A credit contract may provide for an interest charge to become payable or be debited at any time after the day to which it applies.

(3) The regulations may provide that subsection (1) does not apply to the first payment of interest charges under a credit contract.

Default interest

28. (1) A credit contract may not provide that an annual percentage rate applicable under a credit contract to any part of the unpaid balance will differ according to whether the debtor is in default under the contract. 5

(2) However, a credit contract may provide for such a differential rate if the higher rate is imposed only in the event of default in payment, in respect of the amount in default and while the default continues.

Division 4—Fees and charges 10

Prohibited credit fees or charges

29. The regulations may specify credit fees or charges or classes of credit fees or charges that are prohibited for the purposes of this Code.

Fees or charges passed on to other parties

30. (1) A fee or charge payable by a debtor in respect of an amount payable by the credit provider to another person, body or agency is not to exceed the actual amount payable by the credit provider if that amount is ascertainable when the fee or charge is paid by the debtor. The actual amount payable is to be determined after taking into account any discount or other rebate or other applicable allowance received or receivable by the credit provider or a related body corporate within the meaning of the Corporations Law. 15 20

(2) If the actual amount paid by the credit provider to another person was not ascertainable when the debtor paid an amount to the credit provider for the fee or charge and is less than the amount paid by the debtor, the credit provider must refund or credit the difference to the debtor. 25

(3) Nothing in this section requires a rebate on tax payable by the credit provider or a related body corporate to be taken into account in determining the actual amount payable or paid by a credit provider.

(4) Nothing in this section prevents a commission from being payable or paid in accordance with section 135. 30

Division 5—Credit provider's obligation to account

Statements of account

31. (1) A credit provider that provides credit must give to the debtor, or arrange for the debtor to be given, periodic statements of account in accordance with this Division. 5

Maximum penalty—100 penalty units.

(2) The maximum period for a statement of account is—

- (a) in the case of a continuing credit contract under which credit is ordinarily obtained only by the use of a card—40 days; or
- (b) in the case of any other continuing credit contract—40 days or such longer period, not exceeding 3 months, as is agreed by the credit provider and the debtor; or 10
- (c) in any other case—6 months.

(3) A statement of account need not be given if—

- (a) the credit is provided under a credit contract for which the annual percentage rate is fixed for the whole term of the contract and under which there is no provision for varying the rate; or 15
- (b) no amount has been debited or credited to the account during the statement period and the amount outstanding is zero or below a level fixed by the regulations; or 20
- (c) the credit provider wrote off the debt of the debtor under the credit contract during the statement period and no further amount has been debited or credited to the account during the statement period; or
- (d) the debtor was in default under the credit contract (not being a continuing credit contract) during the statement period and the credit provider has commenced enforcement proceedings; or 25
- (e) the debtor was in default under a continuing credit contract during the preceding 120 days, or during the statement period and the 2 immediately preceding statement periods, whichever is the shorter time, and the credit provider has, before the commencement of the statement period, exercised a right not to provide further credit under the contract and has not provided further credit during the period. 30

Information to be contained in statements of account

32. A statement of account must contain the following matters—

(A) Statement period.

The dates on which the statement period begins and ends.

(B) Balances.

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The opening and closing balances (indicating the amount owed by the debtor at the beginning and at the end of the statement period).

(C) Credit provided.

Particulars of each amount of credit provided by the credit provider to the debtor during the statement period.

10

(D) Identity of supplier.

In the case of a continuing credit contract under which credit is ordinarily obtained only by the use of a card—the identity of the supplier if the credit was provided for any cash, goods or services supplied by another person.

15

(E) Interest charges.

(a) The amount of the interest charge debited to the debtor's account during the statement period and when the interest was debited.

(b) The annual percentage rate or rates and, if required by Part 4, details of any change since the last statement period.

20

(F) Fees and charges.

Particulars of any fees and charges debited to the debtor's account during the statement period.

(G) Payments to or from account.

25

(a) Particulars of each amount paid by the debtor to the credit provider, or credited to the debtor, during the statement period.

(b) Particulars of any amount transferred to or from the account to which the statement relates or to or from any other account maintained under or for the purposes of the credit contract.

30

(H) Amounts payable by debtor.

If a minimum amount is payable by the debtor under a continuing credit contract, a statement of the amount and the date by which it is due.

(I) Insurance payments.

5

If payment to an insurer is made during the statement period under a credit-related insurance contract that is agreed to be financed under the credit contract—

(a) the name of the insurer, the amount paid to the insurer and the kind of insurance;

10

(b) if the credit provider is aware of any commission to be paid by the insurer in relation to the insurance contract—the amount of the commission expressed either as a monetary amount or as a proportion of the premium, if ascertainable when the statement is given;

15

(if not previously disclosed in accordance with this Code).

(J) Alterations.

Any correction of information in a previous statement of account.

(K) Other.

Any other information required by the regulations.

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Note: Sections 158–160 set out the tolerances and assumptions applicable to matters required to be included in statements of accounts.

Opening balance must not exceed closing balance of previous statement

33. (1) The opening balance shown in each successive statement of account must not exceed the closing balance shown in the last statement of account.

25

(2) However, if no statement of account was given for the previous period, the next statement of account required to be given by this Code may have an opening balance that exceeds the closing balance for the previous statement and must provide the particulars referred to in section 32 (C)–(K) in relation to any immediately preceding periods for which statements were not given.

30

Statement of amount owing and other matters

34. (1) A credit provider must, at the request of a debtor or guarantor and within the time specified by this section, provide a statement of all or any of the following—

- (a) the current balance of the debtor's account; 5
- (b) any amounts credited or debited during a period specified in the request;
- (c) any amounts overdue and when each such amount became due;
- (d) any amount payable and the date it became due.

Maximum penalty—100 penalty units. 10

(2) The statement must be given—

- (a) within 14 days, if all information requested relates to a period 1 year or less before the request is given; or
- (b) within 30 days, if any information requested relates to a period more than 1 year before the request is given. 15

(3) A statement under this section may be given orally but if the request for the statement is made in writing the statement must be given in writing.

(4) A credit provider is not required to provide a further written statement under this section if it has, within the 3 months before the request is given, given such a statement to the person requesting it. 20

(5) Except where otherwise ordered by the Court on the application of the debtor or guarantor, a credit provider is not required to provide information in a statement under this section about amounts credited or debited, or which were overdue or payable, more than 7 years before the request is given unless those amounts are currently overdue and payable. 25

Court may order statement to be provided

35. If a statement is not provided within the time required by this Division, the Court may, on the application of the debtor or guarantor, order the credit provider to provide the statement or itself determine the amounts in relation to which the statement was sought. 30

Disputed accounts

36. (1) If a debtor, by written notice to a credit provider, disputes a particular liability entered against the debtor under a credit contract, the

credit provider must give the debtor a written notice explaining in reasonable detail how the liability arises.

(2) A written notice need not be given if the credit provider agrees with the debtor as to the disputed amount and gives the debtor a written notice advising of the agreed liability. 5

(3) If in the case of a continuing credit contract the disputed entry appears in a statement of account in which a date for payment of the amount of the account, or part of that amount, is shown, the notice of dispute must be given to the credit provider on or before that date.

(4) In any other case, the notice of dispute must be given to the credit provider within 30 days of receiving the statement of account in which the amount, or part of that amount, was first shown. 10

(5) The credit provider must not begin enforcement proceedings on the basis of a default arising from the disputed liability until at least 30 days have elapsed from the time the written explanation or advice as to agreement was given. 15

(6) A debtor or credit provider may apply to the Court to have the Court determine a disputed liability and, if satisfied that a liability is genuinely disputed, the Court may determine the matters in dispute and make such consequential orders as it thinks just. 20

(7) If an application is made to the Court under this section within 30 days after the explanation is given, the credit provider must not, without leave of the Court, begin enforcement proceedings on the basis of a default arising from the disputed liability.

Maximum penalty—50 penalty units. 25

(8) This section does not affect a dispute not dealt with, or not arising, under this section.

Division 6—Certain transactions not to be treated as contracts

Deferrals, waivers and changes under contracts

37. The provision of credit as a result of a change to an existing credit contract, or a deferral or waiver of an amount under an existing credit contract, is not to be treated as creating a new credit contract for the purposes of this Code, if the change, deferral or waiver is made in accordance with this Code or the contract. 30

PART 3—RELATED MORTGAGES AND GUARANTEES

Division 1—Mortgages

Note: 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, whether or not it also secures other obligations (see section 8). 5

Form of mortgage

38. (1) A mortgage must be in the form of a written mortgage document that is signed by the mortgagor.

(2) It is sufficient compliance with subsection (1) if—

- (a)** the mortgage is contained in a credit contract signed by the mortgagor; or 10
- (b)** one of the documents comprising the mortgage document is signed by the mortgagor (and the other documents are referred to in the signed document).

(3) However, a goods mortgage need not be in the form of a written mortgage document if the credit provider lawfully had possession of the goods that are subject to the mortgage before the mortgage was entered into, otherwise than because the credit provider supplied the goods (for example, the goods were held by way of security). 15

(4) A mortgage is not enforceable unless it complies with this section. 20

Copy of mortgage for mortgagor

39. If a mortgage is in the form of a written mortgage document and is not part of a credit contract, the credit provider must give the mortgagor a copy to keep, in the form in which it was made, within 14 days after it is made. 25

Mortgages over all property void

40. (1) A mortgage that does not describe or identify the property which is subject to the mortgage is void.

(2) Without limiting subsection (1), a provision in a mortgage that charges all the property of the mortgagor is void. 30

Restriction on mortgage of future property

41. (1) A provision in a mortgage to the effect that the mortgagor creates or agrees to create a mortgage over or in respect of property or a class of property that is to be, or may be, acquired by the mortgagor after the mortgage is entered into is void. 5

(2) However, this section does not apply—

- (a)** to a provision in a mortgage of property that is to be acquired wholly or partly with the credit provided under the credit contract secured by the mortgage; or
- (b)** to a provision in a mortgage relating to property or a class of property (whether or not ascertained) described or identified in the mortgage; or 10
- (c)** to a provision in a mortgage relating to goods acquired in replacement for, or as additions or accessories to, other goods subject to the mortgage; or 15
- (d)** to any other provision specified by the regulations.

Mortgages and continuing credit contracts

42. (1) A provision in a mortgage to the effect that goods supplied from time to time under a continuing credit contract are subject to the mortgage is void. 20

(2) However, this section does not apply to a provision in a mortgage relating to specified goods securing payment of a debt under a continuing credit contract.

All accounts mortgages

43. (1) In addition to securing credit provided by the credit contract or proposed credit contract, or securing obligations under a related guarantee or proposed related guarantee, to which a mortgage initially applies, the mortgage may contain a provision that secures credit provided under another future credit contract or future related guarantee. 25

(2) Any such mortgage is unenforceable in relation to such a future credit contract or future related guarantee unless the credit provider has— 30

- (a)** given the mortgagor a copy of the contract document of the credit contract or proposed credit contract or a copy of the guarantee or proposed guarantee to which the mortgage is to relate; and

(b) subsequently obtained from the mortgagor a written acceptance of the extension of the mortgage or obtained acceptance in some other form provided for by the regulations.

(3) Section 38 (Form of mortgage) does not apply to an extension of a mortgage under this section. 5

Third party mortgages prohibited

44. (1) A credit provider must not enter into a mortgage to secure obligations under a credit contract unless each mortgagor is a debtor under the contract or a guarantor under a related guarantee.

(2) A credit provider must not enter into a mortgage to secure obligations under a guarantee unless each mortgagor is a guarantor under the guarantee or a debtor under the related credit contract. 10

(3) A mortgage which does not comply with this section is unenforceable.

(4) The Court may, on the application of a party to a mortgage that is unenforceable because of this section, order that the credit provider takes such steps as are necessary to discharge the mortgage. 15

Maximum amount which may be secured

45. (1) A mortgage is void to the extent that it secures an amount, in relation to any credit contract which it secures, that exceeds the sum of the amount of the liabilities of the debtor under the credit contract and the reasonable enforcement expenses of enforcing the mortgage. 20

(2) A mortgage is void to the extent that it secures an amount, in relation to any guarantee which it secures, that exceeds the limit of the guarantor's liability under the guarantee and the reasonable enforcement expenses of enforcing the mortgage. 25

(3) This section does not affect a provision of a mortgage permitted by section 43.

Prohibited securities

46. (1) A mortgage cannot be created over employees' remuneration or employment benefits or benefits under a superannuation scheme unless the regulations permit it to do so. 30

(2) An obligation under a credit contract cannot be secured by a cheque, or bill of exchange or promissory note, endorsed or issued by the debtor or guarantor.

(3) A mortgage or security is void to the extent that it contravenes this section.

Assignment or disposal of mortgaged property by mortgagor

47. (1) A mortgagor must not assign or dispose of property that is subject to a mortgage without the credit provider's consent or the authority of the Court under subsection (3). 5

Maximum penalty—50 penalty units.

(2) The credit provider must not unreasonably withhold consent or attach unreasonable conditions to the consent (but a condition requiring security over property of an equivalent kind and value is not to be regarded as unreasonable). 10

(3) The Court may, on application by a mortgagor, authorise the mortgagor to dispose of mortgaged property on conditions determined by the Court if—

- (a) the credit provider fails within a reasonable time to reply to a request for consent to do so by the mortgagor; or 15
- (b) consent is unreasonably withheld, or unreasonable conditions are attached to the consent.

Conditions on consent to assignment or disposal of property subject to mortgage 20

48. (1) As a condition of granting consent to an assignment or disposal of property subject to a mortgage, the credit provider may make any or all of the requirements set out in this section. This section does not limit any other requirements that may be made by the credit provider.

(2) The credit provider may require any breaches of the credit contract to which the mortgage relates and of the mortgage to be remedied. 25

(3) The credit provider may require the mortgagor and the assignee or person to whom the property is disposed to execute and deliver to the credit provider an agreement relating to the assignment or disposal in a form approved by the credit provider under which, without prejudicing or affecting the liability of the mortgagor, the assignee or person to whom the property is disposed agrees with the credit provider— 30

- (a) to be personally liable to pay the amounts due or that become due under the mortgage; and

(b) to perform and observe all other requirements and conditions of the mortgage.

(4) The credit provider may require the mortgagor and the assignee or person to whom the property is disposed to pay the reasonable costs (if any) incurred by the credit provider for—

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(a) stamp duty in respect of the assignment or disposal agreement, or any other document the credit provider reasonably requires to be executed in connection with the assignment or disposal; and

(b) fees payable to a duly qualified legal practitioner.

Offence for non-compliance

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49. (1) A credit provider must not—

(a) enter into a mortgage that contravenes a requirement of this Division; or

(b) otherwise contravene a requirement of this Division.

(2) A credit provider must not enter into a mortgage that is void or unenforceable, or that includes a provision that is void or unenforceable, because of this Division.

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Maximum penalty—50 penalty units.

Division 2—Guarantees

Note: This Division applies to a guarantee (under which the guarantor is a natural person or a strata corporation) to the extent to which it guarantees obligations under a credit contract, whether or not it also guarantees other obligations (see section 9).

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Form of guarantee

50. (1) A guarantee must be in writing signed by the guarantor.

(2) It is sufficient compliance with subsection (1) if the guarantee is contained in a mortgage signed by the guarantor.

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(3) The regulations may make provision for or with respect to the content of guarantees and the way they are expressed.

(4) A guarantee is not enforceable unless it complies with this section and any regulations made under this section.

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Disclosure

51. (1) Before the obligations under a credit contract are secured by a guarantee, the credit provider must give to the prospective guarantor—

- (a) a copy of the contract document of the credit contract or proposed credit contract; and 5
- (b) a document in the form prescribed by the regulations explaining the rights and obligations of a guarantor.

(2) A guarantee is not enforceable unless subsection (1) (a) is complied with.

Copies of documents for guarantor 10

52. A credit provider must, within 14 days after a guarantee is signed and given to the credit provider, give to the guarantor a copy of the guarantee signed by the guarantor and any related credit contract or proposed credit contract (if a copy of the related contract has not previously been given to the guarantor). 15

Guarantor may withdraw before credit is provided

53. (1) Although a guarantee has been made, the guarantor may nevertheless, by written notice to the credit provider—

- (a) withdraw from the guarantee at any time before credit is first provided under the credit contract; or 20
- (b) withdraw from the guarantee after credit is first provided under the contract if the credit contract made differs in some material respect from the proposed credit contract or pre-contractual statement given to the guarantor before the guarantee is signed.

(2) The guarantor may withdraw from a guarantee under this section to the extent only that it guarantees obligations under the credit contract. 25

(3) This section is subject to section 56.

Extension of guarantee

54. (1) In addition to guaranteeing obligations under a credit contract or proposed credit contract to which a guarantee initially applies, a guarantee may contain a provision that makes credit provided under another future credit contract subject to the guarantee. 30

(2) Any such guarantee is unenforceable in relation to such a future credit contract unless the credit provider has—

- (a) given the guarantor a copy of the contract document of that future credit contract; and
- (b) subsequently obtained from the guarantor a written acceptance of the extension of the guarantee or obtained acceptance in some other form provided for by the regulations.

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(3) Section 50 (Form of guarantee) does not apply to an extension of a guarantee under this section.

Limitation of guarantor's liability

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55. (1) Total amount for which guarantor can be liable. A guarantee is void to the extent that it secures an amount, in relation to a credit contract to which this Code applies, that exceeds the sum of the amount of the liabilities of the debtor under the credit contract and the reasonable expenses of enforcing the guarantee, or any lesser amount agreed between the credit provider and the guarantor.

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(2) Unenforceable contracts. Nothing in subsection (1) prevents a credit provider from enforcing a guarantee relating to liabilities under a credit contract that is unenforceable solely because of the debtor's death, insolvency or incapacity or any other act or omission by, or circumstance affecting, the debtor.

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(3) Debtors under 18 years of age. A guarantee which guarantees the liability of a debtor who was under 18 years of age when the liability was incurred cannot be enforced against the guarantor unless it contains a prominent statement to the effect that the guarantor may not be entitled to an indemnity against the debtor.

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(4) Guarantor may limit liabilities under continuing credit contract. In the case of a continuing credit contract, a guarantor may, by notice to the credit provider, limit the guarantee so that it applies only to liabilities related to credit previously provided to the debtor under the credit contract (including any such liabilities not yet debited to the debtor's account) and such further amount (if any) as the guarantor agrees to guarantee.

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(5) Guarantee must not limit indemnity. A guarantee is void to the extent that it limits the guarantor's right to indemnity from the person whose liability the guarantor has guaranteed or it postpones or otherwise purports to limit the guarantor's right to enforce the indemnity against the person.

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(6) **Effect of section.** This section does not affect a provision of a guarantee permitted by section 54.

Increase in guarantor's liabilities

56. (1) If the terms of a credit contract are changed to increase or allow for an increase in liabilities, the liabilities of a guarantor under a guarantee that secures those liabilities are not increased unless— 5

- (a) the credit provider gives to the guarantor a written notice setting out particulars of the change in the terms of the credit contract; and
- (b) the credit provider has subsequently obtained from the guarantor a written acceptance of the extension of the guarantee to those increased liabilities or obtained acceptance in some other form provided for by the regulations. 10

(2) This section does not apply to an increase in liabilities resulting from a change of a kind referred to in section 58 (2) (a) or (b) or to a change of which notice is required to be given under Division 1 of Part 4 (not being a change referred to in section 62 (3) or 63). 15

Offence for non-compliance

57. (1) A credit provider must not—

- (a) enter into a guarantee that contravenes a requirement of this Division; or 20
- (b) otherwise contravene a requirement of this Division.

(2) A credit provider must not enter into a guarantee that is void or unenforceable, or that contains a provision that is void or unenforceable, because of this Division.

Maximum penalty—50 penalty units. 25

PART 4—CHANGES TO OBLIGATIONS UNDER CREDIT CONTRACTS, MORTGAGES AND GUARANTEES

Division 1—Unilateral changes by credit provider

Application of Division

58. (1) This Division applies only to changes made unilaterally by a credit provider under a credit contract, mortgage or guarantee. 30

(2) This Division does not apply to the following changes under a credit contract—

- (a) a change to a new annual percentage rate payable under the contract (not being a rate determined by referring to a reference rate), if both the new rate and when it takes effect are ascertainable from the contract; 5
- (b) an increase in the amount of repayments, if the increase occurs automatically, as specified by the contract, and both the amount of the increase and when it takes effect are ascertainable from the contract; 10
- (c) an increase in the term of a credit contract, if the increase occurs only because of an increase in the annual percentage rate or rates payable under the contract;
- (d) a change made under Division 3.

(3) Nothing in this Division confers on a credit provider or a debtor any power or right to change the credit contract or its terms in addition to those conferred by the contract. 15

Interest rate changes

59. (1) Notification of interest rate changes. A credit provider must, not later than the day on which a change in the annual percentage rate or rates payable under a credit contract takes effect, give to the debtor written notice setting out— 20

- (a) the new rate or rates or, if a rate is determined by referring to a reference rate, the new reference rate; and
- (b) any information required by the regulations. 25

Maximum penalty—100 penalty units.

(2) **Notification by publication.** Notice under subsection (1) may be given by publishing the notice in a newspaper circulating throughout this jurisdiction. A credit provider that gives notice in accordance with this subsection must give to the debtor particulars of the change before or when the next statement of account is sent to the debtor after the change takes effect. 30

Maximum penalty—100 penalty units.

(3) Changes in reference rates. Subsection (1) does not apply to a change in a rate that is determined by referring to a reference rate if the changed reference rate is notified (whether or not by the credit provider) in a newspaper circulating throughout this jurisdiction not later than the date the change takes effect. 5

(4) Notification of other interest changes. A credit provider must, not later than 30 days before a change in the manner in which interest is calculated or applied under a credit contract (including a change in or abolition of any interest free period under the contract) takes effect, give to the debtor written notice setting out— 10

- (a) particulars of the change; and
- (b) any information required by the regulations.

Maximum penalty—100 penalty units.

(5) Interest rate reductions. Subsections (1) and (4) do not apply to a change that reduces the obligations of the debtor under the credit contract. 15

(6) Application. This section applies whether or not the change is a change to the terms of the contract.

Repayment changes

60. (1) Notification of repayment changes. A credit provider must, not later than 30 days before a change in the amount or frequency or time for payment of, or a change in the method of calculation of, instalments or minimum repayments, under a credit contract takes effect, give to the debtor written notice setting out— 20

- (a) particulars of the change; and
- (b) any information required by the regulations. 25

Maximum penalty—100 penalty units.

(2) Repayment reductions. Subsection (1) does not apply to a change that reduces the obligations of the debtor, or extends the time for payment, under the credit contract. The credit provider must, however, give particulars of any such change before or when the next statement of account is sent to the debtor after the change takes effect. 30

Maximum penalty—100 penalty units.

(3) Application. This section applies whether or not the change is a change to the terms of the contract.

Credit fees and charges changes

61. (1) Notification of credit fees and charges changes. A credit provider must, not later than 30 days before a change in the amount of a credit fee or charge (including a new credit fee or charge), or a change in the frequency or time for payment of a credit fee or charge, under a credit contract takes effect, give to the debtor written notice setting out— 5

- (a) particulars of the change; and
- (b) any information required by the regulations.

Maximum penalty—100 penalty units.

(2) Notification by publication. Notice relating to a change in the amount of a credit fee or charge (including a new credit fee or charge) may be given by publishing the notice in a newspaper circulating throughout this jurisdiction. A credit provider that gives notice in accordance with this subsection must give particulars of the change before or when the next statement of account is sent to the debtor after the change takes effect. 10 15

Maximum penalty—100 penalty units.

(3) Credit fee or charge reductions. Subsection (1) does not apply to a change that reduces the obligations of the debtor, or extends the time for payment, under the credit contract. The credit provider must, however, give particulars of any such change before or when the next statement of account is sent to the debtor after the change takes effect. 20

Maximum penalty—100 penalty units.

(4) Application. This section applies whether or not the change is a change to the terms of the contract.

Changes to credit limits etc. in continuing credit contracts 25

62. (1) If a credit provider decides not to provide any further credit under a continuing credit contract, the credit contract continues in force in relation to any credit previously provided under the contract. However, this subsection does not prevent the termination of the contract if otherwise permitted by this Code or the contract. 30

(2) A credit provider must, unless the debtor is in default under the contract, as soon as practicable after deciding not to provide any further credit or to reduce the credit limit, give to the debtor a written notice to that effect if such notice has not previously been given.

Maximum penalty—100 penalty units. 35

(3) A credit provider may increase the credit limit under a continuing credit contract only at the request of the debtor or with the written consent of the debtor.

Other unilateral changes by credit provider

63. (1) A credit provider must not exercise a power under a credit contract, mortgage or guarantee to unilaterally change its terms without giving to the other party, not less than 30 days before the change takes effect, written notice setting out— 5

(a) particulars of the change in the terms of the credit contract, mortgage or guarantee; and 10

(b) any information required by the regulations.

Maximum penalty—100 penalty units.

(2) Subsection (1) does not apply to a change that reduces the obligations of the debtor, or extends the time for payment, under the credit contract. The credit provider must, however, give particulars of any such change before or when the next statement of account is sent to the debtor after the change takes effect. 15

Maximum penalty—100 penalty units.

(3) This section does not apply to a change of which notice is required to be given under section 59, 60, 61 or 62 or which is referred to in section 62 (3). 20

Prohibited increases in liabilities

64. (1) If the annual percentage rate under a credit contract is currently fixed for a specified term (including the whole term) of the contract, the contract cannot be changed unilaterally by a credit provider so as to increase, or change the method of calculation of a fee or charge so as to increase, a fee or charge— 25

(a) payable by the debtor on early termination of the credit contract; or

(b) payable on prepayment of an amount under the credit contract.

(2) The regulations may prescribe circumstances in which such a change is permitted. 30

Division 2—Changes by agreement of parties

Changes by agreement

65. (1) If the parties under a credit contract, mortgage or guarantee agree to change its terms, the credit provider must, within 30 days after the date of the agreement, give to the other party under the agreement a written notice setting out—

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- (a) particulars of the change in the terms of the credit contract, mortgage or guarantee; and
- (b) any information required by the regulations.

Maximum penalty—100 penalty units.

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(2) Subsection (1) does not apply to a change which defers or otherwise reduces the obligations of the debtor for a period not exceeding 90 days or to an agreement to increase the amount of credit under a credit contract.

(3) If the parties under a credit contract propose to increase the amount of credit under the contract by agreement, the credit provider must also, before the agreement is made, give to the debtor a written notice containing the information required by the regulations.

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Maximum penalty—100 penalty units.

(4) This section does not apply to a change made under Division 3.

Division 3—Changes on grounds of hardship and unjust transactions

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Changes on grounds of hardship

66. (1) General principle. A debtor who is unable reasonably, because of illness, unemployment or other reasonable cause, to meet the debtor's obligations under a credit contract and who reasonably expects to be able to discharge the debtor's obligations if the terms of the contract were changed in a manner set out in subsection (2) may apply to the credit provider for such a change.

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(2) Changes. An application by a debtor must seek to change the terms of the contract in one of the following ways—

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- (a) extending the period of the contract and reducing the amount of each payment due under the contract accordingly (without a change being made to the annual percentage rate or rates);

- (b) postponing during a specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates);
- (c) extending the period of the contract and postponing during a specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates). 5

(3) Application. This section and sections 67–69 do not apply to a credit contract under which the maximum amount of credit that is or may be provided is more than \$125 000 (or such other amount as may be prescribed by the regulations). 10

Notice of change

67. A credit provider that enters into an agreement with the debtor on any such application must, within 30 days after the date of the agreement, give to the debtor, and any guarantor under a guarantee related to the contract, a written notice setting out— 15

- (a) particulars of the change in the terms of the credit contract; and
- (b) any information required by the regulations.

Maximum penalty—50 penalty units.

Changes by Court 20

68. (1) If the credit provider does not change the credit contract in accordance with the application, the debtor may apply to the Court to change the terms of the credit contract.

(2) The Court may, after allowing the applicant, the credit provider and any guarantor a reasonable opportunity to be heard, by order change the credit contract in a manner set out in section 66, and make such other orders as it thinks fit, or refuse to change the credit contract. 25

(3) The Court may, if it thinks it appropriate in the circumstances, stay any enforcement proceedings under the credit contract, and make such other orders as it thinks fit, until the application has been determined. 30

Credit provider may apply for variation of change

69. (1) A credit provider under a credit contract that has been changed by an order under section 68 (2) may apply to the Court for an order varying or revoking the order.

(2) A credit provider subject to a stay of enforcement proceedings or other order under section 68 (3) may apply to the Court for an order varying or revoking the stay or order.

(3) On an application under this section, the Court may vary or revoke the order or stay to which the application relates as it thinks fit, or may refuse the application.

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Court may re-open unjust transactions

70. (1) Power to re-open unjust transactions. The Court may, if satisfied on the application of a debtor, mortgagor or guarantor that, in the circumstances relating to the relevant credit contract, mortgage or guarantee at the time it was entered into or changed (whether or not by agreement), the contract, mortgage or guarantee or change was unjust, re-open the transaction that gave rise to the contract, mortgage or guarantee or change.

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(2) **Matters to be considered by Court.** In determining whether a term of a particular credit contract, mortgage or guarantee is unjust in the circumstances relating to it at the time it was entered into or changed, the Court is to have regard to the public interest and to all the circumstances of the case and may have regard to the following—

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(a) the consequences of compliance, or non-compliance, with all or any of the provisions of the contract, mortgage or guarantee;

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(b) the relative bargaining power of the parties;

(c) whether or not, at the time the contract, mortgage or guarantee was entered into or changed, its provisions were the subject of negotiation;

(d) whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the contract, mortgage or guarantee or the change;

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(e) whether or not any of the provisions of the contract, mortgage or guarantee impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the contract, mortgage or guarantee;

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(f) whether or not the debtor, mortgagor or guarantor, or a person who represented the debtor, mortgagor or guarantor, was reasonably able to protect the interests of the debtor, mortgagor or guarantor because of his or her age or physical or mental condition;

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Consumer Credit (New South Wales) Bill 1995

Note The Consumer Credit Code

- (g) the form of the contract, mortgage or guarantee and the intelligibility of the language in which it is expressed;
 - (h) whether or not, and if so when, independent legal or other expert advice was obtained by the debtor, mortgagor or guarantor;
 - (i) the extent to which the provisions of the contract, mortgage or guarantee or change and their legal and practical effect were accurately explained to the debtor, mortgagor or guarantor and whether or not the debtor, mortgagor or guarantor understood those provisions and their effect; 5
 - (j) whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor, mortgagor or guarantor and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics; 10
 - (k) whether the credit provider took measures to ensure that the debtor, mortgagor or guarantor understood the nature and implications of the transaction and, if so, the adequacy of those measures; 15
 - (l) whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship; 20
 - (m) whether the terms of the transaction or the conduct of the credit provider is justified in the light of the risks undertaken by the credit provider;
 - (n) the terms of other comparable transactions involving other credit providers and, if the injustice is alleged to result from excessive interest charges, the annual percentage rate or rates payable in comparable cases; 25
 - (o) any other relevant factor.
- (3) Representing debtor, mortgagor or guarantor.** For the purposes of subsection (2) (f), a person is taken to have represented a debtor, mortgagor or guarantor if the person represented the debtor, mortgagor or guarantor, or assisted the debtor, mortgagor or guarantor to a significant degree, in the negotiations process prior to, or at, the time the credit contract, mortgage or guarantee was entered into or changed. 30
- 35

(4) Unforeseen circumstances. In determining whether a credit contract, mortgage or guarantee is unjust, the Court is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract, mortgage or guarantee was entered into or changed.

(5) Conduct. In determining whether to grant relief in respect of a credit contract, mortgage or guarantee that it finds to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the contract, mortgage or guarantee since it was entered into or changed. 5

(6) Application. This section does not apply to a change in the annual percentage rate or rates payable under a contract, or to an establishment fee or charge or other fee or charge, in respect of which an application may be made under section 72 (Court may review unconscionable interest and other charges). This section does not apply to a change to a contract under this Division. 10

(7) Meaning of unjust. In this section, “unjust” includes unconscionable, harsh or oppressive. 15

Orders on re-opening of transactions

71. The Court may, if it re-opens a transaction under this Division, do any one or more of the following, despite any settlement of accounts or any agreement purporting to close previous dealings and create a new obligation— 20

- (a) re-open an account already taken between the parties;
- (b) relieve the debtor and any guarantor from payment of any amount in excess of such amount as the Court, having regard to the risk involved and all other circumstances, considers to be reasonably payable; 25
- (c) set aside either wholly or in part or revise or alter an agreement made or mortgage given in connection with the transaction;
- (d) order that the mortgagee takes such steps as are necessary to discharge the mortgage; 30
- (e) give judgment for or make an order in favour of a party of such amount as, having regard to the relief (if any) which the Court thinks fit to grant, is justly due to that party under the contract, mortgage or guarantee;

- (f) give judgment or make an order against a person for delivery of goods to which the contract, mortgage or guarantee relates and which are in the possession of that person;
- (g) make ancillary or consequential orders.

Court may review unconscionable interest and other charges 5

72. (1) The Court may, if satisfied on the application of a debtor or guarantor that—

- (a) a change in the annual percentage rate or rates under a credit contract to which section 59 (1) or (4) applies; or
- (b) an establishment fee or charge; or 10
- (c) a fee or charge payable on early termination of a credit contract; or
- (d) a fee or charge for a prepayment of an amount under a credit contract;

is unconscionable, annul or reduce the change or fee or charge and may make ancillary or consequential orders. 15

(2) For the purposes of this section, a change to the annual percentage rate or rates is unconscionable if and only if it appears to the Court that—

- (a) it changes the annual percentage rate or rates in a manner that is unreasonable, having regard to any advertised rate or other representations made by the credit provider before or at the time the contract was entered into, the period of time since the contract was entered into and any other consideration the Court thinks relevant; or 20
- (b) the change is a measure that discriminates unjustifiably against the debtor when the debtor is compared to other debtors of the credit provider under similar contracts. 25

(3) In determining whether an establishment fee or charge is unconscionable, the Court is to have regard to whether the amount of the fee or charge is equal to the credit provider's reasonable costs of determining an application for credit and the initial administrative costs of providing the credit or is equal to the credit provider's average reasonable costs of those things in respect of that class of contract. 30

(4) For the purposes of this section, a fee or charge payable on early termination of the contract or a prepayment of an amount under the credit contract is unconscionable if and only if it appears to the Court that it

exceeds a reasonable estimate of the credit provider's loss arising from the early termination or prepayment, including the credit provider's average reasonable administrative costs in respect of such a termination or prepayment.

Time limit

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73. (1) An application (other than an application under section 72) may not be brought under this Division more than 2 years after the relevant credit contract is rescinded or discharged or the credit provider writes off the relevant debt, whichever occurs first.

(2) An application under section 72 may not be brought more than 2 years after the relevant change takes effect or fee or charge is charged under the credit contract or the credit provider writes off the relevant debt, whichever occurs first.

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Joinder of parties

74. (1) If it appears to the Court that a person other than a credit provider or a mortgagee (a "third party") has shared in the profits of, or has a beneficial interest prospectively or otherwise in, a credit contract or mortgage that the Court holds to be unjust, the Court may make an order about the third party that the Court considers appropriate.

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(2) However, before making an order about the third party, the Court must—

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- (a) join the third party as a party to the proceedings; and
- (b) give the third party an opportunity to appear and be heard in the proceedings.

PART 5—ENDING AND ENFORCING CREDIT CONTRACTS, MORTGAGES AND GUARANTEES

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Division 1—Ending of credit contract by debtor

Debtor's or guarantor's right to pay out contract

75. (1) A debtor or guarantor is entitled to pay out the credit contract at any time.

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(2) The amount required to pay out a credit contract (other than a continuing credit contract) is the total of the following amounts—

- (a) the amount of credit;
- (b) the interest charges and all other fees and charges payable by the debtor to the credit provider up to the date of termination;
- (c) reasonable enforcement expenses;
- (d) early termination charges, if provided for in the contract; 5

less any payments made under the contract and any rebate of premium under section 138.

Statement of pay out figure

76. (1) A credit provider must, at the written request of a debtor or guarantor, provide a written statement of the amount required to pay out a credit contract (other than a continuing credit contract) as at such date as the debtor or guarantor specifies. If so requested, the credit provider must also provide details of the items which make up that amount. 10

(2) The statement must also contain a statement to the effect that the amount required to pay out the credit contract may change according to the date on which it is paid. 15

(3) A credit provider must give a statement, complying with this section, within 7 days after the request is given to the credit provider.

Maximum penalty—50 penalty units.

Court may determine pay out figure if credit provider does not provide a pay out figure 20

77. (1) If the credit provider does not provide a statement of the amount required to pay out a credit contract (other than a continuing credit contract) in accordance with this Part after a request is duly made by a debtor or guarantor, the Court may, on the application of the debtor or guarantor, determine the amount payable on the date of determination, the amount by which it increases daily and the period for which the determination is applicable. 25

(2) The credit contract is discharged if an amount calculated in accordance with the determination is tendered to the credit provider within the applicable period. 30

Surrender of mortgaged goods and goods subject to sale by instalments

78. (1) General principle. If—

- (a) a credit contract takes the form of a sale of goods by instalments and title in the goods does not pass until all instalments are paid; or
- (b) the credit provider has a mortgage over goods of the debtor or guarantor;

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the debtor or mortgagor may give written notice of an intention to return the goods to the credit provider or, if the goods are in the credit provider's possession, require the credit provider in writing to sell the goods.

(2) Delivery of goods. A debtor or mortgagor may return the goods to the credit provider at the credit provider's place of business during ordinary business hours within 7 days of the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider.

10

(3) Notice of value. The credit provider must, within 14 days after a debtor or mortgagor returns the goods or requires the credit provider to sell the goods, give the debtor or mortgagor a written notice containing the estimated value of the goods and any other information required by the regulations.

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(4) Return or sale of goods. If the debtor or mortgagor, within 21 days after the notice under subsection (3) is given, requests by written notice return of the goods to the debtor or mortgagor or withdraws the requirement to sell the goods (and the debtor is not in default under the terms of the credit contract), the credit provider must return to the debtor or mortgagor any goods returned by the debtor or mortgagor and must not comply with the requirement.

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(5) Nominated purchaser. The debtor or mortgagor may, within 21 days after the notice under subsection (3) is given, nominate in writing a person who is prepared to purchase the goods from the credit provider at the estimated value or at any greater amount for which the credit provider has obtained a written offer to buy the goods. The credit provider must offer to sell the goods to that person for the estimated value or, if there is a written offer to buy the goods for a greater amount, that amount.

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(6) Sale of goods by credit provider. The credit provider must, if the goods are not required to be returned under subsection (4), as soon as reasonably practicable (or at such other time as the credit provider and the

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debtor or mortgagor agree) sell the goods in accordance with subsection (5) or, if no buyer is nominated or the nominated buyer under that subsection does not buy the goods, for the best price reasonably obtainable.

(7) Amount to be credited to debtor or mortgagor. The credit provider must credit the debtor or mortgagor with a payment equivalent to the proceeds of the sale less any amounts which the credit provider is entitled to deduct from those proceeds. On the sale of the goods, the total amount payable under the contract becomes due. 5

(8) Deductions from proceeds. A credit provider that sells mortgaged goods under this section is entitled to deduct from the proceeds of that sale only the following amounts— 10

- (a) the amount currently secured by the mortgage in relation to the credit contract, not being more than the amount required to discharge the contract;
- (b) the amount payable to discharge any prior mortgage to which the goods were subject; 15
- (c) the amounts payable in successive discharge of any subsequent mortgages to which the goods were subject and of which the credit provider had notice;
- (d) the credit provider's reasonable enforcement expenses. 20

(9) Notice of amount credited and other matters. The credit provider must give the debtor or mortgagor a written notice stating the gross amount realised on the sale, the net proceeds of the sale, the amount credited to the debtor or mortgagor and the net amount due under the credit contract.

(10) Offence—credit provider. A credit provider that contravenes a requirement of this section is guilty of an offence. 25

Maximum penalty (subsection (10))—50 penalty units.

Compensation to debtor or mortgagor

79. (1) The Court, on application by the debtor or mortgagor, may order a credit provider to credit the debtor or mortgagor with a payment, fixed by the Court, exceeding the net proceeds of sale if it is not satisfied that the credit provider sold the goods as soon as reasonably practicable (or at such other time as the credit provider and debtor or mortgagor agreed) for the best price reasonably obtainable. 30

(2) On application by the debtor or mortgagor, the mortgagee under any prior mortgage to which the goods are subject or the mortgagee under any subsequent mortgage of which the credit provider has notice, the Court, if not satisfied that the credit provider complied with section 78, may make an order requiring the credit provider to compensate the debtor or mortgagor or the relevant mortgagee for any loss suffered as a result.

5

(3) The onus of proving that section 78 was complied with is on the credit provider.

Division 2—Enforcement of credit contracts, mortgages and guarantees

10

Requirements to be met before credit provider can enforce credit contract or mortgage against defaulting debtor or mortgagor

80. (1) Enforcement of credit contract. A credit provider must not begin enforcement proceedings against a debtor in relation to a credit contract unless the debtor is in default under the credit contract and—

15

(a) the credit provider has given the debtor, and any guarantor, a “**default notice**”, complying with this section, allowing the debtor a period of at least 30 days from the date of the notice to remedy the default; and

(b) the default has not been remedied within that period.

20

Maximum penalty—50 penalty units.

(2) Enforcement of mortgage. A credit provider must not begin enforcement proceedings against a mortgagor to recover payment of money due or take possession of, sell, appoint a receiver for or foreclose in relation to property subject to a mortgage, unless the mortgagor is in default under the mortgage and—

25

(a) the credit provider has given the mortgagor a “**default notice**”, complying with this section, allowing the mortgagor a period of at least 30 days from the date of the notice to remedy the default; and

(b) the default has not been remedied within that period.

30

Maximum penalty—50 penalty units.

(3) Default notice requirements. A default notice must specify the default and the action necessary to remedy it and that a subsequent default

of the same kind that occurs during the period of 30 days may be the subject of enforcement proceedings without further notice if it is not remedied within the period.

(4) When default notice not required. A credit provider is not required to give a default notice or to wait until the period specified in the default notice has elapsed, before beginning enforcement proceedings, if— 5

- (a) the credit provider believes on reasonable grounds that it was induced by fraud on the part of the debtor or mortgagor to enter into the credit contract or mortgage; or
- (b) the credit provider has made reasonable attempts to locate the debtor or mortgagor but without success; or 10
- (c) the Court authorises the credit provider to do so; or
- (d) the credit provider believes on reasonable grounds that the debtor or mortgagor has removed or disposed of mortgaged goods under a mortgage related to the credit contract or under the mortgage concerned, or intends to remove or dispose of mortgaged goods, without the credit provider's permission or that urgent action is necessary to protect the mortgaged property. 15

(5) Non-remedial default. If the credit provider believes on reasonable grounds that a default is not capable of being remedied— 20

- (a) the default notice need only specify the default; and
- (b) the credit provider may begin the enforcement proceedings after the period of 30 days from the date of the notice.

(6) Other law about mortgages not affected. This section is in addition to any provision of any other law relating to the enforcement of real property mortgages and does not prevent the issue of notices to defaulting mortgagors under other legislation. Nothing in this section prevents the issue of any such notice when a default notice is given under this section. 25

Note: By virtue of section 161 (2), a notice may contain information required to be given under other legislation or be included in a notice given under other legislation. 30

Defaults may be remedied

81. (1) If a default notice states that the credit provider intends to take action because the debtor or mortgagor is in default under the credit contract or mortgage, the debtor, mortgagor or guarantor may remedy the default within the period specified in the notice, and the contract or mortgage is then reinstated and any acceleration clause cannot operate. 35

(2) A debtor, mortgagor or guarantor does not remedy the default if, at the end of the period, the debtor or mortgagor is in default under the credit contract or mortgage because of the breach specified in the notice or because of a subsequent breach of the same type.

Requirements to be met before credit provider can enforce guarantee against guarantor 5

82. A credit provider must not, under a guarantee, enforce a judgment against a guarantor unless—

- (a) the credit provider has obtained a judgment against the debtor for payment of the guaranteed liability and the judgment remains unsatisfied for 30 days after the credit provider has made a written demand for payment of the judgment debt; or 10
- (b) the Court has relieved the credit provider from the obligation to obtain a judgment against the debtor on the ground that recovery from the debtor is unlikely; or 15
- (c) the credit provider has made reasonable attempts to locate the debtor but without success; or
- (d) the debtor is insolvent.

Maximum penalty—50 penalty units.

Requirements to be met before credit provider can repossess mortgaged goods 20

83. (1) A credit provider must not, without the consent of the Court, take possession of mortgaged goods if the amount currently owing under the credit contract related to the relevant mortgage is less than 25% of the amount of credit provided under the contract or \$10 000, whichever is the lesser. 25

Maximum penalty—100 penalty units.

(2) However, the restriction does not apply—

- (a) to a continuing credit contract; or
- (b) if the credit provider believes on reasonable grounds that the debtor has removed or disposed of the mortgaged goods, or intends to remove or dispose of them, without the credit provider's permission or that urgent action is necessary to protect the goods. 30

(3) In any proceedings in which it is established that a credit provider has taken possession of mortgaged goods contrary to subsection (1), the burden of establishing that the possession of the goods was lawfully taken by virtue of subsection (2) lies on the credit provider.

(4) Nothing in this section prevents a credit provider from accepting the return of goods under section 78. 5

Acceleration clauses

84. (1) For the purposes of this Part, an “**acceleration clause**” is a term of a credit contract or mortgage providing that—

- (a) on the occurrence or non-occurrence of a particular event, the credit provider becomes entitled to immediate payment of all, or a part, of an amount under the contract that would not otherwise have been immediately payable; or 10
- (b) whether or not on the occurrence or non-occurrence of a particular event, the credit provider has a discretion to require repayment of the amount of credit otherwise than by repayments fixed, or determined on a basis stated, in the contract; 15

but does not include any such term in a credit contract or mortgage that is an on demand facility.

(2) An “**on demand facility**” is a credit contract or mortgage under which— 20

- (a) the total amount outstanding under the contract or mortgage is repayable at any time on demand by the credit provider; and
- (b) there is no agreement, arrangement or understanding between the credit provider and the debtor or mortgagor that repayment will only be demanded on the occurrence or non-occurrence of a particular event. 25

Requirements to be met before credit provider can enforce an acceleration clause

85. (1) An acceleration clause is to operate only if the debtor or mortgagor is in default under the credit contract or mortgage and— 30

- (a) the credit provider has given to the debtor and any guarantor, or to the mortgagor, a default notice under section 80; and

-
- (b) the default notice contains an additional statement of the manner in which the liabilities of the debtor or mortgagor under the contract or mortgage would be affected by the operation of the acceleration clause and also of the amount required to pay out the contract (as accelerated); and 5
 - (c) the default has not been remedied within the period specified in the default notice (unless the credit provider believes on reasonable grounds that the default is not capable of being remedied).
- (2) However, a credit provider is not required to give a default notice under section 80 or to wait until the period specified in the default notice has elapsed before bringing an acceleration clause into operation, if— 10
- (a) the credit provider believes on reasonable grounds that it was induced by fraud on the part of the debtor or mortgagor to enter into the contract or mortgage; or
 - (b) the credit provider has made reasonable attempts to locate the debtor or mortgagor but without success; or 15
 - (c) the Court authorises the credit provider not to do so; or
 - (d) the credit provider believes on reasonable grounds that the debtor or mortgagor has removed or disposed of mortgaged goods under a mortgage related to the credit contract or the mortgage concerned, or intends to remove or dispose of mortgaged goods, without the credit provider's permission or that urgent action is necessary to protect the goods. 20
- (3) This section is in addition to any provision of any other law relating to the enforcement of real property mortgages and does not prevent the issue of notices to defaulting mortgagors under other legislation. 25

Division 3—Postponement of enforcement proceedings

Postponement of exercise of rights

86. (1) A debtor, mortgagor or guarantor who has been given a default notice under Division 2 or a demand for payment under section 82 may, at any time before the end of the period specified in the notice or demand, negotiate with the credit provider a postponement of the enforcement proceedings or any action taken under such proceedings or of the operation of any applicable acceleration clause. 30

(2) This Division does not apply to a credit contract under which the maximum amount of credit that is or may be provided is more than \$125 000 (or such other amount as may be prescribed by the regulations).

Effect of negotiated postponement

87. (1) The default notice or demand for payment is taken, for the purposes of this Code, not to have been given or made if a postponement is negotiated with the credit provider, written notice of the conditions of postponement is given to the debtor, mortgagor or guarantor and the debtor, mortgagor or guarantor complies with the conditions of postponement. 5

(2) It is a condition of any postponement negotiated with a credit provider after the credit provider has taken possession of property subject to a mortgage that the mortgagor pay the reasonable costs of the credit provider in taking possession of the property. 10

Postponement by Court

88. (1) If the debtor, mortgagor or guarantor is unable to negotiate a postponement, the debtor, mortgagor or guarantor may apply to the Court for a postponement. 15

(2) The Court may, after allowing the applicant, the credit provider and any debtor, mortgagor or guarantor concerned a reasonable opportunity to be heard, order or refuse to order the postponement to which the application relates and may make such other orders as it thinks fit. 20

(3) The Court may, if it thinks it appropriate in the circumstances, stay any enforcement proceedings under the credit contract or mortgage until the application has been determined.

Credit provider may apply for variation of postponement order 25

89. (1) A credit provider that is subject to an order under this Division may apply to the Court for variation of the order.

(2) On such an application, the Court may vary the order to which the application relates as it thinks fit or may refuse to vary the order or may revoke the order. 30

Division 4—Enforcement procedures for goods mortgaged

Information as to location of mortgaged goods

90. (1) A credit provider may, by written notice to a mortgagor under a goods mortgage, require the mortgagor to inform the credit provider within 7 days where the mortgaged goods are and, if the mortgaged goods are not 35

in the mortgagor's possession, to give the credit provider all information in the mortgagor's possession that might assist the credit provider to trace the goods.

(2) A mortgagor who contravenes a notice under this section is guilty of an offence. 5

Maximum penalty—50 penalty units.

Entry to residential property to take possession of goods

91. (1) A credit provider, or an agent of a credit provider, must not enter any part of premises used for residential purposes for the purpose of taking possession of mortgaged goods under a goods mortgage unless— 10

- (a) the Court has authorised the entry; or
- (b) the occupier of the premises has, after being informed in writing of the provisions of this section, consented in writing to the entry.

(2) The regulations may provide for procedures for the obtaining and giving of consent for the purposes of this section and may set out the circumstances in which consent is or is not taken to have been given. 15

(3) If premises are entered in contravention of this section by a credit provider or an agent of a credit provider, the credit provider is guilty of an offence.

Maximum penalty (subsection (3))—50 penalty units. 20

Court may order entry

92. The Court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, authorise the credit provider to enter residential premises for the purpose of taking possession of mortgaged goods. 25

Order for possession

93. (1) The Court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, order a person who has possession of the goods to deliver them to the credit provider at a specified time or place or within a specified period. 30

(2) The Court may, on the application of a credit provider or other person required to deliver goods to a credit provider, by order vary the place at which or time or period within which goods must be delivered to the credit provider.

(3) A person who contravenes an order under this section is guilty of an offence.

Maximum penalty (subsection (3))—30 penalty units.

Procedures to be followed by credit provider after taking possession of goods 5

94. (1) Notice to be given. A credit provider that has taken possession of goods under a mortgage must, within 14 days after doing so, give the mortgagor a written notice containing the following matters—

- (a) the estimated value of the goods;
- (b) the enforcement expenses incurred up to the date on which the goods were taken into the credit provider's possession and, if enforcement expenses are accruing while the goods remain in the credit provider's possession, the rate of accrual; 10
- (c) a statement of the mortgagor's rights and obligations in the form set out in the regulations. 15

(2) Goods not to be sold immediately. A credit provider must not dispose of goods taken under the mortgage within 21 days after the date of the notice, unless the Court authorises the credit provider to do so.

(3) Effect of proceedings. If at the end of that 21-day period a stay of enforcement proceedings is in force under this Code or an application under section 70 has not been determined, the credit provider must not dispose of the goods until those proceedings have been determined and any period allowed for appeal has elapsed. 20

(4) Payment during notice period. The credit provider must return the goods if— 25

- (a) the amount in arrears (less any accelerated amount) and the credit provider's reasonable enforcement expenses are paid within that 21-day period and the debtor has not committed a further default of the same kind under the credit contract; or
- (b) the credit contract is paid out. 30

(5) Offence. A credit provider that contravenes this section is guilty of an offence.

Maximum penalty (subsection (5))—50 penalty units.

Mortgagor may nominate purchaser of goods taken by credit provider

95. (1) The mortgagor may, within 21 days after the date of the notice given under section 94, nominate in writing a person who is prepared to purchase the goods from the credit provider at the estimated value or at any greater amount for which the credit provider has obtained a written offer to buy the goods. 5

(2) The credit provider must offer to sell the goods to that person for the estimated value or, if there is a written offer to buy the goods for a greater amount, that amount.

Maximum penalty—50 penalty units. 10

Sale of goods by credit provider

96. (1) The credit provider must, if payment is not made within 21 days after the date of the notice given under section 94 and that section does not prevent the sale, as soon as reasonably practicable (or at such time as the credit provider and mortgagor agree) sell the goods in accordance with section 95 or, if there is no nominated buyer or the nominated buyer under that section does not buy the goods, for the best price reasonably obtainable. 15

(2) The credit provider must credit the mortgagor with a payment equivalent to the proceeds of the sale less any amounts which the credit provider is entitled to deduct from those proceeds. On the sale of the goods, the total amount payable under the contract becomes due. 20

(3) A credit provider that sells mortgaged goods must give the mortgagor a written notice stating the gross amount realised on the sale, the net proceeds of the sale, the net amount due under the credit contract, any further recovery action proposed to be taken by the credit provider against the debtor and any other information required by the regulations. 25

(4) A credit provider that contravenes a requirement of this section is guilty of an offence.

Maximum penalty (subsection (4))—50 penalty units.

Matters for which account can be debited after mortgagee sale of goods 30

97. A credit provider that sells mortgaged goods under section 96 is entitled to deduct from the proceeds of that sale only the following amounts—

Note The Consumer Credit Code

- (a) the amount currently secured by the mortgage in relation to the credit contract, not being more than the amount required to discharge the contract;
- (b) the amount payable to discharge any prior mortgage to which the goods were subject; 5
- (c) the amounts payable in successive discharge of any subsequent mortgages to which the goods were subject and of which the credit provider had notice;
- (d) the credit provider's reasonable enforcement expenses.

Compensation to mortgagor 10

98. (1) The Court, on application by a mortgagor, may order a credit provider to credit the mortgagor with a payment, fixed by the Court, exceeding the net proceeds of sale if it is not satisfied that the credit provider sold the goods as soon as reasonably practicable for the best price reasonably obtainable. 15

(2) On application by a mortgagor, the mortgagee under any prior mortgage to which the goods are subject or the mortgagee under any subsequent mortgage of which the credit provider has notice, the Court, if not satisfied that the credit provider exercised its power of sale in accordance with this Division, may make an order requiring the credit provider to compensate the mortgagor or the relevant mortgagee for any loss suffered as a result. 20

(3) The onus of proving that a power of sale was exercised in accordance with this Division is on the credit provider that exercised it.

Division 5—Enforcement expenses 25

Recovery of enforcement expenses

99. (1) A credit provider must not recover or seek to recover enforcement expenses from a debtor, mortgagor or guarantor in excess of those reasonably incurred by the credit provider.

(2) Civil effect: 30

- (a) any provision of the credit contract, mortgage or guarantee that appears to confer a greater right is void; and

-
- (b) if enforcement expenses are in fact recovered in excess of this limitation, they may be recovered back.

**PART 6—CIVIL PENALTIES FOR DEFAULTS OF
CREDIT PROVIDERS**

*Division 1—Civil penalties for breach of key disclosure and
other requirements* 5

Key requirements

100. (1) For the purposes of this Division, a “**key requirement**” in connection with a credit contract (other than a continuing credit contract) is any one of the requirements of this Code contained in the following provisions— 10

- (a) Section 15 (B);
- (b) Section 15 (C);
- (c) Section 15 (D);
- (d) Section 15 (E); 15
- (e) Section 15 (G);
- (f) Section 15 (H);
- (g) Section 15 (J);
- (h) Section 15 (N) (a) and (b);
- (i) Section 21 (1)—but only at the time the credit contract is entered into. 20

(2) For the purposes of this Division, a “**key requirement**” in connection with a continuing credit contract is any one of the requirements of this Code contained in the following provisions—

- (a) Section 15 (B) (b); 25
- (b) Section 15 (C);
- (c) Section 15 (D);
- (d) Section 15 (G);
- (e) Section 15 (H);

(f) Section 21 (1);

(g) Section 32 (E);

(h) Section 33.

(3) A key requirement relating to a disclosure or a statement of account extends to the requirements set out in Part 2 as to the manner in which the disclosure or statement is to be made, but does not extend to any requirements set out in the regulations. 5

Application for order relating to key requirements

101. (1) A party to a credit contract or a guarantor or the Government Consumer Agency may apply to the Court for an order under this Division. 10

(2) A debtor or guarantor may not make an application for an order under this Division in respect of a contravention under a contract if the contravention under that contract is or has been subject to an application for an order made by the credit provider or a Government Consumer Agency anywhere in Australia under this Code or a corresponding law of another jurisdiction. 15

(3) Subsection (2) does not prevent an application from being made for an order for the payment of compensation under section 107.

Civil penalty may be imposed for contravention of key requirement

102. (1) Declaration as to key requirement. The Court must, on an application being made, by order declare whether or not the credit provider has contravened a key requirement in connection with the credit contract or contracts concerned. 20

(2) **Penalty orders.** The Court may make an order, in accordance with this Division, requiring the credit provider to pay an amount as a civil penalty, if it is of the opinion that the credit provider has contravened a key requirement. 25

(3) **Prudential standing.** The Court, in considering the imposition of a civil penalty, must have regard primarily to the prudential standing of any credit provider concerned, or of any subsidiary of the credit provider (within the meaning of the Corporations Law), if the credit provider or subsidiary takes deposits or is a borrowing corporation (within the meaning of that Law). However, the Court is to have regard to that prudential standing only if the credit provider requests the Court to do so. 30

(4) Other matters to be considered. The Court, in considering the imposition of a civil penalty, must have regard to the following—

- (a) the conduct of the credit provider and debtor before and after the credit contract was entered into;
- (b) whether the contravention was deliberate or otherwise; 5
- (c) the loss or other detriment (if any) suffered by the debtor as a result of the contravention;
- (d) when the credit provider first became aware, or ought reasonably to have become aware, of the contravention;
- (e) any systems or procedures of the credit provider to prevent or identify contraventions; 10
- (f) whether the contravention could have been prevented by the credit provider;
- (g) any action taken by the credit provider to remedy the contravention or compensate the debtor or to prevent further contraventions; 15
- (h) the time taken to make the application and the nature of the application;
- (i) any other matter the Court considers relevant.

(5) Related contraventions. The Court must, for the purposes of determining an application for an order under this Division or the amount of a civil penalty, treat a contravention of a key requirement that occurs merely because of another contravention of a key requirement as being a contravention of the same kind. If a provision referred to in section 100 contains several requirements, the Court must treat contraventions of more than one of those requirements as a single contravention of the one key requirement for the purposes of determining the amount of a civil penalty. 20 25

(6) Suppression of publication of application. The Court may, if it thinks it appropriate in the circumstances, order that particulars of or any matters relating to an application for an order under this Division not be published. 30

Penalty if application made by debtor or guarantor

103. (1) On application being made by a debtor or a guarantor for an order, the maximum civil penalty that may be imposed by the Court for a contravention of a key requirement is an amount not exceeding the amount of— 35

- (a) except as provided by paragraphs (b) and (c)—all interest charges payable under the contract from the date it was made; or
 - (b) in the case of a contravention of a key requirement relating to a statement of account of a continuing credit contract—all interest charges payable under the contract for the period to which the statement of account relates; or 5
 - (c) in the case of a contravention of a key requirement relating to prohibited monetary obligations—all interest charges accruing under the contract from the date the contravention occurred.
- (2) The Court may, however, impose a greater civil penalty if the debtor or guarantor satisfies the Court that the debtor has suffered a loss. The amount of the civil penalty is to be not less than the amount of the loss. 10
- (3) For the purposes of subsection (1) (a), the amount of future interest charges payable under a credit contract is to be calculated on the assumptions in sections 158 and 160. 15
- Payment of penalty to debtor or guarantor**
- 104. (1)** An amount of civil penalty ordered by the Court to be paid on an application for an order made by a debtor or a guarantor may be set off by the debtor or guarantor against any amount that is due or becomes due to the credit provider under the credit contract. If there is no such amount, the amount of the civil penalty is a debt due by the credit provider to the debtor or guarantor. 20
- (2) An order made on application by a debtor or a guarantor may include such directions as the Court considers appropriate relating to the payment of the amount owed by the debtor or the credit provider as a result of the order. 25
- Penalty if application made by a credit provider or Government Consumer Agency**
- 105. (1)** On application being made by a credit provider or the Government Consumer Agency for an order, the maximum civil penalty that may be imposed by the Court for a contravention of a key requirement relating to a contract affected by the application is an amount calculated so that the total civil penalty for all contraventions of the requirement in Australia (as disclosed by the credit provider) does not exceed \$500 000. 30
- (2) For the purpose of determining the penalty, the Court is, in making an order, to determine the appropriate amount of penalty for disclosed contraventions of the key requirement in all jurisdictions and to determine 35

the amount payable in each jurisdiction proportionately according to the number of contracts in that jurisdiction affected by the disclosed contraventions.

(3) An order relating to the amount payable in another jurisdiction has no effect in this jurisdiction and has such effect in that other jurisdiction as the law of that other jurisdiction provides. 5

Payment of penalty to fund

106. An amount of civil penalty ordered by the Court to be paid on an application for an order made by a credit provider or the Government Consumer Agency must be paid by the credit provider into a fund established and operated under another law of this jurisdiction for the purposes of this section or, if no such fund is established, to the Government Consumer Agency. 10

Compensation for debtor or guarantor

107. (1) The Court may, on application by a debtor or a guarantor, order that the credit provider pay to the debtor or guarantor an amount by way of compensation for loss arising from the contravention of a key requirement. 15

(2) The Court may only order an amount to be paid by way of compensation if the debtor or guarantor satisfies the Court that the debtor or guarantor has suffered a loss arising from the contravention. The amount of compensation is not to exceed the amount of the loss. 20

(3) The Court may not make an order under this section if the debtor or guarantor has previously obtained or been refused a civil penalty referred to in section 104 relating to the same contravention.

(4) An amount payable under this section does not affect the amount of penalty for the purposes of section 105. 25

Recognition of civil penalty determined in other jurisdictions

108. (1) A credit provider or the Government Consumer Agency may register with the Court of this jurisdiction an order made by a Court in another jurisdiction under a provision of a law of that other jurisdiction corresponding to sections 102 and 105. 30

(2) On registration of the order, the order is taken to be an order under sections 102 and 105 for the purposes of this Code in relation to the contraventions occurring in this jurisdiction.

Other jurisdiction more appropriate

109. (1) The Court may, on the application of a credit provider or the Government Consumer Agency or a Government Consumer Agency of another jurisdiction, refuse to hear an application on the ground that it is more appropriate that the application be determined in another specified jurisdiction under the corresponding provisions of the corresponding laws of that jurisdiction. 5

(2) Before determining whether to refuse to hear an application, the Court must consider—

- (a)** whether the number of affected credit contracts in the other jurisdiction exceeds the number in this jurisdiction; and 10
- (b)** any other matter the Court considers relevant.

General provisions relating to applications by credit providers or Government Consumer Agencies

110. (1) An application for an order by a credit provider or the Government Consumer Agency— 15

- (a)** may apply to any one or more credit contracts; and
- (b)** may apply to all or any class of credit contracts entered into by the credit provider during a specified period (for example, all credit contracts entered into during a specified period which are affected by a specified contravention). 20

(2) The Court may require notice of any such application to be published by notice, in a form approved by the Court, in a newspaper circulating throughout this jurisdiction or Australia, as the Court determines.

(3) Notice of an application by a credit provider must be given by the credit provider to the Government Consumer Agency. 25

Government Consumer Agency may represent interests of debtors

111. The Government Consumer Agency may apply to the Court to become a party to an application under this Division and, if joined as a party, has standing to represent the public interest and the interests of debtors. 30

Directions pending Court's decision

112. (1) The Court may, before disposing of an application by a debtor or guarantor for an order under this Division, make such directions as it considers appropriate to protect the interests of the debtor or guarantor concerned. 35

(2) Subject to any such directions of the Court, the application does not prevent—

- (a) any proceedings for the enforcement of the debtor's obligations (or the obligations of a guarantor) from being taken; or
- (b) any rights over property the subject of a mortgage from being exercised.

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(3) For the purposes of this section, a reference to the disposal of an application includes a reference to its withdrawal by the applicant.

(4) A credit provider affected by a direction of the Court may apply to the Court for variation of the direction. The Court may, on such an application being made, vary or revoke the direction or refuse to vary or revoke the direction.

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Offences

113. Nothing in this Division affects the liability of a person for an offence against this Code or the regulations.

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Division 2—Other civil penalties

Civil effect of other contraventions

114. (1) If a credit provider contravenes a requirement of or made under this Code (other than one for which a civil effect is specifically provided by Division 1 or by any other provision of this Code), the Court may order the credit provider to make restitution or pay compensation to any person affected by the contravention and, in that event, may make any consequential order it considers appropriate in the circumstances.

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(2) An application for the exercise of the Court's powers under this section may be made by the Government Consumer Agency or by any person affected by the contravention.

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PART 7—RELATED SALE CONTRACTS

Division 1—Interpretation and application

Meaning of sale contract

115. For the purposes of this Code, a "sale contract" is a contract for any one or more of the following—

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- (a) a contract for the sale of goods;
- (b) a contract for the supply of services.

Sale contracts to which this Part applies

116. This Part applies to or in respect of a sale contract or proposed sale contract only if the sale of the goods or supply of services concerned is financed, or is proposed to be financed, wholly or partly by the provision of credit to which this Code applies. 5

Linked credit providers and tied credit contracts

117. (1) For the purposes of this Code, a “**linked credit provider**” of a supplier means a credit provider—

- (a) with whom the supplier has a contract, arrangement or understanding relating to the supply to the supplier of goods in which the supplier deals, relating to the business carried on by the supplier of supplying goods or services or relating to the provision to persons to whom goods or services are supplied by the supplier of credit in respect of payment for those goods or services; or 10
- (b) to whom the supplier, by arrangement with the credit provider, regularly refers persons for the purpose of obtaining credit; or 15
- (c) whose forms of contract or forms of application or offers for credit are, by arrangement with the credit provider, made available to persons by the supplier; or
- (d) with whom the supplier has a contract, arrangement or understanding under which contracts or applications or offers for credit from the credit provider may be signed by persons at the premises of the supplier. 20

(2) For the purposes of this Code, a “**tied continuing credit contract**” is a continuing credit contract under which a credit provider provides credit in respect of the payment by a debtor for goods or services supplied by a supplier in relation to whom the credit provider is a linked credit provider. 25

(3) For the purposes of this Code, a “**tied loan contract**” is a credit contract entered into between a credit provider and a debtor where—

- (a) the credit provider knows or ought reasonably to know that the debtor enters into the credit contract wholly or partly for the purposes of payment for the goods or services supplied by a supplier; and 30
- (b) at the time the credit contract is entered into the credit provider is a linked credit provider of the supplier. 35

Division 2—Liability of credit providers for suppliers' misrepresentations

Credit provider liable with respect to supplier's misrepresentations etc. about tied credit contract

118. (1) If there is a tied loan contract or a tied continuing credit contract in respect of a sale contract, any representation, warranty or statement made (whether orally or in writing) by the supplier, or any person acting on behalf of the supplier, to the debtor in relation to the tied loan contract or tied continuing credit contract gives the debtor the same rights against the credit provider as the debtor would have had if it had been made by the credit provider. 5 10

(2) Without prejudice to any other rights or remedies to which a credit provider may be entitled, a 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, against any damage suffered by the credit provider through the operation of this section. 15

Division 3—Liability of credit providers in relation to goods

Right to damages under sale contract against both supplier and linked credit provider (cf. Trade Practices Act 1974 of the Commonwealth, s. 73) 20

119. (1) General right to damages. If—

(a) a supplier supplies goods, or causes goods to be supplied, to a linked credit provider of the supplier and a debtor enters into a contract with the linked credit provider for the provision of credit in respect of the supply by way of sale of the goods to the debtor; or 25

(b) a debtor enters into a contract with a linked credit provider of a supplier for the provision of credit in respect of the supply by the supplier of goods or services, or goods and services, to the debtor;

and the debtor suffers loss or damage as a result of misrepresentation, breach of contract, or failure of consideration in relation to the contract, the supplier and the linked credit provider are, subject to this Division, jointly and severally liable to the debtor for the amount of the loss or damage, and the debtor may recover that amount by action in accordance with this section in a court of competent jurisdiction. 30

(2) Credit provider's defences. A linked credit provider of a particular supplier is not liable to a debtor by virtue of subsection (1) in proceedings arising under that subsection if the credit provider establishes—

- (a) that the credit provided by the credit provider to the debtor was the result of an approach made to the credit provider by the debtor that was not induced by the supplier; or 5
- (b) if the proceedings relate to a contract of sale with respect to which a tied loan contract applies, that—
 - (i) after due inquiry before becoming a linked credit provider of the supplier, the credit provider was satisfied that the reputation of the supplier in respect of the supplier's financial standing and business conduct was good; and 10
 - (ii) after becoming a linked credit provider of the supplier, but before the tied loan contract was entered into, the linked credit provider had not had cause to suspect that the debtor might, if the contract was entered into, be entitled to recover an amount of loss or damage suffered as a result of misrepresentation, breach of contract or failure of consideration in relation to the contract as referred to in subsection (1); and 15
20
 - (iii) after becoming a linked credit provider of the supplier, but before the tied loan contract was entered into, the credit provider had not had cause to suspect that the supplier might be unable to meet the supplier's liabilities as and when they fell due; or 25
- (c) if the proceedings relate to a contract of sale with respect to which a tied continuing credit contract entered into by the linked credit provider applies, that, having regard to—
 - (i) the nature and volume of business carried on by the linked credit provider; and 30
 - (ii) such other matters as appear to be relevant in the circumstances of the case;

the linked credit provider, before becoming aware of the contract of sale, or of proposals for the making of the contract of sale (whichever the linked credit provider first became aware of), had not had cause to suspect that a person entering into such a contract 35

with the supplier might be entitled to claim damages against, or recover a sum of money from, the supplier for misrepresentation, breach of contract or failure of consideration as referred to in subsection (1).

Limits on debtor's right of action against linked credit provider (cf. Trade Practices Act 1974 of the Commonwealth, s. 73) 5

120. (1) Debtor may raise credit provider's liability. Subject to subsection (2), in relation to a contract referred to in section 119 (1) (a) or (b), in which a credit provider claims damages or an amount of money from a debtor, the debtor may set up the liability of the credit provider under section 119 in diminution or extinction of the debtor's liability. 10

(2) Proceedings to be brought against both supplier and linked credit provider. Subject to subsection (3), a debtor may not, in respect of a liability for which, by reason of section 119, a supplier and a linked credit provider are jointly and severally liable— 15

(a) bring proceedings to recover an amount of loss or damage from the credit provider; or

(b) where proceedings are brought against the debtor by the linked credit provider, make a counter-claim or exercise the right conferred by subsection (1) against the credit provider; 20

unless the debtor brings the action against the supplier and the credit provider jointly or, in the case of a counter-claim or right conferred by subsection (1), claims in the proceedings against the supplier in respect of the liability by third-party proceedings or otherwise.

(3) When joint proceedings not required. Subsections (2), (5) (a) and (6) (a) do not apply in relation to proceedings where— 25

(a) the supplier is insolvent, cannot be located after reasonable inquiry, or has died or been dissolved; or

(b) in the opinion of the court in which the proceedings are taken, it is not reasonably likely that a judgment obtained against the supplier would be satisfied and the court has, on the application of the debtor, declared that subsections (2), (5) (a) and (6) (a) do not apply in relation to the proceedings. 30

(4) Limit of credit provider's liability. The liability of a linked credit provider to a debtor for damages or a sum of money in respect of a contract referred to in section 119 (1) is not to exceed the sum of— 35

Consumer Credit (New South Wales) Bill 1995

Note The Consumer Credit Code

- (a) the amount of credit under the tied loan contract or tied continuing credit contract; and
 - (b) the amount of interest (if any) or damages in the nature of interest allowed or awarded against the linked credit provider by the court; and 5
 - (c) the amount of costs (if any) awarded by the court against the linked credit provider or supplier or both.
- (5) Enforcement of judgment against linked credit provider.** Where in proceedings arising under section 119, judgment is given against a supplier and a linked credit provider, the judgment— 10
- (a) must not be enforced against the linked credit provider unless a written demand made on the supplier for satisfaction of the judgment has remained unsatisfied for not less than 30 days; and
 - (b) may be enforced against the linked credit provider only to the extent of the amount calculated in accordance with this section, or so much of the judgment debt as has not been satisfied by the supplier, whichever is the lesser. 15
- (6) Enforcement of right against linked credit provider.** Where in proceedings in respect of the liability arising under section 119, a right conferred by subsection (1) is established against a linked credit provider, the debtor— 20
- (a) may not receive the benefit of the right unless judgment has been given against the supplier and linked credit provider, a written demand has been made on the supplier for satisfaction of the judgment and the demand has remained unsatisfied for not less than 30 days; and 25
 - (b) may receive the benefit only to the extent of the amount calculated in accordance with this section or so much of the judgment debt as has not been satisfied by the supplier, whichever is the lesser.
- Liability of supplier to linked credit provider (cf. Trade Practices Act 1974 of the Commonwealth, s. 73) 30**
- 121.** Unless the linked credit provider and supplier otherwise agree, the supplier is liable to the linked credit provider for the amount of a loss suffered by the linked credit provider, being an amount not exceeding the maximum amount of the linked credit provider's liability under section 120 35

(4) and, unless the court otherwise determines, the amount of costs (if any) reasonably incurred by the linked credit provider in defending the proceedings by reason of which the liability was incurred.

Interest may be awarded (cf. Trade Practices Act 1974 of the Commonwealth, s. 73)

5

122. (1) Despite any other law, where, in proceedings arising under section 119, judgment is given against a supplier and a linked credit provider or against a linked credit provider for an amount of loss or damage, the court in which the proceedings are taken must, on the application of the debtor, unless good cause is shown to the contrary, award interest to the debtor against the supplier and credit provider or against the credit provider, as the case may be, on the whole or a part of the amount from the time when the debtor became entitled to recover the amount until the date on which the judgment is given, at a rate prescribed by the regulations.

10

(2) In determining whether good cause is shown against awarding interest under this section on the whole or part of an amount of loss or damage, the court is to take into account any payment made into court by the supplier or credit provider.

15

Subrogation of credit provider (cf. Trade Practices Act 1974 of the Commonwealth, s. 73)

20

123. If a judgment given in proceedings arising under section 119 is enforced against a linked credit provider of a particular supplier, the credit provider is subrogated to the extent of the judgment so enforced to any rights that the debtor would have had but for the judgment against the supplier or any other person in respect of the loss or damage suffered by the debtor as a result of the misrepresentation, breach of contract or failure of consideration in relation to the contract from which the liability arose.

25

Division 4—Termination of related transactions

Termination of sale contract which is conditional on obtaining credit

124. (1) If a purchaser of goods or services makes it known to a supplier that credit is required in order to pay for the goods or services and the purchaser, after making reasonable endeavours to do so, fails to obtain credit on reasonable terms, the purchaser is entitled to terminate the sale contract.

30

(2) A purchaser may terminate a sale contract under this section even though goods or services have already been supplied under the contract but, if practicable, goods supplied under the sale contract must be returned to the supplier.

(3) If a sale contract is terminated under this section— 5

(a) the supplier is entitled to—

(i) reasonable compensation for damage to, or deterioration of, goods supplied under the sale contract (other than fair wear and tear) up to the date of their return to the supplier or, if they are not returned, the cash price of the goods; and 10

(ii) the reasonable value of the services supplied under the sale contract up to the date of termination; and

(b) the purchaser is entitled (subject to the supplier's entitlement referred to above) to the return of money paid under the sale contract. 15

Termination of (or recredit under) tied credit contract if sale contract terminated

125. (1) If a sale contract is rescinded or discharged (whether under this Code or any other law) and there is a tied loan contract or a tied continuing credit contract made with the purchaser by a linked credit provider of the supplier under the sale contract, the debtor is entitled— 20

(a) in the case of a tied loan contract—to terminate the credit contract; or

(b) in the case of a tied continuing credit contract—to be credited with the amount of credit in relation to the sale contract and the interest charges attributable to that amount. 25

(2) If a tied loan contract is terminated under this section, any related guarantee or mortgage is terminated to the extent to which it secures obligations under the contract or any related guarantee.

(3) If a tied loan contract is terminated under this section, the credit provider is entitled to recover from the debtor any part of the amount of credit that has not been paid to the supplier and the debtor is entitled to recover from the credit provider any interest charges or other amounts paid by the debtor under the credit contract. 30

(4) If a mortgage or guarantee is terminated under this section, the credit provider is entitled to recover from the mortgagor or guarantor any part of the amount of credit that has not been paid to the supplier and that is secured by the mortgage or guarantee, and the mortgagor or guarantor is entitled to recover from the credit provider any other amounts paid by the mortgagor or guarantor. 5

(5) If a tied loan contract is terminated under this section, the credit provider is entitled to recover from the supplier (subject to any agreement between them) the amount of any loss suffered by the credit provider as a result of the operation of this section. 10

(6) A supplier who knows that a sale contract referred to in subsection (1) has been rescinded or discharged must forthwith give the credit provider under any tied loan contract or tied continuing credit contract notice of the termination.

Maximum penalty—50 penalty units. 15

(7) This section does not apply if the credit is provided as a result of an approach by the debtor that was not induced by the supplier or credit provider.

Termination of linked maintenance services contract if credit contract terminated 20

126. (1) If—

(a) there is a tied loan contract or a tied continuing credit contract made with the debtor by a linked credit provider of the supplier under a sale contract to supply maintenance services; and

(b) the tied loan contract or tied continuing credit contract is terminated (whether under this Code or any other law) before the end of the term of the sale contract; 25

the debtor is entitled to terminate the sale contract to supply maintenance services and recover from the supplier a proportionate rebate of consideration paid under the sale contract. 30

(2) In any such case, the credit provider must inform the debtor in accordance with the regulations of the debtor's rights under this section.

Maximum penalty—50 penalty units.

(3) The regulations may prescribe the manner of calculating the proportionate rebate of consideration for the purposes of this section. 35

(4) This section does not apply if the credit is provided as a result of an approach by the debtor that was not induced by the supplier or credit provider.

Termination of contract under this Part to be in writing

127. An entitlement to terminate a sale contract or credit contract that is conferred by a provision of this Part may be exercised only by notice in writing to the other party to the contract. 5

Powers of Court with respect to termination of contract under this Part

128. The Court may, on the application of any interested party, make orders— 10

- (a) declaring whether a purported termination of a contract under this Part is valid; and
- (b) for the adjustment of rights following termination of a contract under this Part.

Part 5 not to apply to termination of contract under this Part 15

129. Part 5 does not apply to the termination of a contract under this Part.

Division 5—Other provisions

Requirement as to source of credit for goods or services

130. A supplier must not require a purchaser of goods or services to apply for, or obtain, credit from a particular credit provider. 20

Maximum penalty—100 penalty units.

Prohibition on payment for goods or services by post-dated bills of exchange or notes which exceed cash price of goods or services

131. (1) A supplier must not demand or accept payment from the purchaser for goods or services supplied under a sale contract in the form of a post-dated bill of exchange or promissory note given by the purchaser if the face value of the bill or note exceeds the cash price of the goods or services. 25

Maximum penalty—100 penalty units.

(2) This section does not apply unless the postponement of the debt to the supplier constitutes a provision of credit to which this Code applies. 30

PART 8—RELATED INSURANCE CONTRACTS

Meaning of credit-related insurance contract

132. For the purposes of this Code, a “**credit-related insurance contract**” is a contract for insurance of any of the following kinds in connection with a credit contract—

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- (a) insurance over mortgaged property;
- (b) consumer credit insurance;
- (c) insurance of a nature prescribed for the purposes of this section by the regulations.

Requirement to take out insurance or to insure with particular insurer or on particular terms

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133. (1) A credit provider or a supplier must not—

- (a) require a debtor or guarantor to take out insurance or to pay the cost of insurance taken out or arranged by the credit provider or supplier;
or
- (b) represent to a debtor or guarantor that the debtor or guarantor is required to pay the cost of any such insurance;

15

unless the insurance is compulsory insurance, mortgage indemnity insurance, insurance over mortgaged property or insurance of a nature and extent approved for the purposes of this section by the regulations.

20

Maximum penalty—100 penalty units.

(2) A credit provider or a supplier must not, in connection with a credit contract or a sale contract in relation to which there is a tied loan contract or a tied continuing credit contract—

- (a) require a debtor or guarantor to take out insurance with a particular insurer (unless the insurer is the only insurer providing insurance of the relevant kind or the requirement is exempted from the operation of this section by the regulations); or
- (b) make any unreasonable requirement as to the terms on which the debtor or guarantor is to take out insurance.

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Maximum penalty—100 penalty units.

(3) Civil effect. If the credit provider or supplier contravenes this section, the insured is entitled to recover the whole of the premium paid under the contract from the credit provider or supplier, as the case requires.

Financing of insurance premiums over mortgaged property

134. (1) A credit provider must not knowingly provide credit to the debtor to pay the premium or finance the premium on insurance taken out by the debtor over mortgaged property for a period of insurance exceeding 1 year, but may provide credit for or finance successive premiums for periods of 1 year or less. This subsection does not apply to a premium paid to obtain an extended period of warranty for goods purchased by a debtor. 5
10

Maximum penalty—100 penalty units.

(2) The credit provider must not knowingly debit the premium to the debtor's account more than 30 days before the beginning of the period of insurance to which it relates.

Maximum penalty—100 penalty units. 15

(3) Civil effect. If a credit provider contravenes subsection (1), the insured is entitled to recover the whole of the premium paid under the contract from the credit provider. If a credit provider contravenes subsection (2), the insured is entitled to recover the amount of premium debited in contravention of the subsection. 20

Commission for consumer credit insurance

135. (1) This section applies to commission paid by an insurer in connection with consumer credit insurance taken out by the debtor, or for which an amount is paid by the debtor.

(2) The total of any such commission accepted by all or any of the following— 25

(a) the credit provider;

(b) the supplier under a sale contract in relation to which there is a tied loan contract or a tied continuing credit contract;

(c) the agent of the credit provider or supplier; 30

must not exceed, in amount or value, 20% of the premium (excluding government charges).

(3) A credit provider or any such supplier or agent must not accept, and an insurer must not pay, a commission exceeding, in amount or value, the maximum allowed under this section.

Maximum penalty—100 penalty units.

(4) **Civil effect.** If a credit provider or supplier contravenes this section, the insured is entitled to recover the whole amount or value of the commission from the credit provider or the supplier, as the case requires.

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Supply of copy of credit-related insurance contract by insurer

136. (1) If the premium under a credit-related insurance contract is financed under the credit contract, the insurer must ensure that a copy of the policy of insurance is given to the debtor within 14 days after acceptance of the insurance proposal by the insurer.

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(2) In the case of any such contract of insurance entered into by the credit provider in which the debtor has a beneficial interest, the credit provider must ensure that a written notice containing particulars of the insurance prescribed by the regulations is given to the debtor within 14 days after the beneficial interest is acquired by the debtor.

15

(3) This section does not apply to compulsory insurance.

Maximum penalty—100 penalty units.

Rejection of debtor's proposal for insurance

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137. (1) If a credit provider proposes to finance the amount payable by the debtor under or in connection with a credit-related insurance contract and the proposal for insurance is rejected by an insurer, the insurer must inform the debtor and the credit provider of its rejection.

(2) Unless the insurance is to be arranged with another insurer, the credit provider must ensure that any amount paid by the debtor is refunded or credited in full.

25

Maximum penalty—100 penalty units.

(3) The credit provider may, in turn, recover the amount paid to the debtor from the insurer, if an amount has been paid to the insurer by the debtor under or in connection with the proposed insurance contract.

30

Termination of consumer credit insurance contract if credit contract terminated

138. (1) On termination of a credit contract, any relevant credit-related insurance contract financed under the credit contract for consumer credit insurance in force is also terminated. 5

(2) If a credit contract is terminated, the credit provider is required to pay the debtor or credit the debtor with a proportionate rebate of premium paid under any relevant credit-related insurance contract for consumer credit insurance in force immediately before the credit contract is terminated.

(3) The credit provider may, in turn, recover the amount paid to the debtor from the insurer. 10

(4) The regulations may prescribe the manner of calculating the proportionate rebate of premium for the purposes of this section.

(5) This section has effect despite any provision of the credit-related insurance contract. 15

Termination of insurance contract over mortgaged property if credit contract terminated

139. (1) If a credit contract is terminated before the end of the term of a credit-related insurance contract over mortgaged property financed under the credit contract or before any such insurance contract is otherwise terminated, the debtor is entitled to terminate the insurance contract and recover from the insurer a proportionate rebate of premium paid under the insurance contract. 20

(2) On the termination of the credit contract, the credit provider must inform the debtor in accordance with the regulations of the debtor's rights under this section. 25

Maximum penalty—50 penalty units.

(3) The regulations may prescribe the manner of calculating the proportionate rebate of premium for the purposes of this section.

(4) An entitlement under this section to terminate an insurance contract may be exercised only by notice in writing to the insurer. 30

(5) This section has effect despite any provision of the credit-related insurance contract.

PART 9—ADVERTISING AND RELATED CONDUCT

Advertising

140. (1) General principle. A person must not publish, or cause to be published, an advertisement that states or implies that credit is available unless the advertisement complies with this section. 5

Maximum penalty—100 penalty units.

(2) Regulations. The advertisement must not contain a statement of a kind prohibited by the regulations. It must contain any statement required by the regulations.

(3) Cost of credit. If the advertisement contains any reference to the cost of any credit, it must contain the annual percentage rate or rates and, if any fees or charges are payable, a statement to that effect. The advertisement may contain the comparison rate calculated as prescribed by the regulations and, if it does so, must be accompanied by the warnings set out in the regulations. 10
15

(4) Interest charges. The advertisement must not contain any statement of interest charges or of the cost of credit other than a statement referred to in subsection (3).

(5) Civil effect. A person who suffers loss as a result of a contravention by another person of this section may recover the amount of the loss against that other person or any other person involved in the contravention. 20

Persons liable for advertisements

141. (1) A person is, in the absence of proof to the contrary, taken to have caused an advertisement to be published if—

(a) the person provides credit, owns or has an interest in any goods, or supplies or has an interest in the supply of any goods or services, which the advertisement promotes; and 25

(b) the advertisement specifies the name, business name, address, telephone number, facsimile number or post office box number of the person or the person's agent. 30

(2) It is a defence to a charge under section 140 of causing an advertisement that does not comply with that section to be published if the person charged proves that he or she could not, by the exercise of reasonable care, have prevented the non-compliance to which the offence relates. 35

Defence

142. A printer, publisher or proprietor of a newspaper, a licensee of a commercial broadcasting or television station, an exhibitor of a film, or a person acting with the authority of any of them, is not guilty of an offence under section 140 unless he or she suspected, or had reason to suspect, that publishing the advertisement would constitute an offence. 5

Interest rates which may be disclosed

143. A person must not disclose an interest rate—

- (a) in an advertisement that states or implies that credit is available; or
- (b) to a debtor before the debtor enters into a credit contract; 10

unless the interest rate is the annual percentage rate or rates or is the comparison rate calculated as prescribed by the regulations and accompanied by the warnings set out in the regulations.

Maximum penalty—100 penalty units.

False or misleading representations 15

144. (1) A person must not make a false or misleading representation in relation to a matter that is material to entry into a credit contract or a related transaction or in attempting to induce another person to enter into a credit contract or related transaction.

Maximum penalty—50 penalty units. 20

(2) It is a defence to prosecution for an offence against this section if a person charged proves that he or she reasonably believed that the representation was not false or misleading.

(3) Civil effect. A person who suffers loss as a result of a contravention by another person of this section may recover the amount of the loss from that other person or any other person involved in the contravention. 25

Harassment

145. A credit provider or supplier must not harass a person in attempting to get that person to apply for credit or to enter into a credit contract or a related transaction. 30

Maximum penalty—100 penalty units.

Canvassing of credit at home

146. (1) A credit provider must not visit (personally or in the person of an employee or agent) a place of residence for the purpose of inducing a person who resides there to apply for or obtain credit, except by prior arrangement by the credit provider with the person. 5

Maximum penalty—100 penalty units.

(2) A person who visits another's residence for the purpose of offering goods or services for sale and who offers to provide or arrange for the provision of credit to finance the sale will not be taken to have called for the purpose of inducing a person to apply for or obtain credit. 10

PART 10—CONSUMER LEASES

Division 1—Interpretation and application

Meaning of consumer lease

147. For the purposes of this Code, a “**consumer lease**” is a contract for the hire of goods by a natural person or strata corporation under which that person or corporation does not have a right or obligation to purchase the goods. 15

Consumer leases to which this Part applies

148. (1) This Part applies to a consumer lease if, when the lease is entered into— 20

- (a) the lessee is ordinarily resident in this jurisdiction or a strata corporation formed in this jurisdiction; and
- (b) the goods are hired wholly or predominantly for personal, domestic or household purposes; and
- (c) a charge is or may be made for hiring the goods and the charge together with any other amount payable under the consumer lease exceeds the cash price of the goods; and 25
- (d) the lessor hires the goods in the course of a business of hiring goods or as part of or incidentally to any other business of the lessor.

(2) If not all the lessees under a consumer lease ordinarily reside, or are strata corporations formed, in this jurisdiction, this Code applies only if goods are first hired under the lease in this jurisdiction. 30

- (3) If this Part applies to a consumer lease—
- (a) this Part applies to all transactions or acts under the lease whether or not they take place in this jurisdiction; and
 - (b) this Part continues to apply even though the lessee ceases to be ordinarily resident in this jurisdiction. 5
- (4) For the purposes of this section, the amount payable under a consumer lease includes any agreed or residual value of the goods at the end of the lease or on termination of the lease by the lessor or lessee, but does not include—
- (a) any amount payable for services that are incidental to the hire of the goods under the lease; or 10
 - (b) any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the lessee at the earliest opportunity.
- (5) For the purposes of this section, the **predominant** purpose for which goods are hired is— 15
- (a) the purpose for which more than one half of the goods are intended to be used; or
 - (b) if the same goods are intended to be used for different purposes, the purpose for which the goods are intended to be most used. 20
- Consumer leases to which this Part does not apply**
- 149. (1) Short term or indefinite leases.** This Part does not apply to a consumer lease for a fixed period of 4 months or less or for an indefinite period.
- (2) **Employment-related leases.** This Part does not apply to a consumer lease under which goods are hired by an employee in connection with the employee's remuneration or other employment benefits. 25
- (3) **Regulations.** The regulations may exclude from the application of all or any provisions of this Part consumer leases of a class specified in the regulations. 30
- Presumptions relating to application of this Part**
- 150. (1)** In any proceedings (whether brought under this Code or not) in which a party claims that a lease is a consumer lease to which this Part applies, it will be presumed to be such unless the contrary is established.

(2) Goods hired under a lease are presumed conclusively for the purposes of this Part not to be hired wholly or predominantly for personal, domestic or household purposes if the lessee declares, before hiring the goods, that the goods are hired wholly or predominantly for business purposes.

(3) However, such a declaration is ineffective for the purposes of this section if the lessor (or any other person who obtained the declaration from the lessee) knew, or had reason to believe, at the time the declaration was made that the goods were in fact hired wholly or predominantly for personal, domestic or household purposes. 5

Note: See section 176 for the circumstances in which a credit provider is taken to have knowledge of or reason to believe something for the purposes of this Code. 10

(4) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.

Division 2—Form of and information to be included in consumer leases 15

Form of consumer lease

151. (1) A consumer lease must be in the form of a written lease document signed by the lessee and containing the information required by this Division. 20

(2) The regulations may make provision for or with respect to the form of consumer leases and the way they are expressed.

(3) A lessor must not enter into a consumer lease that contravenes a requirement of this section or regulations made under this section.

Maximum penalty (subsection (3))—100 penalty units. 25

Disclosures in consumer leases

152. (1) A consumer lease must contain the following matters, if ascertainable—

- (a) a description or identification of the goods hired under the lease;
- (b) the amount or value of any consideration to be paid or provided by the lessee before the delivery of those goods; 30
- (c) the amount of any stamp duty or other government charge payable by the lessee in respect of the lease;

- (d) the amount of any other charges not included in the rental payable under the lease, and a description of those charges;
 - (e) the amount of each rental payment to be made by the lessee under the lease, the date on which the first rental payment is due and either the dates on which subsequent rental payments are due or the interval between rental payments; 5
 - (f) the number of rental payments to be made by the lessee, and the total amount of rental payable under the lease;
 - (g) a statement of the conditions on which the lessee may terminate the lease; 10
 - (h) a statement of the liabilities (if any) of the lessee on termination of the lease.
- (2) A consumer lease is taken to comply with this section despite any omission or other error if the Court is satisfied that the omission or error is not of such a nature as to mislead the lessee to his or her disadvantage. 15
- (3) A lessor must not enter into a consumer lease that contravenes a requirement of this section.
- Maximum penalty (subsection (3))—100 penalty units.
- Copy of lease etc. for lessee**
- 153.** A lessor must, within 14 days after entering into a consumer lease, give to the lessee a copy of the consumer lease, together with a statement in the form prescribed by the regulations explaining the rights and obligations of a lessee. 20
- Maximum penalty—50 penalty units.
- Further goods and deferrals or waivers under consumer leases** 25
- 154.** The provision of further goods under a consumer lease or a change in a consumer lease as a result of a deferral or waiver of payment of an amount payable under a consumer lease is not to be treated as creating a new consumer lease for the purposes of this Part or as creating a credit contract, if the provision of the further goods or the deferral or waiver is permitted by this Code or the consumer lease. 30

Division 3—Other provisions applicable to consumer leases

Application of certain Code provisions to consumer leases

155. (1) The following provisions of this Code apply in relation to a consumer lease in the same way as they apply in relation to credit contracts—

- (a) Division 3 of Part 4 (relating to changes to contracts on the grounds of hardship and unjust transactions), other than section 72;
- (b) sections 90–93 (relating to information as to mortgaged goods, entry to residential property to take possession of goods and orders by the Court for entry and possession);
- (c) Part 11 (relating to miscellaneous matters).

(2) For the purposes of the application of those provisions—

- (a) references to a credit provider are to be read as references to a lessor; and
- (b) references to a debtor are to be read as references to a lessee; and
- (c) references to a credit contract or contract are to be read as references to a consumer lease; and
- (d) references to mortgaged goods are to be read as references to goods hired under a consumer lease.

(3) For the purposes of the application of Division 3 of Part 4, the words “(without a change being made to the annual percentage rate or rates)” are taken to be omitted from section 66 wherever occurring.

Notice of repossession

156. (1) A lessor must not exercise any right under a consumer lease to take possession of goods subject to the lease unless the lessor has given the lessee 30 days’ written notice of the lessor’s intention to do so.

(2) However, the lessor is not required to give the notice in accordance with this section if—

- (a) the right arises under a lease granted for a fixed term at the end of that term; or
- (b) the lessor believes on reasonable grounds that the lessee has disposed of goods hired under the lease, or intends to dispose of such goods, contrary to the terms of the lease; or

- (c) the lessor has made reasonable attempts to locate the lessee but without success; or
- (d) the lessee is insolvent; or
- (e) the Court authorises the lessor to do so.

Maximum penalty—50 penalty units.

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Termination of lease

157. (1) A lessee may, at any time before the end of a consumer lease, end the lease by returning the goods hired under the lease to the lessor during ordinary business hours or at such other time as may be agreed with the lessor or fixed by the Court on the application of the lessee.

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(2) The amount payable by a lessee on the termination of a consumer lease under this section before the end of its fixed term is—

- (a) the amount payable under the lease on such a termination; or
- (b) the amount determined in accordance with the principles (if any) set out in the regulations for the purposes of this section;

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whichever is the lesser.

PART 11—MISCELLANEOUS

Division 1—Tolerances and assumptions

Tolerances and assumptions relating to information

158. (1) Disclosures generally. Information disclosed in a pre-contractual statement, contract document, mortgage document or guarantee, statement, notice or consumer lease, or otherwise disclosed for the purposes of this Code, is taken to be correctly disclosed if—

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- (a) it is within tolerances allowed by the regulations; and
- (b) the disclosure is made as at a date stated in it.

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(2) Disclosure of interest charges. Disclosures for the purposes of this Code relating to interest charges may be made on the following assumptions (and such other assumptions under this section as are applicable)—

-
- (a) that, in the case of an annual percentage rate or default rate, there will be no variation in the rate as disclosed over the whole term of the contract or any shorter term for which it applies;
 - (b) if a change to a variable rate is provided for by the contract, that the variable rate applicable over the term for which it applies is the same as the equivalent variable rate as at the date disclosure is made; and 5
 - (c) that the debtor will make the repayments required by the contract at the times required by the contract.

(3) Disclosure of repayments. Disclosures for the purposes of this Code relating to repayments may be made on the assumption that the debtor will pay the repayments required by the contract at the times required by the contract and on such other assumptions under this section as are applicable. 10

(4) Disclosures of credit fees and charges. Disclosures relating to credit fees and charges for the purposes of this Code may be made on the following assumptions (and on such other assumptions under this section as are applicable)— 15

- (a) that there will be no change in the credit fees and charges as so disclosed and no new fees or charges imposed;
- (b) that the debtor will pay the fees and charges required by the contract at the times required by the contract. 20

(5) Disclosures in consumer leases. Disclosures for the purposes of this Code relating to consideration, charges and payments in a consumer lease may be made on the assumptions that there will be no change in the matters disclosed and no new charges imposed. 25

(6) When information is ascertainable. Information required to be disclosed for the purposes of this Code, which is not otherwise ascertainable, is taken to be ascertainable if it is ascertainable, as at the date the disclosure is made, on the basis of assumptions set out in this section or in the regulations. 30

(7) Disclosure of names. Information disclosed for the purposes of this Code as to a name is taken to be correctly disclosed if the information is sufficient to identify the person concerned.

Tolerances relating to contracts and other documents

159. An amount of interest, a fee or charge or any other amount charged, payable or calculated under or in connection with a credit contract, mortgage, guarantee or consumer lease is, for the purposes of this Code, taken to comply with this Code if the amount is within tolerances allowed by the regulations. 5

Regulations

160. The regulations may vary an assumption set out in this Division and may provide for additional assumptions.

Division 2—Documentary provisions 10

Form of notices

161. (1) The regulations may prescribe the form of any notices required or authorised to be given under this Code and may require such notices to contain specified information.

(2) A notice required to be given by a mortgagee under this Code may include information required to be given in the same situation under an Act, and the notice may be included in any notice given under that Act. 15

(3) A notice required or authorised to be given under this Code is to be in writing unless this Code or the regulations otherwise provide.

Legibility and language 20

162. (1) A credit contract, guarantee or a notice given by a credit provider under this Code—

- (a) must be easily legible; and
- (b) to the extent that it is printed or typed must conform with the provisions of the regulations as to print or type; and 25
- (c) must be clearly expressed.

(2) If the Court is satisfied, on application by the Government Consumer Agency, that a provision of a credit contract, a guarantee or a notice given by a credit provider under this Code does not comply with the requirements of this section, it may prohibit the credit provider from using a provision in the same or similar terms in future credit contracts, guarantees or notices. 30

(3) A credit provider that contravenes a prohibition imposed under subsection (2) is guilty of an offence.

Maximum penalty (subsection (3))—100 penalty units.

Copies of contracts and other documents

163. (1) A credit provider must in accordance with this section, at the written request of a debtor, mortgagor or guarantor, provide to the debtor, mortgagor or guarantor a copy of—

- (a) the credit contract, mortgage or guarantee; or 5
- (b) any credit-related insurance contract in the credit provider's possession; or
- (c) a notice previously given to the debtor, mortgagor or guarantor under this Code.

(2) The copy must be provided— 10

- (a) within 14 days, if the original came into existence 1 year or less before the request is given; or
- (b) within 30 days, if the original came into existence more than 1 year before the request is given.

Note: Section 173 provides for the date on which notice is taken to be given. 15

(3) A copy under this section may instead be provided in the form of a computer generated facsimile containing the same information as was contained in the original document, or in any other manner prescribed by the regulations. Until the contrary is proved, any such facsimile or copy is taken to contain the same information as the original document. 20

(4) A credit provider must provide a copy of a notice which requires a debtor, mortgagor or guarantor to take action if requested in accordance with subsection (1) even though the contract has been discharged or terminated but only if the request is made within 2 years of the discharge or termination. 25

Maximum penalty—30 penalty units.

Signing of documents

164. (1) It is sufficient compliance with a requirement under this Code that a document be signed by a person if the person's signature is written on the document by another person by or under the authority of the person required to sign. 30

(2) This section has effect subject to section 176 (Conduct of agents and related matters).

Division 3—General provisions

Crown to be bound

165. This Code binds the Crown in right of this jurisdiction and, in so far as the legislative power of the Legislature of this jurisdiction permits, the Crown in all its other capacities. 5

Assignment by credit provider

166. (1) If the rights of a credit provider under a credit contract, mortgage or guarantee are assigned or pass by law to another person, this Code from then on applies to that other person and does not impose any further obligation on the credit provider. 10

(2) The debtor, mortgagor or guarantor has and may exercise the same rights in respect of the credit contract, mortgage or guarantee against the assignee as the debtor, mortgagor or guarantor has against the credit provider.

(3) Subsection (1) does not apply while the credit provider continues to receive payments from the debtor. 15

Assignment by debtor, mortgagor or guarantor

167. (1) If the rights of a debtor, mortgagor or guarantor under a credit contract, mortgage or guarantee are assigned or pass by law to another person, this Code from then on applies to that other person and does not confer any further rights on the debtor, mortgagor or guarantor. 20

(2) Subsection (1) does not apply if the rights are assigned or pass by law to a corporation which is neither a trustee for the debtor, mortgagor or guarantor nor an executor of the debtor's, mortgagor's or guarantor's estate.

(3) Subsection (1) does not affect a requirement which is made of a debtor or mortgagor under section 48. 25

Appropriation of payments

168. (1) A debtor who is liable to a credit provider under 2 or more credit contracts may require the credit provider by written notice to apply a payment to a particular one of those contracts or to divide the payment between them in a specified manner. 30

(2) A credit provider that contravenes a requirement under this section is guilty of an offence.

Maximum penalty—30 penalty units.

(3) A debtor may not make a requirement under this section if the debtor and the credit provider have previously agreed as to the application of the payment concerned in relation to the credit contracts under which the debtor is liable to the credit provider.

Contracting out

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169. (1) A provision of a contract or other instrument by which a person seeks to avoid or modify the effect of this Code is void.

(2) A provision of a contract or other instrument by which a person seeks to have the debtor or guarantor indemnify the credit provider for any loss or liability arising under this Code is void.

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(3) A credit provider that is a party to any such contract or other instrument is guilty of an offence.

Maximum penalty—100 penalty units.

(4) Subsection (2) does not affect the operation of section 55 (2).

Effect of non-compliance

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170. (1) A credit contract, mortgage or guarantee or any other contract is not illegal, void or unenforceable because of a contravention of this Code unless this Code contains an express provision to that effect.

(2) Except as provided by this section, this Code does not derogate from rights and remedies that exist apart from this Code.

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Giving notice or other document

171. (1) The Court may relieve a person from the obligation to give a notice or other document if satisfied that a reasonable attempt has been made to locate the person to whom the notice or other document is to be given, but without success. The order of the Court may be made subject to conditions.

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(2) A notice or other document must be given to each debtor, mortgagor or guarantor to be effective in the case of joint debtors, mortgagors or guarantors.

(3) In a case where the joint debtors, mortgagors or guarantors reside at the same address, one may be nominated by them to receive notices and other documents on behalf of all of them. In that event, a notice or other document given to that one is, while the nomination remains in force, taken to have been given to both or all of them.

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(4) A nomination under subsection (3) must be in the form required by the regulations.

(5) Subsection (3) does not apply in relation to default notices.

Manner of giving notice or other document

172. (1) If this Code requires or permits a notice or other document to be given to a person (whether the expression “deliver”, “serve”, “notify”, “send” or “give” or another expression is used), the notice or other document may be given— 5

(a) to a natural person—

(i) by delivering it to the person personally; or 10

(ii) by leaving it at, or by sending it by post, telex, facsimile or similar facility to, the address of the place of residence or business of the person last known to the person giving the notice or other document; or

(b) to a body corporate— 15

(i) by leaving it at the registered office of the body corporate with an officer of the body corporate; or

(ii) by sending it by post, telex, facsimile or similar electronic facility to its registered office.

(2) Nothing in subsection (1)— 20

(a) affects the operation of another law that authorises the service of a notice or other document otherwise than as provided in subsection (1); or

(b) affects the power of a court or tribunal to authorise service of a notice or other document otherwise than as provided in subsection (1). 25

(3) If this Code requires or permits a notice or other document to be given by post (whether the expression “deliver”, “serve”, “notify”, “send” or “give” or another expression is used), service may be effected by properly addressing, prepaying and posting the notice or other document as a letter. 30

Date of notice or other document

173. (1) For the purposes of this Code a notice or other document is taken to be given—

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- (a) in the case of a notice or other document given personally—on the date it bears or the date it is received by the addressee, whichever is the later; or
 - (b) in the case of a notice or other document sent by post—on the date it bears or the date when it would have been delivered in the ordinary course of post, whichever is the later; or 5
 - (c) in the case of a notice or other document sent by facsimile transmission or some other form of electronic transmission—on the date it bears or the date on which the machine from which the transmission was sent produces a report indicating that the notice or other document was sent to the facsimile or other number of the addressee, whichever is the later. 10

(2) For the purposes of this Code, the date of a notice or other document is the date it is taken to be given in accordance with this section.

Extensions of time 15

174. The Court may extend a period if authorised by this Code to do so even though the period has elapsed.

Orders of Court

175. An order of the Court in force under this Code, including such an order as varied from time to time, has effect according to its tenor. 20

Conduct of agents and related matters

176. (1) 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 and taken to be conduct of the credit provider.

(2) A person cannot authorise a credit provider, or a person associated with a credit provider, to enter into a credit contract, mortgage or guarantee on the person's behalf. 25

(3) A credit provider or person associated with a credit provider that purports to act as agent of a debtor, mortgagor or a guarantor in entering into a credit contract or a mortgage or guarantee is guilty of an offence. 30

Maximum penalty—50 penalty units.

(4) A person is associated with a credit provider if—

- (a) that person and the credit provider are related bodies corporate for the purposes of the Corporations Law; or
- (b) that person is an officer, agent or employee of the credit provider or a related body corporate. 35

(5) A credit provider is not, for the purposes of this Code taken to know or have reason to believe something because an officer, agent or employee of the credit provider does so, unless the knowledge or reason to believe that thing is acquired by the officer, agent or employee acting in that capacity and in connection with the transaction concerned. 5

Reciprocal conferral of powers and jurisdiction

177. (1) The regulations may give effect to a cross-vesting scheme under which—

- (a) administrative and judicial powers conferred by this Code may be exercised by administrative and judicial authorities of any jurisdiction in which a law adopting this Code is in force; and 10
- (b) administrative and judicial authorities of this jurisdiction may exercise administrative and judicial powers conferred by any such law of that jurisdiction.

(2) Nothing in subsection (1) affects any other powers of any court. 15

Division 4—Provisions relating to offences

Penalty at end of provision

178. (1) In this Code, a penalty specified at the end of—
- (a) a section (whether or not the section is divided into subsections); or
 - (b) a subsection (but not at the end of a section); or 20
 - (c) a section or subsection and expressed in such a way as to indicate that it applies only to part of the section or subsection;

indicates that an offence mentioned in the section, subsection or part is punishable on conviction by a penalty not more than the specified penalty.

(2) If no offence is so mentioned, a contravention of the section, subsection or part constitutes an offence against the provision that is punishable on conviction by a penalty not more than the specified penalty. 25

(3) This section applies to the regulations in the same way as it applies to this Code, subject to any necessary modification.

Penalty units 30

179. A reference in this Code or the regulations to a number of penalty units is to be read as a reference to an amount of money equal to the amount obtained by multiplying \$100 by that number of penalty units.

Summary offences

180. An offence against this Code or the regulations is punishable summarily.

Double jeopardy

181. If an act or omission constitutes an offence—

(a) under this Code; or

(b) under a law of this jurisdiction or a law of another jurisdiction;

and the offender has been punished in relation to the offence under a law mentioned in paragraph (b), the offender is not liable to be punished in relation to the offence under this Code.

Aiding and abetting, attempts

182. (1) A person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly concerned in or a party to, the commission of an offence against this Code or the regulations is taken to have committed that offence and is liable to the penalty for the offence.

(2) A person who attempts to commit an offence against this Code or the regulations commits an offence and is punishable as if the attempted offence had been committed.

Offences by corporations

183. (1) If a corporation contravenes a provision of this Code or the regulations, each officer of the corporation is taken to have contravened the provision if the officer knowingly authorised or permitted the contravention.

(2) An officer of a corporation may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or convicted under the provision.

(3) Nothing in this section affects the liability imposed on a corporation for an offence committed by the corporation against this Code or the regulations.

(4) In this section, “**officer**” means a director of the corporation or a person who is otherwise concerned in its management.

Limitations

184. Despite anything in any Act, proceedings for an offence against this Code or the regulations 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.

SCHEDULE 1—PRINCIPAL DEFINITIONS

(Sec. 3 (1))

In this Code, unless the contrary intention appears—

- “acceleration clause”** *see section 84;*
- “amount of credit”** *see section 4 (2);* 5
- “annual percentage rate”** *see section 25;*
- “cash price”** of goods or services to which a credit contract relates means the lowest price (unaffected by any discount between the credit provider and the supplier) that a cash purchaser might reasonably be expected to pay for them (either from the supplier or, if not available for cash from the supplier, from another supplier); 10
- “commission”** includes any form of monetary consideration or any form of non-monetary consideration to which a monetary value can be assigned;
- “compulsory insurance”** means— 15
- (a) compulsory third-party personal injury insurance; or
 - (b) insurance of a nature declared by the regulations to be compulsory insurance for the purposes of this Code;
- “consumer credit insurance”** means insurance that insures the capacity of the debtor to make repayments under the credit contract, including insurance against sickness of, injury to, or disability or death of, the debtor or against unemployment of the debtor, and also including life insurance (including insurance under a group policy) to cover any outstanding amount on the debtor’s death; 20
- “consumer lease”** *see section 147;* 25
- “continuing credit contract”** means a credit contract under which—
- (a) multiple advances of credit are contemplated; and
 - (b) the amount of available credit ordinarily increases as the amount of credit is reduced;
- “contract”** includes a series or combination of contracts, or contracts and arrangements; 30

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- “contract document”** means the document or documents setting out the terms of a contract;
- “Court”**, in relation to a provision of this Code, means the court or tribunal which has by law jurisdiction under that provision;
- “credit”** *see section 4 (1)*; 5
- “credit contract”** *see section 7*;
- “credit fees and charges”** means fees and charges payable in connection with a credit contract or mortgage, but does not include—
- (a) interest charges (including default charges); or
 - (b) any fees or charges that are payable to or by a credit provider in connection with a credit contract under which both credit and debit facilities are available whether or not a transaction involves the provision of credit (for example, transaction fees); or 10
 - (c) government charges and duties on receipts or withdrawals;
- “credit provider”** means a person that provides credit, and includes a prospective credit provider; 15
- “credit-related insurance contract”** *see section 132*;
- “daily percentage rate”** *see section 25*;
- “date”** of a notice *see section 173*;
- “debtor”** means a person (other than a guarantor) who is liable to pay for (or to repay) credit, and includes a prospective debtor; 20
- “default notice”** *see Part 5*;
- “default rate”** *see section 25*;
- “dispose”** of property includes—
- (a) sell the property; or 25
 - (b) part with possession of the property to the prejudice of the owner or a mortgagee of the property; or
 - (c) destroy the property;

- “enforcement expenses”**, in relation to a mortgage, includes expenses incurred by the mortgagee in preserving or maintaining property subject to the mortgage (including insurance, rates and taxes payable for the property) but only if the expenses are incurred after a breach occurs and are authorised by the mortgage; 5
- “enforcement proceedings”**, in relation to a credit contract or a guarantee or mortgage, means—
- (a) proceedings in a court to recover a payment due under the contract or a guarantee; or
 - (b) taking possession of property under a mortgage or taking any other action to enforce a mortgage; 10
- “goods”** includes—
- (a) ships, aircraft or other vehicles; or
 - (b) animals, including fish; or
 - (c) minerals, trees or crops, whether on, under or attached to land or not; 15
- but does not include anything declared by the regulations not to be goods for the purposes of this Code;
- “goods mortgage”** means a mortgage over goods;
- “Government Consumer Agency”** means the person who, or body which, has by law the functions of the Government Consumer Agency under this Code; 20
- “guarantee”** includes an indemnity (other than one arising under a contract of insurance);
- “guarantee document”** means the document or documents setting out the terms of a guarantee; 25
- “guarantor”** includes a prospective guarantor;
- “insolvent”** means—
- (a) in the case of a natural person—a person who is an insolvent under administration within the meaning of the Corporations Law; or
 - (b) in the case of a corporation—a corporation that is an externally-administered corporation within the meaning of the Corporations Law; 30

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- “jurisdiction”** means a State or Territory;
- “key requirement”** *see Part 6*;
- “land”** includes any interest in land;
- “linked credit provider”** *see section 117 (1)*;
- “merchant service agreement”** means an agreement between a credit provider and a supplier of goods and services under which the credit provider agrees to pay to the supplier amounts for goods or services supplied by the supplier and paid by means of credit cards, whether or not the credit cards are issued by the credit provider; 5
- “mortgage”** includes— 10
- (a) any interest in, or power over, property securing obligations of a debtor or guarantor; or
 - (b) a credit provider’s title to land or goods subject to a sale by instalments; or
 - (c) a mortgage taken to have been entered into under section 10 (3); 15
- but does not include a consumer lease to which Part 10 applies;
- “mortgage document”** means the document or documents setting out the terms of a mortgage by reference to which the mortgage is created;
- “mortgagor”** includes a prospective mortgagor;
- “ordinarily resident”** in a jurisdiction means, if the person concerned is not ordinarily resident in Australia, resident for the time being in the jurisdiction; 20
- “penalty unit”** *see section 179*;
- “predominant”** purpose for which credit is provided or goods are hired under a consumer lease means— 25
- (a) a purpose for which more than half of the credit is or goods are intended to be used; or
 - (b) if the credit is intended to be used to obtain goods or services intended to be used for more than one purpose, or the goods are intended to be used for more than one purpose, the purpose for which the goods or services are intended to be most used; 30

“purchaser” means—

- (a) in relation to goods—a person who purchases, or proposes to purchase, the goods; or
- (b) in relation to services—a person who contracts, or proposes to contract, to obtain services;

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“reference rate” means a benchmark, index or other reference rate;

“regulation” means a regulation made or in force for the purposes of this Code;

“sale contract” *see section 115*;

“services” includes—

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- (a) rights in relation to, and interests in, real property; or
- (b) insurance; or
- (c) professional services; or
- (d) a right to services;

but does not include the provision of credit or a right to credit or services provided under a consumer lease;

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“strata corporation” means—

- (a) a body corporate incorporated in relation to land subdivided wholly or mainly for residential purposes under a law of this or some other jurisdiction providing for strata, cluster, precinct or other subdivision of land; or
- (b) a body corporate whose issued shares confer a right to occupy land for residential purposes;

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“supplier” means a supplier of goods or services;

“supply” includes agree to supply;

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“termination” of a contract includes the discharge or rescission of the contract;

“tied continuing credit contract” *see section 117 (2)*;

“tied loan contract” *see section 117 (3)*;

“unpaid balance” *see section 25*;

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“unpaid daily balance” *see section 25*.

**SCHEDULE 2—MISCELLANEOUS PROVISIONS RELATING
TO INTERPRETATION**

(Sec. 3 (2))

PART 1—PRELIMINARY

Displacement of Schedule by contrary intention

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1. The application of this Schedule may be displaced, wholly or partly, by a contrary intention appearing in this Code.

PART 2—GENERAL

Code to be construed not to exceed legislative power of Legislature

2. (1) This Code is to be construed as operating to the full extent of, but so as not to exceed, the legislative power of the Legislature of this jurisdiction.

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(2) If a provision of this Code, or the application of a provision of this Code to a person, subject matter or circumstance, would, but for this clause, be construed as being in excess of the legislative power of the Legislature of this jurisdiction—

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(a) it is a valid provision to the extent to which it is not in excess of the power; and

(b) the remainder of this Code, and the application of the provision to other persons, subject matters or circumstances, is not affected.

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(3) This clause applies to this Code in addition to, and without limiting the effect of, any provision of this Code.

Every section to be a substantive enactment

3. Every section of this Code has effect as a substantive enactment without introductory words.

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Material that is, and is not, part of this Code

4. (1) The heading to a Part, Division or Subdivision into which this Code is divided is part of this Code.

(2) A Schedule to this Code is part of this Code.

(3) Punctuation in this Code is part of this Code.

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(4) A heading to a section or subsection of this Code does not form part of this Code.

(5) Notes included in this Code (including footnotes and endnotes) do not form part of this Code.

References to particular Acts and to enactments 5

5. In this Code—

- (a) an Act of this jurisdiction may be cited—
 - (i) by its short title; or
 - (ii) by reference to the year in which it was passed and its number; and 10

- (b) a Commonwealth Act may be cited—
 - (i) by its short title; or
 - (ii) in another way sufficient in a Commonwealth Act for the citation of such an Act;

together with a reference to the Commonwealth; and 15

- (c) an Act of another jurisdiction may be cited—
 - (i) by its short title; or
 - (ii) in another way sufficient in an Act of the jurisdiction for the citation of such an Act;

together with a reference to the jurisdiction. 20

References taken to be included in Act or Code citation etc.

6. (1) A reference in this Code to an Act includes a reference to—

- (a) the Act as originally enacted, and as amended from time to time since its original enactment; and
- (b) if the Act has been repealed and re-enacted (with or without modification) since the enactment of the reference—the Act as re-enacted, and as amended from time to time since its re-enactment. 25

(2) A reference in this Code to a provision of this Code or of an Act includes a reference to—

- (a) the provision as originally enacted, and as amended from time to time since its original enactment; and 30

- (b) if the provision has been omitted and re-enacted (with or without modification) since the enactment of the reference—the provision as re-enacted, and as amended from time to time since its re-enactment.

(3) Subclauses (1) and (2) apply to a reference in this Code to a law of the Commonwealth or another jurisdiction as they apply to a reference in this Code to an Act and to a provision of an Act.

Interpretation best achieving Code's purpose

7. (1) In the interpretation of a provision of this Code, the interpretation that will best achieve the purpose or object of this Code is to be preferred to any other interpretation. 5

(2) Subclause (1) applies whether or not the purpose is expressly stated in this Code.

Use of extrinsic material in interpretation 10

8. (1) In this clause—

“extrinsic material” means relevant material not forming part of this Code, including, for example—

(a) material that is set out in the document containing the text of this Code as printed by the Government Printer of Queensland; and 15

(b) a relevant report of a Royal Commission, Law Reform Commission, commission or committee of inquiry, or a similar body, that was laid before the Legislative Assembly of Queensland before the provision concerned was enacted; and

(c) a relevant report of a committee of the Legislative Assembly of Queensland that was made to the Legislative Assembly of Queensland before the provision was enacted; and 20

(d) a treaty or other international agreement that is mentioned in this Code; and

(e) an explanatory note or memorandum relating to the Bill that contained the provision, or any relevant document, that was laid before, or given to the members of, the Legislative Assembly of Queensland by the member bringing in the Bill before the provision was enacted; and 25

(f) the speech made to the Legislative Assembly of Queensland by the member in moving a motion that the Bill be read a second time; and 30

- (g) material in the Votes and Proceedings of the Legislative Assembly of Queensland or in any official record of debates in the Legislative Assembly of Queensland; and
 - (h) document that is declared by this Code to be a relevant document for the purposes of this clause; 5
- “ordinary meaning”** means the ordinary meaning conveyed by a provision having regard to its context in this Code and to the purpose of this Code.
- (2) Subject to subclause (3), in the interpretation of a provision of this Code, consideration may be given to extrinsic material capable of assisting in the interpretation— 10
 - (a) if the provision is ambiguous or obscure—to provide an interpretation of it; or
 - (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable—to provide an interpretation that avoids such a result; or 15
 - (c) in any other case—to confirm the interpretation conveyed by the ordinary meaning of the provision.
 - (3) In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be had to— 20
 - (a) the desirability of a provision being interpreted as having its ordinary meaning; and
 - (b) the undesirability of prolonging proceedings without compensating advantage; and 25
 - (c) other relevant matters.
- Effect of change of drafting practice and use of examples**
9. If—
- (a) a provision of this Code expresses an idea in particular words; and
 - (b) a provision enacted later appears to express the same idea in different words for the purpose of implementing a different legislative drafting practice, including, for example— 30

(i) the use of a clearer or simpler style; or

(ii) the use of gender-neutral language;

the ideas must not be taken to be different merely because different words are used.

Use of examples

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10. If this Code includes an example of the operation of a provision—

(a) the example is not exhaustive; and

(b) the example does not limit, but may extend, the meaning of the provision; and

(c) the example and the provision are to be read in the context of each other and the other provisions of this Code, but, if the example and the provision so read are inconsistent, the provision prevails. 10

Compliance with forms

11. (1) If a form is prescribed or approved by or for the purpose of this Code, strict compliance with the form is not necessary and substantial compliance is sufficient. 15

(2) If a form prescribed or approved by or for the purpose of this Code requires—

(a) the form to be completed in a specified way; or

(b) specified information or documents to be included in, attached to or given with the form; or 20

(c) the form, or information or documents included in, attached to or given with the form, to be verified in a specified way;

the form is not properly completed unless the requirement is complied with.

PART 3—TERMS AND REFERENCES

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Definitions

12. (1) In this Code—

“Act” means an Act of the Legislature of this jurisdiction;

“adult” means an individual who is 18 or more;

- “affidavit”**, in relation to a person allowed by law to affirm, declare or promise, includes affirmation, declaration and promise;
- “amend”** includes—
- (a) omit or omit and substitute; or
 - (b) alter or vary; or 5
 - (c) amend by implication;
- “appoint”** includes re-appoint;
- “Australia”** means the Commonwealth of Australia but, when used in a geographical sense, does not include an external Territory;
- “business day”** means a day that is not— 10
- (a) a Saturday or Sunday; or
 - (b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done;
- “calendar month”** means a period starting at the beginning of any day of 1 of the 12 named months and ending— 15
- (a) immediately before the beginning of the corresponding day of the next named month; or
 - (b) if there is no such corresponding day—at the end of the next named month;
- “calendar year”** means a period of 12 months beginning on 1 January; 20
- “commencement”**, in relation to this Code or an Act or a provision of this Code or an Act, means the time at which this Code, the Act or provision comes into operation;
- “Commonwealth”** means the Commonwealth of Australia but, when used in a geographical sense, does not include an external Territory; 25
- “confer”**, in relation to a function, includes impose;
- “contravene”** includes fail to comply with;
- “country”** includes—
- (a) a federation; or
 - (b) a state, province or other part of a federation; 30

“date of assent”, in relation to an Act, means the day on which the Act receives the Royal Assent;

“definition” means a provision of this Code (however expressed) that—

(a) gives a meaning to a word or expression; or

(b) limits or extends the meaning of a word or expression;

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“document” includes—

(a) any paper or other material on which there is writing; or

(b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; or

10

(c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being reproduced (with or without the aid of another article or device);

“estate” includes easement, charge, right, title, claim, demand, lien or encumbrance, whether at law or in equity;

15

“expire” includes lapse or otherwise cease to have effect;

“external Territory” means a Territory, other than an internal Territory, for the government of which as a Territory provision is made by a Commonwealth Act;

“fail” includes refuse;

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“financial year” means a period of 12 months beginning on 1 July;

“foreign country” means a country (whether or not an independent sovereign State) outside Australia and the external Territories;

“function” includes duty;

“Gazette” means the Government Gazette of this jurisdiction;

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“Gazette notice” means notice published in the Gazette;

“gazetted” means published in the Gazette;

“Government Printer” means the Government Printer of this jurisdiction, and includes any other person authorised by the Government of this jurisdiction to print an Act or instrument;

30

- “individual”** means a natural person;
- “insert”**, in relation to a provision of this Code, includes substitute;
- “instrument”** includes a statutory instrument;
- “interest”**, in relation to land or other property, means—
- (a) a legal or equitable estate in the land or other property; or 5
 - (b) a right, power or privilege over, or in relation to, the land or other property;
- “internal Territory”** means the Australian Capital Territory, the Jervis Bay Territory or the Northern Territory;
- “Jervis Bay Territory”** means the Territory mentioned in the Jervis Bay Territory Acceptance Act 1915 of the Commonwealth; 10
- “make”** includes issue or grant;
- “minor”** means an individual who is under 18;
- “modification”** includes addition, omission or substitution;
- “month”** means a calendar month; 15
- “named month”** means 1 of the 12 months of the year;
- “Northern Territory”** means the Northern Territory of Australia;
- “number”** means—
- (a) a number expressed in figures or words; or
 - (b) a letter; or 20
 - (c) a combination of a number so expressed and a letter;
- “oath”**, in relation to a person allowed by law to affirm, declare or promise, includes affirmation, declaration or promise;
- “office”** includes position;
- “omit”**, in relation to a provision of this Code or an Act, includes repeal; 25
- “party”** includes an individual or a body politic or corporate;
- “penalty”** includes forfeiture or punishment;

-
- “person”** includes an individual or a body politic or corporate;
- “power”** includes authority;
- “prescribed”** means prescribed by, or by regulations made or in force for the purposes of or under, this Code;
- “printed”** includes typewritten, lithographed or reproduced by any mechanical means; 5
- “proceeding”** means a legal or other action or proceeding;
- “property”** means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action; 10
- “provision”**, in relation to this Code or an Act, means words or other matter that form or forms part of this Code or the Act, and includes—
- (a) a Chapter, Part, Division, Subdivision, section, subsection, paragraph, subparagraph, sub-subparagraph or Schedule of or to this Code or the Act; or 15
 - (b) a section, clause, subclause, item, column, table or form of or in a Schedule to this Code or the Act; or
 - (c) the long title and any preamble to the Act;
- “record”** includes information stored or recorded by means of a computer; 20
- “repeal”** includes—
- (a) revoke or rescind; or
 - (b) repeal by implication; or
 - (c) abrogate or limit the effect of this Code or instrument concerned; or 25
 - (d) exclude from, or include in, the application of this Code or instrument concerned any person, subject matter or circumstance;
- “sign”** includes the affixing of a seal or the making of a mark;
- “statutory declaration”** means a declaration made under an Act, or under a Commonwealth Act or an Act of another jurisdiction, that authorises a declaration to be made otherwise than in the course of a judicial proceeding; 30

“**statutory instrument**” means an instrument (including a regulation) made or in force under or for the purposes of this Code, and includes an instrument made or in force under any such instrument;

“**swear**”, in relation to a person allowed by law to affirm, declare or promise, includes affirm, declare or promise; 5

“**word**” includes any symbol, figure or drawing;

“**writing**” includes any mode of representing or reproducing words in a visible form.

(2) In a statutory instrument—

“**the Code**” means this Code. 10

Provisions relating to defined terms and gender and number

13. (1) If this Code defines a word or expression, other parts of speech and grammatical forms of the word or expression have corresponding meanings.

(2) Definitions in or applicable to this Code apply except so far as the context or subject matter otherwise indicates or requires. 15

(3) In this Code, words indicating a gender include each other gender.

(4) In this Code—

(a) words in the singular include the plural; and

(b) words in the plural include the singular. 20

Meaning of may and must etc.

14. (1) In this Code, the word “**may**”, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion.

(2) In this Code, the word “**must**”, or a similar word or expression, used in relation to a power indicates that the power is required to be exercised. 25

(3) This clause has effect despite any rule of construction to the contrary.

Words and expressions used in statutory instruments

15. (1) Words and expressions used in a statutory instrument have the same meanings as they have, from time to time, in this Code, or relevant provisions of this Code, under or for the purposes of which the instrument is made or in force. 30

(2) This clause has effect in relation to an instrument except so far as the contrary intention appears in the instrument.

Effect of express references to bodies corporate and individuals

16. In this Code, a reference to a person generally (whether the expression “person”, “party”, “someone”, “anyone”, “no-one”, “one”, “another” or “whoever” or another expression is used)— 5

(a) does not exclude a reference to a body corporate or an individual merely because elsewhere in this Code there is particular reference to a body corporate (however expressed); and

(b) does not exclude a reference to an individual or a body corporate merely because elsewhere in this Code there is particular reference to an individual (however expressed). 10

Production of records kept in computers etc.

17. If a person who keeps a record of information by means of a mechanical, electronic or other device is required by or under this Code— 15

(a) to produce the information or a document containing the information to a court, tribunal or person; or

(b) to make a document containing the information available for inspection by a court, tribunal or person;

then, unless the court, tribunal or person otherwise directs— 20

(c) the requirement obliges the person to produce or make available for inspection, as the case may be, a document that reproduces the information in a form capable of being understood by the court, tribunal or person; and

(d) the production to the court, tribunal or person of the document in that form complies with the requirement. 25

References to this jurisdiction to be implied

18. In this Code—

(a) a reference to an officer, office or statutory body is a reference to such an officer, office or statutory body in and for this jurisdiction; and 30

(b) a reference to a locality or other matter or thing is a reference to such a locality or other matter or thing in and of this jurisdiction.

References to officers and holders of offices

19. In this Code, a reference to a particular officer, or to the holder of a particular office, includes a reference to the person for the time being occupying or acting in the office concerned.

Reference to certain provisions of Code 5

20. If a provision of this Code refers—

- (a) to a Part, section or Schedule by a number and without reference to this Code—the reference is a reference to the Part, section or Schedule, designated by the number, of or to this Code; or
- (b) to a Schedule without reference to it by a number and without reference to this Code—the reference, if there is only 1 Schedule to this Code, is a reference to the Schedule; or 10
- (c) to a Division, Subdivision, subsection, paragraph, subparagraph, sub-subparagraph, clause, subclause, item, column, table or form by a number and without reference to this Code—the reference is a reference to— 15
 - (i) the Division, designated by the number, of the Part in which the reference occurs; and
 - (ii) the Subdivision, designated by the number, of the Division in which the reference occurs; and 20
 - (iii) the subsection, designated by the number, of the section in which the reference occurs; and
 - (iv) the paragraph, designated by the number, of the section, subsection, Schedule or other provision in which the reference occurs; and 25
 - (v) the paragraph, designated by the number, of the clause, subclause, item, column, table or form of or in the Schedule in which the reference occurs; and
 - (vi) the subparagraph, designated by the number, of the paragraph in which the reference occurs; and 30
 - (vii) the sub-subparagraph, designated by the number, of the subparagraph in which the reference occurs; and
 - (viii) the section, clause, subclause, item, column, table or form, designated by the number, of or in the Schedule in which the reference occurs; 35

as the case requires.

Reference to provisions of this Code or an Act is inclusive

21. In this Code, a reference to a portion of this Code or an Act includes—

- (a) a reference to the Chapter, Part, Division, Subdivision, section, subsection or other provision of this Code or the Act referred to that forms the beginning of the portion; and 5
- (b) a reference to the Chapter, Part, Division, Subdivision, section, subsection or other provision of this Code or the Act referred to that forms the end of the portion.

Example: A reference to “sections 5 to 9” includes both section 5 and section 9. It is not necessary to refer to “sections 5 to 9 (both inclusive)” to ensure that the reference is given an inclusive interpretation. 10

PART 4—FUNCTIONS AND POWERS

Performance of statutory functions

22. (1) If this Code confers a function or power on a person or body, the function may be performed, or the power may be exercised, from time to time as occasion requires. 15

(2) If this Code confers a function or power on a particular officer or the holder of a particular office, the function may be performed, or the power may be exercised, by the person for the time being occupying or acting in the office concerned. 20

(3) If this Code confers a function or power on a body (whether or not incorporated), the performance of the function, or the exercise of the power, is not affected merely because of vacancies in the membership of the body.

Power to make instrument or decision includes power to amend or repeal 25

23. If this Code authorises or requires the making of an instrument or decision—

- (a) the power includes power to amend or repeal the instrument or decision; and 30
- (b) the power to amend or repeal the instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision.

Matters for which statutory instruments may make provision

24. (1) If this Code authorises or requires the making of a statutory instrument in relation to a matter, a statutory instrument made under this Code may make provision for the matter by applying, adopting or incorporating (with or without modification) the provisions of— 5

- (a) an Act or statutory instrument; or
- (b) another document (whether of the same or a different kind);

as in force at a particular time or as in force from time to time.

(2) If a statutory instrument applies, adopts or incorporates the provisions of a document, the statutory instrument applies, adopts or incorporates the provisions as in force from time to time, unless the statutory instrument otherwise expressly provides. 10

(3) A statutory instrument may—

(a) apply generally throughout this jurisdiction or be limited in its application to a particular part of this jurisdiction; or 15

(b) apply generally to all persons, matters or things or be limited in its application to—

- (i) particular persons, matters or things; or
- (ii) particular classes of persons, matters or things; or

(c) otherwise apply generally or be limited in its application by reference to specified exceptions or factors. 20

(4) A statutory instrument may—

(a) apply differently according to different specified factors; or

(b) otherwise make different provision in relation to—

- (i) different persons, matters or things; or 25
- (ii) different classes of persons, matters or things.

(5) A statutory instrument may authorise a matter or thing to be from time to time determined, applied or regulated by a specified person or body.

(6) If this Code authorises or requires a matter to be regulated by statutory instrument, the power may be exercised by prohibiting by statutory instrument the matter or any aspect of the matter. 30

(7) If this Code authorises or requires provision to be made with respect to a matter by statutory instrument, a statutory instrument made under this Code may make provision with respect to a particular aspect of the matter despite the fact that provision is made by this Code in relation to another aspect of the matter or in relation to another matter.

5

(8) A statutory instrument may provide for the review of, or a right of appeal against, a decision made under the statutory instrument, or this Code, and may, for that purpose, confer jurisdiction on any court, tribunal, person or body.

(9) A statutory instrument may require a form prescribed by or under the statutory instrument, or information or documents included in, attached to or given with the form, to be verified by statutory declaration.

10

Presumption of validity and power to make

25. (1) All conditions and preliminary steps required for the making of a statutory instrument are presumed to have been satisfied and performed in the absence of evidence to the contrary.

15

(2) A statutory instrument is taken to be made under all powers under which it may be made, even though it purports to be made under this Code or a particular provision of this Code.

Appointments may be made by name or office

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26. (1) If this Code authorises or requires a person or body—

- (a) to appoint a person to an office; or
- (b) to appoint a person or body to exercise a power; or
- (c) to appoint a person or body to do another thing;

the person or body may make the appointment by—

25

- (d) appointing a person or body by name; or
- (e) appointing a particular officer, or the holder of a particular office, by reference to the title of the office concerned.

(2) An appointment of a particular officer, or the holder of a particular office, is taken to be the appointment of the person for the time being occupying or acting in the office concerned.

30

Acting appointments

27. (1) If this Code authorises a person or body to appoint a person to act in an office, the person or body may, in accordance with this Code, appoint—
- (a) a person by name; or 5
 - (b) a particular officer, or the holder of a particular office, by reference to the title of the office concerned;
- to act in the office.
- (2) The appointment may be expressed to have effect only in the circumstances specified in the instrument of appointment. 10
- (3) The appointer may—
- (a) determine the terms and conditions of the appointment, including remuneration and allowances; and
 - (b) terminate the appointment at any time.
- (4) The appointment, or the termination of the appointment, must be in, or evidenced by, writing signed by the appointer. 15
- (5) The appointee must not act for more than 1 year during a vacancy in the office.
- (6) If the appointee is acting in the office otherwise than because of a vacancy in the office and the office becomes vacant, then, subject to subclause (2), the appointee may continue to act until— 20
- (a) the appointer otherwise directs; or
 - (b) the vacancy is filled; or
 - (c) the end of a year from the day of the vacancy;
- whichever happens first. 25
- (7) The appointment ceases to have effect if the appointee resigns by writing signed and delivered to the appointer.
- (8) While the appointee is acting in the office—
- (a) the appointee has all the powers and functions of the holder of the office; and 30
 - (b) this Code and other laws apply to the appointee as if the appointee were the holder of the office.

(9) Anything done by or in relation to a person purporting to act in the office is not invalid merely because—

- (a) the occasion for the appointment had not arisen; or
- (b) the appointment had ceased to have effect; or
- (c) the occasion for the person to act had not arisen or had ceased. 5

(10) If this Code authorises the appointer to appoint a person to act during a vacancy in the office, an appointment to act in the office may be made by the appointer whether or not an appointment has previously been made to the office.

Powers of appointment imply certain incidental powers 10

28. (1) If this Code authorises or requires a person or body to appoint a person to an office—

- (a) the power may be exercised from time to time as occasion requires; and
- (b) the power includes— 15
 - (i) power to remove or suspend, at any time, a person appointed to the office; and
 - (ii) power to appoint another person to act in the office if a person appointed to the office is removed or suspended; and 20
 - (iii) power to reinstate or reappoint a person removed or suspended; and
 - (iv) power to appoint a person to act in the office if it is vacant (whether or not the office has ever been filled); and
 - (v) power to appoint a person to act in the office if the person appointed to the office is absent or is unable to discharge the functions of the office (whether because of illness or otherwise). 25

(2) The power to remove or suspend a person under subclause (1) (b) may be exercised even if this Code provides that the holder of the office to which the person was appointed is to hold office for a specified period. 30

(3) The power to make an appointment under subclause (1) (b) may be exercised from time to time as occasion requires.

(4) An appointment under subclause (1) (b) may be expressed to have effect only in the circumstances specified in the instrument of appointment.

Exercise of powers between enactment and commencement

29. (1) If a provision of this Code (the “**empowering provision**”) that does not commence on its enactment would, had it commenced, confer a power— 5

(a) to make an appointment; or

(b) to make a statutory instrument of a legislative or administrative character; or

(c) to do another thing; 10

then—

(d) the power may be exercised; and

(e) anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment, instrument or other thing into effect; 15

before the empowering provision commences.

(2) If a provision of a Queensland Act (the “**empowering provision**”) that does not commence on its enactment would, had it commenced, amend a provision of this Code so that it would confer a power—

(a) to make an appointment; or 20

(b) to make a statutory instrument of a legislative or administrative character; or

(c) to do another thing;

then—

(d) the power may be exercised; and 25

(e) anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment, instrument or other thing into effect;

before the empowering provision commences.

-
- (3) If—
- (a) this Code has commenced and confers a power to make a statutory instrument (the “**basic instrument-making power**”); and
 - (b) a provision of a Queensland Act that does not commence on its enactment would, had it commenced, amend this Code so as to confer additional power to make a statutory instrument (the “**additional instrument-making power**”);
- then—
- (c) the basic instrument-making power and the additional instrument-making power may be exercised by making a single instrument; and
 - (d) any provision of the instrument that required an exercise of the additional instrument-making power is to be treated as made under subclause (2).
- (4) If an instrument, or a provision of an instrument, is made under subclause (1) or (2) that is necessary for the purpose of—
- (a) enabling the exercise of a power mentioned in the subclause; or
 - (b) bringing an appointment, instrument or other thing made or done under such a power into effect;
- the instrument or provision takes effect—
- (c) on the making of the instrument; or
 - (d) on such later day (if any) on which, or at such later time (if any) at which, the instrument or provision is expressed to take effect.
- (5) If—
- (a) an appointment is made under subclause (1) or (2); or
 - (b) an instrument, or a provision of an instrument, made under subclause (1) or (2) is not necessary for a purpose mentioned in subclause (4);
- the appointment, instrument or provision takes effect—
- (c) on the commencement of the relevant empowering provision; or
 - (d) on such later day (if any) on which, or at such later time (if any) at which, the appointment, instrument or provision is expressed to take effect.

(6) Anything done under subclause (1) or (2) does not confer a right, or impose a liability, on a person before the relevant empowering provision commences.

(7) After the enactment of a provision mentioned in subclause (2) but before the provision's commencement, this clause applies as if the references in subclauses (2) and (5) to the commencement of the empowering provision were references to the commencement of the provision mentioned in subclause (2) as amended by the empowering provision. 5

(8) In the application of this clause to a statutory instrument, a reference to the enactment of the instrument is a reference to the making of the instrument. 10

PART 5—DISTANCE, TIME AND AGE

Matters relating to distance, time and age

30. (1) In the measurement of distance for the purposes of this Code, the distance is to be measured along the shortest road ordinarily used for travelling. 15

(2) If a period beginning on a given day, act or event is provided or allowed for a purpose by this Code, the period is to be calculated by excluding the day, or the day of the act or event, and— 20

(a) if the period is expressed to be a specified number of clear days or at least a specified number of days—by excluding the day on which the purpose is to be fulfilled; and

(b) in any other case—by including the day on which the purpose is to be fulfilled. 25

(3) If the last day of a period provided or allowed by this Code for doing anything is not a business day in the place in which the thing is to be or may be done, the thing may be done on the next business day in the place.

(4) If the last day of a period provided or allowed by this Code for the filing or registration of a document is a day on which the office is closed where the filing or registration is to be or may be done, the document may be filed or registered at the office on the next day that the office is open. 30

(5) If no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the prescribed occasion happens.

(6) If, in this Code, there is a reference to time, the reference is, in relation to the doing of anything in a jurisdiction, a reference to the legal time in the jurisdiction.

(7) For the purposes of this Code, a person attains an age in years at the beginning of the person's birthday for the age. 5

PART 6—EFFECT OF REPEAL, AMENDMENT OR EXPIRATION

Time of Code ceasing to have effect

31. If a provision of this Code is expressed—

- (a) to expire on a specified day; or 10
- (b) to remain or continue in force, or otherwise have effect, until a specified day;

this provision has effect until the last moment of the specified day.

Repealed Code provisions not revived

32. If a provision of this Code is repealed or amended by a Queensland Act, or a provision of a Queensland Act, the provision is not revived merely because the Queensland Act or the provision of the Queensland Act— 15

- (a) is later repealed or amended; or
- (b) later expires.

Saving of operation of repealed Code provisions 20

33. (1) The repeal, amendment or expiry of a provision of this Code does not—

- (a) revive anything not in force or existing at the time the repeal, amendment or expiry takes effect; or
- (b) affect the previous operation of the provision or anything suffered, done or begun under the provision; or 25
- (c) affect a right, privilege or liability acquired, accrued or incurred under the provision; or
- (d) affect a penalty incurred in relation to an offence arising under the provision; or 30
- (e) affect an investigation, proceeding or remedy in relation to such a right, privilege, liability or penalty.

Note The Consumer Credit Code

(2) Any such penalty may be imposed and enforced, and any such investigation, proceeding or remedy may be begun, continued or enforced, as if the provision had not been repealed or amended or had not expired.

Continuance of repealed provisions

34. If a Queensland Act repeals some provisions of this Code and enacts new provisions in substitution for the repealed provisions, the repealed provisions continue in force until the new provisions commence. 5

Code and amending Acts to be read as one

35. This Code and all Queensland Acts amending this Code are to be read as one. 10

PART 7—INSTRUMENTS UNDER CODE

Schedule applies to statutory instruments

36. (1) This Schedule applies to a statutory instrument, and to things that may be done or are required to be done under a statutory instrument, in the same way as it applies to this Code, and things that may be done or are required to be done under this Code, except so far as the context or subject matter otherwise indicates or requires. 15

(2) The fact that a provision of this Schedule refers to this Code and not also to a statutory instrument does not, by itself, indicate that the provision is intended to apply only to this Code. 20

PART 8—APPLICATION TO COASTAL SEA

Application

37. This Code has effect in and relation to the coastal sea of this jurisdiction as if that coastal sea were part of this jurisdiction.

CONSUMER CREDIT (NEW SOUTH WALES) BILL 1995

SECOND READING SPEECH

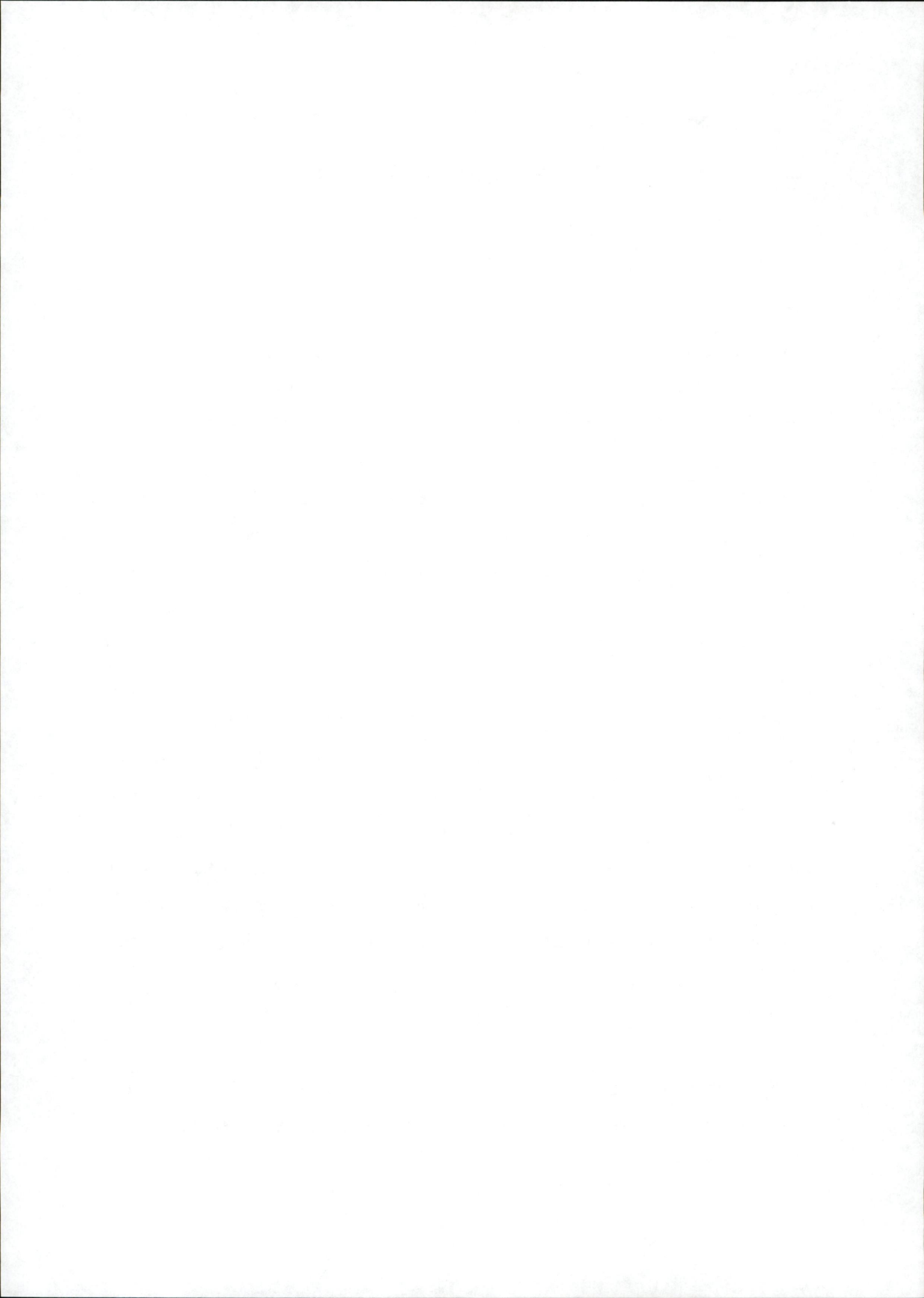
MR SPEAKER,

I move that this Bill be now read a second time.

The Bill now before the House adopts the Consumer Credit Code as a law of New South Wales. That Code was passed by the Queensland Parliament in September last year as agreed by the Ministerial Agreement on credit laws as the first step in the process towards achieving uniform consumer credit laws in Australia.

Honourable Members would be aware of the long history of this legislation. It was in fact recognised when the Credit Act 1984 took effect that that law was already outdated and the process would have to begin again, but on a very different basis. That knowledge has influenced in a major way the philosophy and structure of the legislation before the House. It taught us that legislation must be flexible enough to accommodate major changes in government policy, in this case deregulation of the finance sector and also the demands of the marketplace for products which suit the present and future needs of the consumer.

Mr Speaker, I am confident that this legislation will meet the needs of the credit consumer for the foreseeable future, and will be effective in redressing the



imbalance of power between the borrower and lender. The market will work more efficiently than it now does, and both consumers and industry will benefit.

Honourable Members would be aware that the current Credit Act 1984 regulates less than 20% of the consumer credit market. In this State it applies only to credit under \$20,000 and to certain farming machinery and commercial vehicles. Not all types of loan nor all credit providers are regulated. It does not cover housing finance. The majority of consumer credit purchasers in this State are therefore without protection.

This Bill, Mr Speaker, seeks to protect the consumer without undue interference or over-regulation of industry. Where it is considered that competition will not address a problem, then that is directly regulated.

The Bill is based on truth-in-lending principles. It aims to give the credit purchaser accurate and relevant information on which to make an informed choice of products, and to inform potential debtors or guarantors of their rights and obligations under the contract.

I am sure that Members would be aware that the most common complaints about financial institutions is that they did not give essential information before the contract was entered into. The Consumer Credit Bill will certainly ensure that in future, debtors and guarantors will be properly informed.

I mentioned in my opening remarks that the Bill forms part of a legislative scheme which is to be uniform in all States and Territories. The scheme is based on the Uniform Credit Laws Agreement 1993 signed by Ministers of all jurisdictions.

The Agreement requires that Queensland enact a Uniform Consumer Credit Code, and that the other States and Territories apply the Code as the law of that State or Territory, or pass alternative consistent legislation. It is intended therefore that New South Wales adopt the Consumer Credit Code passed by the Queensland Parliament as a law of this State. The Code is appended to the New South Wales adopting Bill.

Under the terms of the Ministerial Agreement any amending legislation must not be introduced by a State or Territory unless there has been a resolution of the Ministerial Council, passed by a majority comprising at least two thirds of the members. Any jurisdiction which breaches this clause of the Agreement ceases to be party to the scheme. Ministers also agreed that they would not submit legislation to the Parliament or make regulations which would conflict with or negate the operation of the Credit Legislation.

The Agreement therefore recognizes the importance of laws that are consistent across all jurisdictions. Businesses and consumers will benefit from cost savings achieved by standard documentation in all States and the greater certainty of application which flows from uniform legislation.

Certain matters are however left to the individual jurisdiction and are not required to be uniform. These are: the fixing of a maximum interest rate; the establishment of trust funds with designated purposes into which forfeited interest charges may be paid; the establishment of a scheme for the licensing or registration of credit providers, and the vesting of jurisdiction in a Tribunal which under the Code is vested in a Court. I will address these matters further when I explain the specific clauses of the adopting Bill.

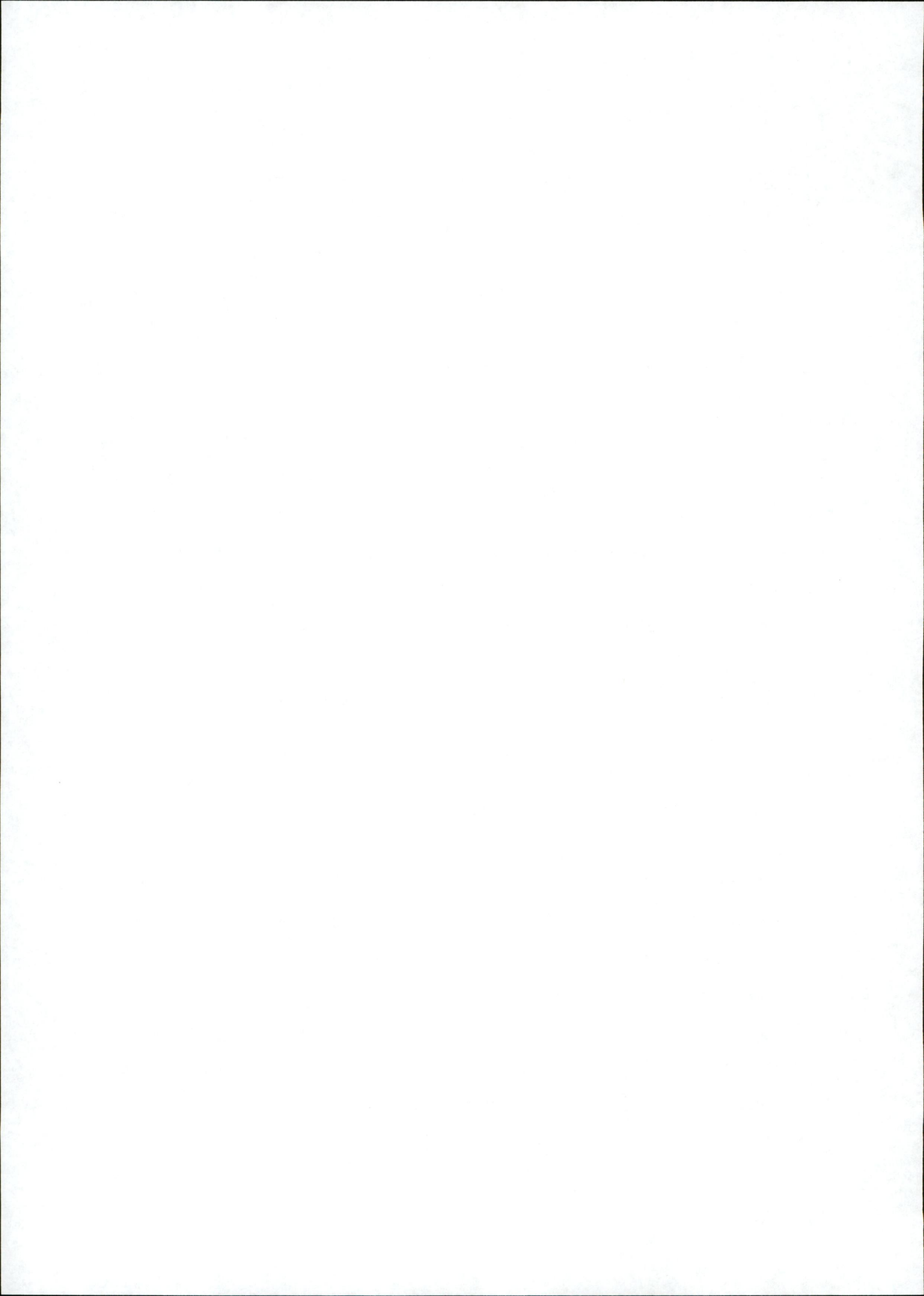
Honourable members may be aware that the Ministers responsible for this legislation have recently agreed to extend the date for its implementation to 31 March 1996. Due to the complexity of systems changes and new documentation, both of which rely to a great extent on regulations which are yet to be formally released, industry successfully put the case that more time was needed in order to comply with the legislation, and this was agreed.

It is heartening that industry has shown a determination in relation to this legislation to 'getting it right'. There seems little doubt that the Credit Act, 1984 had no such support and New South Wales has seen a succession of credit providers in the Commercial Tribunal seeking reinstatement of credit charges. I hope we have come to the end of that era. The new legislation reflects a more mature industry and a more informed and rational consumer.

I believe it is also true to say that the support for this Code is due in great part to the extensive consultation which has taken place over the past few years so that both industry and consumer representatives have been closely associated with its development and will have a stake in its success.

New South Wales has had a major role in developing this legislation and it has in fact been drafted in this state by agreement of all jurisdictions. I believe we can be confident that the legislation is fair and workable.

There is of course much work remaining. In order that consumers get maximum benefit from the legislation, Government will have to ensure that they are educated as to their rights, and educated in credit matters.



To this end the jurisdictions are pooling their resources to maximise resources and I am committed to my Department's full and continued involvement in credit education. An informed consumer is essential to the proper working of the credit market and I believe we will see the development of better products at better prices as a result of the transparency that the legislation requires.

Governments also have to turn their attention to the administration of credit, and decide whether to continue with licensing of credit providers and finance brokers. This will require legislative changes before the Code comes into effect.

I will turn now to the provision of the adopting legislation.

Clause 1 names the Act 'The Consumer Credit (NSW South Wales) Act 1995.

Clause 2 provides that the Act will commence on a day or days to be proclaimed.

Clause 3 defines terms used in the Act.

Clause 4 excludes the explanatory notes from the Act.

Clause 5 applies the Code as a law of New South Wales and names it the Consumer Credit (New South Wales) Code.

Clause 6 applies the regulations under the Queensland Code as regulations under the New South Wales Code. The regulations are also uniform under the terms of the Agreement.

Clause 7 defines some expressions in the Code as they apply to New South Wales.

Clause 8 provides for the exercise of jurisdiction under the Code to be by the Commercial Tribunal, if regulations so prescribe, or in other cases a court of appropriate monetary jurisdiction. Regulations conferring jurisdiction on the Tribunal will be made shortly and are intended to follow the current policy of giving expert jurisdiction to the Commercial Tribunal and shared jurisdiction in other matters.

Clause 9 specifies that the Commissioner of Consumer Affairs should exercise the functions of the Government Consumer Agency under the Code.

Clause 10 continues the functions of the financial counselling trust fund in relation to the Code, so that amounts paid under the civil penalty regime in the Code can be paid into this fund.

Clause 11 allows a maximum interest rate to be prescribed. New South Wales intends to prescribe a maximum interest rate but it is intended to review the current methods of prescribing that rate before it is applied to the Code.

Clause 12 provides for offences under the Code or the regulations to be dealt with by a local court constituted by a Magistrate sitting alone.

Clause 13 binds the Crown.

Clause 14 provides that regulations may make special savings and transitional regulations for New South Wales.

Clause 15 allows the Governor to make regulations for the purposes of this Act.

Clause 16 gives effect to a schedule of consequential amendments.

Clause 17 requires that the Act be reviewed in 5 years to determine whether the policy objectives of the Act remain valid.

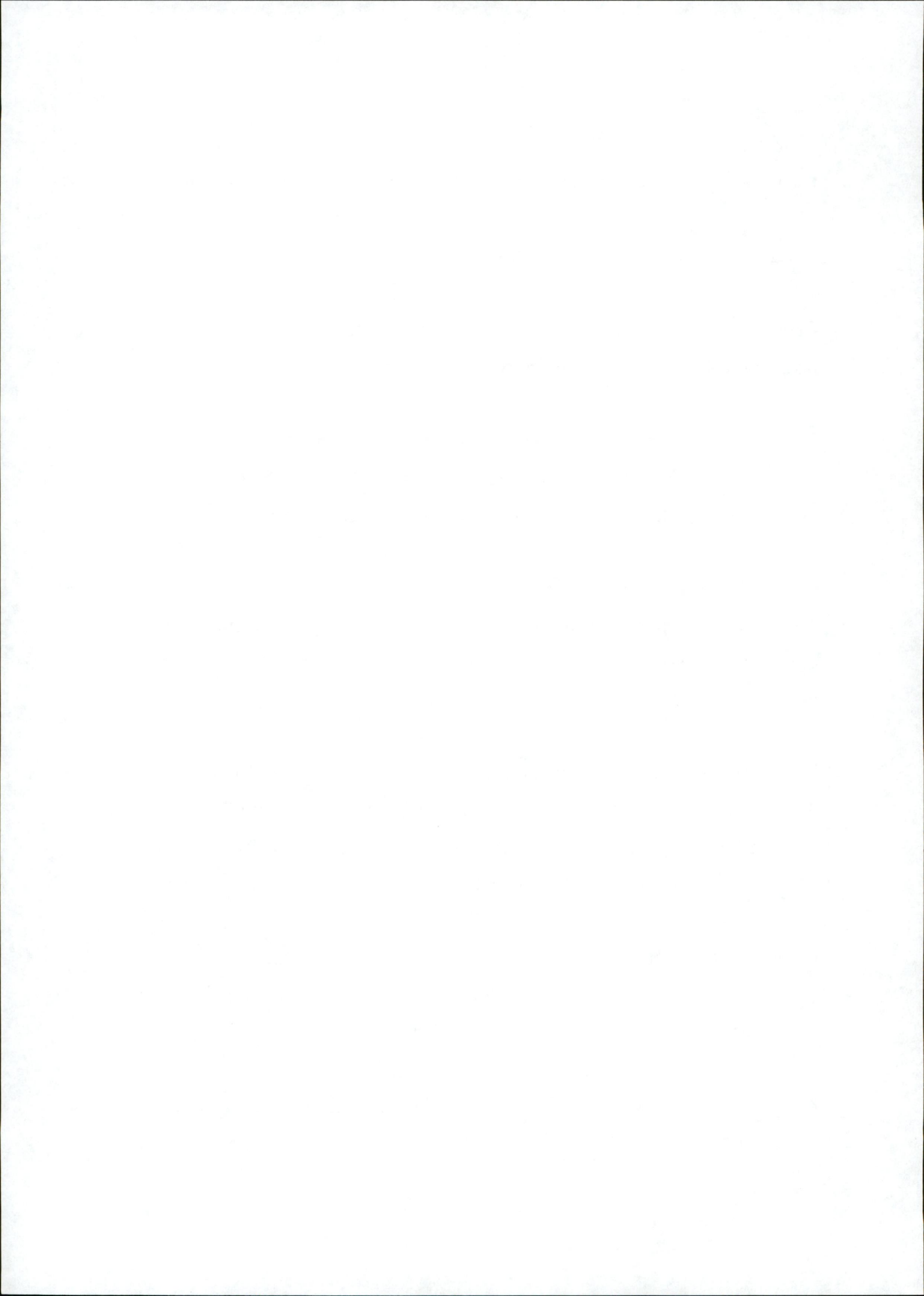
That is the extent of the New South Wales adopting legislation. The Code has been fully described in its introduction in Queensland so that I will not explain it on a clause by clause basis. I will however highlight important aspects of the Code.

The Code will apply if a debtor is a natural person or a strata corporation and the credit is to be provided wholly or predominantly for personal domestic or household purposes.

While the focus of the legislation is consumer credit these provisions recognise the multi-purpose nature of some loan products, so that if some of the credit is used for business purposes, as long as it is less than half of the proposed advance of credit, it will not prevent the application of the legislation to that product.

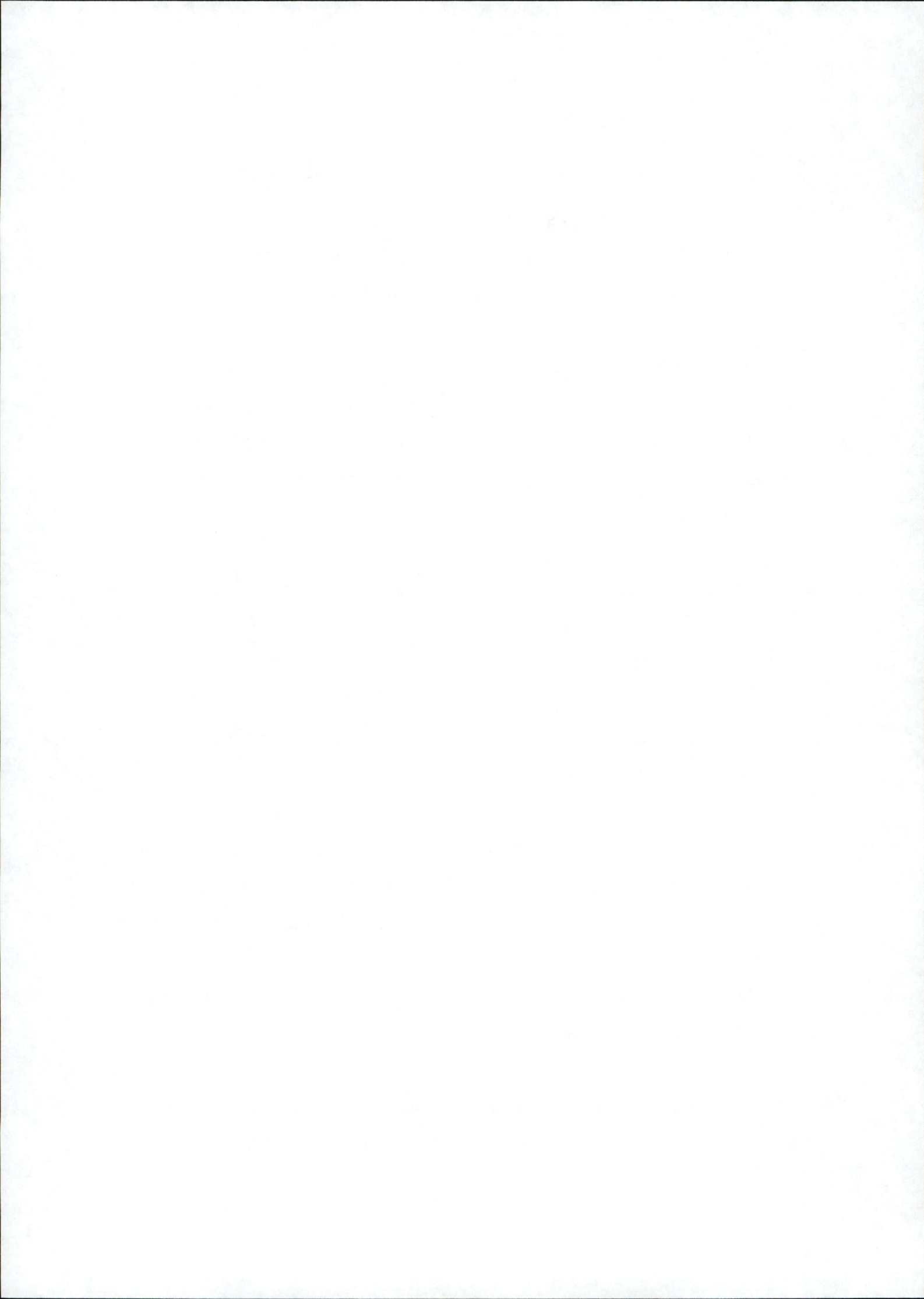
Clause 7 sets out circumstances in which the Code will not apply. These are:

- Where the contract is for 62 days or less; and credit without prior agreement, such as an overdrawn account;
- If the contract has both debit and credit facilities, that part of the contract relating to the debit facility.



- Bills of exchange. While it is accepted that these may be used for consumer credit purposes, it is doubtful whether they are in fact deferred debt and it was decided to exclude them. Certain aspects of such facilities are in fact regulated by the Commonwealth.
- Insurance premiums by instalments. These are considered not to be a credit contract intended to be regulated by the Code, even though they may fit the definition of credit, because the contract is in effect terminated by the debtor discontinuing the instalments and there is not outstanding debt.
- Pawnbrokers are also considered to be generally outside the scope of the Act and are subject to their own legislation. However the unjust contracts provisions of the Code will apply.
- Trustees of estates which give loans to beneficiaries are similarly exempt except for unjust contract provisions.
- Employee loans are exempt from the Code except for hardship and unjust contract provisions, provisions relating to enforcement procedures and expenses, related sale contracts, and the miscellaneous provisions. Where the employer is a credit provider, the exemptions only apply if the terms of the contract are more favourable to the debtor than debtors who are not employees.

These are all the exemptions, however the Code has a power to make regulations to exclude other types of credit should this be considered necessary.



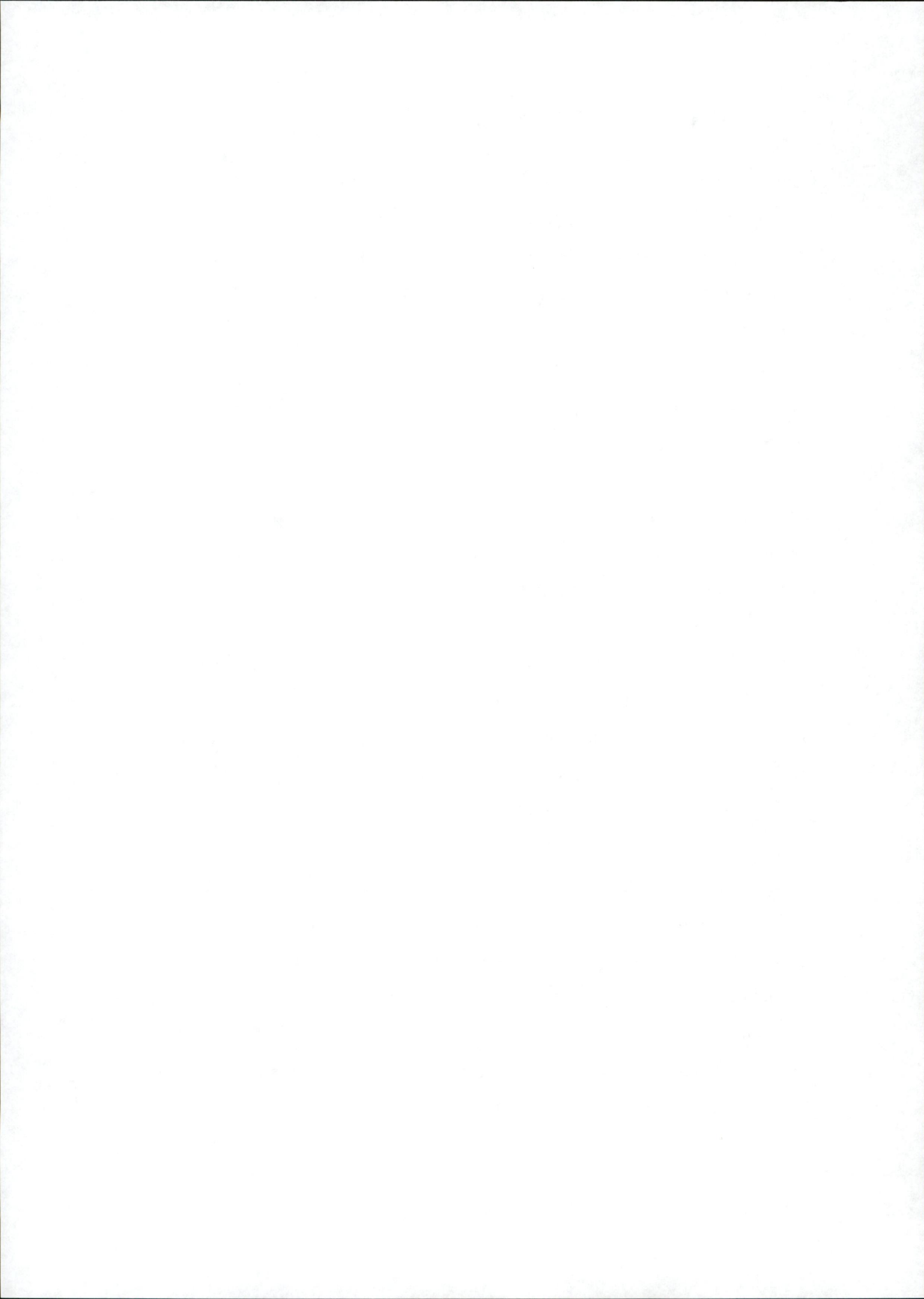
Clause 8 applies the Code to mortgages which secure credit contracts or guarantees which are themselves covered by the Code. If a mortgage also secures contracts or guarantees that are not covered by the Code, the Code will apply only to the extent that it secures obligations under the regulated contract or guarantee.

Clause 9 applies that same principle to guarantees in relation to obligations under the credit contract.

Mr Speaker, I now turn to the pivotal part of the legislation - negotiating and making credit contracts. This is where the 'truth-in-lending' concept has most relevance - before the contract is entered.

Clause 12 provides, firstly, that the contract document should be in writing, however clause 13 implicitly acknowledges that technological developments may, at some time, overtake the written contract. It is not intended to deal with such a prospect until contract law has addressed the issues, but the power is there in the Code to modify the rules should this become necessary.

Clause 14 addresses the timing for the giving of information. It also requires that the information which is to be given is that which will be in the contract document, as well as a statutory notice describing the rights and obligations of the debtor and credit provider under the Code. This means that all that a potential debtor needs to know about his or her financial contractual and statutory obligations will be given before the contract is entered into, or before the debtor makes an offer to enter into the contract.



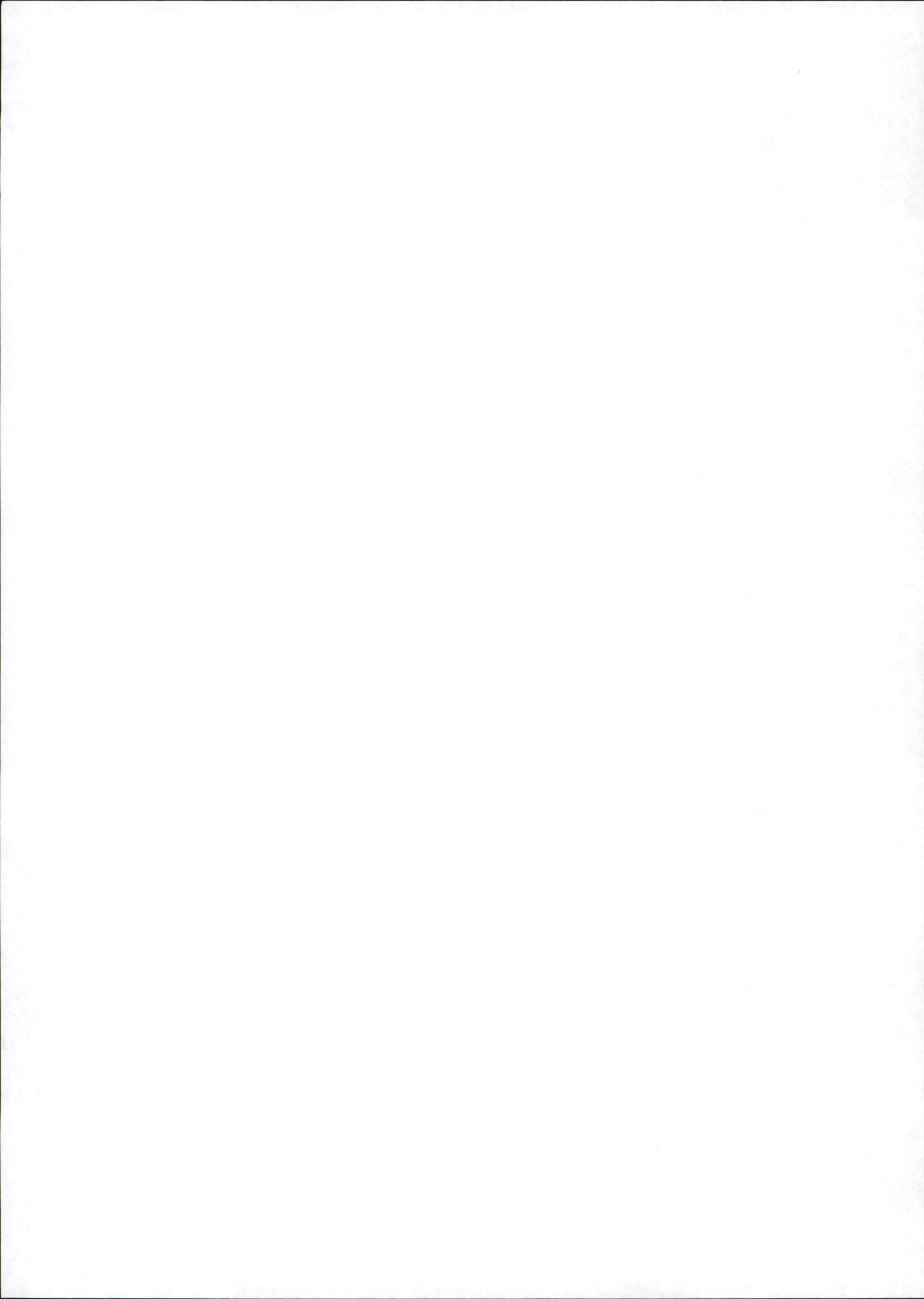
In addition, certain financial information will be required to be given in a tabular format so that the prospective debtor can see at a glance the cost of the credit being negotiated. This requirement has replaced the requirement for a comparison rate, however the Code allows credit providers to supply a comparison rate if they wish. If they do, it will be calculated according to the method required by the regulations.

The matters which must be contained in the contract document are set out in Clause 15. I will not detail all the information which is to be given to the prospective debtor since that is clearly set out in the Code, but Honourable Members will note that the information which must be given is all the costs that are ascertainable at the time the contract is entered into. The Code does not limit what can be charged but ensures that the prospective debtor is fully conversant with the arrangements.

The disclosures are, I believe, comprehensive and will allow comparisons to be made between lenders so as to get the best deal possible.

This is a primary objective of the Code, Mr Speaker, and will, I believe, result in credit providers being far more responsive to the needs of consumers so that in future, products offered will give real value.

Division 4 contains two very important clauses. The Honourable Members would have noted that the Code does not specify what fees or charges can be charged it merely requires that the fact and where ascertainable, the amount of particular fees and charges are disclosed to the potential debtor. Consumer Affairs Ministers were persuaded that competition would keep fees and charges to a minimum. Should this not be the case, or should a particular fee or charge



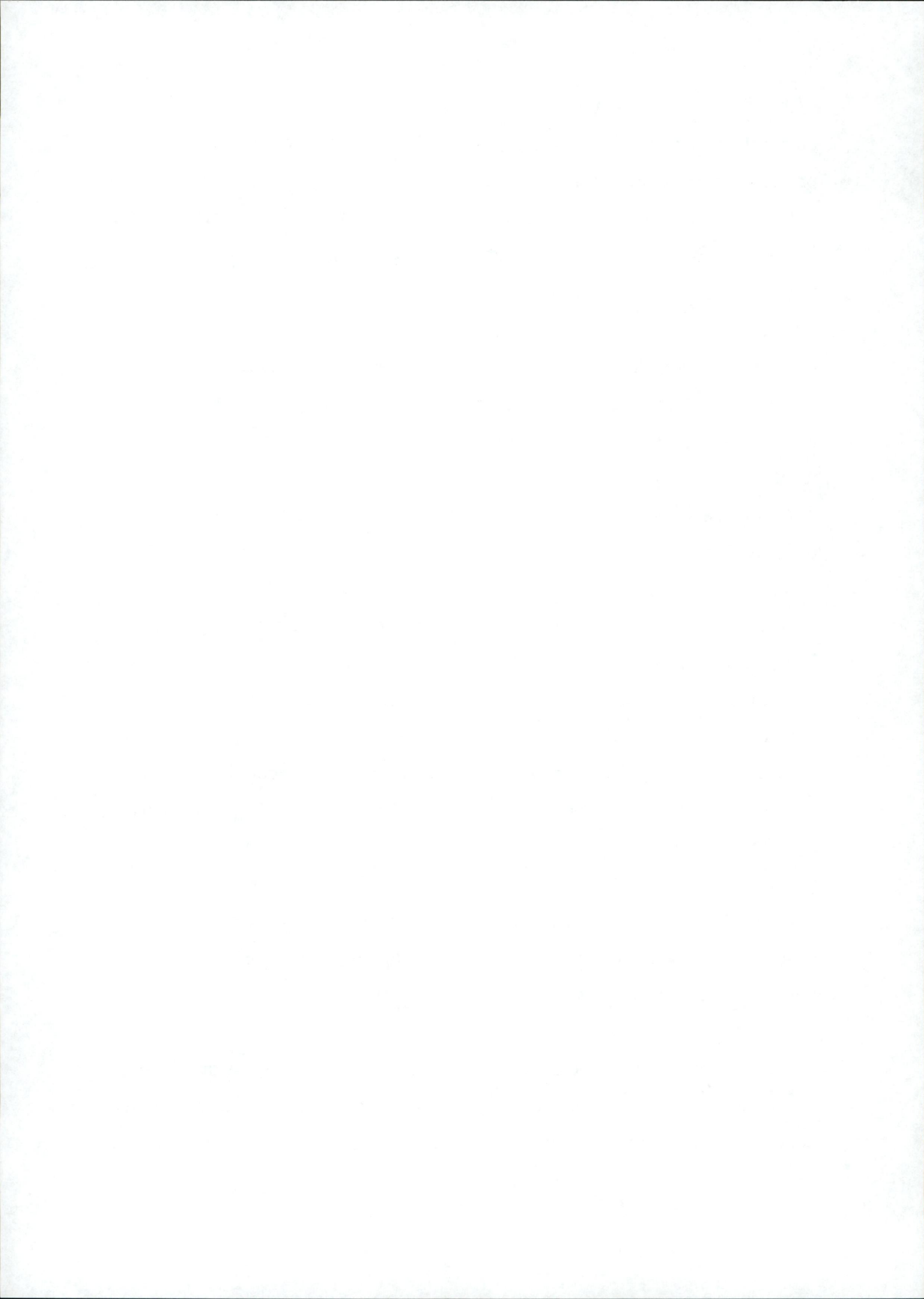
be resistant to competitive forces, Ministers have the power under clause 29 to prohibit particular fees or charges or classes of fees or charges. Credit providers should be aware that while Ministers are prepared to give the market the opportunity to control prices, they have the power and the will to act if it is clear that credit consumers are being cheated.

Clause 30 reflects the Code's response to an unacceptable practice. It has been noted that credit providers have in some instances inflated a fee or charge due to a third party that is passed on by the credit provider, thereby retaining for themselves that amount in excess of the actual amount payable to the third party. This is considered to be a totally unacceptable practice, and it is prohibited by the provisions of this clause.

Division 2 of Part 3 is significant in the protection it affords to guarantors. Honourable Members would be aware that a considerable number of actions before the courts in past years have been by guarantors who were not aware of the potential consequences of guaranteeing another's loan. This Code, Mr Speaker, will ensure that guarantors are properly informed about both their legal obligations and the financial commitments of the debtor whose loan they are considering guaranteeing.

The Code provides firstly that the guarantee must be in writing. Before the guarantor guarantees the debtor's loan he or she must be given a copy of the credit contract which is to be subject to the guarantee.

The guarantor can therefore be aware of the financial commitment that is to be undertaken by the debtor and make a judgement as to whether, in their view, the debtor would be able to fulfil these financial obligations. The prospective



guarantor will also be given a statement which explains the rights and obligations of the guarantor. This is a plain English document which should leave no doubt as to the risks involved in 'going guarantor'. On the basis of these two documents the guarantor can make a rational decision about his or her involvement.

Mr Speaker, the next aspect of the Code, Part 4 - changes to obligations under credit contracts, mortgages and guarantees, represents something of a departure from the current legislation in order to more closely reflect the commercial realities of a deregulated finance market.

The credit products of the 70's and 80's were relatively simple and few in number. Today, and increasingly, credit products are more sophisticated and closely tied to the movements of the market.

The highly regulatory approach of the Credit Act 1984 resulted in significant market distortions and cross subsidisation. These may be exemplified by the fact that interest rates on credit cards which were kept at a very high level when other rates had fallen dramatically. This reflected the inability of the credit provider to reflect costs in the fee structures, and to change rates without a substantial period of notice.

This Code has taken the approach that changes can be made under the contract, provided that the contract clearly states that this might happen.

There is nevertheless one unilateral change which is prohibited under the Code. Clause 64(1) prohibits the method of calculation of early termination charges from being changed in a fixed rate contract. It is considered essential that credit

consumers should have certainty in relation to break costs so that they can change credit providers if a better deal can be obtained elsewhere.

Mr Speaker, I believe the next Division - changes on grounds of hardship and unjust transactions is noteworthy in several respects.

Firstly, the provisions with regard to the ability of the debtor to negotiate changes on the basis of hardship have been changed from those in the current Act to reflect consumers desires to be allowed direct access to the Tribunal where a credit provider declines to negotiate a change. Currently, the debtor may ask the Commissioner to negotiate on his or her behalf and only be referred to the Tribunal if the credit provider will not negotiate.

It was considered that there would be greater benefit to the debtor in making the process simpler and shorter, thereby reducing the amount of debt that might accumulate if the debtor was unable to make payments. The Commissioner will of course negotiate if that is the debtor's wish but there will be no statutory duty to do so under the Code.

These provisions will however be limited to contracts where the maximum amount of credit to be provided is \$125,000 or less. Given that the scope of the Code is unlimited, it is considered that resources should be targetted where they are most needed.

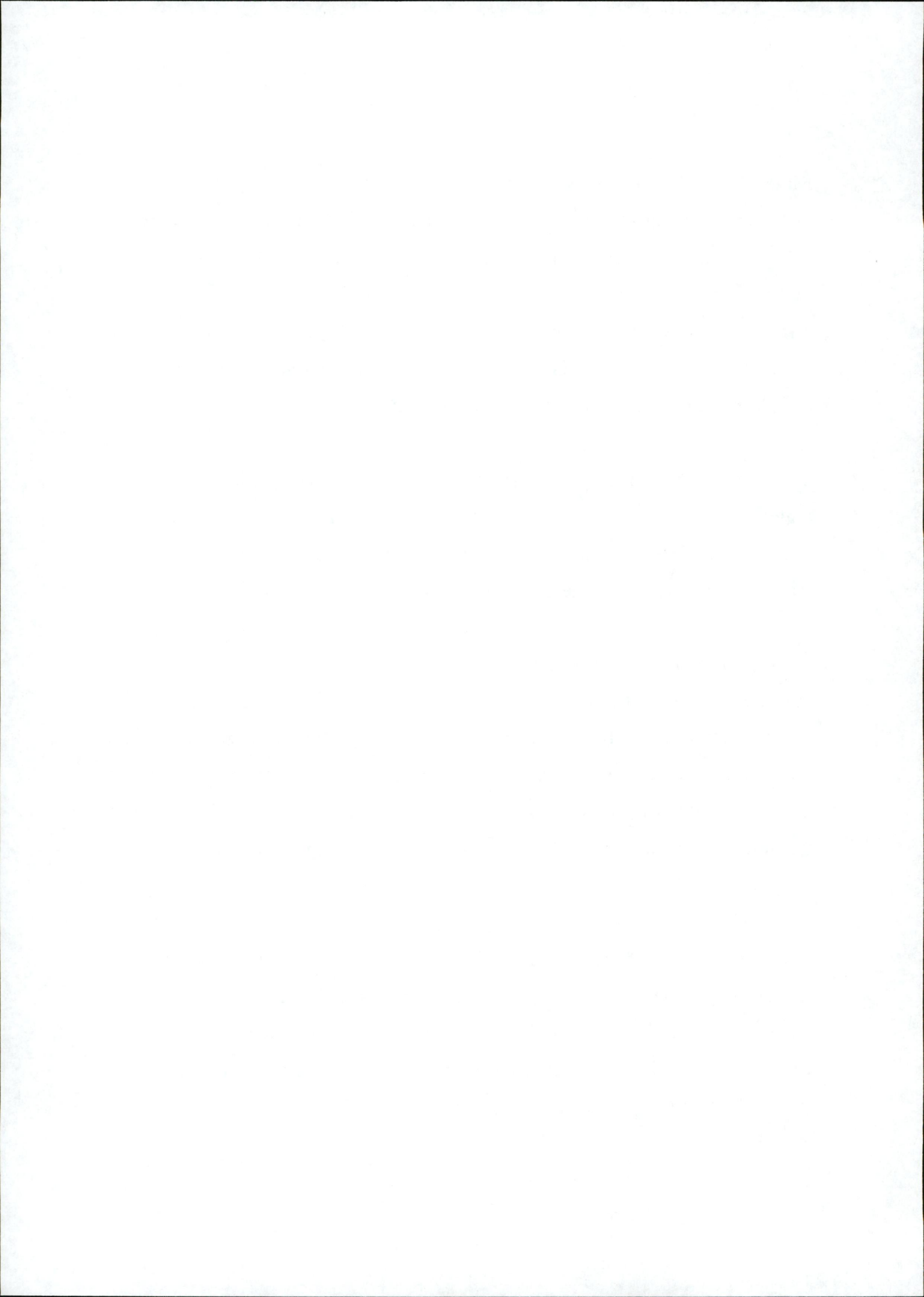
When a matter is before the Tribunal, any enforcement proceedings can be stayed if it is thought appropriate. The credit provider will have the right to apply for a variation or renegotiation of the Tribunal's orders under a hardship application.

Mr Speaker, I would now like to direct the attention to the House to the provisions with regard to unjust contracts. In legislation such as this which relies to a great extent on market forces to achieve the desired outcomes, it is important to have strong redress mechanisms to help achieve a balance of the power relationship between borrower and lender. Clause 70 gives power to the Court to re-open a transaction which gave rise to a contract, mortgage or guarantee, or a change to any of those contractual arrangements.

The matters to which the Court is to have regard in determining whether a term is unjust are detailed in subsection (2) and are based on those in the NSW Contracts Review Act. There is already a substantial body of law in relation to that Act which will assist the Court in its deliberations.

I will not address each matter but would draw the Honourable Members' attention to one particular ground for reopening which received much public attention when it was first proposed. This is, and I quote, 'whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship'.

This ground for reopening was added specifically to address that common occurrence of the '80's - overcommitment. It was clear that many borrowers were being offered credit they could not possibly repay, simply because the credit provider did not make adequate inquiries about a potential borrower's financial commitments, income and expenditure. This was a symptom of the

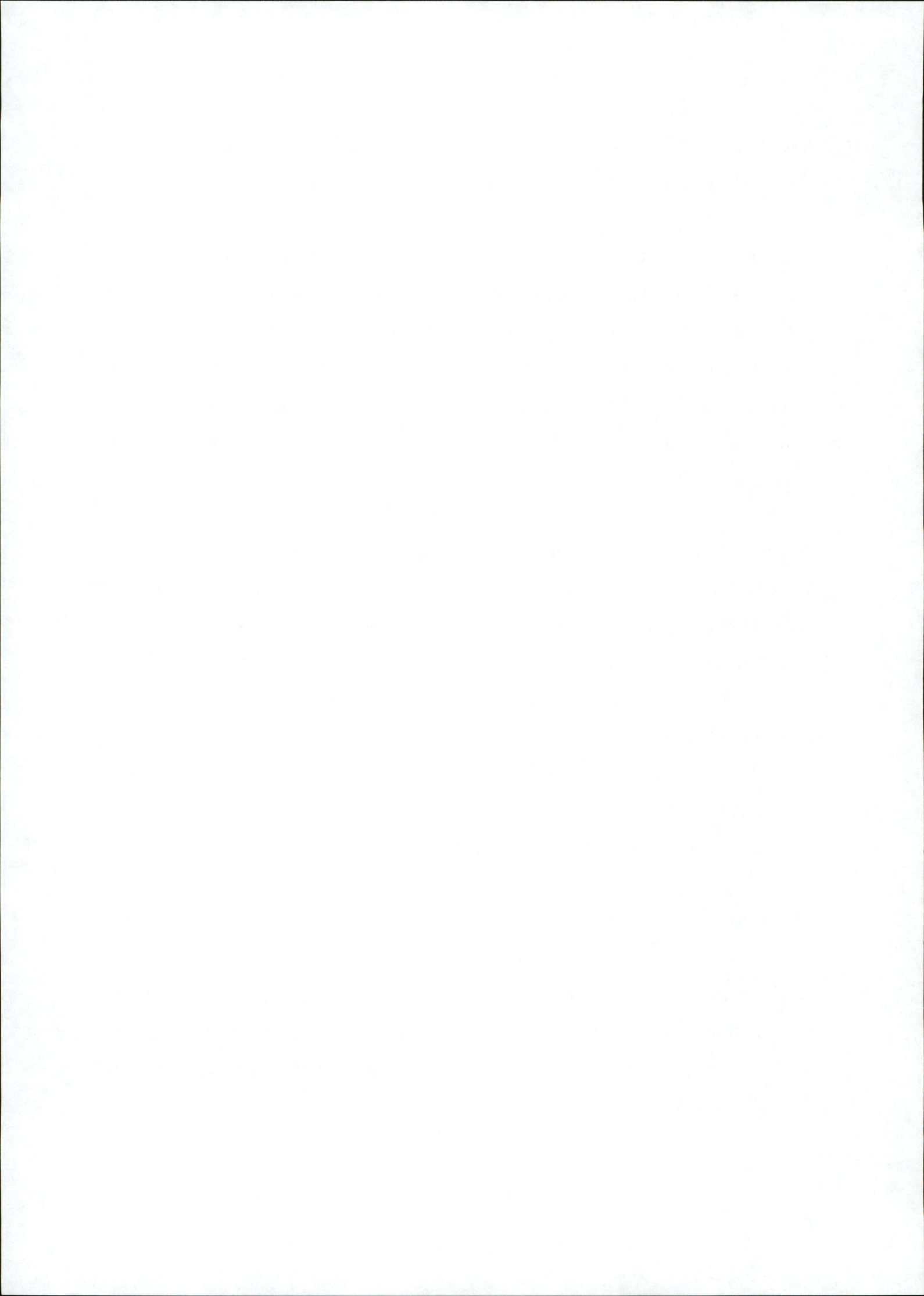


intense competition for market share in the years before high interest rates and the subsequent difficulties experienced by many credit purchasers.

This is not, however, to imply that credit providers are to be obliged to predict the future. This is a requirement that credit providers, on the basis of information made available to them at the time by the debtor, make a proper assessment of the potential borrower's capacity to repay the credit for which they have applied. This is not to say credit providers can not use credit scoring, but they must do more. This legislative requirement makes good sense for both parties and merely reflects prudent lending practices.

It is not a stand-alone provision. It is to be considered in the context of whether the contract, mortgage, guarantee or charge is unjust. I say this because fears have been expressed that such a provision will prevent low income earners or first home buyers from getting home finance. That is not the intention of the legislation. It is recognised that most people are prepared to make sacrifices in order to buy their own home. What Ministers aim to do with these provisions is to ensure that credit providers do not take advantage of people who may not realise the dangers of overcommitment, and who may be unfairly persuaded or allowed to take more credit than they can afford.

I have alluded above to the fact that the credit provider is not required to predict the future, and subsection (4) states that 'in determining whether a credit contract, mortgage or guarantee is unjust, the Court is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract mortgage or guarantee was entered into or changed'. I believe there is no ambiguity in that regard.

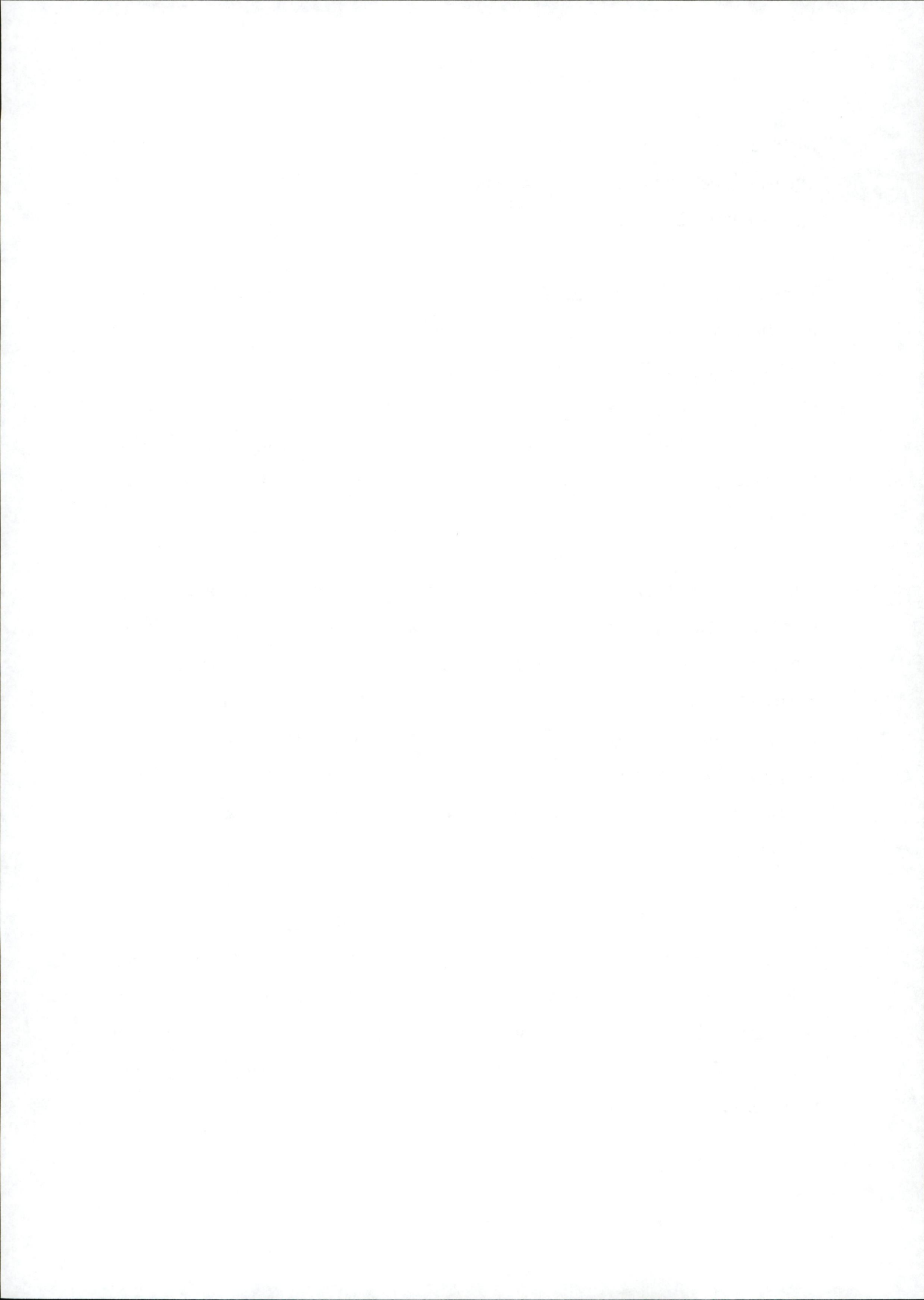


Mr Speaker, I turn now to that part of the Bill which has been highly contentious but which now appears to be accepted by all the major players. I refer to the civil penalty provisions.

Honourable Members would be aware that the Credit Act 1984 has an automatic civil penalty regime which means that a penalty in the way of forfeited interest charges is imposed as soon as a breach of disclosure occurs. That legislation requires a credit provider to make application to the Court before any interest charges can be reinstated to the credit provider, and the proportion which is reinstated depends on matters related generally to the conduct of the credit provider.

This system is considered to have been instrumental in encouraging a culture of compliance in those institutions covered by the Credit Act. It does have however, consequences that were possibly not foreseen by the drafters. Systemic errors by banks have resulted in many thousands of contracts being affected. Applications to the Commercial Tribunal have been heard over a very long period, and as could be expected, at considerable cost in legal fees. In most cases, there was little or no financial detriment to the borrower as a result of the breach.

Another issue was the contingent liability incurred by the automatic nature of the penalty. While it is unlikely that a credit provider which applies to the Tribunal will not have the major part of the interest charges returned to it, until the matter is determined the liability is the total amount of interest charges due under the contract, which has all sorts of implications for the balance sheets of a credit provider's accounts.

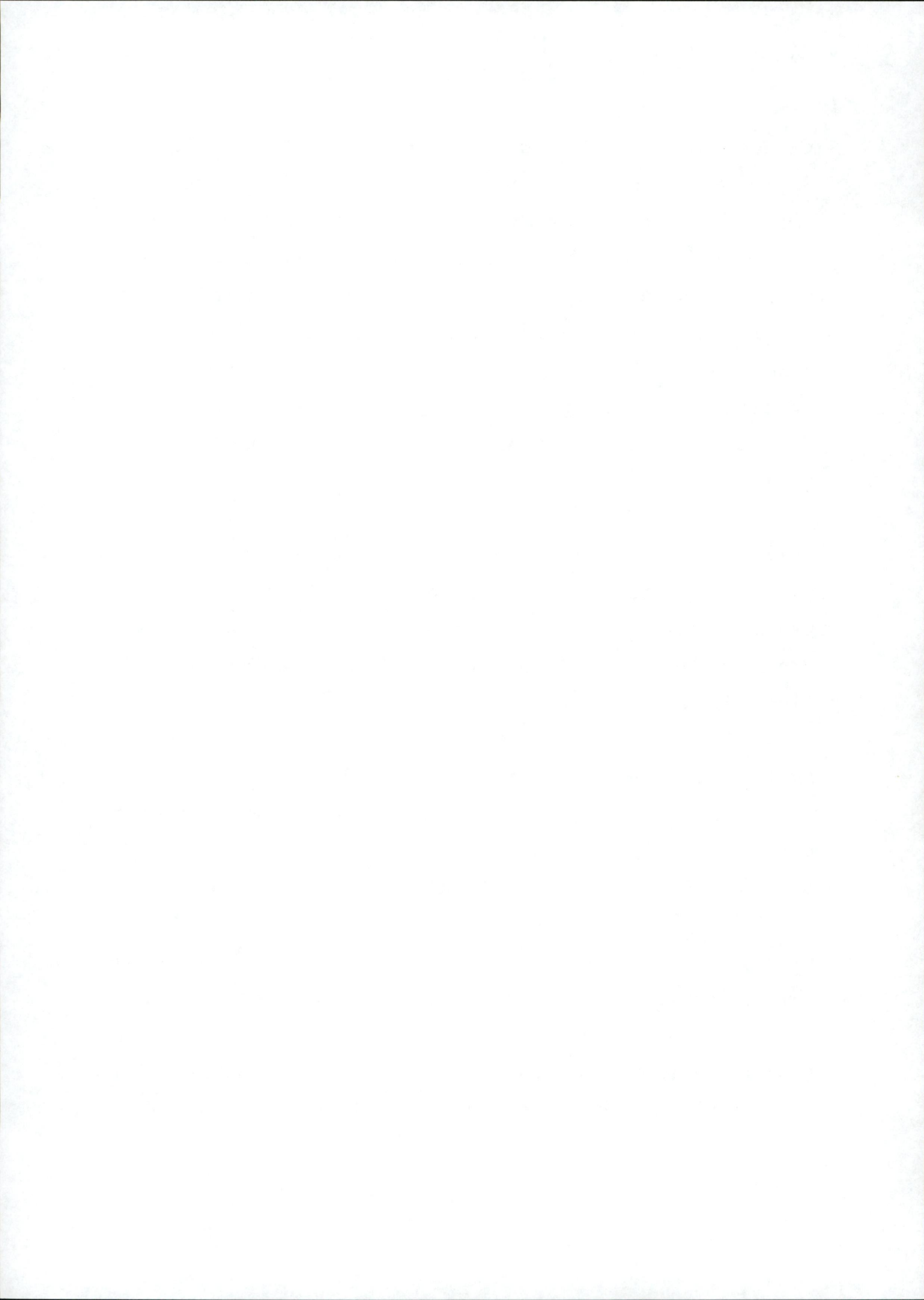


On review of the legislation when the decision was taken to increase the scope, very real fears were expressed that the small institutions, such as some credit unions, might incur such a liability which, if it became public knowledge, could cause a run on funds which might cause a collapse. Clearly, this could not be permitted to happen. This was another matter in which Federal Treasury intervened in view of the serious consequences that could be foreseen, and a capped regime was suggested. This proved unworkable when worked through by practitioners during a period of consultation, and finally a scheme was developed which had the necessary incentives for compliance but did not threaten the viability of the institution.

The civil penalty regime in this Bill, Mr Speaker, is not automatic but relies on application by a party to the contract, or a guarantor, or the Government Consumer Agency to the Court for an order. It might reasonably be asked what incentive is there for a credit provider to comply in such circumstances. The incentive lies in two processes.

Firstly, the penalty differs according to which party takes the matter to the Court, or Tribunal. If the debtor applies, then the penalty can be the full amount of credit charges due under the contract. If the credit provider applies, then the penalty for a class of breaches Australia-wide is a maximum of \$500,000.

Clearly, five single debtors with breaches of disclosure in relation to their housing contracts could have a penalty decided in their favour to the value of \$500,000. If a credit provider or the Government Consumer Agency applied to the court then that same amount of penalty could apply in relation to thousands of contracts Australia-wide. There would be great benefit in a credit provider

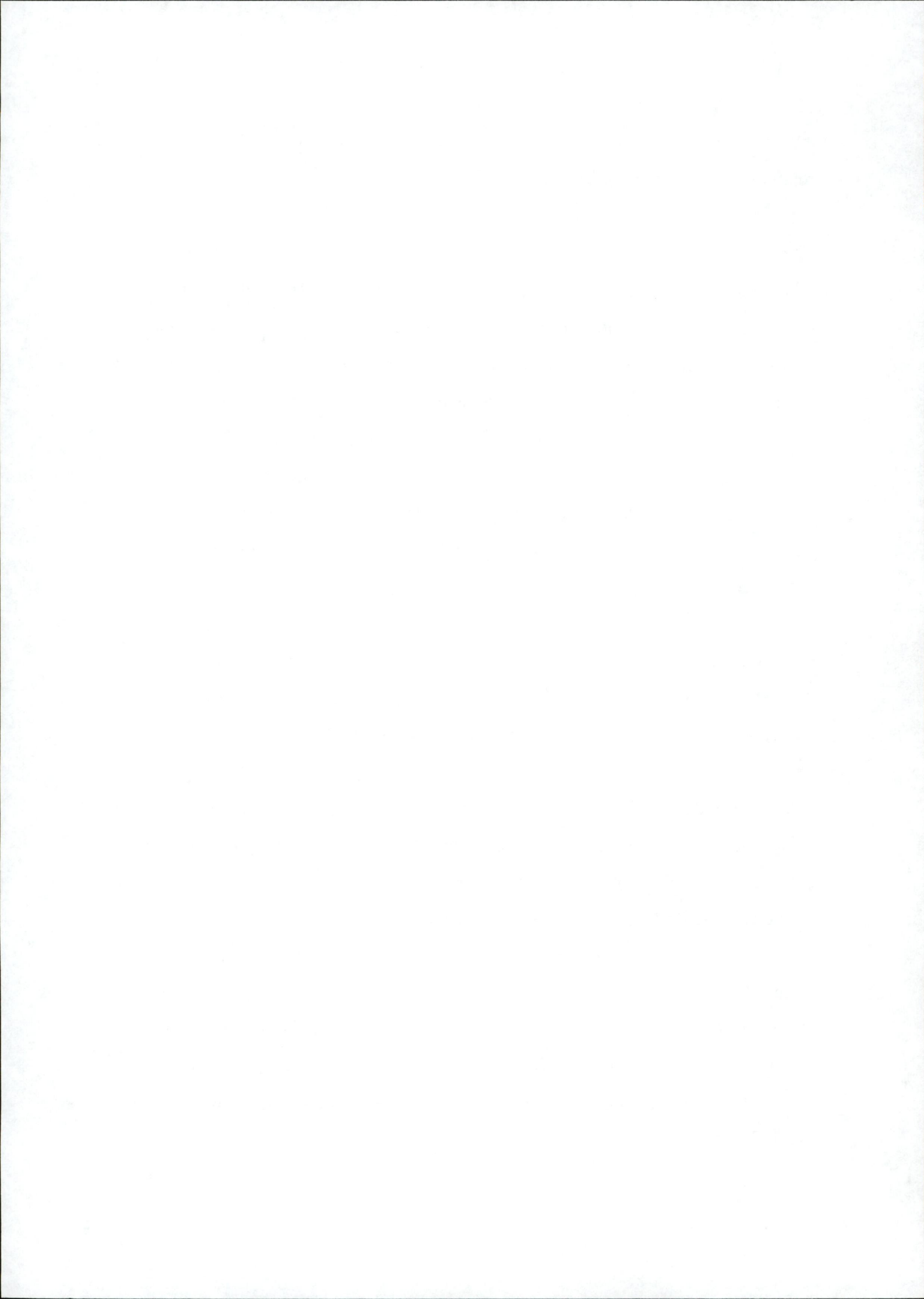


making the application first, in which case a debtor cannot apply for an order relating to that particular breach.

The second factor which creates a compliance incentive is the list of factors which the Court must take into account in determining the level of penalty which is to apply. These relate not only to the conduct of the credit provider, but also when the credit provider became aware, or ought reasonably to have become aware, of the contravention; any systems or procedures of the credit provider to prevent or identify contraventions; whether the contraventions could have been prevented by the credit provider; any action taken by the credit provider to remedy the contravention or compensate the debtor or to prevent further contraventions; and the time taken to make the application and the nature of the application.

It is evident from these criteria that the credit provider's efforts to comply with the requirements of the legislation will be significant to the Court's or Tribunal's consideration of the issue and the imposition of the penalty.

Clause 103 deals with the penalty if an application is made by the debtor or guarantor. In addition to the maximum penalty of all interest charges under the contract, or for the statement period if the contravention relates to a continuing credit contract statement, subsection (2) allows the Court to impose a greater civil penalty if the debtor or guarantor satisfies the court that the debtor has suffered a loss. The amount of the civil penalty is to be not less than the amount of the loss. Clause 104 provides that where an application by a debtor or guarantor is successful, the civil penalty may be set off against any amount outstanding under the contract, or if there is no amount outstanding, is a debt due to the debtor or guarantor.

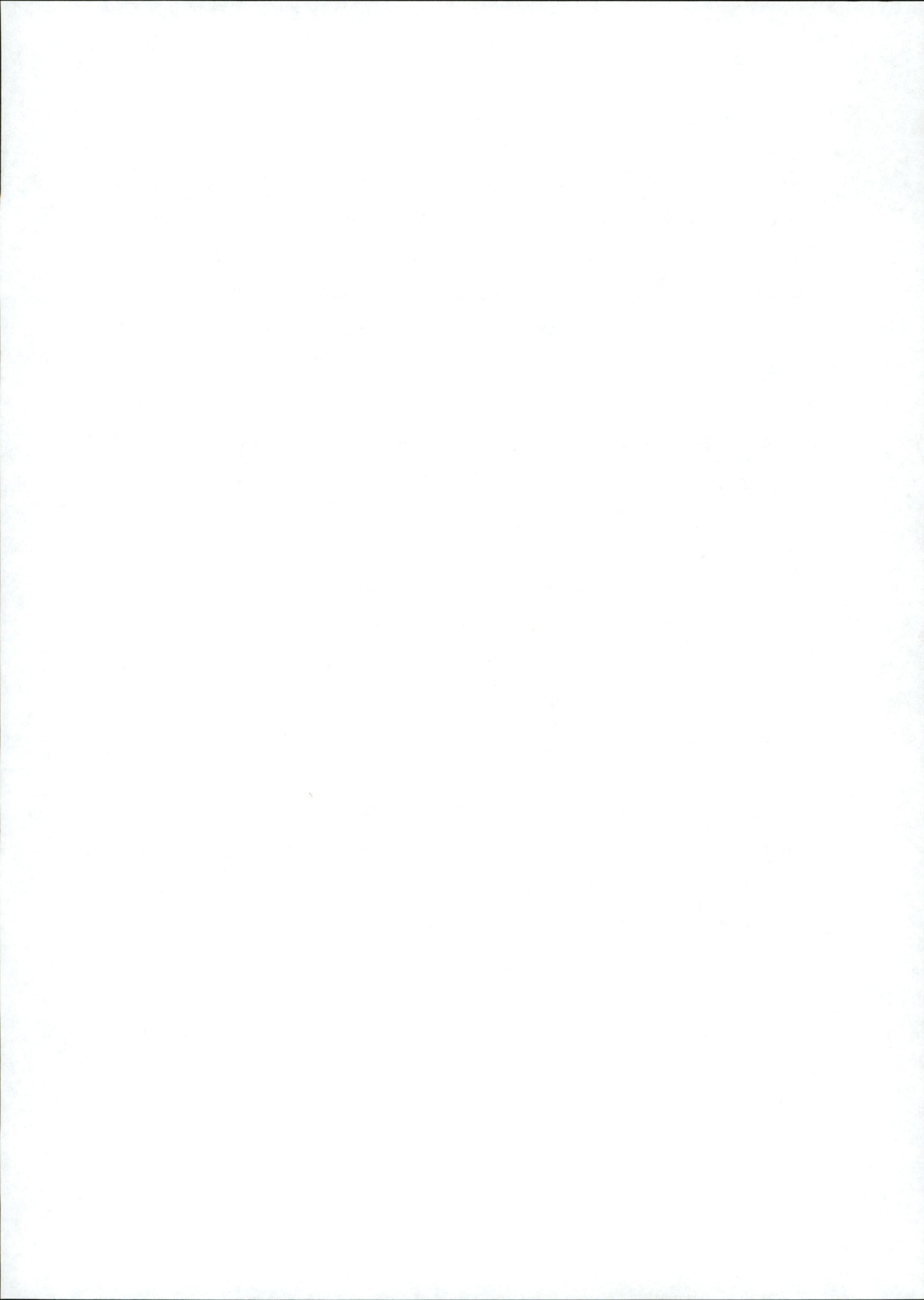


I have noted previously that the penalty if the application is made by the credit provider or Government Consumer Agency is \$500,000. Clause 105(2) directs the Court to determine the appropriate amount of penalty for disclosed contraventions in all jurisdictions and to determine the amount of penalty payable in each jurisdiction proportionately according to the number of contracts in that jurisdiction affected by the disclosed contraventions. This provision, Mr Speaker, is especially important as it means that a credit provider need make only one application in one jurisdiction, and that will be a considerable saving with respect to the Court's time and all parties legal costs.

Clause 106 allows payment of a civil penalty, where the application is made by the credit provider or Government Consumer Agency, to be paid into a fund established for the purposes of this section. Honourable Members would be aware that such a fund exists under the current legislation and the penalties paid into it are used for the purposes of financial counselling and education. It is intended that this practice will continue under the new legislation.

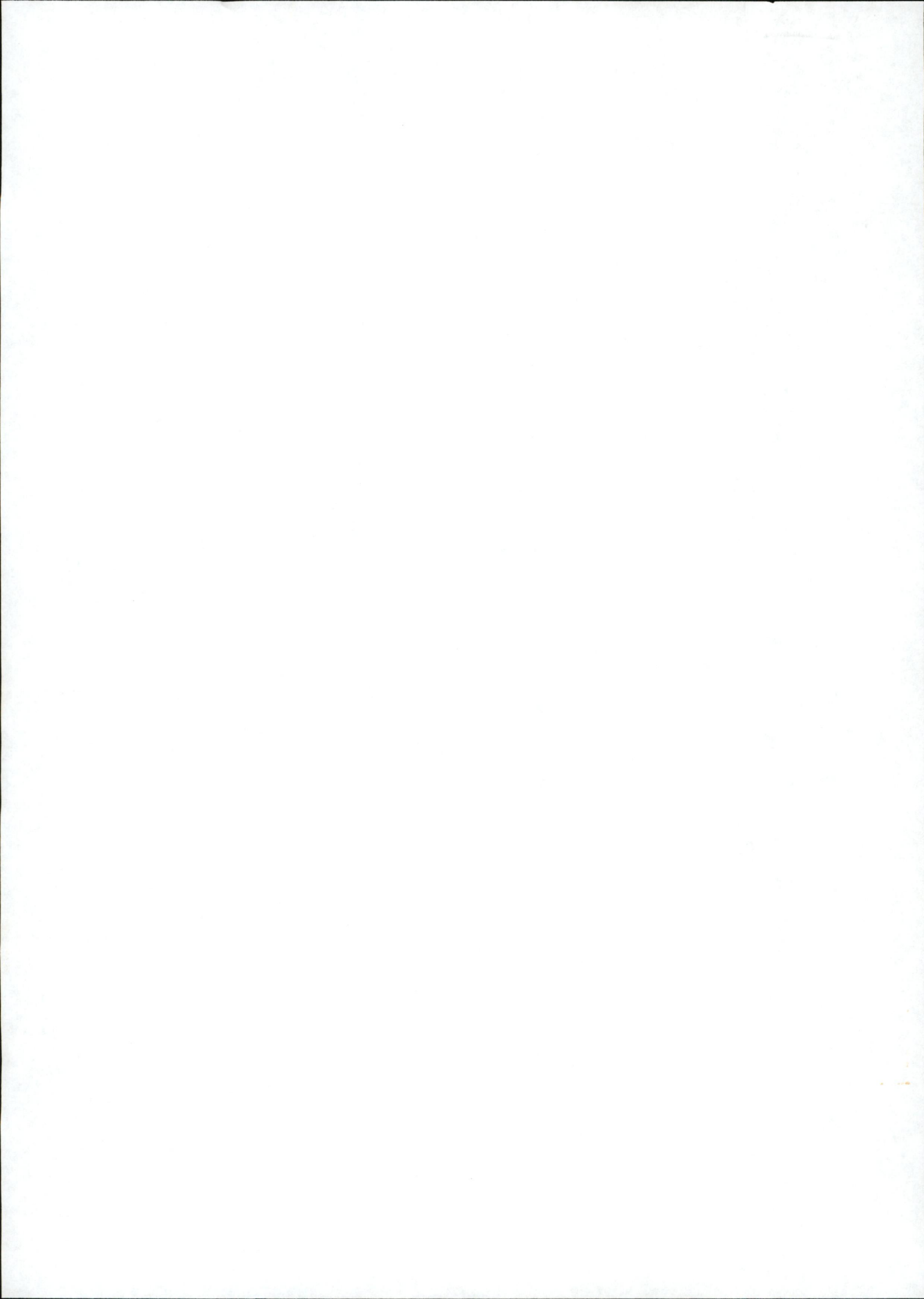
Mr Speaker this brings me to the end of this important legislation. In finishing, I would like to say that I believe this Code represents the very committed efforts of all stakeholders to provide a fair legislative solution to the very complex problems which exist in the financial marketplace.

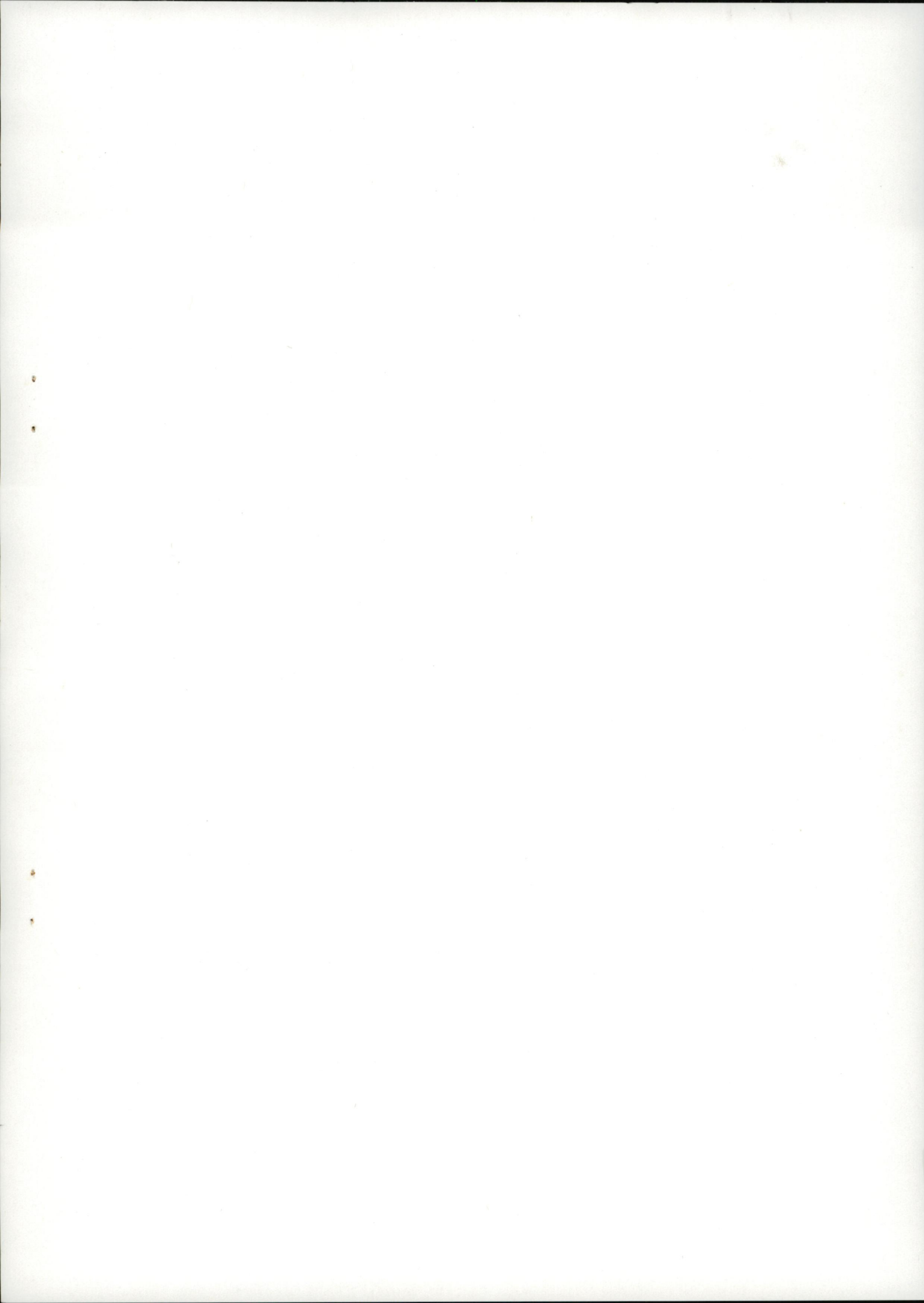
Inevitably, some interests will not be satisfied but Government are satisfied that the best possible compromise has been reached which will have positive returns for consumers, credit providers and the market.



I commend the Bill to the House.

J\MARGARET\SPEECHES\CONSCRE2







New South Wales

Consumer Credit (New South Wales) Act 1995 No 7

Contents

	Page
Part 1 Preliminary	
1 Name of Act	2
2 Commencement	2
3 Definitions	2
4 Notes in text	2
<hr/>	
Part 2 Consumer Credit (New South Wales) Code and Regulations	
5 Application in New South Wales of the Consumer Credit Code	3
6 Application of uniform regulations under the Consumer Credit Code	3
7 Interpretation of expressions in the Consumer Credit (New South Wales) Code and the Consumer Credit (New South Wales) Regulations	3

	Page
Part 3 Conferral of judicial and administrative functions	
8 Conferral of judicial functions	5
9 Conferral of administrative functions	5
<hr/>	
Part 4 Miscellaneous	
10 Civil penalties payable to financial counselling trust fund	6
11 Maximum annual percentage rate	6
12 Proceedings for offences against the Code or regulations	6
13 Crown to be bound	6
14 Special savings and transitional regulations for New South Wales	7
15 Regulations generally	7
16 Consequential amendments to Credit Act 1984 and other Acts	7
17 Review of Act	7
 Schedule 1 Consequential amendments to Credit Act 1984 and other Acts	 8



New South Wales

Consumer Credit (New South Wales) Act 1995 No 7

Act No 7, 1995

An Act to regulate the provision of consumer credit. [Assented to 8 June 1995]

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Consumer Credit (New South Wales) Act 1995*.

2 Commencement

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

3 Definitions

(1) In this Act:

Consumer Credit (Queensland) Act means the *Consumer Credit (Queensland) Act 1994* of Queensland.

Consumer Credit (New South Wales) Code means the provisions applying because of section 5 of this Act.

Consumer Credit (New South Wales) Regulations means the provisions applying because of section 6 of this Act.

(2) Words and expressions used in this Act and also in the *Consumer Credit (New South Wales) Code* have the same meanings in this Act as they have in that Code.

4 Notes in text

Notes included in this Act are explanatory notes and do not form part of this Act.

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

5 Application in New South Wales of the Consumer Credit Code

The *Consumer Credit Code* set out in the Appendix to the *Consumer Credit (Queensland) Act*, as in force for the time being:

- (a) applies as a law of New South Wales, and
- (b) as so applying may be referred to as the *Consumer Credit (New South Wales) Code*.

6 Application of uniform regulations under the Consumer Credit Code

- (1) The regulations in force for the time being under Part 4 of the *Consumer Credit (Queensland) Act*:
 - (a) apply as regulations in force for the purposes of the *Consumer Credit (New South Wales) Code*, and
 - (b) as so applying may be referred to as the *Consumer Credit (New South Wales) Regulations*.
- (2) Schedule 2 to the *Consumer Credit (New South Wales) Code* applies in relation to any such regulation.
- (3) To the extent to which a provision of any such regulation of a savings or transitional nature takes effect from a day earlier than the day of the regulation's notification in the Government Gazette of Queensland, the provision does not operate in this State to the disadvantage of a person (other than the State or a State authority) by:
 - (a) decreasing the person's rights, or
 - (b) imposing liabilities on the person.

7 Interpretation of expressions in the Consumer Credit (New South Wales) Code and the Consumer Credit (New South Wales) Regulations

- (1) In the *Consumer Credit (New South Wales) Code* and the *Consumer Credit (New South Wales) Regulations*:

Legislature of this jurisdiction means the Legislature of New South Wales.

the Code or this Code means the *Consumer Credit (New South Wales) Code*.

the jurisdiction or this jurisdiction means New South Wales.

- (2) The *Acts Interpretation Act 1954*, and other Acts, of Queensland do not apply to:
- (a) the *Consumer Credit Code* set out in the Appendix to the *Consumer Credit (Queensland) Act* in its application as a law of New South Wales, or
 - (b) the regulations in force for the time being under Part 4 of the *Consumer Credit (Queensland) Act* in their application as regulations in force for the purposes of the *Consumer Credit (New South Wales) Code*.

Part 3 Conferral of judicial and administrative functions

8 Conferral of judicial functions

- (1) The jurisdiction that is expressed to be exercisable by “the Court” under the *Consumer Credit (New South Wales) Code* and the *Consumer Credit (New South Wales) Regulations* is exercisable by the following:
 - (a) in the case of any jurisdiction prescribed by the regulations for the purposes of this paragraph—only the Commercial Tribunal,
 - (b) except in the case referred to in paragraph (a)—either the Commercial Tribunal or any court,
 - (c) in the case of any jurisdiction prescribed by the regulations for the purposes of this paragraph (and without limiting paragraphs (a) and (b))—a Consumer Claims Tribunal.
- (2) The jurisdiction conferred on a court by this section (other than the Commercial Tribunal) is subject to the court’s general jurisdictional limits (so far as they relate to the amounts, or the value of property, with which the court may deal), but is not subject to the court’s other jurisdictional limits.
- (3) The regulations may make provision for or with respect to the transfer of proceedings between the Commercial Tribunal and other courts or between other courts.
- (4) In subsections (2) and (3), *court* includes a Consumer Claims Tribunal.

9 Conferral of administrative functions

The Commissioner for Consumer Affairs has the functions of the Government Consumer Agency under the *Consumer Credit (New South Wales) Code* and the *Consumer Credit (New South Wales) Regulations*.

Part 4 Miscellaneous

10 Civil penalties payable to financial counselling trust fund

The financial counselling trust fund established in accordance with the regulations under the *Credit Act 1984* is the fund into which are to be paid amounts of civil penalty payable under section 106 of the *Consumer Credit (New South Wales) Code*.

11 Maximum annual percentage rate

- (1) The regulations may prescribe a maximum annual percentage rate for a credit contract or class of credit contracts to which the *Consumer Credit (New South Wales) Code* applies.
- (2) Division 2 of Part 2 of that Code applies in relation to such a maximum annual percentage rate as if that rate had been prescribed by that Code.

Note. The effect of subsection (2) is that a contract is void to the extent it imposes a monetary liability prohibited under subsection (1) and that any amount paid under the contract may be recovered. In addition the credit provider is guilty of an offence for entering into such a contract.

- (3) Nothing in this section affects the powers of the Court under Division 3 of Part 4 of the *Consumer Credit (New South Wales) Code* in relation to a contract that is not, by reason of this section, void.

Note. Division 3 of Part 4 allows (among other things) the Court to re-open unjust transactions.

12 Proceedings for offences against the Code or regulations

Proceedings for offences against the *Consumer Credit (New South Wales) Code* or the *Consumer Credit (New South Wales) Regulations* (that are punishable summarily) are to be dealt with by a Local Court constituted by a Magistrate sitting alone.

13 Crown to be bound

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

14 Special savings and transitional regulations for New South Wales

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or of an Act of Queensland amending the *Consumer Credit Code* set out in the Appendix to the *Consumer Credit (Queensland) Act*.
- (2) If such a regulation so provides, it has effect despite any provision of this Act, including the *Consumer Credit (New South Wales) Code*.
- (3) A provision of a regulation made under this section may, if the regulation so provides, take effect from the date of assent to the Act concerned or from a later date.
- (4) To the extent to which a provision takes effect from a date earlier than the date of the regulation's publication in the Gazette, the provision does not operate to the disadvantage of a person (other than the State or a State authority) by:
 - (a) decreasing the person's rights, or
 - (b) imposing liabilities on the person.

15 Regulations generally

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.

16 Consequential amendments to Credit Act 1984 and other Acts

Schedule 1 has effect.

17 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Schedule 1 Consequential amendments to Credit Act 1984 and other Acts

(Section 16)

1.1 Consumer Claims Tribunals Act 1987 No 206

Section 10 Jurisdiction

Insert after section 10 (4):

- (4A) If a matter relating to the provision of credit arises or could arise under the *Consumer Credit (New South Wales) Code*, that matter is not within the jurisdiction of a tribunal unless the tribunal has the jurisdiction conferred on it by or under section 8 of the *Consumer Credit (New South Wales) Act 1995*.

1.2 Credit Act 1984 No 94

Insert after section 19:

19A Act not to apply to new credit contracts

- (1) Subject to subsection (2), this Act does not apply to a credit contract made on or after the commencement of Schedule 1.2 to the *Consumer Credit (New South Wales) Act 1995*.
- (2) This Act applies to:
- (a) a credit contract, other than a continuing credit contract, and to a mortgage or guarantee relating to such a credit contract:
 - (i) made on or after the commencement of Schedule 1.2 to the *Consumer Credit (New South Wales) Act 1995* if the offer to enter

into it was made before that commencement, and

- (ii) to which this Act would have applied if the credit contract had been made before that commencement, and
- (b) a credit contract, other than a continuing credit contract, and to a mortgage or guarantee relating to such a credit contract made on or after that commencement but not later than one month after that commencement if:
 - (i) the credit contract does not comply with the *Consumer Credit (New South Wales) Code*, and
 - (ii) had the credit contract been made before that commencement, this Act would have applied to it and it would have complied with this Act.

19B Act to continue to apply in certain cases

- (1) Except as otherwise provided by this section, this Act continues to apply:
 - (a) to a continuing credit contract entered into before the commencement of Schedule 1.2 to the *Consumer Credit (New South Wales) Act 1995*, but only in respect of anything done or omitted to be done before that commencement, and
 - (b) to a credit contract of any other kind entered into before that commencement in respect of anything done or omitted to be done, whether before or after that commencement, and
 - (c) to a mortgage or guarantee relating to a continuing contract referred to in paragraph (a), but only in respect of anything done or omitted to be done before that commencement, and

- (d) to a mortgage or guarantee relating to a credit contract referred to in paragraph (b) in respect of anything done or omitted to be done, whether before or after that commencement.
- (2) If the credit provider under a contract to which this Act continues to apply acts in accordance with a provision of section 34, 35, 66 to 69, 78 to 99, 163, 171, 172 or 173 of the *Consumer Credit (New South Wales) Code*, the credit provider is taken to have acted in accordance with the corresponding provision of this Act.
- (3) Despite anything to the contrary in subsection (2), section 112 (1) (b) continues to apply in respect of goods subject to a regulated mortgage.

1.3 Credit (Home Finance Contracts) Act 1984 No 97

Insert after section 2:

2A Act not to apply to new home finance contracts

- (1) Subject to subsection (2), this Act does not apply to a home finance contract made on or after the commencement of Schedule 1.3 to the *Consumer Credit (New South Wales) Act 1995*.
- (2) This Act applies to a home finance contract, and to a mortgage or guarantee relating to such a contract, made on or after the commencement of Schedule 1.3 to the *Consumer Credit (New South Wales) Act 1995* if the offer to enter into it was made before that commencement.
- (3) This Act continues to apply to a home finance contract entered into before that commencement, and to a mortgage or guarantee relating to such a home finance contract, in respect of anything done or omitted to be done, whether before or after that commencement.

1.4 Interpretation Act 1987 No 15

Section 21 Meaning of commonly used words

Insert in alphabetical order in section 21 (1):

Consumer Credit (New South Wales) Code means the provisions applying because of section 5 of the *Consumer Credit (New South Wales) Act 1995*.

Consumer Credit (New South Wales) Regulations means the provisions applying because of section 6 of the *Consumer Credit (New South Wales) Act 1995*.

1.5 Stamp Duties Act 1920 No 47

[1] Section 84EB Exemption of certain loan securities from duty

Insert at the end of paragraph (b) of the definition of "regulated contract" in section 84EB (1):

, or

- (c) a credit contract within the meaning of the *Consumer Credit (New South Wales) Code*, being a contract of a class prescribed by the regulations.

[2] Section 98

Omit "and 19" from the definitions of *credit contract* and *credit provider* in section 98 (1).

Insert instead ", 19 and 19A".

NOTE

The text of the Consumer Credit Code set out in the Appendix to the Consumer Credit (Queensland) Act 1994 of Queensland (as at the date of its enactment) is set out in the following note. That Code (as in force from time to time) is applied as a law of New South Wales.

NOTE—THE CONSUMER CREDIT CODE

PART 1—PRELIMINARY

PART 2—CREDIT CONTRACTS

- Division 1—Negotiating and making credit contracts
- Division 2—Debtor's monetary obligations
- Division 3—Interest charges
- Division 4—Fees and charges
- Division 5—Credit provider's obligation to account
- Division 6—Certain transactions not to be treated as contracts

PART 3—RELATED MORTGAGES AND GUARANTEES

- Division 1—Mortgages
- Division 2—Guarantees

PART 4—CHANGES TO OBLIGATIONS UNDER CREDIT CONTRACTS, MORTGAGES AND GUARANTEES

- Division 1—Unilateral changes by credit provider
- Division 2—Changes by agreement of parties
- Division 3—Changes on grounds of hardship and unjust transactions

PART 5—ENDING AND ENFORCING CREDIT CONTRACTS, MORTGAGES AND GUARANTEES

- Division 1—Ending of credit contract by debtor
- Division 2—Enforcement of credit contracts, mortgages and guarantees
- Division 3—Postponement of enforcement proceedings
- Division 4—Enforcement procedures for goods mortgaged
- Division 5—Enforcement expenses

PART 6—CIVIL PENALTIES FOR DEFAULTS OF CREDIT PROVIDERS

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

Division 2—Other civil penalties

PART 7—RELATED SALE CONTRACTS

Division 1—Interpretation and application

Division 2—Liability of credit providers for suppliers' misrepresentations

Division 3—Liability of credit providers in relation to goods

Division 4—Termination of related transactions

Division 5—Other provisions

PART 8—RELATED INSURANCE CONTRACTS

PART 9—ADVERTISING AND RELATED CONDUCT

PART 10—CONSUMER LEASES

Division 1—Interpretation and application

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

Division 3—Other provisions applicable to consumer leases

PART 11—MISCELLANEOUS

Division 1—Tolerances and assumptions

Division 2—Documentary provisions

Division 3—General provisions

Division 4—Provisions relating to offences

SCHEDULE 1—PRINCIPAL DEFINITIONS

SCHEDULE 2—MISCELLANEOUS PROVISIONS RELATING TO INTERPRETATION

NOTE—CONSUMER CREDIT CODE

PART 1—PRELIMINARY

Short title

1. This Code may be cited as the Consumer Credit Code.

Commencement

2. This Code commences as provided under section 2 of the *Consumer Credit (Queensland) Act 1994* of Queensland.

Interpretation generally

3. (1) Schedule 1 contains the principal definitions of words and expressions used in this Code.

(2) Schedule 2 contains other miscellaneous provisions relating to the interpretation of this Code.

Meaning of “credit” and “amount of credit”

4. (1) For the purposes of this Code, “credit” is provided if under a contract—

- (a) payment of a debt owed by one person (the debtor) to another (the credit provider) is deferred; or
- (b) one person (the debtor) incurs a deferred debt to another (the credit provider).

(2) For the purposes of this Code, the “amount of credit” is the amount of the debt actually deferred.

Meaning of “credit contract”

5. For the purposes of this Code, a “credit contract” is a contract under which credit is or may be provided, being the provision of credit to which this Code applies.

Provision of credit to which this Code applies

6. (1) This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered into or (in the case of pre-contractual obligations) is proposed to be entered into—

- (a) the debtor is a natural person ordinarily resident in this jurisdiction or a strata corporation formed in this jurisdiction; and

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- (b) the credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes; and
 - (c) a charge is or may be made for providing the credit; and
 - (d) the credit provider provides the credit in the course of a business of providing credit or as part of or incidentally to any other business of the credit provider.

(2) If not all the debtors under a credit contract ordinarily reside, or are strata corporations formed, in this jurisdiction, this Code applies only if credit is first provided under the contract in this jurisdiction.

(3) If this Code applies to the provision of credit (and to the credit contract and related matters)—

- (a) this Code applies in relation to all transactions or acts under the contract whether or not they take place in this jurisdiction; and
- (b) this Code continues to apply even though the debtor ceases to be ordinarily resident in this jurisdiction.

(4) For the purposes of this section, **investment** by the debtor is not a personal, domestic or household purpose.

(5) For the purposes of this section, the **predominant** purpose for which credit is provided is—

- (a) the purpose for which more than half of the credit is intended to be used; or
- (b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

Provision of credit to which this Code does not apply

7. (1) **Short term credit.** This Code does not apply to the provision of credit limited by the contract to a total period not exceeding 62 days.

(2) **Credit without prior agreement.** This Code does not apply to the provision of credit without prior agreement between the credit provider and the debtor. For example, when a cheque account becomes overdrawn but there is no agreed overdraft facility or when a savings account falls into debit.

(3) Credit for which only account charge payable. This Code does not apply to the provision of credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided. However, this Code applies if the charge is of a nature prescribed by the regulations for the purposes of this subsection or if the charge exceeds the maximum charge (if any) so prescribed.

(4) Joint credit and debit facilities. This Code does not apply to any part of a credit contract under which both credit and debit facilities are available to the extent that the contract or any amount payable or other matter arising out of it relates only to the debit facility.

(5) Bill facilities. This Code does not apply to the provision of credit arising out of a bill facility, that is, a facility under which the credit provider provides credit by accepting, drawing, discounting or endorsing a bill of exchange or promissory note. However, the regulations may provide for the application of the Code to the provision of all or any credit arising out of such a facility.

(6) Insurance premiums by instalments. This Code does not apply to the provision of credit by an insurer for the purpose of the payment to the insurer of an insurance premium by instalments, even though the instalments exceed the total of the premium that would be payable if the premium were paid in a lump sum, if on cancellation the insured would have no liability to make further payments under the contract.

(7) Pawnbrokers. This Code does not apply to the provision of credit by a pawnbroker in the ordinary course of a pawnbroker's business (being a business which is being lawfully conducted by the pawnbroker). However, sections 70-72 (Court may re-open unjust transactions) apply to any such provision of credit.

(8) Trustees of estates. This Code does not apply to the provision of credit by the trustee of the estate of a deceased person by way of an advance to a beneficiary or prospective beneficiary of the estate. However, sections 70-72 (Court may re-open unjust transactions) apply to any such provision of credit.

(9) Employee loans. This Code (other than this Part, Division 3 of Part 4, Divisions 4 and 5 of Part 5, Part 7, Part 11 and Schedules 1 and 2) does not apply to the provision of credit by an employer, or a related body corporate within the meaning of the Corporations Law of an employer, to an employee

or former employee (whether or not it is provided to the employee or former employee with another person). However, for a credit provider who provides credit in the course of a business of providing credit, this subsection applies only to the provision of credit on terms that are more favourable to the debtor than the terms on which the credit provider provides credit to persons who are not employees or former employees of the credit provider or a related body corporate.

(10) **Regulations may exclude credit.** The regulations may exclude, from the application of all or any provisions of this Code, the provision of credit of a class specified in the regulations. In particular (but without limiting the generality of the foregoing), the regulations may so exclude the provision of credit if the amount of the credit exceeds or may exceed a specified amount or if the credit is provided by a credit provider of a specified class.

Mortgages to which this Code applies

8. (1) This Code applies to a mortgage if—

- (a) it secures obligations under a credit contract or a related guarantee; and
- (b) the mortgagor is a natural person or a strata corporation.

(2) If any such mortgage also secures other obligations, this Code applies to the mortgage to the extent only that it secures obligations under the credit contract or related guarantee.

(3) The regulations may exclude, from the application of all or any provisions of this Code, a mortgage of a class specified in the regulations.

Guarantees to which this Code applies

9. (1) This Code applies to a guarantee if—

- (a) it guarantees obligations under a credit contract; and
- (b) the guarantor is a natural person or a strata corporation.

(2) If any such guarantee also guarantees other obligations, this Code applies to the guarantee to the extent only that it guarantees obligations under the credit contract.

(3) The regulations may exclude, from the application of all or any provisions of this Code, a guarantee of a class specified in the regulations.

Goods leases with option to purchase to be regarded as sale by instalments

10. (1) For the purposes of this Code, a contract for the hire of goods under which the hirer has a right or obligation to purchase the goods, is to be regarded as a sale of the goods by instalments if the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so) exceeds the cash price of the goods.

Note: A contract includes a series of contracts, or contracts and arrangements (see Schedule 1).

(2) A debt is to be regarded as having been incurred, and credit provided, in such circumstances.

(3) Accordingly, if because of section 6 (1) the contract is a credit contract, this Code (including Part 6) applies as if the contract had always been a sale of goods by instalments, and for that purpose—

- (a) the amounts payable under the contract are the instalments; and
- (b) the credit provider is the person who is to receive those payments; and
- (c) the debtor is the person who is to make those payments; and
- (d) the property of the supplier in the goods passes under the contract to the person to whom the goods are hired on delivery of the goods or the making of the contract, whichever occurs last; and
- (e) the charge for providing the credit is the amount by which the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so), exceeds the cash price of the goods; and
- (f) a mortgage containing the terms and conditions set out in the regulations is taken to have been entered into in writing between the person to whom the goods are hired under the contract and the supplier as security for payment to the supplier of the amount payable to the supplier by the person to whom the goods are hired under the contract; and

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- (g) any provision in the contract for hiring by virtue of which the supplier is empowered to take possession, or dispose of, the goods to which the contract relates is void.

(4) For the purposes of this section, the amount payable under the contract includes any agreed or residual value of the goods at the end of the hire period or on termination of the contract, but does not include the following amounts—

- (a) any amount payable in respect of services that are incidental to the hire of goods under the contract;
- (b) any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the hirer at the earliest opportunity.

Note: Part 10 (Consumer leases) applies to the contracts specified in that Part for the hire of goods under which the hirer does not have a right or obligation to purchase the goods.

Presumptions relating to application of Code

11. (1) In any proceedings (whether brought under this Code or not) in which a party claims that a credit contract, mortgage or guarantee is one to which this Code applies, it is presumed to be such unless the contrary is established.

(2) Credit is presumed conclusively for the purposes of this Code not to be provided wholly or predominantly for personal, domestic or household purposes if the debtor declares, before entering into the credit contract, that the credit is to be applied wholly or predominantly for business or investment purposes (or for both purposes).

(3) However, such a declaration is ineffective for the purposes of this section if the credit provider (or any other person who obtained the declaration from the debtor) knew, or had reason to believe, at the time the declaration was made that the credit was in fact to be applied wholly or predominantly for personal, domestic or household purposes.

Note: See section 176 for the circumstances in which a credit provider is taken to have knowledge of or reason to believe something for the purposes of this Code.

(4) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.

PART 2—CREDIT CONTRACTS

Division 1—Negotiating and making credit contracts

Credit contract to be in form of written contract document

12. A credit contract must be in the form of—

- (a) a written contract document signed by the debtor and the credit provider; or
- (b) a written contract document signed by the credit provider and constituting an offer to the debtor that is accepted, if the terms of the offer provide for it, by the debtor or another authorised person accessing or drawing down credit to incur a liability or by any other act of the debtor that satisfies the conditions of the offer.

Other forms of contract

13. (1) The regulations may authorise other ways of making a credit contract that do not involve a written document.

(2) In that case, the provisions of this Division apply with such modifications as are prescribed by the regulations.

Pre-contractual disclosure

14. (1) A credit provider must not enter into a credit contract unless the credit provider has given the debtor—

- (a) a pre-contractual statement setting out the matters required by section 15 to be included in the contract document; and
- (b) an information statement in the form required by the regulations of the debtor's statutory rights and statutory obligations.

(2) Those statements must be given—

- (a) before the contract is entered into; or
- (b) before the debtor makes an offer to enter into the contract,

whichever first occurs.

(3) Before entering into a credit contract, the credit provider may inform the debtor of the comparison rate. If the credit provider does so, the comparison rate must be calculated as prescribed by the regulations and be accompanied by the warnings set out in the regulations.

(4) The pre-contractual statement must contain the financial information specified by the regulations in the form prescribed by the regulations.

(5) The pre-contractual statement may be the proposed contract document or be a separate document or documents.

(6) A document forming part of a pre-contractual statement consisting of more than one document when the pre-contractual statement is first given must indicate that it does not contain all of the required pre-contractual information.

(7) A pre-contractual statement may be varied, within the time referred to in subsection (2), by written notice containing particulars of the variation given to the debtor.

Matters that must be in contract document

15. The contract document must contain the following matters—

(A) Credit provider's name.

The credit provider's name.

(B) Amount of credit.

(a) If the amount of the credit to be provided is ascertainable, that amount and the persons, bodies or agents (including the credit provider) to whom the amount is to be paid and the amounts payable to them, to the extent that they are ascertainable.

(b) If the amount of the credit to be provided is not ascertainable, the maximum amount of credit agreed to be provided, or the credit limit under the contract, if any.

(c) If the credit is provided by the supplier for a sale of land or goods by instalments, a description of the land and its price or of the goods and their cash price.

(C) Annual percentage rate or rates.

(a) The annual percentage rate or rates under the contract.

(b) If there is more than one rate, how each rate applies.

(c) If an annual percentage rate under the contract is determined by referring to a reference rate—

- (i) the name of the rate or a description of it; and
- (ii) the margin or margins (if any) above or below the reference rate to be applied to determine the annual percentage rate or rates; and
- (iii) where and when the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and
- (iv) the current annual percentage rate or rates.

(D) Calculation of interest charges.

The method of calculation of the interest charges payable under the contract and the frequency with which interest charges are to be debited under the contract.

(E) Total amount of interest charges payable.

The total amount of interest charges payable under the contract, if ascertainable (but only if the contract would, on the assumptions in sections 158 and 160, be paid out within 7 years of the date on which credit is first provided under the contract).

(F) Repayments.

- (a) If more than one repayment is to be made—
 - (i) the amount of the repayments or the method of calculating the amount; and
 - (ii) if ascertainable when the contract is made—the number of the repayments, the period over which they are to be paid and the total amount of the repayments; and
 - (iii) when the first repayment is to be paid, if ascertainable, and the frequency of payment of repayments.
- (b) If the contract provides for a minimum repayment, the amount of that repayment, if ascertainable, but, if not, the method of calculation of the minimum repayment.

(G) Credit fees and charges.

- (a) A statement of the credit fees and charges that are, or may become, payable under the contract, and when each such fee or charge is payable, if ascertainable.

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- (b) The amount of any such fee or charge if ascertainable, but, if not, the method of calculation of the fee or charge, if ascertainable.
 - (c) The total amount of credit fees and charges payable under the contract to the extent that it is ascertainable.

(H) Changes affecting interest and credit fees and charges.

If the annual percentage rate or rates or the amount or frequency of payment of a credit fee or charge or instalment payable under the contract may be changed, or a new credit fee or charge may be imposed, a statement or statements to that effect and of the means by which the debtor will be informed of the change or the new fee or charge.

(I) Statements of account.

The frequency with which statements of account are to be provided to the debtor (except in the case of a credit contract for which the annual percentage rate is fixed for the whole term of the contract and under which there is no provision for varying the rate).

(J) Default rate.

- (a) If the contract is a contract under which a default rate of interest may be charged when payments are in default—a statement to that effect and the default rate and how it is to be applied.
- (b) If the default rate under the contract is determined by referring to a reference rate—
 - (i) the name of the rate or a description of it; and
 - (ii) the margin or margins (if any) above or below the reference rate to be applied to determine the default rate; and
 - (iii) when and where the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and
 - (iv) the current default rate.

(K) Enforcement expenses.

A statement that enforcement expenses may become payable under the credit contract or mortgage (if any) in the event of a breach.

(L) Mortgage or guarantee.

- (a) If any mortgage or guarantee is to be or has been taken by the credit provider, a statement to that effect.
- (b) In the case of a mortgage, a description of the property subject to, or proposed to be subject to, the mortgage, to the extent to which it is ascertainable.

(M) Commission.

If a commission is to be paid by or to the credit provider for the introduction of credit business or business financed by the contract—

- (a) a statement of that fact; and
- (b) the person by whom the commission is payable; and
- (c) the person to whom the commission is payable; and
- (d) the amount if ascertainable.

Commission does not include fees payable by a supplier under a merchant service agreement with a credit provider, an amount payable in connection with a credit-related insurance contract or commission paid to employees of the credit provider.

(N) Insurance financed by contract.

If the credit provider knows that the debtor is to enter into a credit-related insurance contract and that the insurance is to be financed under the credit contract—

- (a) the name of the insurer; and
- (b) the amount payable to the insurer or, if it is not ascertainable, how it is calculated; and
- (c) the kind of insurance and any other particulars that may be prescribed by the regulations; and
- (d) if the credit provider knows of any commission to be paid by the insurer for the introduction of the insurance business—a statement that it is to be paid and, if ascertainable, the amount of the commission expressed either as a monetary amount or as a proportion of the premium.

(O) Other information.

Any information or warning required by the regulations.

Note: Sections 158–160 set out the tolerances and assumptions applicable to matters required to be disclosed.

Form and expression of contract document

16. The contract document must conform to the requirements of the regulations as to its form and the way it is expressed and, subject to any such requirements, may consist of one or more separate documents.

Alteration of contract document

17. (1) An alteration of (including an addition to) a contract document by the credit provider after it is signed by the debtor is presumed to be ineffective unless, after the alteration is made, the debtor signs or initials in the margin opposite the alteration.

(2) This section does not apply to an alteration having the effect of reducing the debtor's liabilities under the credit contract.

Copy of contract for debtor

18. (1) If a contract document is to be signed by the debtor and returned to the credit provider, the credit provider must give the debtor a copy to keep.

(2) A credit provider must, not later than 14 days after a credit contract is made, give a copy of the contract in the form in which it was made to the debtor.

(3) Subsection (2) does not apply to a credit contract the terms of which are accepted by accessing or drawing down credit to incur a liability or by the debtor satisfying the conditions of an offer.

When debtor may terminate contract

19. (1) Although a credit contract has been made, the debtor may nevertheless, by written notice to the credit provider, terminate the contract unless any credit has been obtained or attempted to be obtained under the contract.

(2) Nothing in this section prevents the credit provider from retaining or requiring payment of fees or charges incurred before the termination and which would have been payable under the credit contract.

Offence for non-compliance

20. A credit provider must not—

- (a) enter into a credit contract that contravenes a requirement of this Division; or
- (b) otherwise contravene a requirement of this Division.

Maximum penalty—100 penalty units.

Division 2—Debtor's monetary obligations

Prohibited monetary obligations

21. (1) A credit contract must not impose a monetary liability on the debtor—

- (a) in respect of a fee or charge prohibited by this Code; or
- (b) in respect of an amount of a fee or charge exceeding the amount that may be charged consistently with this Code; or
- (c) in respect of an interest charge under the contract exceeding the amount that may be charged consistently with this Code.

(2) Civil effect. Any provision of the credit contract that imposes a monetary liability prohibited by subsection (1) is void to the extent that it does so. If an amount that is prohibited by subsection (1) is paid, it may be recovered.

(3) A credit fee or charge cannot be charged in respect of a credit contract unless the contract authorises it to be charged.

(4) Civil effect. If an amount that is prohibited by subsection (3) is paid, it may be recovered.

Offences related to prohibited monetary obligations

22. A credit provider must not—

- (a) enter into a credit contract on terms imposing a monetary liability prohibited by section 21 (1); or
- (b) require or accept payment of an amount in respect of a monetary liability that cannot be imposed consistently with this Code.

Maximum penalty—100 penalty units.

Loan to be in money or equivalent

23. (1) A credit provider must not under a credit contract pay an amount to or in accordance with the instructions of the debtor unless the payment is in cash or money's worth and is made in full without deducting an amount for interest charges under the contract.

Maximum penalty—100 penalty units.

(2) The regulations may provide that subsection (1) does not apply to the deduction of an amount for the first payment of interest charges under the contract.

Early payments and crediting of payments

24. (1) A credit provider must accept any payment under a credit contract that is made before it is payable under the contract unless the contract prohibits its early payment.

Maximum penalty—100 penalty units.

(2) A credit provider must credit each payment made under a credit contract to the debtor as soon as practicable after receipt of the payment.

Maximum penalty—100 penalty units.

(3) Despite subsection (2), a credit provider is not required to credit a payment made under a credit contract before it is payable under the contract if—

- (a)** the contract prohibits its early payment; and
- (b)** the credit provider informs the debtor, before accepting the payment, that the payment will not be credited to the debtor before it becomes payable under the contract.

(4) A credit contract may not, under this section, prohibit the paying out of the contract at any time under section 75.

Division 3—Interest charges

Definitions relating to interest

25. (1) In this Code—

“annual percentage rate” under a credit contract means a rate specified in the contract as an annual percentage rate;

“**daily percentage rate**” means the rate determined by dividing the annual percentage rate by 365;

“**default rate**” means a higher annual percentage rate permitted by section 28;

“**unpaid balance**” under a credit contract at any time means the difference between all amounts credited and all amounts debited to the debtor under the contract at that time;

“**unpaid daily balance**” for a day under a credit contract means the unpaid balance under the contract at the end of that day.

(2) A credit contract may specify, for the purposes of payments under the contract, when a day ends.

Limit on interest charges

26. (1) The maximum amount of an interest charge that may be imposed or provided for under a credit contract is—

- (a) where only one annual percentage rate applies to the unpaid balances under the contract—the amount determined by applying the daily percentage rate to the unpaid daily balances; or
- (b) in any other case—the sum of each of the amounts determined by applying each daily percentage rate to that part of the unpaid daily balances to which it applies under the contract.

(2) However, an interest charge under a credit contract for a month, a quarter or half a year may be determined by applying the annual percentage rate or rates, divided by 12 (for a month), by 4 (for a quarter) or by 2 (for half a year), to the whole or that part of the average unpaid daily balances to which it applies. The regulations may provide for the calculation of unpaid daily balances in these circumstances.

(3) This section does not prevent the imposition of a default rate of interest permitted by section 28.

Early debit or payment of interest charges prohibited

27. (1) A credit provider must not, at any time before the end of a day to which an interest charge applies, require payment of or debit the interest charge.

(2) A credit contract may provide for an interest charge to become payable or be debited at any time after the day to which it applies.

(3) The regulations may provide that subsection (1) does not apply to the first payment of interest charges under a credit contract.

Default interest

28. (1) A credit contract may not provide that an annual percentage rate applicable under a credit contract to any part of the unpaid balance will differ according to whether the debtor is in default under the contract.

(2) However, a credit contract may provide for such a differential rate if the higher rate is imposed only in the event of default in payment, in respect of the amount in default and while the default continues.

Division 4—Fees and charges

Prohibited credit fees or charges

29. The regulations may specify credit fees or charges or classes of credit fees or charges that are prohibited for the purposes of this Code.

Fees or charges passed on to other parties

30. (1) A fee or charge payable by a debtor in respect of an amount payable by the credit provider to another person, body or agency is not to exceed the actual amount payable by the credit provider if that amount is ascertainable when the fee or charge is paid by the debtor. The actual amount payable is to be determined after taking into account any discount or other rebate or other applicable allowance received or receivable by the credit provider or a related body corporate within the meaning of the Corporations Law.

(2) If the actual amount paid by the credit provider to another person was not ascertainable when the debtor paid an amount to the credit provider for the fee or charge and is less than the amount paid by the debtor, the credit provider must refund or credit the difference to the debtor.

(3) Nothing in this section requires a rebate on tax payable by the credit provider or a related body corporate to be taken into account in determining the actual amount payable or paid by a credit provider.

(4) Nothing in this section prevents a commission from being payable or paid in accordance with section 135.

Division 5—Credit provider's obligation to account

Statements of account

31. (1) A credit provider that provides credit must give to the debtor, or arrange for the debtor to be given, periodic statements of account in accordance with this Division.

Maximum penalty—100 penalty units.

(2) The maximum period for a statement of account is—

- (a) in the case of a continuing credit contract under which credit is ordinarily obtained only by the use of a card—40 days; or
- (b) in the case of any other continuing credit contract—40 days or such longer period, not exceeding 3 months, as is agreed by the credit provider and the debtor; or
- (c) in any other case—6 months.

(3) A statement of account need not be given if—

- (a) the credit is provided under a credit contract for which the annual percentage rate is fixed for the whole term of the contract and under which there is no provision for varying the rate; or
- (b) no amount has been debited or credited to the account during the statement period and the amount outstanding is zero or below a level fixed by the regulations; or
- (c) the credit provider wrote off the debt of the debtor under the credit contract during the statement period and no further amount has been debited or credited to the account during the statement period; or
- (d) the debtor was in default under the credit contract (not being a continuing credit contract) during the statement period and the credit provider has commenced enforcement proceedings; or
- (e) the debtor was in default under a continuing credit contract during the preceding 120 days, or during the statement period and the 2 immediately preceding statement periods, whichever is the shorter time, and the credit provider has, before the commencement of the statement period, exercised a right not to provide further credit under the contract and has not provided further credit during the period.

Information to be contained in statements of account

32. A statement of account must contain the following matters—

(A) Statement period.

The dates on which the statement period begins and ends.

(B) Balances.

The opening and closing balances (indicating the amount owed by the debtor at the beginning and at the end of the statement period).

(C) Credit provided.

Particulars of each amount of credit provided by the credit provider to the debtor during the statement period.

(D) Identity of supplier.

In the case of a continuing credit contract under which credit is ordinarily obtained only by the use of a card—the identity of the supplier if the credit was provided for any cash, goods or services supplied by another person.

(E) Interest charges.

(a) The amount of the interest charge debited to the debtor's account during the statement period and when the interest was debited.

(b) The annual percentage rate or rates and, if required by Part 4, details of any change since the last statement period.

(F) Fees and charges.

Particulars of any fees and charges debited to the debtor's account during the statement period.

(G) Payments to or from account.

(a) Particulars of each amount paid by the debtor to the credit provider, or credited to the debtor, during the statement period.

(b) Particulars of any amount transferred to or from the account to which the statement relates or to or from any other account maintained under or for the purposes of the credit contract.

(H) Amounts payable by debtor.

If a minimum amount is payable by the debtor under a continuing credit contract, a statement of the amount and the date by which it is due.

(I) Insurance payments.

If payment to an insurer is made during the statement period under a credit-related insurance contract that is agreed to be financed under the credit contract—

- (a) the name of the insurer, the amount paid to the insurer and the kind of insurance;
- (b) if the credit provider is aware of any commission to be paid by the insurer in relation to the insurance contract—the amount of the commission expressed either as a monetary amount or as a proportion of the premium, if ascertainable when the statement is given;

(if not previously disclosed in accordance with this Code).

(J) Alterations.

Any correction of information in a previous statement of account.

(K) Other.

Any other information required by the regulations.

Note: Sections 158–160 set out the tolerances and assumptions applicable to matters required to be included in statements of accounts.

Opening balance must not exceed closing balance of previous statement

33. (1) The opening balance shown in each successive statement of account must not exceed the closing balance shown in the last statement of account.

(2) However, if no statement of account was given for the previous period, the next statement of account required to be given by this Code may have an opening balance that exceeds the closing balance for the previous statement and must provide the particulars referred to in section 32 (C)–(K) in relation to any immediately preceding periods for which statements were not given.

Statement of amount owing and other matters

34. (1) A credit provider must, at the request of a debtor or guarantor and within the time specified by this section, provide a statement of all or any of the following—

- (a) the current balance of the debtor's account;
- (b) any amounts credited or debited during a period specified in the request;
- (c) any amounts overdue and when each such amount became due;
- (d) any amount payable and the date it became due.

Maximum penalty—100 penalty units.

(2) The statement must be given—

- (a) within 14 days, if all information requested relates to a period 1 year or less before the request is given; or
- (b) within 30 days, if any information requested relates to a period more than 1 year before the request is given.

(3) A statement under this section may be given orally but if the request for the statement is made in writing the statement must be given in writing.

(4) A credit provider is not required to provide a further written statement under this section if it has, within the 3 months before the request is given, given such a statement to the person requesting it.

(5) Except where otherwise ordered by the Court on the application of the debtor or guarantor, a credit provider is not required to provide information in a statement under this section about amounts credited or debited, or which were overdue or payable, more than 7 years before the request is given unless those amounts are currently overdue and payable.

Court may order statement to be provided

35. If a statement is not provided within the time required by this Division, the Court may, on the application of the debtor or guarantor, order the credit provider to provide the statement or itself determine the amounts in relation to which the statement was sought.

Disputed accounts

36. (1) If a debtor, by written notice to a credit provider, disputes a particular liability entered against the debtor under a credit contract, the

credit provider must give the debtor a written notice explaining in reasonable detail how the liability arises.

(2) A written notice need not be given if the credit provider agrees with the debtor as to the disputed amount and gives the debtor a written notice advising of the agreed liability.

(3) If in the case of a continuing credit contract the disputed entry appears in a statement of account in which a date for payment of the amount of the account, or part of that amount, is shown, the notice of dispute must be given to the credit provider on or before that date.

(4) In any other case, the notice of dispute must be given to the credit provider within 30 days of receiving the statement of account in which the amount, or part of that amount, was first shown.

(5) The credit provider must not begin enforcement proceedings on the basis of a default arising from the disputed liability until at least 30 days have elapsed from the time the written explanation or advice as to agreement was given.

(6) A debtor or credit provider may apply to the Court to have the Court determine a disputed liability and, if satisfied that a liability is genuinely disputed, the Court may determine the matters in dispute and make such consequential orders as it thinks just.

(7) If an application is made to the Court under this section within 30 days after the explanation is given, the credit provider must not, without leave of the Court, begin enforcement proceedings on the basis of a default arising from the disputed liability.

Maximum penalty—50 penalty units.

(8) This section does not affect a dispute not dealt with, or not arising, under this section.

Division 6—Certain transactions not to be treated as contracts

Deferrals, waivers and changes under contracts

37. The provision of credit as a result of a change to an existing credit contract, or a deferral or waiver of an amount under an existing credit contract, is not to be treated as creating a new credit contract for the purposes of this Code, if the change, deferral or waiver is made in accordance with this Code or the contract.

PART 3—RELATED MORTGAGES AND GUARANTEES

Division 1—Mortgages

Note: 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, whether or not it also secures other obligations (see section 8).

Form of mortgage

38. (1) A mortgage must be in the form of a written mortgage document that is signed by the mortgagor.

(2) It is sufficient compliance with subsection (1) if—

- (a)** the mortgage is contained in a credit contract signed by the mortgagor; or
- (b)** one of the documents comprising the mortgage document is signed by the mortgagor (and the other documents are referred to in the signed document).

(3) However, a goods mortgage need not be in the form of a written mortgage document if the credit provider lawfully had possession of the goods that are subject to the mortgage before the mortgage was entered into, otherwise than because the credit provider supplied the goods (for example, the goods were held by way of security).

(4) A mortgage is not enforceable unless it complies with this section.

Copy of mortgage for mortgagor

39. If a mortgage is in the form of a written mortgage document and is not part of a credit contract, the credit provider must give the mortgagor a copy to keep, in the form in which it was made, within 14 days after it is made.

Mortgages over all property void

40. (1) A mortgage that does not describe or identify the property which is subject to the mortgage is void.

(2) Without limiting subsection (1), a provision in a mortgage that charges all the property of the mortgagor is void.

Restriction on mortgage of future property

41. (1) A provision in a mortgage to the effect that the mortgagor creates or agrees to create a mortgage over or in respect of property or a class of property that is to be, or may be, acquired by the mortgagor after the mortgage is entered into is void.

(2) However, this section does not apply—

- (a)** to a provision in a mortgage of property that is to be acquired wholly or partly with the credit provided under the credit contract secured by the mortgage; or
- (b)** to a provision in a mortgage relating to property or a class of property (whether or not ascertained) described or identified in the mortgage; or
- (c)** to a provision in a mortgage relating to goods acquired in replacement for, or as additions or accessories to, other goods subject to the mortgage; or
- (d)** to any other provision specified by the regulations.

Mortgages and continuing credit contracts

42. (1) A provision in a mortgage to the effect that goods supplied from time to time under a continuing credit contract are subject to the mortgage is void.

(2) However, this section does not apply to a provision in a mortgage relating to specified goods securing payment of a debt under a continuing credit contract.

All accounts mortgages

43. (1) In addition to securing credit provided by the credit contract or proposed credit contract, or securing obligations under a related guarantee or proposed related guarantee, to which a mortgage initially applies, the mortgage may contain a provision that secures credit provided under another future credit contract or future related guarantee.

(2) Any such mortgage is unenforceable in relation to such a future credit contract or future related guarantee unless the credit provider has—

- (a)** given the mortgagor a copy of the contract document of the credit contract or proposed credit contract or a copy of the guarantee or proposed guarantee to which the mortgage is to relate; and

-
- (b) subsequently obtained from the mortgagor a written acceptance of the extension of the mortgage or obtained acceptance in some other form provided for by the regulations.

(3) Section 38 (Form of mortgage) does not apply to an extension of a mortgage under this section.

Third party mortgages prohibited

44. (1) A credit provider must not enter into a mortgage to secure obligations under a credit contract unless each mortgagor is a debtor under the contract or a guarantor under a related guarantee.

(2) A credit provider must not enter into a mortgage to secure obligations under a guarantee unless each mortgagor is a guarantor under the guarantee or a debtor under the related credit contract.

(3) A mortgage which does not comply with this section is unenforceable.

(4) The Court may, on the application of a party to a mortgage that is unenforceable because of this section, order that the credit provider takes such steps as are necessary to discharge the mortgage.

Maximum amount which may be secured

45. (1) A mortgage is void to the extent that it secures an amount, in relation to any credit contract which it secures, that exceeds the sum of the amount of the liabilities of the debtor under the credit contract and the reasonable enforcement expenses of enforcing the mortgage.

(2) A mortgage is void to the extent that it secures an amount, in relation to any guarantee which it secures, that exceeds the limit of the guarantor's liability under the guarantee and the reasonable enforcement expenses of enforcing the mortgage.

(3) This section does not affect a provision of a mortgage permitted by section 43.

Prohibited securities

46. (1) A mortgage cannot be created over employees' remuneration or employment benefits or benefits under a superannuation scheme unless the regulations permit it to do so.

(2) An obligation under a credit contract cannot be secured by a cheque, or bill of exchange or promissory note, endorsed or issued by the debtor or guarantor.

(3) A mortgage or security is void to the extent that it contravenes this section.

Assignment or disposal of mortgaged property by mortgagor

47. (1) A mortgagor must not assign or dispose of property that is subject to a mortgage without the credit provider's consent or the authority of the Court under subsection (3).

Maximum penalty—50 penalty units.

(2) The credit provider must not unreasonably withhold consent or attach unreasonable conditions to the consent (but a condition requiring security over property of an equivalent kind and value is not to be regarded as unreasonable).

(3) The Court may, on application by a mortgagor, authorise the mortgagor to dispose of mortgaged property on conditions determined by the Court if—

- (a) the credit provider fails within a reasonable time to reply to a request for consent to do so by the mortgagor; or
- (b) consent is unreasonably withheld, or unreasonable conditions are attached to the consent.

Conditions on consent to assignment or disposal of property subject to mortgage

48. (1) As a condition of granting consent to an assignment or disposal of property subject to a mortgage, the credit provider may make any or all of the requirements set out in this section. This section does not limit any other requirements that may be made by the credit provider.

(2) The credit provider may require any breaches of the credit contract to which the mortgage relates and of the mortgage to be remedied.

(3) The credit provider may require the mortgagor and the assignee or person to whom the property is disposed to execute and deliver to the credit provider an agreement relating to the assignment or disposal in a form approved by the credit provider under which, without prejudicing or affecting the liability of the mortgagor, the assignee or person to whom the property is disposed agrees with the credit provider—

- (a) to be personally liable to pay the amounts due or that become due under the mortgage; and

(b) to perform and observe all other requirements and conditions of the mortgage.

(4) The credit provider may require the mortgagor and the assignee or person to whom the property is disposed to pay the reasonable costs (if any) incurred by the credit provider for—

- (a) stamp duty in respect of the assignment or disposal agreement, or any other document the credit provider reasonably requires to be executed in connection with the assignment or disposal; and
- (b) fees payable to a duly qualified legal practitioner.

Offence for non-compliance

49. (1) A credit provider must not—

- (a) enter into a mortgage that contravenes a requirement of this Division; or
- (b) otherwise contravene a requirement of this Division.

(2) A credit provider must not enter into a mortgage that is void or unenforceable, or that includes a provision that is void or unenforceable, because of this Division.

Maximum penalty—50 penalty units.

Division 2—Guarantees

Note: This Division applies to a guarantee (under which the guarantor is a natural person or a strata corporation) to the extent to which it guarantees obligations under a credit contract, whether or not it also guarantees other obligations (see section 9).

Form of guarantee

50. (1) A guarantee must be in writing signed by the guarantor.

(2) It is sufficient compliance with subsection (1) if the guarantee is contained in a mortgage signed by the guarantor.

(3) The regulations may make provision for or with respect to the content of guarantees and the way they are expressed.

(4) A guarantee is not enforceable unless it complies with this section and any regulations made under this section.

Disclosure

51. (1) Before the obligations under a credit contract are secured by a guarantee, the credit provider must give to the prospective guarantor—

- (a) a copy of the contract document of the credit contract or proposed credit contract; and
- (b) a document in the form prescribed by the regulations explaining the rights and obligations of a guarantor.

(2) A guarantee is not enforceable unless subsection (1) (a) is complied with.

Copies of documents for guarantor

52. A credit provider must, within 14 days after a guarantee is signed and given to the credit provider, give to the guarantor a copy of the guarantee signed by the guarantor and any related credit contract or proposed credit contract (if a copy of the related contract has not previously been given to the guarantor).

Guarantor may withdraw before credit is provided

53. (1) Although a guarantee has been made, the guarantor may nevertheless, by written notice to the credit provider—

- (a) withdraw from the guarantee at any time before credit is first provided under the credit contract; or
- (b) withdraw from the guarantee after credit is first provided under the contract if the credit contract made differs in some material respect from the proposed credit contract or pre-contractual statement given to the guarantor before the guarantee is signed.

(2) The guarantor may withdraw from a guarantee under this section to the extent only that it guarantees obligations under the credit contract.

(3) This section is subject to section 56.

Extension of guarantee

54. (1) In addition to guaranteeing obligations under a credit contract or proposed credit contract to which a guarantee initially applies, a guarantee may contain a provision that makes credit provided under another future credit contract subject to the guarantee.

(2) Any such guarantee is unenforceable in relation to such a future credit contract unless the credit provider has—

- (a) given the guarantor a copy of the contract document of that future credit contract; and
- (b) subsequently obtained from the guarantor a written acceptance of the extension of the guarantee or obtained acceptance in some other form provided for by the regulations.

(3) Section 50 (Form of guarantee) does not apply to an extension of a guarantee under this section.

Limitation of guarantor's liability

55. (1) Total amount for which guarantor can be liable. A guarantee is void to the extent that it secures an amount, in relation to a credit contract to which this Code applies, that exceeds the sum of the amount of the liabilities of the debtor under the credit contract and the reasonable expenses of enforcing the guarantee, or any lesser amount agreed between the credit provider and the guarantor.

(2) Unenforceable contracts. Nothing in subsection (1) prevents a credit provider from enforcing a guarantee relating to liabilities under a credit contract that is unenforceable solely because of the debtor's death, insolvency or incapacity or any other act or omission by, or circumstance affecting, the debtor.

(3) Debtors under 18 years of age. A guarantee which guarantees the liability of a debtor who was under 18 years of age when the liability was incurred cannot be enforced against the guarantor unless it contains a prominent statement to the effect that the guarantor may not be entitled to an indemnity against the debtor.

(4) Guarantor may limit liabilities under continuing credit contract. In the case of a continuing credit contract, a guarantor may, by notice to the credit provider, limit the guarantee so that it applies only to liabilities related to credit previously provided to the debtor under the credit contract (including any such liabilities not yet debited to the debtor's account) and such further amount (if any) as the guarantor agrees to guarantee.

(5) Guarantee must not limit indemnity. A guarantee is void to the extent that it limits the guarantor's right to indemnity from the person whose liability the guarantor has guaranteed or it postpones or otherwise purports to limit the guarantor's right to enforce the indemnity against the person.

(6) Effect of section. This section does not affect a provision of a guarantee permitted by section 54.

Increase in guarantor's liabilities

56. (1) If the terms of a credit contract are changed to increase or allow for an increase in liabilities, the liabilities of a guarantor under a guarantee that secures those liabilities are not increased unless—

- (a) the credit provider gives to the guarantor a written notice setting out particulars of the change in the terms of the credit contract; and
- (b) the credit provider has subsequently obtained from the guarantor a written acceptance of the extension of the guarantee to those increased liabilities or obtained acceptance in some other form provided for by the regulations.

(2) This section does not apply to an increase in liabilities resulting from a change of a kind referred to in section 58 (2) (a) or (b) or to a change of which notice is required to be given under Division 1 of Part 4 (not being a change referred to in section 62 (3) or 63).

Offence for non-compliance

57. (1) A credit provider must not—

- (a) enter into a guarantee that contravenes a requirement of this Division; or
- (b) otherwise contravene a requirement of this Division.

(2) A credit provider must not enter into a guarantee that is void or unenforceable, or that contains a provision that is void or unenforceable, because of this Division.

Maximum penalty—50 penalty units.

PART 4—CHANGES TO OBLIGATIONS UNDER CREDIT CONTRACTS, MORTGAGES AND GUARANTEES

Division 1—Unilateral changes by credit provider

Application of Division

58. (1) This Division applies only to changes made unilaterally by a credit provider under a credit contract, mortgage or guarantee.

(2) This Division does not apply to the following changes under a credit contract—

- (a) a change to a new annual percentage rate payable under the contract (not being a rate determined by referring to a reference rate), if both the new rate and when it takes effect are ascertainable from the contract;
- (b) an increase in the amount of repayments, if the increase occurs automatically, as specified by the contract, and both the amount of the increase and when it takes effect are ascertainable from the contract;
- (c) an increase in the term of a credit contract, if the increase occurs only because of an increase in the annual percentage rate or rates payable under the contract;
- (d) a change made under Division 3.

(3) Nothing in this Division confers on a credit provider or a debtor any power or right to change the credit contract or its terms in addition to those conferred by the contract.

Interest rate changes

59. (1) Notification of interest rate changes. A credit provider must, not later than the day on which a change in the annual percentage rate or rates payable under a credit contract takes effect, give to the debtor written notice setting out—

- (a) the new rate or rates or, if a rate is determined by referring to a reference rate, the new reference rate; and
- (b) any information required by the regulations.

Maximum penalty—100 penalty units.

(2) **Notification by publication.** Notice under subsection (1) may be given by publishing the notice in a newspaper circulating throughout this jurisdiction. A credit provider that gives notice in accordance with this subsection must give to the debtor particulars of the change before or when the next statement of account is sent to the debtor after the change takes effect.

Maximum penalty—100 penalty units.

(3) Changes in reference rates. Subsection (1) does not apply to a change in a rate that is determined by referring to a reference rate if the changed reference rate is notified (whether or not by the credit provider) in a newspaper circulating throughout this jurisdiction not later than the date the change takes effect.

(4) Notification of other interest changes. A credit provider must, not later than 30 days before a change in the manner in which interest is calculated or applied under a credit contract (including a change in or abolition of any interest free period under the contract) takes effect, give to the debtor written notice setting out—

- (a) particulars of the change; and
- (b) any information required by the regulations.

Maximum penalty—100 penalty units.

(5) Interest rate reductions. Subsections (1) and (4) do not apply to a change that reduces the obligations of the debtor under the credit contract.

(6) Application. This section applies whether or not the change is a change to the terms of the contract.

Repayment changes

60. (1) Notification of repayment changes. A credit provider must, not later than 30 days before a change in the amount or frequency or time for payment of, or a change in the method of calculation of, instalments or minimum repayments, under a credit contract takes effect, give to the debtor written notice setting out—

- (a) particulars of the change; and
- (b) any information required by the regulations.

Maximum penalty—100 penalty units.

(2) Repayment reductions. Subsection (1) does not apply to a change that reduces the obligations of the debtor, or extends the time for payment, under the credit contract. The credit provider must, however, give particulars of any such change before or when the next statement of account is sent to the debtor after the change takes effect.

Maximum penalty—100 penalty units.

(3) Application. This section applies whether or not the change is a change to the terms of the contract.

Credit fees and charges changes

61. (1) Notification of credit fees and charges changes. A credit provider must, not later than 30 days before a change in the amount of a credit fee or charge (including a new credit fee or charge), or a change in the frequency or time for payment of a credit fee or charge, under a credit contract takes effect, give to the debtor written notice setting out—

- (a) particulars of the change; and
- (b) any information required by the regulations.

Maximum penalty—100 penalty units.

(2) Notification by publication. Notice relating to a change in the amount of a credit fee or charge (including a new credit fee or charge) may be given by publishing the notice in a newspaper circulating throughout this jurisdiction. A credit provider that gives notice in accordance with this subsection must give particulars of the change before or when the next statement of account is sent to the debtor after the change takes effect.

Maximum penalty—100 penalty units.

(3) Credit fee or charge reductions. Subsection (1) does not apply to a change that reduces the obligations of the debtor, or extends the time for payment, under the credit contract. The credit provider must, however, give particulars of any such change before or when the next statement of account is sent to the debtor after the change takes effect.

Maximum penalty—100 penalty units.

(4) Application. This section applies whether or not the change is a change to the terms of the contract.

Changes to credit limits etc. in continuing credit contracts

62. (1) If a credit provider decides not to provide any further credit under a continuing credit contract, the credit contract continues in force in relation to any credit previously provided under the contract. However, this subsection does not prevent the termination of the contract if otherwise permitted by this Code or the contract.

(2) A credit provider must, unless the debtor is in default under the contract, as soon as practicable after deciding not to provide any further credit or to reduce the credit limit, give to the debtor a written notice to that effect if such notice has not previously been given.

Maximum penalty—100 penalty units.

(3) A credit provider may increase the credit limit under a continuing credit contract only at the request of the debtor or with the written consent of the debtor.

Other unilateral changes by credit provider

63. (1) A credit provider must not exercise a power under a credit contract, mortgage or guarantee to unilaterally change its terms without giving to the other party, not less than 30 days before the change takes effect, written notice setting out—

- (a) particulars of the change in the terms of the credit contract, mortgage or guarantee; and
- (b) any information required by the regulations.

Maximum penalty—100 penalty units.

(2) Subsection (1) does not apply to a change that reduces the obligations of the debtor, or extends the time for payment, under the credit contract. The credit provider must, however, give particulars of any such change before or when the next statement of account is sent to the debtor after the change takes effect.

Maximum penalty—100 penalty units.

(3) This section does not apply to a change of which notice is required to be given under section 59, 60, 61 or 62 or which is referred to in section 62 (3).

Prohibited increases in liabilities

64. (1) If the annual percentage rate under a credit contract is currently fixed for a specified term (including the whole term) of the contract, the contract cannot be changed unilaterally by a credit provider so as to increase, or change the method of calculation of a fee or charge so as to increase, a fee or charge—

- (a) payable by the debtor on early termination of the credit contract; or
- (b) payable on prepayment of an amount under the credit contract.

(2) The regulations may prescribe circumstances in which such a change is permitted.

Division 2—Changes by agreement of parties

Changes by agreement

65. (1) If the parties under a credit contract, mortgage or guarantee agree to change its terms, the credit provider must, within 30 days after the date of the agreement, give to the other party under the agreement a written notice setting out—

- (a) particulars of the change in the terms of the credit contract, mortgage or guarantee; and
- (b) any information required by the regulations.

Maximum penalty—100 penalty units.

(2) Subsection (1) does not apply to a change which defers or otherwise reduces the obligations of the debtor for a period not exceeding 90 days or to an agreement to increase the amount of credit under a credit contract.

(3) If the parties under a credit contract propose to increase the amount of credit under the contract by agreement, the credit provider must also, before the agreement is made, give to the debtor a written notice containing the information required by the regulations.

Maximum penalty—100 penalty units.

(4) This section does not apply to a change made under Division 3.

Division 3—Changes on grounds of hardship and unjust transactions

Changes on grounds of hardship

66. (1) General principle. A debtor who is unable reasonably, because of illness, unemployment or other reasonable cause, to meet the debtor's obligations under a credit contract and who reasonably expects to be able to discharge the debtor's obligations if the terms of the contract were changed in a manner set out in subsection (2) may apply to the credit provider for such a change.

(2) Changes. An application by a debtor must seek to change the terms of the contract in one of the following ways—

- (a) extending the period of the contract and reducing the amount of each payment due under the contract accordingly (without a change being made to the annual percentage rate or rates);

- (b) postponing during a specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates);
- (c) extending the period of the contract and postponing during a specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates).

(3) Application. This section and sections 67–69 do not apply to a credit contract under which the maximum amount of credit that is or may be provided is more than \$125 000 (or such other amount as may be prescribed by the regulations).

Notice of change

67. A credit provider that enters into an agreement with the debtor on any such application must, within 30 days after the date of the agreement, give to the debtor, and any guarantor under a guarantee related to the contract, a written notice setting out—

- (a) particulars of the change in the terms of the credit contract; and
- (b) any information required by the regulations.

Maximum penalty—50 penalty units.

Changes by Court

68. (1) If the credit provider does not change the credit contract in accordance with the application, the debtor may apply to the Court to change the terms of the credit contract.

(2) The Court may, after allowing the applicant, the credit provider and any guarantor a reasonable opportunity to be heard, by order change the credit contract in a manner set out in section 66, and make such other orders as it thinks fit, or refuse to change the credit contract.

(3) The Court may, if it thinks it appropriate in the circumstances, stay any enforcement proceedings under the credit contract, and make such other orders as it thinks fit, until the application has been determined.

Credit provider may apply for variation of change

69. (1) A credit provider under a credit contract that has been changed by an order under section 68 (2) may apply to the Court for an order varying or revoking the order.

(2) A credit provider subject to a stay of enforcement proceedings or other order under section 68 (3) may apply to the Court for an order varying or revoking the stay or order.

(3) On an application under this section, the Court may vary or revoke the order or stay to which the application relates as it thinks fit, or may refuse the application.

Court may re-open unjust transactions

70. (1) Power to re-open unjust transactions. The Court may, if satisfied on the application of a debtor, mortgagor or guarantor that, in the circumstances relating to the relevant credit contract, mortgage or guarantee at the time it was entered into or changed (whether or not by agreement), the contract, mortgage or guarantee or change was unjust, re-open the transaction that gave rise to the contract, mortgage or guarantee or change.

(2) Matters to be considered by Court. In determining whether a term of a particular credit contract, mortgage or guarantee is unjust in the circumstances relating to it at the time it was entered into or changed, the Court is to have regard to the public interest and to all the circumstances of the case and may have regard to the following—

- (a) the consequences of compliance, or non-compliance, with all or any of the provisions of the contract, mortgage or guarantee;
- (b) the relative bargaining power of the parties;
- (c) whether or not, at the time the contract, mortgage or guarantee was entered into or changed, its provisions were the subject of negotiation;
- (d) whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the contract, mortgage or guarantee or the change;
- (e) whether or not any of the provisions of the contract, mortgage or guarantee impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the contract, mortgage or guarantee;
- (f) whether or not the debtor, mortgagor or guarantor, or a person who represented the debtor, mortgagor or guarantor, was reasonably able to protect the interests of the debtor, mortgagor or guarantor because of his or her age or physical or mental condition;

- (g) the form of the contract, mortgage or guarantee and the intelligibility of the language in which it is expressed;
- (h) whether or not, and if so when, independent legal or other expert advice was obtained by the debtor, mortgagor or guarantor;
- (i) the extent to which the provisions of the contract, mortgage or guarantee or change and their legal and practical effect were accurately explained to the debtor, mortgagor or guarantor and whether or not the debtor, mortgagor or guarantor understood those provisions and their effect;
- (j) whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor, mortgagor or guarantor and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics;
- (k) whether the credit provider took measures to ensure that the debtor, mortgagor or guarantor understood the nature and implications of the transaction and, if so, the adequacy of those measures;
- (l) whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship;
- (m) whether the terms of the transaction or the conduct of the credit provider is justified in the light of the risks undertaken by the credit provider;
- (n) the terms of other comparable transactions involving other credit providers and, if the injustice is alleged to result from excessive interest charges, the annual percentage rate or rates payable in comparable cases;
- (o) any other relevant factor.

(3) Representing debtor, mortgagor or guarantor. For the purposes of subsection (2) (f), a person is taken to have represented a debtor, mortgagor or guarantor if the person represented the debtor, mortgagor or guarantor, or assisted the debtor, mortgagor or guarantor to a significant degree, in the negotiations process prior to, or at, the time the credit contract, mortgage or guarantee was entered into or changed.

(4) Unforeseen circumstances. In determining whether a credit contract, mortgage or guarantee is unjust, the Court is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract, mortgage or guarantee was entered into or changed.

(5) Conduct. In determining whether to grant relief in respect of a credit contract, mortgage or guarantee that it finds to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the contract, mortgage or guarantee since it was entered into or changed.

(6) Application. This section does not apply to a change in the annual percentage rate or rates payable under a contract, or to an establishment fee or charge or other fee or charge, in respect of which an application may be made under section 72 (Court may review unconscionable interest and other charges). This section does not apply to a change to a contract under this Division.

(7) Meaning of unjust. In this section, “unjust” includes unconscionable, harsh or oppressive.

Orders on re-opening of transactions

71. The Court may, if it re-opens a transaction under this Division, do any one or more of the following, despite any settlement of accounts or any agreement purporting to close previous dealings and create a new obligation—

- (a) re-open an account already taken between the parties;
- (b) relieve the debtor and any guarantor from payment of any amount in excess of such amount as the Court, having regard to the risk involved and all other circumstances, considers to be reasonably payable;
- (c) set aside either wholly or in part or revise or alter an agreement made or mortgage given in connection with the transaction;
- (d) order that the mortgagee takes such steps as are necessary to discharge the mortgage;
- (e) give judgment for or make an order in favour of a party of such amount as, having regard to the relief (if any) which the Court thinks fit to grant, is justly due to that party under the contract, mortgage or guarantee;

- (f) give judgment or make an order against a person for delivery of goods to which the contract, mortgage or guarantee relates and which are in the possession of that person;
- (g) make ancillary or consequential orders.

Court may review unconscionable interest and other charges

72. (1) The Court may, if satisfied on the application of a debtor or guarantor that—

- (a) a change in the annual percentage rate or rates under a credit contract to which section 59 (1) or (4) applies; or
- (b) an establishment fee or charge; or
- (c) a fee or charge payable on early termination of a credit contract; or
- (d) a fee or charge for a prepayment of an amount under a credit contract;

is unconscionable, annul or reduce the change or fee or charge and may make ancillary or consequential orders.

(2) For the purposes of this section, a change to the annual percentage rate or rates is unconscionable if and only if it appears to the Court that—

- (a) it changes the annual percentage rate or rates in a manner that is unreasonable, having regard to any advertised rate or other representations made by the credit provider before or at the time the contract was entered into, the period of time since the contract was entered into and any other consideration the Court thinks relevant; or
- (b) the change is a measure that discriminates unjustifiably against the debtor when the debtor is compared to other debtors of the credit provider under similar contracts.

(3) In determining whether an establishment fee or charge is unconscionable, the Court is to have regard to whether the amount of the fee or charge is equal to the credit provider's reasonable costs of determining an application for credit and the initial administrative costs of providing the credit or is equal to the credit provider's average reasonable costs of those things in respect of that class of contract.

(4) For the purposes of this section, a fee or charge payable on early termination of the contract or a prepayment of an amount under the credit contract is unconscionable if and only if it appears to the Court that it

exceeds a reasonable estimate of the credit provider's loss arising from the early termination or prepayment, including the credit provider's average reasonable administrative costs in respect of such a termination or prepayment.

Time limit

73. (1) An application (other than an application under section 72) may not be brought under this Division more than 2 years after the relevant credit contract is rescinded or discharged or the credit provider writes off the relevant debt, whichever occurs first.

(2) An application under section 72 may not be brought more than 2 years after the relevant change takes effect or fee or charge is charged under the credit contract or the credit provider writes off the relevant debt, whichever occurs first.

Joinder of parties

74. (1) If it appears to the Court that a person other than a credit provider or a mortgagee (a "third party") has shared in the profits of, or has a beneficial interest prospectively or otherwise in, a credit contract or mortgage that the Court holds to be unjust, the Court may make an order about the third party that the Court considers appropriate.

(2) However, before making an order about the third party, the Court must—

- (a) join the third party as a party to the proceedings; and
- (b) give the third party an opportunity to appear and be heard in the proceedings.

PART 5—ENDING AND ENFORCING CREDIT CONTRACTS, MORTGAGES AND GUARANTEES

Division 1—Ending of credit contract by debtor

Debtor's or guarantor's right to pay out contract

75. (1) A debtor or guarantor is entitled to pay out the credit contract at any time.

(2) The amount required to pay out a credit contract (other than a continuing credit contract) is the total of the following amounts—

- (a) the amount of credit;
- (b) the interest charges and all other fees and charges payable by the debtor to the credit provider up to the date of termination;
- (c) reasonable enforcement expenses;
- (d) early termination charges, if provided for in the contract;

less any payments made under the contract and any rebate of premium under section 138.

Statement of pay out figure

76. (1) A credit provider must, at the written request of a debtor or guarantor, provide a written statement of the amount required to pay out a credit contract (other than a continuing credit contract) as at such date as the debtor or guarantor specifies. If so requested, the credit provider must also provide details of the items which make up that amount.

(2) The statement must also contain a statement to the effect that the amount required to pay out the credit contract may change according to the date on which it is paid.

(3) A credit provider must give a statement, complying with this section, within 7 days after the request is given to the credit provider.

Maximum penalty—50 penalty units.

Court may determine pay out figure if credit provider does not provide a pay out figure

77. (1) If the credit provider does not provide a statement of the amount required to pay out a credit contract (other than a continuing credit contract) in accordance with this Part after a request is duly made by a debtor or guarantor, the Court may, on the application of the debtor or guarantor, determine the amount payable on the date of determination, the amount by which it increases daily and the period for which the determination is applicable.

(2) The credit contract is discharged if an amount calculated in accordance with the determination is tendered to the credit provider within the applicable period.

Surrender of mortgaged goods and goods subject to sale by instalments

78. (1) General principle. If—

- (a) a credit contract takes the form of a sale of goods by instalments and title in the goods does not pass until all instalments are paid; or
- (b) the credit provider has a mortgage over goods of the debtor or guarantor;

the debtor or mortgagor may give written notice of an intention to return the goods to the credit provider or, if the goods are in the credit provider's possession, require the credit provider in writing to sell the goods.

(2) Delivery of goods. A debtor or mortgagor may return the goods to the credit provider at the credit provider's place of business during ordinary business hours within 7 days of the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider.

(3) Notice of value. The credit provider must, within 14 days after a debtor or mortgagor returns the goods or requires the credit provider to sell the goods, give the debtor or mortgagor a written notice containing the estimated value of the goods and any other information required by the regulations.

(4) Return or sale of goods. If the debtor or mortgagor, within 21 days after the notice under subsection (3) is given, requests by written notice return of the goods to the debtor or mortgagor or withdraws the requirement to sell the goods (and the debtor is not in default under the terms of the credit contract), the credit provider must return to the debtor or mortgagor any goods returned by the debtor or mortgagor and must not comply with the requirement.

(5) Nominated purchaser. The debtor or mortgagor may, within 21 days after the notice under subsection (3) is given, nominate in writing a person who is prepared to purchase the goods from the credit provider at the estimated value or at any greater amount for which the credit provider has obtained a written offer to buy the goods. The credit provider must offer to sell the goods to that person for the estimated value or, if there is a written offer to buy the goods for a greater amount, that amount.

(6) Sale of goods by credit provider. The credit provider must, if the goods are not required to be returned under subsection (4), as soon as reasonably practicable (or at such other time as the credit provider and the

debtor or mortgagor agree) sell the goods in accordance with subsection (5) or, if no buyer is nominated or the nominated buyer under that subsection does not buy the goods, for the best price reasonably obtainable.

(7) Amount to be credited to debtor or mortgagor. The credit provider must credit the debtor or mortgagor with a payment equivalent to the proceeds of the sale less any amounts which the credit provider is entitled to deduct from those proceeds. On the sale of the goods, the total amount payable under the contract becomes due.

(8) Deductions from proceeds. A credit provider that sells mortgaged goods under this section is entitled to deduct from the proceeds of that sale only the following amounts—

- (a) the amount currently secured by the mortgage in relation to the credit contract, not being more than the amount required to discharge the contract;
- (b) the amount payable to discharge any prior mortgage to which the goods were subject;
- (c) the amounts payable in successive discharge of any subsequent mortgages to which the goods were subject and of which the credit provider had notice;
- (d) the credit provider's reasonable enforcement expenses.

(9) Notice of amount credited and other matters. The credit provider must give the debtor or mortgagor a written notice stating the gross amount realised on the sale, the net proceeds of the sale, the amount credited to the debtor or mortgagor and the net amount due under the credit contract.

(10) Offence—credit provider. A credit provider that contravenes a requirement of this section is guilty of an offence.

Maximum penalty (subsection (10))—50 penalty units.

Compensation to debtor or mortgagor

79. (1) The Court, on application by the debtor or mortgagor, may order a credit provider to credit the debtor or mortgagor with a payment, fixed by the Court, exceeding the net proceeds of sale if it is not satisfied that the credit provider sold the goods as soon as reasonably practicable (or at such other time as the credit provider and debtor or mortgagor agreed) for the best price reasonably obtainable.

(2) On application by the debtor or mortgagor, the mortgagee under any prior mortgage to which the goods are subject or the mortgagee under any subsequent mortgage of which the credit provider has notice, the Court, if not satisfied that the credit provider complied with section 78, may make an order requiring the credit provider to compensate the debtor or mortgagor or the relevant mortgagee for any loss suffered as a result.

(3) The onus of proving that section 78 was complied with is on the credit provider.

Division 2—Enforcement of credit contracts, mortgages and guarantees

Requirements to be met before credit provider can enforce credit contract or mortgage against defaulting debtor or mortgagor

80. (1) Enforcement of credit contract. A credit provider must not begin enforcement proceedings against a debtor in relation to a credit contract unless the debtor is in default under the credit contract and—

- (a) the credit provider has given the debtor, and any guarantor, a “**default notice**”, complying with this section, allowing the debtor a period of at least 30 days from the date of the notice to remedy the default; and
- (b) the default has not been remedied within that period.

Maximum penalty—50 penalty units.

(2) Enforcement of mortgage. A credit provider must not begin enforcement proceedings against a mortgagor to recover payment of money due or take possession of, sell, appoint a receiver for or foreclose in relation to property subject to a mortgage, unless the mortgagor is in default under the mortgage and—

- (a) the credit provider has given the mortgagor a “**default notice**”, complying with this section, allowing the mortgagor a period of at least 30 days from the date of the notice to remedy the default; and
- (b) the default has not been remedied within that period.

Maximum penalty—50 penalty units.

(3) Default notice requirements. A default notice must specify the default and the action necessary to remedy it and that a subsequent default

of the same kind that occurs during the period of 30 days may be the subject of enforcement proceedings without further notice if it is not remedied within the period.

(4) When default notice not required. A credit provider is not required to give a default notice or to wait until the period specified in the default notice has elapsed, before beginning enforcement proceedings, if—

- (a) the credit provider believes on reasonable grounds that it was induced by fraud on the part of the debtor or mortgagor to enter into the credit contract or mortgage; or
- (b) the credit provider has made reasonable attempts to locate the debtor or mortgagor but without success; or
- (c) the Court authorises the credit provider to do so; or
- (d) the credit provider believes on reasonable grounds that the debtor or mortgagor has removed or disposed of mortgaged goods under a mortgage related to the credit contract or under the mortgage concerned, or intends to remove or dispose of mortgaged goods, without the credit provider's permission or that urgent action is necessary to protect the mortgaged property.

(5) Non-remedial default. If the credit provider believes on reasonable grounds that a default is not capable of being remedied—

- (a) the default notice need only specify the default; and
- (b) the credit provider may begin the enforcement proceedings after the period of 30 days from the date of the notice.

(6) Other law about mortgages not affected. This section is in addition to any provision of any other law relating to the enforcement of real property mortgages and does not prevent the issue of notices to defaulting mortgagors under other legislation. Nothing in this section prevents the issue of any such notice when a default notice is given under this section.

Note: By virtue of section 161 (2), a notice may contain information required to be given under other legislation or be included in a notice given under other legislation.

Defaults may be remedied

81. (1) If a default notice states that the credit provider intends to take action because the debtor or mortgagor is in default under the credit contract or mortgage, the debtor, mortgagor or guarantor may remedy the default within the period specified in the notice, and the contract or mortgage is then reinstated and any acceleration clause cannot operate.

(2) A debtor, mortgagor or guarantor does not remedy the default if, at the end of the period, the debtor or mortgagor is in default under the credit contract or mortgage because of the breach specified in the notice or because of a subsequent breach of the same type.

Requirements to be met before credit provider can enforce guarantee against guarantor

82. A credit provider must not, under a guarantee, enforce a judgment against a guarantor unless—

- (a) the credit provider has obtained a judgment against the debtor for payment of the guaranteed liability and the judgment remains unsatisfied for 30 days after the credit provider has made a written demand for payment of the judgment debt; or
- (b) the Court has relieved the credit provider from the obligation to obtain a judgment against the debtor on the ground that recovery from the debtor is unlikely; or
- (c) the credit provider has made reasonable attempts to locate the debtor but without success; or
- (d) the debtor is insolvent.

Maximum penalty—50 penalty units.

Requirements to be met before credit provider can repossess mortgaged goods

83. (1) A credit provider must not, without the consent of the Court, take possession of mortgaged goods if the amount currently owing under the credit contract related to the relevant mortgage is less than 25% of the amount of credit provided under the contract or \$10 000, whichever is the lesser.

Maximum penalty—100 penalty units.

(2) However, the restriction does not apply—

- (a) to a continuing credit contract; or
- (b) if the credit provider believes on reasonable grounds that the debtor has removed or disposed of the mortgaged goods, or intends to remove or dispose of them, without the credit provider's permission or that urgent action is necessary to protect the goods.

(3) In any proceedings in which it is established that a credit provider has taken possession of mortgaged goods contrary to subsection (1), the burden of establishing that the possession of the goods was lawfully taken by virtue of subsection (2) lies on the credit provider.

(4) Nothing in this section prevents a credit provider from accepting the return of goods under section 78.

Acceleration clauses

84. (1) For the purposes of this Part, an “**acceleration clause**” is a term of a credit contract or mortgage providing that—

- (a) on the occurrence or non-occurrence of a particular event, the credit provider becomes entitled to immediate payment of all, or a part, of an amount under the contract that would not otherwise have been immediately payable; or
- (b) whether or not on the occurrence or non-occurrence of a particular event, the credit provider has a discretion to require repayment of the amount of credit otherwise than by repayments fixed, or determined on a basis stated, in the contract;

but does not include any such term in a credit contract or mortgage that is an on demand facility.

(2) An “**on demand facility**” is a credit contract or mortgage under which—

- (a) the total amount outstanding under the contract or mortgage is repayable at any time on demand by the credit provider; and
- (b) there is no agreement, arrangement or understanding between the credit provider and the debtor or mortgagor that repayment will only be demanded on the occurrence or non-occurrence of a particular event.

Requirements to be met before credit provider can enforce an acceleration clause

85. (1) An acceleration clause is to operate only if the debtor or mortgagor is in default under the credit contract or mortgage and—

- (a) the credit provider has given to the debtor and any guarantor, or to the mortgagor, a default notice under section 80; and

-
- (b) the default notice contains an additional statement of the manner in which the liabilities of the debtor or mortgagor under the contract or mortgage would be affected by the operation of the acceleration clause and also of the amount required to pay out the contract (as accelerated); and
 - (c) the default has not been remedied within the period specified in the default notice (unless the credit provider believes on reasonable grounds that the default is not capable of being remedied).

(2) However, a credit provider is not required to give a default notice under section 80 or to wait until the period specified in the default notice has elapsed before bringing an acceleration clause into operation, if—

- (a) the credit provider believes on reasonable grounds that it was induced by fraud on the part of the debtor or mortgagor to enter into the contract or mortgage; or
- (b) the credit provider has made reasonable attempts to locate the debtor or mortgagor but without success; or
- (c) the Court authorises the credit provider not to do so; or
- (d) the credit provider believes on reasonable grounds that the debtor or mortgagor has removed or disposed of mortgaged goods under a mortgage related to the credit contract or the mortgage concerned, or intends to remove or dispose of mortgaged goods, without the credit provider's permission or that urgent action is necessary to protect the goods.

(3) This section is in addition to any provision of any other law relating to the enforcement of real property mortgages and does not prevent the issue of notices to defaulting mortgagors under other legislation.

Division 3—Postponement of enforcement proceedings

Postponement of exercise of rights

86. (1) A debtor, mortgagor or guarantor who has been given a default notice under Division 2 or a demand for payment under section 82 may, at any time before the end of the period specified in the notice or demand, negotiate with the credit provider a postponement of the enforcement proceedings or any action taken under such proceedings or of the operation of any applicable acceleration clause.

(2) This Division does not apply to a credit contract under which the maximum amount of credit that is or may be provided is more than \$125 000 (or such other amount as may be prescribed by the regulations).

Effect of negotiated postponement

87. (1) The default notice or demand for payment is taken, for the purposes of this Code, not to have been given or made if a postponement is negotiated with the credit provider, written notice of the conditions of postponement is given to the debtor, mortgagor or guarantor and the debtor, mortgagor or guarantor complies with the conditions of postponement.

(2) It is a condition of any postponement negotiated with a credit provider after the credit provider has taken possession of property subject to a mortgage that the mortgagor pay the reasonable costs of the credit provider in taking possession of the property.

Postponement by Court

88. (1) If the debtor, mortgagor or guarantor is unable to negotiate a postponement, the debtor, mortgagor or guarantor may apply to the Court for a postponement.

(2) The Court may, after allowing the applicant, the credit provider and any debtor, mortgagor or guarantor concerned a reasonable opportunity to be heard, order or refuse to order the postponement to which the application relates and may make such other orders as it thinks fit.

(3) The Court may, if it thinks it appropriate in the circumstances, stay any enforcement proceedings under the credit contract or mortgage until the application has been determined.

Credit provider may apply for variation of postponement order

89. (1) A credit provider that is subject to an order under this Division may apply to the Court for variation of the order.

(2) On such an application, the Court may vary the order to which the application relates as it thinks fit or may refuse to vary the order or may revoke the order.

Division 4—Enforcement procedures for goods mortgaged

Information as to location of mortgaged goods

90. (1) A credit provider may, by written notice to a mortgagor under a goods mortgage, require the mortgagor to inform the credit provider within 7 days where the mortgaged goods are and, if the mortgaged goods are not

in the mortgagor's possession, to give the credit provider all information in the mortgagor's possession that might assist the credit provider to trace the goods.

(2) A mortgagor who contravenes a notice under this section is guilty of an offence.

Maximum penalty—50 penalty units.

Entry to residential property to take possession of goods

91. (1) A credit provider, or an agent of a credit provider, must not enter any part of premises used for residential purposes for the purpose of taking possession of mortgaged goods under a goods mortgage unless—

- (a) the Court has authorised the entry; or
- (b) the occupier of the premises has, after being informed in writing of the provisions of this section, consented in writing to the entry.

(2) The regulations may provide for procedures for the obtaining and giving of consent for the purposes of this section and may set out the circumstances in which consent is or is not taken to have been given.

(3) If premises are entered in contravention of this section by a credit provider or an agent of a credit provider, the credit provider is guilty of an offence.

Maximum penalty (subsection (3))—50 penalty units.

Court may order entry

92. The Court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, authorise the credit provider to enter residential premises for the purpose of taking possession of mortgaged goods.

Order for possession

93. (1) The Court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, order a person who has possession of the goods to deliver them to the credit provider at a specified time or place or within a specified period.

(2) The Court may, on the application of a credit provider or other person required to deliver goods to a credit provider, by order vary the place at which or time or period within which goods must be delivered to the credit provider.

(3) A person who contravenes an order under this section is guilty of an offence.

Maximum penalty (subsection (3))—30 penalty units.

Procedures to be followed by credit provider after taking possession of goods

94. (1) Notice to be given. A credit provider that has taken possession of goods under a mortgage must, within 14 days after doing so, give the mortgagor a written notice containing the following matters—

- (a) the estimated value of the goods;
- (b) the enforcement expenses incurred up to the date on which the goods were taken into the credit provider's possession and, if enforcement expenses are accruing while the goods remain in the credit provider's possession, the rate of accrual;
- (c) a statement of the mortgagor's rights and obligations in the form set out in the regulations.

(2) Goods not to be sold immediately. A credit provider must not dispose of goods taken under the mortgage within 21 days after the date of the notice, unless the Court authorises the credit provider to do so.

(3) Effect of proceedings. If at the end of that 21-day period a stay of enforcement proceedings is in force under this Code or an application under section 70 has not been determined, the credit provider must not dispose of the goods until those proceedings have been determined and any period allowed for appeal has elapsed.

(4) Payment during notice period. The credit provider must return the goods if—

- (a) the amount in arrears (less any accelerated amount) and the credit provider's reasonable enforcement expenses are paid within that 21-day period and the debtor has not committed a further default of the same kind under the credit contract; or
- (b) the credit contract is paid out.

(5) Offence. A credit provider that contravenes this section is guilty of an offence.

Maximum penalty (subsection (5))—50 penalty units.

Mortgagor may nominate purchaser of goods taken by credit provider

95. (1) The mortgagor may, within 21 days after the date of the notice given under section 94, nominate in writing a person who is prepared to purchase the goods from the credit provider at the estimated value or at any greater amount for which the credit provider has obtained a written offer to buy the goods.

(2) The credit provider must offer to sell the goods to that person for the estimated value or, if there is a written offer to buy the goods for a greater amount, that amount.

Maximum penalty—50 penalty units.

Sale of goods by credit provider

96. (1) The credit provider must, if payment is not made within 21 days after the date of the notice given under section 94 and that section does not prevent the sale, as soon as reasonably practicable (or at such time as the credit provider and mortgagor agree) sell the goods in accordance with section 95 or, if there is no nominated buyer or the nominated buyer under that section does not buy the goods, for the best price reasonably obtainable.

(2) The credit provider must credit the mortgagor with a payment equivalent to the proceeds of the sale less any amounts which the credit provider is entitled to deduct from those proceeds. On the sale of the goods, the total amount payable under the contract becomes due.

(3) A credit provider that sells mortgaged goods must give the mortgagor a written notice stating the gross amount realised on the sale, the net proceeds of the sale, the net amount due under the credit contract, any further recovery action proposed to be taken by the credit provider against the debtor and any other information required by the regulations.

(4) A credit provider that contravenes a requirement of this section is guilty of an offence.

Maximum penalty (subsection (4))—50 penalty units.

Matters for which account can be debited after mortgagee sale of goods

97. A credit provider that sells mortgaged goods under section 96 is entitled to deduct from the proceeds of that sale only the following amounts—

- (a) the amount currently secured by the mortgage in relation to the credit contract, not being more than the amount required to discharge the contract;
- (b) the amount payable to discharge any prior mortgage to which the goods were subject;
- (c) the amounts payable in successive discharge of any subsequent mortgages to which the goods were subject and of which the credit provider had notice;
- (d) the credit provider's reasonable enforcement expenses.

Compensation to mortgagor

98. (1) The Court, on application by a mortgagor, may order a credit provider to credit the mortgagor with a payment, fixed by the Court, exceeding the net proceeds of sale if it is not satisfied that the credit provider sold the goods as soon as reasonably practicable for the best price reasonably obtainable.

(2) On application by a mortgagor, the mortgagee under any prior mortgage to which the goods are subject or the mortgagee under any subsequent mortgage of which the credit provider has notice, the Court, if not satisfied that the credit provider exercised its power of sale in accordance with this Division, may make an order requiring the credit provider to compensate the mortgagor or the relevant mortgagee for any loss suffered as a result.

(3) The onus of proving that a power of sale was exercised in accordance with this Division is on the credit provider that exercised it.

Division 5—Enforcement expenses

Recovery of enforcement expenses

99. (1) A credit provider must not recover or seek to recover enforcement expenses from a debtor, mortgagor or guarantor in excess of those reasonably incurred by the credit provider.

(2) Civil effect:

- (a) any provision of the credit contract, mortgage or guarantee that appears to confer a greater right is void; and

-
- (b) if enforcement expenses are in fact recovered in excess of this limitation, they may be recovered back.

PART 6—CIVIL PENALTIES FOR DEFAULTS OF CREDIT PROVIDERS

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

Key requirements

100. (1) For the purposes of this Division, a “**key requirement**” in connection with a credit contract (other than a continuing credit contract) is any one of the requirements of this Code contained in the following provisions—

- (a) Section 15 (B);
- (b) Section 15 (C);
- (c) Section 15 (D);
- (d) Section 15 (E);
- (e) Section 15 (G);
- (f) Section 15 (H);
- (g) Section 15 (J);
- (h) Section 15 (N) (a) and (b);
- (i) Section 21 (1)—but only at the time the credit contract is entered into.

(2) For the purposes of this Division, a “**key requirement**” in connection with a continuing credit contract is any one of the requirements of this Code contained in the following provisions—

- (a) Section 15 (B) (b);
- (b) Section 15 (C);
- (c) Section 15 (D);
- (d) Section 15 (G);
- (e) Section 15 (H);

- (f) Section 21 (1);
- (g) Section 32 (E);
- (h) Section 33.

(3) A key requirement relating to a disclosure or a statement of account extends to the requirements set out in Part 2 as to the manner in which the disclosure or statement is to be made, but does not extend to any requirements set out in the regulations.

Application for order relating to key requirements

101. (1) A party to a credit contract or a guarantor or the Government Consumer Agency may apply to the Court for an order under this Division.

(2) A debtor or guarantor may not make an application for an order under this Division in respect of a contravention under a contract if the contravention under that contract is or has been subject to an application for an order made by the credit provider or a Government Consumer Agency anywhere in Australia under this Code or a corresponding law of another jurisdiction.

(3) Subsection (2) does not prevent an application from being made for an order for the payment of compensation under section 107.

Civil penalty may be imposed for contravention of key requirement

102. (1) Declaration as to key requirement. The Court must, on an application being made, by order declare whether or not the credit provider has contravened a key requirement in connection with the credit contract or contracts concerned.

(2) **Penalty orders.** The Court may make an order, in accordance with this Division, requiring the credit provider to pay an amount as a civil penalty, if it is of the opinion that the credit provider has contravened a key requirement.

(3) **Prudential standing.** The Court, in considering the imposition of a civil penalty, must have regard primarily to the prudential standing of any credit provider concerned, or of any subsidiary of the credit provider (within the meaning of the Corporations Law), if the credit provider or subsidiary takes deposits or is a borrowing corporation (within the meaning of that Law). However, the Court is to have regard to that prudential standing only if the credit provider requests the Court to do so.

(4) Other matters to be considered. The Court, in considering the imposition of a civil penalty, must have regard to the following—

- (a) the conduct of the credit provider and debtor before and after the credit contract was entered into;
- (b) whether the contravention was deliberate or otherwise;
- (c) the loss or other detriment (if any) suffered by the debtor as a result of the contravention;
- (d) when the credit provider first became aware, or ought reasonably to have become aware, of the contravention;
- (e) any systems or procedures of the credit provider to prevent or identify contraventions;
- (f) whether the contravention could have been prevented by the credit provider;
- (g) any action taken by the credit provider to remedy the contravention or compensate the debtor or to prevent further contraventions;
- (h) the time taken to make the application and the nature of the application;
- (i) any other matter the Court considers relevant.

(5) Related contraventions. The Court must, for the purposes of determining an application for an order under this Division or the amount of a civil penalty, treat a contravention of a key requirement that occurs merely because of another contravention of a key requirement as being a contravention of the same kind. If a provision referred to in section 100 contains several requirements, the Court must treat contraventions of more than one of those requirements as a single contravention of the one key requirement for the purposes of determining the amount of a civil penalty.

(6) Suppression of publication of application. The Court may, if it thinks it appropriate in the circumstances, order that particulars of or any matters relating to an application for an order under this Division not be published.

Penalty if application made by debtor or guarantor

103. (1) On application being made by a debtor or a guarantor for an order, the maximum civil penalty that may be imposed by the Court for a contravention of a key requirement is an amount not exceeding the amount of—

- (a) except as provided by paragraphs (b) and (c)—all interest charges payable under the contract from the date it was made; or
- (b) in the case of a contravention of a key requirement relating to a statement of account of a continuing credit contract—all interest charges payable under the contract for the period to which the statement of account relates; or
- (c) in the case of a contravention of a key requirement relating to prohibited monetary obligations—all interest charges accruing under the contract from the date the contravention occurred.

(2) The Court may, however, impose a greater civil penalty if the debtor or guarantor satisfies the Court that the debtor has suffered a loss. The amount of the civil penalty is to be not less than the amount of the loss.

(3) For the purposes of subsection (1) (a), the amount of future interest charges payable under a credit contract is to be calculated on the assumptions in sections 158 and 160.

Payment of penalty to debtor or guarantor

104. (1) An amount of civil penalty ordered by the Court to be paid on an application for an order made by a debtor or a guarantor may be set off by the debtor or guarantor against any amount that is due or becomes due to the credit provider under the credit contract. If there is no such amount, the amount of the civil penalty is a debt due by the credit provider to the debtor or guarantor.

(2) An order made on application by a debtor or a guarantor may include such directions as the Court considers appropriate relating to the payment of the amount owed by the debtor or the credit provider as a result of the order.

Penalty if application made by a credit provider or Government Consumer Agency

105. (1) On application being made by a credit provider or the Government Consumer Agency for an order, the maximum civil penalty that may be imposed by the Court for a contravention of a key requirement relating to a contract affected by the application is an amount calculated so that the total civil penalty for all contraventions of the requirement in Australia (as disclosed by the credit provider) does not exceed \$500 000.

(2) For the purpose of determining the penalty, the Court is, in making an order, to determine the appropriate amount of penalty for disclosed contraventions of the key requirement in all jurisdictions and to determine

the amount payable in each jurisdiction proportionately according to the number of contracts in that jurisdiction affected by the disclosed contraventions.

(3) An order relating to the amount payable in another jurisdiction has no effect in this jurisdiction and has such effect in that other jurisdiction as the law of that other jurisdiction provides.

Payment of penalty to fund

106. An amount of civil penalty ordered by the Court to be paid on an application for an order made by a credit provider or the Government Consumer Agency must be paid by the credit provider into a fund established and operated under another law of this jurisdiction for the purposes of this section or, if no such fund is established, to the Government Consumer Agency.

Compensation for debtor or guarantor

107. (1) The Court may, on application by a debtor or a guarantor, order that the credit provider pay to the debtor or guarantor an amount by way of compensation for loss arising from the contravention of a key requirement.

(2) The Court may only order an amount to be paid by way of compensation if the debtor or guarantor satisfies the Court that the debtor or guarantor has suffered a loss arising from the contravention. The amount of compensation is not to exceed the amount of the loss.

(3) The Court may not make an order under this section if the debtor or guarantor has previously obtained or been refused a civil penalty referred to in section 104 relating to the same contravention.

(4) An amount payable under this section does not affect the amount of penalty for the purposes of section 105.

Recognition of civil penalty determined in other jurisdictions

108. (1) A credit provider or the Government Consumer Agency may register with the Court of this jurisdiction an order made by a Court in another jurisdiction under a provision of a law of that other jurisdiction corresponding to sections 102 and 105.

(2) On registration of the order, the order is taken to be an order under sections 102 and 105 for the purposes of this Code in relation to the contraventions occurring in this jurisdiction.

Other jurisdiction more appropriate

109. (1) The Court may, on the application of a credit provider or the Government Consumer Agency or a Government Consumer Agency of another jurisdiction, refuse to hear an application on the ground that it is more appropriate that the application be determined in another specified jurisdiction under the corresponding provisions of the corresponding laws of that jurisdiction.

(2) Before determining whether to refuse to hear an application, the Court must consider—

- (a) whether the number of affected credit contracts in the other jurisdiction exceeds the number in this jurisdiction; and
- (b) any other matter the Court considers relevant.

General provisions relating to applications by credit providers or Government Consumer Agencies

110. (1) An application for an order by a credit provider or the Government Consumer Agency—

- (a) may apply to any one or more credit contracts; and
- (b) may apply to all or any class of credit contracts entered into by the credit provider during a specified period (for example, all credit contracts entered into during a specified period which are affected by a specified contravention).

(2) The Court may require notice of any such application to be published by notice, in a form approved by the Court, in a newspaper circulating throughout this jurisdiction or Australia, as the Court determines.

(3) Notice of an application by a credit provider must be given by the credit provider to the Government Consumer Agency.

Government Consumer Agency may represent interests of debtors

111. The Government Consumer Agency may apply to the Court to become a party to an application under this Division and, if joined as a party, has standing to represent the public interest and the interests of debtors.

Directions pending Court's decision

112. (1) The Court may, before disposing of an application by a debtor or guarantor for an order under this Division, make such directions as it considers appropriate to protect the interests of the debtor or guarantor concerned.

(2) Subject to any such directions of the Court, the application does not prevent—

- (a) any proceedings for the enforcement of the debtor's obligations (or the obligations of a guarantor) from being taken; or
- (b) any rights over property the subject of a mortgage from being exercised.

(3) For the purposes of this section, a reference to the disposal of an application includes a reference to its withdrawal by the applicant.

(4) A credit provider affected by a direction of the Court may apply to the Court for variation of the direction. The Court may, on such an application being made, vary or revoke the direction or refuse to vary or revoke the direction.

Offences

113. Nothing in this Division affects the liability of a person for an offence against this Code or the regulations.

Division 2—Other civil penalties

Civil effect of other contraventions

114. (1) If a credit provider contravenes a requirement of or made under this Code (other than one for which a civil effect is specifically provided by Division 1 or by any other provision of this Code), the Court may order the credit provider to make restitution or pay compensation to any person affected by the contravention and, in that event, may make any consequential order it considers appropriate in the circumstances.

(2) An application for the exercise of the Court's powers under this section may be made by the Government Consumer Agency or by any person affected by the contravention.

PART 7—RELATED SALE CONTRACTS

Division 1—Interpretation and application

Meaning of sale contract

115. For the purposes of this Code, a "sale contract" is a contract for any one or more of the following—

- (a) a contract for the sale of goods;
- (b) a contract for the supply of services.

Sale contracts to which this Part applies

116. This Part applies to or in respect of a sale contract or proposed sale contract only if the sale of the goods or supply of services concerned is financed, or is proposed to be financed, wholly or partly by the provision of credit to which this Code applies.

Linked credit providers and tied credit contracts

117. (1) For the purposes of this Code, a “**linked credit provider**” of a supplier means a credit provider—

- (a) with whom the supplier has a contract, arrangement or understanding relating to the supply to the supplier of goods in which the supplier deals, relating to the business carried on by the supplier of supplying goods or services or relating to the provision to persons to whom goods or services are supplied by the supplier of credit in respect of payment for those goods or services; or
- (b) to whom the supplier, by arrangement with the credit provider, regularly refers persons for the purpose of obtaining credit; or
- (c) whose forms of contract or forms of application or offers for credit are, by arrangement with the credit provider, made available to persons by the supplier; or
- (d) with whom the supplier has a contract, arrangement or understanding under which contracts or applications or offers for credit from the credit provider may be signed by persons at the premises of the supplier.

(2) For the purposes of this Code, a “**tied continuing credit contract**” is a continuing credit contract under which a credit provider provides credit in respect of the payment by a debtor for goods or services supplied by a supplier in relation to whom the credit provider is a linked credit provider.

(3) For the purposes of this Code, a “**tied loan contract**” is a credit contract entered into between a credit provider and a debtor where—

- (a) the credit provider knows or ought reasonably to know that the debtor enters into the credit contract wholly or partly for the purposes of payment for the goods or services supplied by a supplier; and
- (b) at the time the credit contract is entered into the credit provider is a linked credit provider of the supplier.

Division 2—Liability of credit providers for suppliers' misrepresentations

Credit provider liable with respect to supplier's misrepresentations etc. about tied credit contract

118. (1) If there is a tied loan contract or a tied continuing credit contract in respect of a sale contract, any representation, warranty or statement made (whether orally or in writing) by the supplier, or any person acting on behalf of the supplier, to the debtor in relation to the tied loan contract or tied continuing credit contract gives the debtor the same rights against the credit provider as the debtor would have had if it had been made by the credit provider.

(2) Without prejudice to any other rights or remedies to which a credit provider may be entitled, a 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, against any damage suffered by the credit provider through the operation of this section.

Division 3—Liability of credit providers in relation to goods

Right to damages under sale contract against both supplier and linked credit provider (cf. Trade Practices Act 1974 of the Commonwealth, s. 73)

119. (1) General right to damages. If—

- (a)** a supplier supplies goods, or causes goods to be supplied, to a linked credit provider of the supplier and a debtor enters into a contract with the linked credit provider for the provision of credit in respect of the supply by way of sale of the goods to the debtor; or
- (b)** a debtor enters into a contract with a linked credit provider of a supplier for the provision of credit in respect of the supply by the supplier of goods or services, or goods and services, to the debtor;

and the debtor suffers loss or damage as a result of misrepresentation, breach of contract, or failure of consideration in relation to the contract, the supplier and the linked credit provider are, subject to this Division, jointly and severally liable to the debtor for the amount of the loss or damage, and the debtor may recover that amount by action in accordance with this section in a court of competent jurisdiction.

(2) Credit provider's defences. A linked credit provider of a particular supplier is not liable to a debtor by virtue of subsection (1) in proceedings arising under that subsection if the credit provider establishes—

- (a) that the credit provided by the credit provider to the debtor was the result of an approach made to the credit provider by the debtor that was not induced by the supplier; or
- (b) if the proceedings relate to a contract of sale with respect to which a tied loan contract applies, that—
 - (i) after due inquiry before becoming a linked credit provider of the supplier, the credit provider was satisfied that the reputation of the supplier in respect of the supplier's financial standing and business conduct was good; and
 - (ii) after becoming a linked credit provider of the supplier, but before the tied loan contract was entered into, the linked credit provider had not had cause to suspect that the debtor might, if the contract was entered into, be entitled to recover an amount of loss or damage suffered as a result of misrepresentation, breach of contract or failure of consideration in relation to the contract as referred to in subsection (1); and
 - (iii) after becoming a linked credit provider of the supplier, but before the tied loan contract was entered into, the credit provider had not had cause to suspect that the supplier might be unable to meet the supplier's liabilities as and when they fell due; or
- (c) if the proceedings relate to a contract of sale with respect to which a tied continuing credit contract entered into by the linked credit provider applies, that, having regard to—
 - (i) the nature and volume of business carried on by the linked credit provider; and
 - (ii) such other matters as appear to be relevant in the circumstances of the case;

the linked credit provider, before becoming aware of the contract of sale, or of proposals for the making of the contract of sale (whichever the linked credit provider first became aware of), had not had cause to suspect that a person entering into such a contract

with the supplier might be entitled to claim damages against, or recover a sum of money from, the supplier for misrepresentation, breach of contract or failure of consideration as referred to in subsection (1).

Limits on debtor's right of action against linked credit provider (cf. Trade Practices Act 1974 of the Commonwealth, s. 73)

120. (1) Debtor may raise credit provider's liability. Subject to subsection (2), in relation to a contract referred to in section 119 (1) (a) or (b), in which a credit provider claims damages or an amount of money from a debtor, the debtor may set up the liability of the credit provider under section 119 in diminution or extinction of the debtor's liability.

(2) Proceedings to be brought against both supplier and linked credit provider. Subject to subsection (3), a debtor may not, in respect of a liability for which, by reason of section 119, a supplier and a linked credit provider are jointly and severally liable—

- (a) bring proceedings to recover an amount of loss or damage from the credit provider; or
- (b) where proceedings are brought against the debtor by the linked credit provider, make a counter-claim or exercise the right conferred by subsection (1) against the credit provider;

unless the debtor brings the action against the supplier and the credit provider jointly or, in the case of a counter-claim or right conferred by subsection (1), claims in the proceedings against the supplier in respect of the liability by third-party proceedings or otherwise.

(3) When joint proceedings not required. Subsections (2), (5) (a) and (6) (a) do not apply in relation to proceedings where—

- (a) the supplier is insolvent, cannot be located after reasonable inquiry, or has died or been dissolved; or
- (b) in the opinion of the court in which the proceedings are taken, it is not reasonably likely that a judgment obtained against the supplier would be satisfied and the court has, on the application of the debtor, declared that subsections (2), (5) (a) and (6) (a) do not apply in relation to the proceedings.

(4) Limit of credit provider's liability. The liability of a linked credit provider to a debtor for damages or a sum of money in respect of a contract referred to in section 119 (1) is not to exceed the sum of—

- (a) the amount of credit under the tied loan contract or tied continuing credit contract; and
- (b) the amount of interest (if any) or damages in the nature of interest allowed or awarded against the linked credit provider by the court; and
- (c) the amount of costs (if any) awarded by the court against the linked credit provider or supplier or both.

(5) Enforcement of judgment against linked credit provider. Where in proceedings arising under section 119, judgment is given against a supplier and a linked credit provider, the judgment—

- (a) must not be enforced against the linked credit provider unless a written demand made on the supplier for satisfaction of the judgment has remained unsatisfied for not less than 30 days; and
- (b) may be enforced against the linked credit provider only to the extent of the amount calculated in accordance with this section, or so much of the judgment debt as has not been satisfied by the supplier, whichever is the lesser.

(6) Enforcement of right against linked credit provider. Where in proceedings in respect of the liability arising under section 119, a right conferred by subsection (1) is established against a linked credit provider, the debtor—

- (a) may not receive the benefit of the right unless judgment has been given against the supplier and linked credit provider, a written demand has been made on the supplier for satisfaction of the judgment and the demand has remained unsatisfied for not less than 30 days; and
- (b) may receive the benefit only to the extent of the amount calculated in accordance with this section or so much of the judgment debt as has not been satisfied by the supplier, whichever is the lesser.

Liability of supplier to linked credit provider (cf. Trade Practices Act 1974 of the Commonwealth, s. 73)

121. Unless the linked credit provider and supplier otherwise agree, the supplier is liable to the linked credit provider for the amount of a loss suffered by the linked credit provider, being an amount not exceeding the maximum amount of the linked credit provider's liability under section 120

(4) and, unless the court otherwise determines, the amount of costs (if any) reasonably incurred by the linked credit provider in defending the proceedings by reason of which the liability was incurred.

Interest may be awarded (cf. Trade Practices Act 1974 of the Commonwealth, s. 73)

122. (1) Despite any other law, where, in proceedings arising under section 119, judgment is given against a supplier and a linked credit provider or against a linked credit provider for an amount of loss or damage, the court in which the proceedings are taken must, on the application of the debtor, unless good cause is shown to the contrary, award interest to the debtor against the supplier and credit provider or against the credit provider, as the case may be, on the whole or a part of the amount from the time when the debtor became entitled to recover the amount until the date on which the judgment is given, at a rate prescribed by the regulations.

(2) In determining whether good cause is shown against awarding interest under this section on the whole or part of an amount of loss or damage, the court is to take into account any payment made into court by the supplier or credit provider.

Subrogation of credit provider (cf. Trade Practices Act 1974 of the Commonwealth, s. 73)

123. If a judgment given in proceedings arising under section 119 is enforced against a linked credit provider of a particular supplier, the credit provider is subrogated to the extent of the judgment so enforced to any rights that the debtor would have had but for the judgment against the supplier or any other person in respect of the loss or damage suffered by the debtor as a result of the misrepresentation, breach of contract or failure of consideration in relation to the contract from which the liability arose.

Division 4—Termination of related transactions

Termination of sale contract which is conditional on obtaining credit

124. (1) If a purchaser of goods or services makes it known to a supplier that credit is required in order to pay for the goods or services and the purchaser, after making reasonable endeavours to do so, fails to obtain credit on reasonable terms, the purchaser is entitled to terminate the sale contract.

(2) A purchaser may terminate a sale contract under this section even though goods or services have already been supplied under the contract but, if practicable, goods supplied under the sale contract must be returned to the supplier.

(3) If a sale contract is terminated under this section—

(a) the supplier is entitled to—

- (i) reasonable compensation for damage to, or deterioration of, goods supplied under the sale contract (other than fair wear and tear) up to the date of their return to the supplier or, if they are not returned, the cash price of the goods; and
- (ii) the reasonable value of the services supplied under the sale contract up to the date of termination; and

(b) the purchaser is entitled (subject to the supplier's entitlement referred to above) to the return of money paid under the sale contract.

Termination of (or recredit under) tied credit contract if sale contract terminated

125. (1) If a sale contract is rescinded or discharged (whether under this Code or any other law) and there is a tied loan contract or a tied continuing credit contract made with the purchaser by a linked credit provider of the supplier under the sale contract, the debtor is entitled—

- (a) in the case of a tied loan contract—to terminate the credit contract; or
- (b) in the case of a tied continuing credit contract—to be credited with the amount of credit in relation to the sale contract and the interest charges attributable to that amount.

(2) If a tied loan contract is terminated under this section, any related guarantee or mortgage is terminated to the extent to which it secures obligations under the contract or any related guarantee.

(3) If a tied loan contract is terminated under this section, the credit provider is entitled to recover from the debtor any part of the amount of credit that has not been paid to the supplier and the debtor is entitled to recover from the credit provider any interest charges or other amounts paid by the debtor under the credit contract.

(4) If a mortgage or guarantee is terminated under this section, the credit provider is entitled to recover from the mortgagor or guarantor any part of the amount of credit that has not been paid to the supplier and that is secured by the mortgage or guarantee, and the mortgagor or guarantor is entitled to recover from the credit provider any other amounts paid by the mortgagor or guarantor.

(5) If a tied loan contract is terminated under this section, the credit provider is entitled to recover from the supplier (subject to any agreement between them) the amount of any loss suffered by the credit provider as a result of the operation of this section.

(6) A supplier who knows that a sale contract referred to in subsection (1) has been rescinded or discharged must forthwith give the credit provider under any tied loan contract or tied continuing credit contract notice of the termination.

Maximum penalty—50 penalty units.

(7) This section does not apply if the credit is provided as a result of an approach by the debtor that was not induced by the supplier or credit provider.

Termination of linked maintenance services contract if credit contract terminated

126. (1) If—

- (a) there is a tied loan contract or a tied continuing credit contract made with the debtor by a linked credit provider of the supplier under a sale contract to supply maintenance services; and
- (b) the tied loan contract or tied continuing credit contract is terminated (whether under this Code or any other law) before the end of the term of the sale contract;

the debtor is entitled to terminate the sale contract to supply maintenance services and recover from the supplier a proportionate rebate of consideration paid under the sale contract.

(2) In any such case, the credit provider must inform the debtor in accordance with the regulations of the debtor's rights under this section.

Maximum penalty—50 penalty units.

(3) The regulations may prescribe the manner of calculating the proportionate rebate of consideration for the purposes of this section.

(4) This section does not apply if the credit is provided as a result of an approach by the debtor that was not induced by the supplier or credit provider.

Termination of contract under this Part to be in writing

127. An entitlement to terminate a sale contract or credit contract that is conferred by a provision of this Part may be exercised only by notice in writing to the other party to the contract.

Powers of Court with respect to termination of contract under this Part

128. The Court may, on the application of any interested party, make orders—

- (a) declaring whether a purported termination of a contract under this Part is valid; and
- (b) for the adjustment of rights following termination of a contract under this Part.

Part 5 not to apply to termination of contract under this Part

129. Part 5 does not apply to the termination of a contract under this Part.

Division 5—Other provisions

Requirement as to source of credit for goods or services

130. A supplier must not require a purchaser of goods or services to apply for, or obtain, credit from a particular credit provider.

Maximum penalty—100 penalty units.

Prohibition on payment for goods or services by post-dated bills of exchange or notes which exceed cash price of goods or services

131. (1) A supplier must not demand or accept payment from the purchaser for goods or services supplied under a sale contract in the form of a post-dated bill of exchange or promissory note given by the purchaser if the face value of the bill or note exceeds the cash price of the goods or services.

Maximum penalty—100 penalty units.

(2) This section does not apply unless the postponement of the debt to the supplier constitutes a provision of credit to which this Code applies.

PART 8—RELATED INSURANCE CONTRACTS

Meaning of credit-related insurance contract

132. For the purposes of this Code, a “**credit-related insurance contract**” is a contract for insurance of any of the following kinds in connection with a credit contract—

- (a) insurance over mortgaged property;
- (b) consumer credit insurance;
- (c) insurance of a nature prescribed for the purposes of this section by the regulations.

Requirement to take out insurance or to insure with particular insurer or on particular terms

133. (1) A credit provider or a supplier must not—

- (a) require a debtor or guarantor to take out insurance or to pay the cost of insurance taken out or arranged by the credit provider or supplier; or
- (b) represent to a debtor or guarantor that the debtor or guarantor is required to pay the cost of any such insurance;

unless the insurance is compulsory insurance, mortgage indemnity insurance, insurance over mortgaged property or insurance of a nature and extent approved for the purposes of this section by the regulations.

Maximum penalty—100 penalty units.

(2) A credit provider or a supplier must not, in connection with a credit contract or a sale contract in relation to which there is a tied loan contract or a tied continuing credit contract—

- (a) require a debtor or guarantor to take out insurance with a particular insurer (unless the insurer is the only insurer providing insurance of the relevant kind or the requirement is exempted from the operation of this section by the regulations); or
- (b) make any unreasonable requirement as to the terms on which the debtor or guarantor is to take out insurance.

Maximum penalty—100 penalty units.

(3) Civil effect. If the credit provider or supplier contravenes this section, the insured is entitled to recover the whole of the premium paid under the contract from the credit provider or supplier, as the case requires.

Financing of insurance premiums over mortgaged property

134. (1) A credit provider must not knowingly provide credit to the debtor to pay the premium or finance the premium on insurance taken out by the debtor over mortgaged property for a period of insurance exceeding 1 year, but may provide credit for or finance successive premiums for periods of 1 year or less. This subsection does not apply to a premium paid to obtain an extended period of warranty for goods purchased by a debtor.

Maximum penalty—100 penalty units.

(2) The credit provider must not knowingly debit the premium to the debtor's account more than 30 days before the beginning of the period of insurance to which it relates.

Maximum penalty—100 penalty units.

(3) Civil effect. If a credit provider contravenes subsection (1), the insured is entitled to recover the whole of the premium paid under the contract from the credit provider. If a credit provider contravenes subsection (2), the insured is entitled to recover the amount of premium debited in contravention of the subsection.

Commission for consumer credit insurance

135. (1) This section applies to commission paid by an insurer in connection with consumer credit insurance taken out by the debtor, or for which an amount is paid by the debtor.

(2) The total of any such commission accepted by all or any of the following—

- (a)** the credit provider;
- (b)** the supplier under a sale contract in relation to which there is a tied loan contract or a tied continuing credit contract;
- (c)** the agent of the credit provider or supplier;

must not exceed, in amount or value, 20% of the premium (excluding government charges).

(3) A credit provider or any such supplier or agent must not accept, and an insurer must not pay, a commission exceeding, in amount or value, the maximum allowed under this section.

Maximum penalty—100 penalty units.

(4) **Civil effect.** If a credit provider or supplier contravenes this section, the insured is entitled to recover the whole amount or value of the commission from the credit provider or the supplier, as the case requires.

Supply of copy of credit-related insurance contract by insurer

136. (1) If the premium under a credit-related insurance contract is financed under the credit contract, the insurer must ensure that a copy of the policy of insurance is given to the debtor within 14 days after acceptance of the insurance proposal by the insurer.

(2) In the case of any such contract of insurance entered into by the credit provider in which the debtor has a beneficial interest, the credit provider must ensure that a written notice containing particulars of the insurance prescribed by the regulations is given to the debtor within 14 days after the beneficial interest is acquired by the debtor.

(3) This section does not apply to compulsory insurance.

Maximum penalty—100 penalty units.

Rejection of debtor's proposal for insurance

137. (1) If a credit provider proposes to finance the amount payable by the debtor under or in connection with a credit-related insurance contract and the proposal for insurance is rejected by an insurer, the insurer must inform the debtor and the credit provider of its rejection.

(2) Unless the insurance is to be arranged with another insurer, the credit provider must ensure that any amount paid by the debtor is refunded or credited in full.

Maximum penalty—100 penalty units.

(3) The credit provider may, in turn, recover the amount paid to the debtor from the insurer, if an amount has been paid to the insurer by the debtor under or in connection with the proposed insurance contract.

Termination of consumer credit insurance contract if credit contract terminated

138. (1) On termination of a credit contract, any relevant credit-related insurance contract financed under the credit contract for consumer credit insurance in force is also terminated.

(2) If a credit contract is terminated, the credit provider is required to pay the debtor or credit the debtor with a proportionate rebate of premium paid under any relevant credit-related insurance contract for consumer credit insurance in force immediately before the credit contract is terminated.

(3) The credit provider may, in turn, recover the amount paid to the debtor from the insurer.

(4) The regulations may prescribe the manner of calculating the proportionate rebate of premium for the purposes of this section.

(5) This section has effect despite any provision of the credit-related insurance contract.

Termination of insurance contract over mortgaged property if credit contract terminated

139. (1) If a credit contract is terminated before the end of the term of a credit-related insurance contract over mortgaged property financed under the credit contract or before any such insurance contract is otherwise terminated, the debtor is entitled to terminate the insurance contract and recover from the insurer a proportionate rebate of premium paid under the insurance contract.

(2) On the termination of the credit contract, the credit provider must inform the debtor in accordance with the regulations of the debtor's rights under this section.

Maximum penalty—50 penalty units.

(3) The regulations may prescribe the manner of calculating the proportionate rebate of premium for the purposes of this section.

(4) An entitlement under this section to terminate an insurance contract may be exercised only by notice in writing to the insurer.

(5) This section has effect despite any provision of the credit-related insurance contract.

PART 9—ADVERTISING AND RELATED CONDUCT

Advertising

140. (1) General principle. A person must not publish, or cause to be published, an advertisement that states or implies that credit is available unless the advertisement complies with this section.

Maximum penalty—100 penalty units.

(2) Regulations. The advertisement must not contain a statement of a kind prohibited by the regulations. It must contain any statement required by the regulations.

(3) Cost of credit. If the advertisement contains any reference to the cost of any credit, it must contain the annual percentage rate or rates and, if any fees or charges are payable, a statement to that effect. The advertisement may contain the comparison rate calculated as prescribed by the regulations and, if it does so, must be accompanied by the warnings set out in the regulations.

(4) Interest charges. The advertisement must not contain any statement of interest charges or of the cost of credit other than a statement referred to in subsection (3).

(5) Civil effect. A person who suffers loss as a result of a contravention by another person of this section may recover the amount of the loss against that other person or any other person involved in the contravention.

Persons liable for advertisements

141. (1) A person is, in the absence of proof to the contrary, taken to have caused an advertisement to be published if—

- (a) the person provides credit, owns or has an interest in any goods, or supplies or has an interest in the supply of any goods or services, which the advertisement promotes; and
- (b) the advertisement specifies the name, business name, address, telephone number, facsimile number or post office box number of the person or the person's agent.

(2) It is a defence to a charge under section 140 of causing an advertisement that does not comply with that section to be published if the person charged proves that he or she could not, by the exercise of reasonable care, have prevented the non-compliance to which the offence relates.

Defence

142. A printer, publisher or proprietor of a newspaper, a licensee of a commercial broadcasting or television station, an exhibitor of a film, or a person acting with the authority of any of them, is not guilty of an offence under section 140 unless he or she suspected, or had reason to suspect, that publishing the advertisement would constitute an offence.

Interest rates which may be disclosed

143. A person must not disclose an interest rate—

- (a) in an advertisement that states or implies that credit is available; or
- (b) to a debtor before the debtor enters into a credit contract;

unless the interest rate is the annual percentage rate or rates or is the comparison rate calculated as prescribed by the regulations and accompanied by the warnings set out in the regulations.

Maximum penalty—100 penalty units.

False or misleading representations

144. (1) A person must not make a false or misleading representation in relation to a matter that is material to entry into a credit contract or a related transaction or in attempting to induce another person to enter into a credit contract or related transaction.

Maximum penalty—50 penalty units.

(2) It is a defence to prosecution for an offence against this section if a person charged proves that he or she reasonably believed that the representation was not false or misleading.

(3) Civil effect. A person who suffers loss as a result of a contravention by another person of this section may recover the amount of the loss from that other person or any other person involved in the contravention.

Harassment

145. A credit provider or supplier must not harass a person in attempting to get that person to apply for credit or to enter into a credit contract or a related transaction.

Maximum penalty—100 penalty units.

Canvassing of credit at home

146. (1) A credit provider must not visit (personally or in the person of an employee or agent) a place of residence for the purpose of inducing a person who resides there to apply for or obtain credit, except by prior arrangement by the credit provider with the person.

Maximum penalty—100 penalty units.

(2) A person who visits another's residence for the purpose of offering goods or services for sale and who offers to provide or arrange for the provision of credit to finance the sale will not be taken to have called for the purpose of inducing a person to apply for or obtain credit.

PART 10—CONSUMER LEASES

Division 1—Interpretation and application

Meaning of consumer lease

147. For the purposes of this Code, a “consumer lease” is a contract for the hire of goods by a natural person or strata corporation under which that person or corporation does not have a right or obligation to purchase the goods.

Consumer leases to which this Part applies

148. (1) This Part applies to a consumer lease if, when the lease is entered into—

- (a) the lessee is ordinarily resident in this jurisdiction or a strata corporation formed in this jurisdiction; and
- (b) the goods are hired wholly or predominantly for personal, domestic or household purposes; and
- (c) a charge is or may be made for hiring the goods and the charge together with any other amount payable under the consumer lease exceeds the cash price of the goods; and
- (d) the lessor hires the goods in the course of a business of hiring goods or as part of or incidentally to any other business of the lessor.

(2) If not all the lessees under a consumer lease ordinarily reside, or are strata corporations formed, in this jurisdiction, this Code applies only if goods are first hired under the lease in this jurisdiction.

(3) If this Part applies to a consumer lease—

- (a) this Part applies to all transactions or acts under the lease whether or not they take place in this jurisdiction; and
- (b) this Part continues to apply even though the lessee ceases to be ordinarily resident in this jurisdiction.

(4) For the purposes of this section, the amount payable under a consumer lease includes any agreed or residual value of the goods at the end of the lease or on termination of the lease by the lessor or lessee, but does not include—

- (a) any amount payable for services that are incidental to the hire of the goods under the lease; or
- (b) any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the lessee at the earliest opportunity.

(5) For the purposes of this section, the **predominant** purpose for which goods are hired is—

- (a) the purpose for which more than one half of the goods are intended to be used; or
- (b) if the same goods are intended to be used for different purposes, the purpose for which the goods are intended to be most used.

Consumer leases to which this Part does not apply

149. (1) Short term or indefinite leases. This Part does not apply to a consumer lease for a fixed period of 4 months or less or for an indefinite period.

(2) Employment-related leases. This Part does not apply to a consumer lease under which goods are hired by an employee in connection with the employee's remuneration or other employment benefits.

(3) Regulations. The regulations may exclude from the application of all or any provisions of this Part consumer leases of a class specified in the regulations.

Presumptions relating to application of this Part

150. (1) In any proceedings (whether brought under this Code or not) in which a party claims that a lease is a consumer lease to which this Part applies, it will be presumed to be such unless the contrary is established.

(2) Goods hired under a lease are presumed conclusively for the purposes of this Part not to be hired wholly or predominantly for personal, domestic or household purposes if the lessee declares, before hiring the goods, that the goods are hired wholly or predominantly for business purposes.

(3) However, such a declaration is ineffective for the purposes of this section if the lessor (or any other person who obtained the declaration from the lessee) knew, or had reason to believe, at the time the declaration was made that the goods were in fact hired wholly or predominantly for personal, domestic or household purposes.

Note: See section 176 for the circumstances in which a credit provider is taken to have knowledge of or reason to believe something for the purposes of this Code.

(4) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.

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

Form of consumer lease

151. (1) A consumer lease must be in the form of a written lease document signed by the lessee and containing the information required by this Division.

(2) The regulations may make provision for or with respect to the form of consumer leases and the way they are expressed.

(3) A lessor must not enter into a consumer lease that contravenes a requirement of this section or regulations made under this section.

Maximum penalty (subsection (3))—100 penalty units.

Disclosures in consumer leases

152. (1) A consumer lease must contain the following matters, if ascertainable—

- (a) a description or identification of the goods hired under the lease;
- (b) the amount or value of any consideration to be paid or provided by the lessee before the delivery of those goods;
- (c) the amount of any stamp duty or other government charge payable by the lessee in respect of the lease;

- (d) the amount of any other charges not included in the rental payable under the lease, and a description of those charges;
- (e) the amount of each rental payment to be made by the lessee under the lease, the date on which the first rental payment is due and either the dates on which subsequent rental payments are due or the interval between rental payments;
- (f) the number of rental payments to be made by the lessee, and the total amount of rental payable under the lease;
- (g) a statement of the conditions on which the lessee may terminate the lease;
- (h) a statement of the liabilities (if any) of the lessee on termination of the lease.

(2) A consumer lease is taken to comply with this section despite any omission or other error if the Court is satisfied that the omission or error is not of such a nature as to mislead the lessee to his or her disadvantage.

(3) A lessor must not enter into a consumer lease that contravenes a requirement of this section.

Maximum penalty (subsection (3))—100 penalty units.

Copy of lease etc. for lessee

153. A lessor must, within 14 days after entering into a consumer lease, give to the lessee a copy of the consumer lease, together with a statement in the form prescribed by the regulations explaining the rights and obligations of a lessee.

Maximum penalty—50 penalty units.

Further goods and deferrals or waivers under consumer leases

154. The provision of further goods under a consumer lease or a change in a consumer lease as a result of a deferral or waiver of payment of an amount payable under a consumer lease is not to be treated as creating a new consumer lease for the purposes of this Part or as creating a credit contract, if the provision of the further goods or the deferral or waiver is permitted by this Code or the consumer lease.

Division 3—Other provisions applicable to consumer leases

Application of certain Code provisions to consumer leases

155. (1) The following provisions of this Code apply in relation to a consumer lease in the same way as they apply in relation to credit contracts—

- (a) Division 3 of Part 4 (relating to changes to contracts on the grounds of hardship and unjust transactions), other than section 72;
- (b) sections 90–93 (relating to information as to mortgaged goods, entry to residential property to take possession of goods and orders by the Court for entry and possession);
- (c) Part 11 (relating to miscellaneous matters).

(2) For the purposes of the application of those provisions—

- (a) references to a credit provider are to be read as references to a lessor; and
- (b) references to a debtor are to be read as references to a lessee; and
- (c) references to a credit contract or contract are to be read as references to a consumer lease; and
- (d) references to mortgaged goods are to be read as references to goods hired under a consumer lease.

(3) For the purposes of the application of Division 3 of Part 4, the words “(without a change being made to the annual percentage rate or rates)” are taken to be omitted from section 66 wherever occurring.

Notice of repossession

156. (1) A lessor must not exercise any right under a consumer lease to take possession of goods subject to the lease unless the lessor has given the lessee 30 days’ written notice of the lessor’s intention to do so.

(2) However, the lessor is not required to give the notice in accordance with this section if—

- (a) the right arises under a lease granted for a fixed term at the end of that term; or
- (b) the lessor believes on reasonable grounds that the lessee has disposed of goods hired under the lease, or intends to dispose of such goods, contrary to the terms of the lease; or

- (c) the lessor has made reasonable attempts to locate the lessee but without success; or
- (d) the lessee is insolvent; or
- (e) the Court authorises the lessor to do so.

Maximum penalty—50 penalty units.

Termination of lease

157. (1) A lessee may, at any time before the end of a consumer lease, end the lease by returning the goods hired under the lease to the lessor during ordinary business hours or at such other time as may be agreed with the lessor or fixed by the Court on the application of the lessee.

(2) The amount payable by a lessee on the termination of a consumer lease under this section before the end of its fixed term is—

- (a) the amount payable under the lease on such a termination; or
- (b) the amount determined in accordance with the principles (if any) set out in the regulations for the purposes of this section;

whichever is the lesser.

PART 11—MISCELLANEOUS

Division 1—Tolerances and assumptions

Tolerances and assumptions relating to information

158. (1) Disclosures generally. Information disclosed in a pre-contractual statement, contract document, mortgage document or guarantee, statement, notice or consumer lease, or otherwise disclosed for the purposes of this Code, is taken to be correctly disclosed if—

- (a) it is within tolerances allowed by the regulations; and
- (b) the disclosure is made as at a date stated in it.

(2) Disclosure of interest charges. Disclosures for the purposes of this Code relating to interest charges may be made on the following assumptions (and such other assumptions under this section as are applicable)—

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- (a) that, in the case of an annual percentage rate or default rate, there will be no variation in the rate as disclosed over the whole term of the contract or any shorter term for which it applies;
 - (b) if a change to a variable rate is provided for by the contract, that the variable rate applicable over the term for which it applies is the same as the equivalent variable rate as at the date disclosure is made; and
 - (c) that the debtor will make the repayments required by the contract at the times required by the contract.

(3) Disclosure of repayments. Disclosures for the purposes of this Code relating to repayments may be made on the assumption that the debtor will pay the repayments required by the contract at the times required by the contract and on such other assumptions under this section as are applicable.

(4) Disclosures of credit fees and charges. Disclosures relating to credit fees and charges for the purposes of this Code may be made on the following assumptions (and on such other assumptions under this section as are applicable)—

- (a) that there will be no change in the credit fees and charges as so disclosed and no new fees or charges imposed;
- (b) that the debtor will pay the fees and charges required by the contract at the times required by the contract.

(5) Disclosures in consumer leases. Disclosures for the purposes of this Code relating to consideration, charges and payments in a consumer lease may be made on the assumptions that there will be no change in the matters disclosed and no new charges imposed.

(6) When information is ascertainable. Information required to be disclosed for the purposes of this Code, which is not otherwise ascertainable, is taken to be ascertainable if it is ascertainable, as at the date the disclosure is made, on the basis of assumptions set out in this section or in the regulations.

(7) Disclosure of names. Information disclosed for the purposes of this Code as to a name is taken to be correctly disclosed if the information is sufficient to identify the person concerned.

Tolerances relating to contracts and other documents

159. An amount of interest, a fee or charge or any other amount charged, payable or calculated under or in connection with a credit contract, mortgage, guarantee or consumer lease is, for the purposes of this Code, taken to comply with this Code if the amount is within tolerances allowed by the regulations.

Regulations

160. The regulations may vary an assumption set out in this Division and may provide for additional assumptions.

Division 2—Documentary provisions

Form of notices

161. (1) The regulations may prescribe the form of any notices required or authorised to be given under this Code and may require such notices to contain specified information.

(2) A notice required to be given by a mortgagee under this Code may include information required to be given in the same situation under an Act, and the notice may be included in any notice given under that Act.

(3) A notice required or authorised to be given under this Code is to be in writing unless this Code or the regulations otherwise provide.

Legibility and language

162. (1) A credit contract, guarantee or a notice given by a credit provider under this Code—

- (a)** must be easily legible; and
- (b)** to the extent that it is printed or typed must conform with the provisions of the regulations as to print or type; and
- (c)** must be clearly expressed.

(2) If the Court is satisfied, on application by the Government Consumer Agency, that a provision of a credit contract, a guarantee or a notice given by a credit provider under this Code does not comply with the requirements of this section, it may prohibit the credit provider from using a provision in the same or similar terms in future credit contracts, guarantees or notices.

(3) A credit provider that contravenes a prohibition imposed under subsection (2) is guilty of an offence.

Maximum penalty (subsection (3))—100 penalty units.

Copies of contracts and other documents

163. (1) A credit provider must in accordance with this section, at the written request of a debtor, mortgagor or guarantor, provide to the debtor, mortgagor or guarantor a copy of—

- (a) the credit contract, mortgage or guarantee; or
- (b) any credit-related insurance contract in the credit provider's possession; or
- (c) a notice previously given to the debtor, mortgagor or guarantor under this Code.

(2) The copy must be provided—

- (a) within 14 days, if the original came into existence 1 year or less before the request is given; or
- (b) within 30 days, if the original came into existence more than 1 year before the request is given.

Note: Section 173 provides for the date on which notice is taken to be given.

(3) A copy under this section may instead be provided in the form of a computer generated facsimile containing the same information as was contained in the original document, or in any other manner prescribed by the regulations. Until the contrary is proved, any such facsimile or copy is taken to contain the same information as the original document.

(4) A credit provider must provide a copy of a notice which requires a debtor, mortgagor or guarantor to take action if requested in accordance with subsection (1) even though the contract has been discharged or terminated but only if the request is made within 2 years of the discharge or termination.

Maximum penalty—30 penalty units.

Signing of documents

164. (1) It is sufficient compliance with a requirement under this Code that a document be signed by a person if the person's signature is written on the document by another person by or under the authority of the person required to sign.

(2) This section has effect subject to section 176 (Conduct of agents and related matters).

Division 3—General provisions

Crown to be bound

165. This Code binds the Crown in right of this jurisdiction and, in so far as the legislative power of the Legislature of this jurisdiction permits, the Crown in all its other capacities.

Assignment by credit provider

166. (1) If the rights of a credit provider under a credit contract, mortgage or guarantee are assigned or pass by law to another person, this Code from then on applies to that other person and does not impose any further obligation on the credit provider.

(2) The debtor, mortgagor or guarantor has and may exercise the same rights in respect of the credit contract, mortgage or guarantee against the assignee as the debtor, mortgagor or guarantor has against the credit provider.

(3) Subsection (1) does not apply while the credit provider continues to receive payments from the debtor.

Assignment by debtor, mortgagor or guarantor

167. (1) If the rights of a debtor, mortgagor or guarantor under a credit contract, mortgage or guarantee are assigned or pass by law to another person, this Code from then on applies to that other person and does not confer any further rights on the debtor, mortgagor or guarantor.

(2) Subsection (1) does not apply if the rights are assigned or pass by law to a corporation which is neither a trustee for the debtor, mortgagor or guarantor nor an executor of the debtor's, mortgagor's or guarantor's estate.

(3) Subsection (1) does not affect a requirement which is made of a debtor or mortgagor under section 48.

Appropriation of payments

168. (1) A debtor who is liable to a credit provider under 2 or more credit contracts may require the credit provider by written notice to apply a payment to a particular one of those contracts or to divide the payment between them in a specified manner.

(2) A credit provider that contravenes a requirement under this section is guilty of an offence.

Maximum penalty—30 penalty units.

(3) A debtor may not make a requirement under this section if the debtor and the credit provider have previously agreed as to the application of the payment concerned in relation to the credit contracts under which the debtor is liable to the credit provider.

Contracting out

169. (1) A provision of a contract or other instrument by which a person seeks to avoid or modify the effect of this Code is void.

(2) A provision of a contract or other instrument by which a person seeks to have the debtor or guarantor indemnify the credit provider for any loss or liability arising under this Code is void.

(3) A credit provider that is a party to any such contract or other instrument is guilty of an offence.

Maximum penalty—100 penalty units.

(4) Subsection (2) does not affect the operation of section 55 (2).

Effect of non-compliance

170. (1) A credit contract, mortgage or guarantee or any other contract is not illegal, void or unenforceable because of a contravention of this Code unless this Code contains an express provision to that effect.

(2) Except as provided by this section, this Code does not derogate from rights and remedies that exist apart from this Code.

Giving notice or other document

171. (1) The Court may relieve a person from the obligation to give a notice or other document if satisfied that a reasonable attempt has been made to locate the person to whom the notice or other document is to be given, but without success. The order of the Court may be made subject to conditions.

(2) A notice or other document must be given to each debtor, mortgagor or guarantor to be effective in the case of joint debtors, mortgagors or guarantors.

(3) In a case where the joint debtors, mortgagors or guarantors reside at the same address, one may be nominated by them to receive notices and other documents on behalf of all of them. In that event, a notice or other document given to that one is, while the nomination remains in force, taken to have been given to both or all of them.

(4) A nomination under subsection (3) must be in the form required by the regulations.

(5) Subsection (3) does not apply in relation to default notices.

Manner of giving notice or other document

172. (1) If this Code requires or permits a notice or other document to be given to a person (whether the expression "deliver", "serve", "notify", "send" or "give" or another expression is used), the notice or other document may be given—

(a) to a natural person—

- (i) by delivering it to the person personally; or
- (ii) by leaving it at, or by sending it by post, telex, facsimile or similar facility to, the address of the place of residence or business of the person last known to the person giving the notice or other document; or

(b) to a body corporate—

- (i) by leaving it at the registered office of the body corporate with an officer of the body corporate; or
- (ii) by sending it by post, telex, facsimile or similar electronic facility to its registered office.

(2) Nothing in subsection (1)—

- (a) affects the operation of another law that authorises the service of a notice or other document otherwise than as provided in subsection (1); or
- (b) affects the power of a court or tribunal to authorise service of a notice or other document otherwise than as provided in subsection (1).

(3) If this Code requires or permits a notice or other document to be given by post (whether the expression "deliver", "serve", "notify", "send" or "give" or another expression is used), service may be effected by properly addressing, prepaying and posting the notice or other document as a letter.

Date of notice or other document

173. (1) For the purposes of this Code a notice or other document is taken to be given—

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- (a) in the case of a notice or other document given personally—on the date it bears or the date it is received by the addressee, whichever is the later; or
 - (b) in the case of a notice or other document sent by post—on the date it bears or the date when it would have been delivered in the ordinary course of post, whichever is the later; or
 - (c) in the case of a notice or other document sent by facsimile transmission or some other form of electronic transmission—on the date it bears or the date on which the machine from which the transmission was sent produces a report indicating that the notice or other document was sent to the facsimile or other number of the addressee, whichever is the later.

(2) For the purposes of this Code, the date of a notice or other document is the date it is taken to be given in accordance with this section.

Extensions of time

174. The Court may extend a period if authorised by this Code to do so even though the period has elapsed.

Orders of Court

175. An order of the Court in force under this Code, including such an order as varied from time to time, has effect according to its tenor.

Conduct of agents and related matters

176. (1) 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 and taken to be conduct of the credit provider.

(2) A person cannot authorise a credit provider, or a person associated with a credit provider, to enter into a credit contract, mortgage or guarantee on the person's behalf.

(3) A credit provider or person associated with a credit provider that purports to act as agent of a debtor, mortgagor or a guarantor in entering into a credit contract or a mortgage or guarantee is guilty of an offence.

Maximum penalty—50 penalty units.

(4) A person is associated with a credit provider if—

- (a) that person and the credit provider are related bodies corporate for the purposes of the Corporations Law; or
- (b) that person is an officer, agent or employee of the credit provider or a related body corporate.

(5) A credit provider is not, for the purposes of this Code taken to know or have reason to believe something because an officer, agent or employee of the credit provider does so, unless the knowledge or reason to believe that thing is acquired by the officer, agent or employee acting in that capacity and in connection with the transaction concerned.

Reciprocal conferral of powers and jurisdiction

177. (1) The regulations may give effect to a cross-vesting scheme under which—

- (a) administrative and judicial powers conferred by this Code may be exercised by administrative and judicial authorities of any jurisdiction in which a law adopting this Code is in force; and
- (b) administrative and judicial authorities of this jurisdiction may exercise administrative and judicial powers conferred by any such law of that jurisdiction.

(2) Nothing in subsection (1) affects any other powers of any court.

Division 4—Provisions relating to offences

Penalty at end of provision

178. (1) In this Code, a penalty specified at the end of—

- (a) a section (whether or not the section is divided into subsections); or
- (b) a subsection (but not at the end of a section); or
- (c) a section or subsection and expressed in such a way as to indicate that it applies only to part of the section or subsection;

indicates that an offence mentioned in the section, subsection or part is punishable on conviction by a penalty not more than the specified penalty.

(2) If no offence is so mentioned, a contravention of the section, subsection or part constitutes an offence against the provision that is punishable on conviction by a penalty not more than the specified penalty.

(3) This section applies to the regulations in the same way as it applies to this Code, subject to any necessary modification.

Penalty units

179. A reference in this Code or the regulations to a number of penalty units is to be read as a reference to an amount of money equal to the amount obtained by multiplying \$100 by that number of penalty units.

Summary offences

180. An offence against this Code or the regulations is punishable summarily.

Double jeopardy

181. If an act or omission constitutes an offence—

(a) under this Code; or

(b) under a law of this jurisdiction or a law of another jurisdiction;

and the offender has been punished in relation to the offence under a law mentioned in paragraph (b), the offender is not liable to be punished in relation to the offence under this Code.

Aiding and abetting, attempts

182. (1) A person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly concerned in or a party to, the commission of an offence against this Code or the regulations is taken to have committed that offence and is liable to the penalty for the offence.

(2) A person who attempts to commit an offence against this Code or the regulations commits an offence and is punishable as if the attempted offence had been committed.

Offences by corporations

183. (1) If a corporation contravenes a provision of this Code or the regulations, each officer of the corporation is taken to have contravened the provision if the officer knowingly authorised or permitted the contravention.

(2) An officer of a corporation may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or convicted under the provision.

(3) Nothing in this section affects the liability imposed on a corporation for an offence committed by the corporation against this Code or the regulations.

(4) In this section, “**officer**” means a director of the corporation or a person who is otherwise concerned in its management.

Limitations

184. Despite anything in any Act, proceedings for an offence against this Code or the regulations 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.

SCHEDULE 1—PRINCIPAL DEFINITIONS

(Sec. 3 (1))

In this Code, unless the contrary intention appears—

“**acceleration clause**” *see section 84*;

“**amount of credit**” *see section 4 (2)*;

“**annual percentage rate**” *see section 25*;

“**cash price**” of goods or services to which a credit contract relates means the lowest price (unaffected by any discount between the credit provider and the supplier) that a cash purchaser might reasonably be expected to pay for them (either from the supplier or, if not available for cash from the supplier, from another supplier);

“**commission**” includes any form of monetary consideration or any form of non-monetary consideration to which a monetary value can be assigned;

“**compulsory insurance**” means—

- (a) compulsory third-party personal injury insurance; or
- (b) insurance of a nature declared by the regulations to be compulsory insurance for the purposes of this Code;

“**consumer credit insurance**” means insurance that insures the capacity of the debtor to make repayments under the credit contract, including insurance against sickness of, injury to, or disability or death of, the debtor or against unemployment of the debtor, and also including life insurance (including insurance under a group policy) to cover any outstanding amount on the debtor's death;

“**consumer lease**” *see section 147*;

“**continuing credit contract**” means a credit contract under which—

- (a) multiple advances of credit are contemplated; and
- (b) the amount of available credit ordinarily increases as the amount of credit is reduced;

“**contract**” includes a series or combination of contracts, or contracts and arrangements;

“contract document” means the document or documents setting out the terms of a contract;

“Court”, in relation to a provision of this Code, means the court or tribunal which has by law jurisdiction under that provision;

“credit” *see section 4 (1)*;

“credit contract” *see section 7*;

“credit fees and charges” means fees and charges payable in connection with a credit contract or mortgage, but does not include—

- (a) interest charges (including default charges); or
- (b) any fees or charges that are payable to or by a credit provider in connection with a credit contract under which both credit and debit facilities are available whether or not a transaction involves the provision of credit (for example, transaction fees); or
- (c) government charges and duties on receipts or withdrawals;

“credit provider” means a person that provides credit, and includes a prospective credit provider;

“credit-related insurance contract” *see section 132*;

“daily percentage rate” *see section 25*;

“date” of a notice *see section 173*;

“debtor” means a person (other than a guarantor) who is liable to pay for (or to repay) credit, and includes a prospective debtor;

“default notice” *see Part 5*;

“default rate” *see section 25*;

“dispose” of property includes—

- (a) sell the property; or
- (b) part with possession of the property to the prejudice of the owner or a mortgagee of the property; or
- (c) destroy the property;

“enforcement expenses”, in relation to a mortgage, includes expenses incurred by the mortgagee in preserving or maintaining property subject to the mortgage (including insurance, rates and taxes payable for the property) but only if the expenses are incurred after a breach occurs and are authorised by the mortgage;

“enforcement proceedings”, in relation to a credit contract or a guarantee or mortgage, means—

- (a) proceedings in a court to recover a payment due under the contract or a guarantee; or
- (b) taking possession of property under a mortgage or taking any other action to enforce a mortgage;

“goods” includes—

- (a) ships, aircraft or other vehicles; or
- (b) animals, including fish; or
- (c) minerals, trees or crops, whether on, under or attached to land or not;

but does not include anything declared by the regulations not to be goods for the purposes of this Code;

“goods mortgage” means a mortgage over goods;

“Government Consumer Agency” means the person who, or body which, has by law the functions of the Government Consumer Agency under this Code;

“guarantee” includes an indemnity (other than one arising under a contract of insurance);

“guarantee document” means the document or documents setting out the terms of a guarantee;

“guarantor” includes a prospective guarantor;

“insolvent” means—

- (a) in the case of a natural person—a person who is an insolvent under administration within the meaning of the Corporations Law; or
- (b) in the case of a corporation—a corporation that is an externally-administered corporation within the meaning of the Corporations Law;

“jurisdiction” means a State or Territory;

“key requirement” *see Part 6*;

“land” includes any interest in land;

“linked credit provider” *see section 117 (1)*;

“merchant service agreement” means an agreement between a credit provider and a supplier of goods and services under which the credit provider agrees to pay to the supplier amounts for goods or services supplied by the supplier and paid by means of credit cards, whether or not the credit cards are issued by the credit provider;

“mortgage” includes—

- (a) any interest in, or power over, property securing obligations of a debtor or guarantor; or
 - (b) a credit provider’s title to land or goods subject to a sale by instalments; or
 - (c) a mortgage taken to have been entered into under section 10 (3);
- but does not include a consumer lease to which Part 10 applies;

“mortgage document” means the document or documents setting out the terms of a mortgage by reference to which the mortgage is created;

“mortgagor” includes a prospective mortgagor;

“ordinarily resident” in a jurisdiction means, if the person concerned is not ordinarily resident in Australia, resident for the time being in the jurisdiction;

“penalty unit” *see section 179*;

“predominant” purpose for which credit is provided or goods are hired under a consumer lease means—

- (a) a purpose for which more than half of the credit is or goods are intended to be used; or
- (b) if the credit is intended to be used to obtain goods or services intended to be used for more than one purpose, or the goods are intended to be used for more than one purpose, the purpose for which the goods or services are intended to be most used;

“purchaser” means—

- (a) in relation to goods—a person who purchases, or proposes to purchase, the goods; or
- (b) in relation to services—a person who contracts, or proposes to contract, to obtain services;

“reference rate” means a benchmark, index or other reference rate;

“regulation” means a regulation made or in force for the purposes of this Code;

“sale contract” *see section 115;*

“services” includes—

- (a) rights in relation to, and interests in, real property; or
- (b) insurance; or
- (c) professional services; or
- (d) a right to services;

but does not include the provision of credit or a right to credit or services provided under a consumer lease;

“strata corporation” means—

- (a) a body corporate incorporated in relation to land subdivided wholly or mainly for residential purposes under a law of this or some other jurisdiction providing for strata, cluster, precinct or other subdivision of land; or
- (b) a body corporate whose issued shares confer a right to occupy land for residential purposes;

“supplier” means a supplier of goods or services;

“supply” includes agree to supply;

“termination” of a contract includes the discharge or rescission of the contract;

“tied continuing credit contract” *see section 117 (2);*

“tied loan contract” *see section 117 (3);*

“unpaid balance” *see section 25;*

“unpaid daily balance” *see section 25.*

**SCHEDULE 2—MISCELLANEOUS PROVISIONS RELATING
TO INTERPRETATION**

(Sec. 3 (2))

PART 1—PRELIMINARY

Displacement of Schedule by contrary intention

1. The application of this Schedule may be displaced, wholly or partly, by a contrary intention appearing in this Code.

PART 2—GENERAL

Code to be construed not to exceed legislative power of Legislature

2. (1) This Code is to be construed as operating to the full extent of, but so as not to exceed, the legislative power of the Legislature of this jurisdiction.

(2) If a provision of this Code, or the application of a provision of this Code to a person, subject matter or circumstance, would, but for this clause, be construed as being in excess of the legislative power of the Legislature of this jurisdiction—

- (a) it is a valid provision to the extent to which it is not in excess of the power; and
- (b) the remainder of this Code, and the application of the provision to other persons, subject matters or circumstances, is not affected.

(3) This clause applies to this Code in addition to, and without limiting the effect of, any provision of this Code.

Every section to be a substantive enactment

3. Every section of this Code has effect as a substantive enactment without introductory words.

Material that is, and is not, part of this Code

4. (1) The heading to a Part, Division or Subdivision into which this Code is divided is part of this Code.

- (2) A Schedule to this Code is part of this Code.
- (3) Punctuation in this Code is part of this Code.

(4) A heading to a section or subsection of this Code does not form part of this Code.

(5) Notes included in this Code (including footnotes and endnotes) do not form part of this Code.

References to particular Acts and to enactments

5. In this Code—

- (a) an Act of this jurisdiction may be cited—
 - (i) by its short title; or
 - (ii) by reference to the year in which it was passed and its number; and
- (b) a Commonwealth Act may be cited—
 - (i) by its short title; or
 - (ii) in another way sufficient in a Commonwealth Act for the citation of such an Act;together with a reference to the Commonwealth; and
- (c) an Act of another jurisdiction may be cited—
 - (i) by its short title; or
 - (ii) in another way sufficient in an Act of the jurisdiction for the citation of such an Act;together with a reference to the jurisdiction.

References taken to be included in Act or Code citation etc.

6. (1) A reference in this Code to an Act includes a reference to—

- (a) the Act as originally enacted, and as amended from time to time since its original enactment; and
- (b) if the Act has been repealed and re-enacted (with or without modification) since the enactment of the reference—the Act as re-enacted, and as amended from time to time since its re-enactment.

(2) A reference in this Code to a provision of this Code or of an Act includes a reference to—

- (a) the provision as originally enacted, and as amended from time to time since its original enactment; and
- (b) if the provision has been omitted and re-enacted (with or without modification) since the enactment of the reference—the provision as re-enacted, and as amended from time to time since its re-enactment.

(3) Subclauses (1) and (2) apply to a reference in this Code to a law of the Commonwealth or another jurisdiction as they apply to a reference in this Code to an Act and to a provision of an Act.

Interpretation best achieving Code's purpose

7. (1) In the interpretation of a provision of this Code, the interpretation that will best achieve the purpose or object of this Code is to be preferred to any other interpretation.

(2) Subclause (1) applies whether or not the purpose is expressly stated in this Code.

Use of extrinsic material in interpretation

8. (1) In this clause—

“extrinsic material” means relevant material not forming part of this Code, including, for example—

- (a) material that is set out in the document containing the text of this Code as printed by the Government Printer of Queensland; and
- (b) a relevant report of a Royal Commission, Law Reform Commission, commission or committee of inquiry, or a similar body, that was laid before the Legislative Assembly of Queensland before the provision concerned was enacted; and
- (c) a relevant report of a committee of the Legislative Assembly of Queensland that was made to the Legislative Assembly of Queensland before the provision was enacted; and
- (d) a treaty or other international agreement that is mentioned in this Code; and
- (e) an explanatory note or memorandum relating to the Bill that contained the provision, or any relevant document, that was laid before, or given to the members of, the Legislative Assembly of Queensland by the member bringing in the Bill before the provision was enacted; and
- (f) the speech made to the Legislative Assembly of Queensland by the member in moving a motion that the Bill be read a second time; and

- (g) material in the Votes and Proceedings of the Legislative Assembly of Queensland or in any official record of debates in the Legislative Assembly of Queensland; and
- (h) document that is declared by this Code to be a relevant document for the purposes of this clause;

“ordinary meaning” means the ordinary meaning conveyed by a provision having regard to its context in this Code and to the purpose of this Code.

(2) Subject to subclause (3), in the interpretation of a provision of this Code, consideration may be given to extrinsic material capable of assisting in the interpretation—

- (a) if the provision is ambiguous or obscure—to provide an interpretation of it; or
- (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable—to provide an interpretation that avoids such a result; or
- (c) in any other case—to confirm the interpretation conveyed by the ordinary meaning of the provision.

(3) In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be had to—

- (a) the desirability of a provision being interpreted as having its ordinary meaning; and
- (b) the undesirability of prolonging proceedings without compensating advantage; and
- (c) other relevant matters.

Effect of change of drafting practice and use of examples

9. If—

- (a) a provision of this Code expresses an idea in particular words; and
- (b) a provision enacted later appears to express the same idea in different words for the purpose of implementing a different legislative drafting practice, including, for example—

- (i) the use of a clearer or simpler style; or
- (ii) the use of gender-neutral language;

the ideas must not be taken to be different merely because different words are used.

Use of examples

10. If this Code includes an example of the operation of a provision—

- (a) the example is not exhaustive; and
- (b) the example does not limit, but may extend, the meaning of the provision; and
- (c) the example and the provision are to be read in the context of each other and the other provisions of this Code, but, if the example and the provision so read are inconsistent, the provision prevails.

Compliance with forms

11. (1) If a form is prescribed or approved by or for the purpose of this Code, strict compliance with the form is not necessary and substantial compliance is sufficient.

(2) If a form prescribed or approved by or for the purpose of this Code requires—

- (a) the form to be completed in a specified way; or
- (b) specified information or documents to be included in, attached to or given with the form; or
- (c) the form, or information or documents included in, attached to or given with the form, to be verified in a specified way;

the form is not properly completed unless the requirement is complied with.

PART 3—TERMS AND REFERENCES

Definitions

12. (1) In this Code—

“**Act**” means an Act of the Legislature of this jurisdiction;

“**adult**” means an individual who is 18 or more;

“affidavit”, in relation to a person allowed by law to affirm, declare or promise, includes affirmation, declaration and promise;

“amend” includes—

- (a) omit or omit and substitute; or
- (b) alter or vary; or
- (c) amend by implication;

“appoint” includes re-appoint;

“Australia” means the Commonwealth of Australia but, when used in a geographical sense, does not include an external Territory;

“business day” means a day that is not—

- (a) a Saturday or Sunday; or
- (b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done;

“calendar month” means a period starting at the beginning of any day of 1 of the 12 named months and ending—

- (a) immediately before the beginning of the corresponding day of the next named month; or
- (b) if there is no such corresponding day—at the end of the next named month;

“calendar year” means a period of 12 months beginning on 1 January;

“commencement”, in relation to this Code or an Act or a provision of this Code or an Act, means the time at which this Code, the Act or provision comes into operation;

“Commonwealth” means the Commonwealth of Australia but, when used in a geographical sense, does not include an external Territory;

“confer”, in relation to a function, includes impose;

“contravene” includes fail to comply with;

“country” includes—

- (a) a federation; or
- (b) a state, province or other part of a federation;

“date of assent”, in relation to an Act, means the day on which the Act receives the Royal Assent;

“definition” means a provision of this Code (however expressed) that—

- (a) gives a meaning to a word or expression; or
- (b) limits or extends the meaning of a word or expression;

“document” includes—

- (a) any paper or other material on which there is writing; or
- (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; or
- (c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being reproduced (with or without the aid of another article or device);

“estate” includes easement, charge, right, title, claim, demand, lien or encumbrance, whether at law or in equity;

“expire” includes lapse or otherwise cease to have effect;

“external Territory” means a Territory, other than an internal Territory, for the government of which as a Territory provision is made by a Commonwealth Act;

“fail” includes refuse;

“financial year” means a period of 12 months beginning on 1 July;

“foreign country” means a country (whether or not an independent sovereign State) outside Australia and the external Territories;

“function” includes duty;

“Gazette” means the Government Gazette of this jurisdiction;

“Gazette notice” means notice published in the Gazette;

“gazetted” means published in the Gazette;

“Government Printer” means the Government Printer of this jurisdiction, and includes any other person authorised by the Government of this jurisdiction to print an Act or instrument;

“individual” means a natural person;

“insert”, in relation to a provision of this Code, includes substitute;

“instrument” includes a statutory instrument;

“interest”, in relation to land or other property, means—

- (a) a legal or equitable estate in the land or other property; or
- (b) a right, power or privilege over, or in relation to, the land or other property;

“internal Territory” means the Australian Capital Territory, the Jervis Bay Territory or the Northern Territory;

“Jervis Bay Territory” means the Territory mentioned in the Jervis Bay Territory Acceptance Act 1915 of the Commonwealth;

“make” includes issue or grant;

“minor” means an individual who is under 18;

“modification” includes addition, omission or substitution;

“month” means a calendar month;

“named month” means 1 of the 12 months of the year;

“Northern Territory” means the Northern Territory of Australia;

“number” means—

- (a) a number expressed in figures or words; or
- (b) a letter; or
- (c) a combination of a number so expressed and a letter;

“oath”, in relation to a person allowed by law to affirm, declare or promise, includes affirmation, declaration or promise;

“office” includes position;

“omit”, in relation to a provision of this Code or an Act, includes repeal;

“party” includes an individual or a body politic or corporate;

“penalty” includes forfeiture or punishment;

“person” includes an individual or a body politic or corporate;

“power” includes authority;

“prescribed” means prescribed by, or by regulations made or in force for the purposes of or under, this Code;

“printed” includes typewritten, lithographed or reproduced by any mechanical means;

“proceeding” means a legal or other action or proceeding;

“property” means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action;

“provision”, in relation to this Code or an Act, means words or other matter that form or forms part of this Code or the Act, and includes—

- (a) a Chapter, Part, Division, Subdivision, section, subsection, paragraph, subparagraph, sub-subparagraph or Schedule of or to this Code or the Act; or
- (b) a section, clause, subclause, item, column, table or form of or in a Schedule to this Code or the Act; or
- (c) the long title and any preamble to the Act;

“record” includes information stored or recorded by means of a computer;

“repeal” includes—

- (a) revoke or rescind; or
- (b) repeal by implication; or
- (c) abrogate or limit the effect of this Code or instrument concerned; or
- (d) exclude from, or include in, the application of this Code or instrument concerned any person, subject matter or circumstance;

“sign” includes the affixing of a seal or the making of a mark;

“statutory declaration” means a declaration made under an Act, or under a Commonwealth Act or an Act of another jurisdiction, that authorises a declaration to be made otherwise than in the course of a judicial proceeding;

“**statutory instrument**” means an instrument (including a regulation) made or in force under or for the purposes of this Code, and includes an instrument made or in force under any such instrument;

“**swear**”, in relation to a person allowed by law to affirm, declare or promise, includes affirm, declare or promise;

“**word**” includes any symbol, figure or drawing;

“**writing**” includes any mode of representing or reproducing words in a visible form.

(2) In a statutory instrument—

“**the Code**” means this Code.

Provisions relating to defined terms and gender and number

13. (1) If this Code defines a word or expression, other parts of speech and grammatical forms of the word or expression have corresponding meanings.

(2) Definitions in or applicable to this Code apply except so far as the context or subject matter otherwise indicates or requires.

(3) In this Code, words indicating a gender include each other gender.

(4) In this Code—

(a) words in the singular include the plural; and

(b) words in the plural include the singular.

Meaning of may and must etc.

14. (1) In this Code, the word “**may**”, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion.

(2) In this Code, the word “**must**”, or a similar word or expression, used in relation to a power indicates that the power is required to be exercised.

(3) This clause has effect despite any rule of construction to the contrary.

Words and expressions used in statutory instruments

15. (1) Words and expressions used in a statutory instrument have the same meanings as they have, from time to time, in this Code, or relevant provisions of this Code, under or for the purposes of which the instrument is made or in force.

(2) This clause has effect in relation to an instrument except so far as the contrary intention appears in the instrument.

Effect of express references to bodies corporate and individuals

16. In this Code, a reference to a person generally (whether the expression "person", "party", "someone", "anyone", "no-one", "one", "another" or "whoever" or another expression is used)—

- (a) does not exclude a reference to a body corporate or an individual merely because elsewhere in this Code there is particular reference to a body corporate (however expressed); and
- (b) does not exclude a reference to an individual or a body corporate merely because elsewhere in this Code there is particular reference to an individual (however expressed).

Production of records kept in computers etc.

17. If a person who keeps a record of information by means of a mechanical, electronic or other device is required by or under this Code—

- (a) to produce the information or a document containing the information to a court, tribunal or person; or
- (b) to make a document containing the information available for inspection by a court, tribunal or person;

then, unless the court, tribunal or person otherwise directs—

- (c) the requirement obliges the person to produce or make available for inspection, as the case may be, a document that reproduces the information in a form capable of being understood by the court, tribunal or person; and
- (d) the production to the court, tribunal or person of the document in that form complies with the requirement.

References to this jurisdiction to be implied

18. In this Code—

- (a) a reference to an officer, office or statutory body is a reference to such an officer, office or statutory body in and for this jurisdiction; and
- (b) a reference to a locality or other matter or thing is a reference to such a locality or other matter or thing in and of this jurisdiction.

References to officers and holders of offices

19. In this Code, a reference to a particular officer, or to the holder of a particular office, includes a reference to the person for the time being occupying or acting in the office concerned.

Reference to certain provisions of Code

20. If a provision of this Code refers—

- (a) to a Part, section or Schedule by a number and without reference to this Code—the reference is a reference to the Part, section or Schedule, designated by the number, of or to this Code; or
- (b) to a Schedule without reference to it by a number and without reference to this Code—the reference, if there is only 1 Schedule to this Code, is a reference to the Schedule; or
- (c) to a Division, Subdivision, subsection, paragraph, subparagraph, sub-subparagraph, clause, subclause, item, column, table or form by a number and without reference to this Code—the reference is a reference to—
 - (i) the Division, designated by the number, of the Part in which the reference occurs; and
 - (ii) the Subdivision, designated by the number, of the Division in which the reference occurs; and
 - (iii) the subsection, designated by the number, of the section in which the reference occurs; and
 - (iv) the paragraph, designated by the number, of the section, subsection, Schedule or other provision in which the reference occurs; and
 - (v) the paragraph, designated by the number, of the clause, subclause, item, column, table or form of or in the Schedule in which the reference occurs; and
 - (vi) the subparagraph, designated by the number, of the paragraph in which the reference occurs; and
 - (vii) the sub-subparagraph, designated by the number, of the subparagraph in which the reference occurs; and
 - (viii) the section, clause, subclause, item, column, table or form, designated by the number, of or in the Schedule in which the reference occurs;

as the case requires.

Reference to provisions of this Code or an Act is inclusive

21. In this Code, a reference to a portion of this Code or an Act includes—

- (a) a reference to the Chapter, Part, Division, Subdivision, section, subsection or other provision of this Code or the Act referred to that forms the beginning of the portion; and
- (b) a reference to the Chapter, Part, Division, Subdivision, section, subsection or other provision of this Code or the Act referred to that forms the end of the portion.

Example: A reference to “sections 5 to 9” includes both section 5 and section 9. It is not necessary to refer to “sections 5 to 9 (both inclusive)” to ensure that the reference is given an inclusive interpretation.

PART 4—FUNCTIONS AND POWERS

Performance of statutory functions

22. (1) If this Code confers a function or power on a person or body, the function may be performed, or the power may be exercised, from time to time as occasion requires.

(2) If this Code confers a function or power on a particular officer or the holder of a particular office, the function may be performed, or the power may be exercised, by the person for the time being occupying or acting in the office concerned.

(3) If this Code confers a function or power on a body (whether or not incorporated), the performance of the function, or the exercise of the power, is not affected merely because of vacancies in the membership of the body.

Power to make instrument or decision includes power to amend or repeal

23. If this Code authorises or requires the making of an instrument or decision—

- (a) the power includes power to amend or repeal the instrument or decision; and
- (b) the power to amend or repeal the instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision.

Matters for which statutory instruments may make provision

24. (1) If this Code authorises or requires the making of a statutory instrument in relation to a matter, a statutory instrument made under this Code may make provision for the matter by applying, adopting or incorporating (with or without modification) the provisions of—

- (a) an Act or statutory instrument; or
- (b) another document (whether of the same or a different kind);

as in force at a particular time or as in force from time to time.

(2) If a statutory instrument applies, adopts or incorporates the provisions of a document, the statutory instrument applies, adopts or incorporates the provisions as in force from time to time, unless the statutory instrument otherwise expressly provides.

(3) A statutory instrument may—

- (a) apply generally throughout this jurisdiction or be limited in its application to a particular part of this jurisdiction; or
- (b) apply generally to all persons, matters or things or be limited in its application to—
 - (i) particular persons, matters or things; or
 - (ii) particular classes of persons, matters or things; or
- (c) otherwise apply generally or be limited in its application by reference to specified exceptions or factors.

(4) A statutory instrument may—

- (a) apply differently according to different specified factors; or
- (b) otherwise make different provision in relation to—
 - (i) different persons, matters or things; or
 - (ii) different classes of persons, matters or things.

(5) A statutory instrument may authorise a matter or thing to be from time to time determined, applied or regulated by a specified person or body.

(6) If this Code authorises or requires a matter to be regulated by statutory instrument, the power may be exercised by prohibiting by statutory instrument the matter or any aspect of the matter.

(7) If this Code authorises or requires provision to be made with respect to a matter by statutory instrument, a statutory instrument made under this Code may make provision with respect to a particular aspect of the matter despite the fact that provision is made by this Code in relation to another aspect of the matter or in relation to another matter.

(8) A statutory instrument may provide for the review of, or a right of appeal against, a decision made under the statutory instrument, or this Code, and may, for that purpose, confer jurisdiction on any court, tribunal, person or body.

(9) A statutory instrument may require a form prescribed by or under the statutory instrument, or information or documents included in, attached to or given with the form, to be verified by statutory declaration.

Presumption of validity and power to make

25. (1) All conditions and preliminary steps required for the making of a statutory instrument are presumed to have been satisfied and performed in the absence of evidence to the contrary.

(2) A statutory instrument is taken to be made under all powers under which it may be made, even though it purports to be made under this Code or a particular provision of this Code.

Appointments may be made by name or office

26. (1) If this Code authorises or requires a person or body—

- (a) to appoint a person to an office; or
- (b) to appoint a person or body to exercise a power; or
- (c) to appoint a person or body to do another thing;

the person or body may make the appointment by—

- (d) appointing a person or body by name; or
- (e) appointing a particular officer, or the holder of a particular office, by reference to the title of the office concerned.

(2) An appointment of a particular officer, or the holder of a particular office, is taken to be the appointment of the person for the time being occupying or acting in the office concerned.

Acting appointments

27. (1) If this Code authorises a person or body to appoint a person to act in an office, the person or body may, in accordance with this Code, appoint—

- (a) a person by name; or
- (b) a particular officer, or the holder of a particular office, by reference to the title of the office concerned;

to act in the office.

(2) The appointment may be expressed to have effect only in the circumstances specified in the instrument of appointment.

(3) The appointer may—

- (a) determine the terms and conditions of the appointment, including remuneration and allowances; and
- (b) terminate the appointment at any time.

(4) The appointment, or the termination of the appointment, must be in, or evidenced by, writing signed by the appointer.

(5) The appointee must not act for more than 1 year during a vacancy in the office.

(6) If the appointee is acting in the office otherwise than because of a vacancy in the office and the office becomes vacant, then, subject to subclause (2), the appointee may continue to act until—

- (a) the appointer otherwise directs; or
- (b) the vacancy is filled; or
- (c) the end of a year from the day of the vacancy;

whichever happens first.

(7) The appointment ceases to have effect if the appointee resigns by writing signed and delivered to the appointer.

(8) While the appointee is acting in the office—

- (a) the appointee has all the powers and functions of the holder of the office; and
- (b) this Code and other laws apply to the appointee as if the appointee were the holder of the office.

(9) Anything done by or in relation to a person purporting to act in the office is not invalid merely because—

- (a) the occasion for the appointment had not arisen; or
- (b) the appointment had ceased to have effect; or
- (c) the occasion for the person to act had not arisen or had ceased.

(10) If this Code authorises the appointer to appoint a person to act during a vacancy in the office, an appointment to act in the office may be made by the appointer whether or not an appointment has previously been made to the office.

Powers of appointment imply certain incidental powers

28. (1) If this Code authorises or requires a person or body to appoint a person to an office—

- (a) the power may be exercised from time to time as occasion requires; and
- (b) the power includes—
 - (i) power to remove or suspend, at any time, a person appointed to the office; and
 - (ii) power to appoint another person to act in the office if a person appointed to the office is removed or suspended; and
 - (iii) power to reinstate or reappoint a person removed or suspended; and
 - (iv) power to appoint a person to act in the office if it is vacant (whether or not the office has ever been filled); and
 - (v) power to appoint a person to act in the office if the person appointed to the office is absent or is unable to discharge the functions of the office (whether because of illness or otherwise).

(2) The power to remove or suspend a person under subclause (1) (b) may be exercised even if this Code provides that the holder of the office to which the person was appointed is to hold office for a specified period.

(3) The power to make an appointment under subclause (1) (b) may be exercised from time to time as occasion requires.

(4) An appointment under subclause (1) (b) may be expressed to have effect only in the circumstances specified in the instrument of appointment.

Exercise of powers between enactment and commencement

29. (1) If a provision of this Code (the “**empowering provision**”) that does not commence on its enactment would, had it commenced, confer a power—

- (a) to make an appointment; or
- (b) to make a statutory instrument of a legislative or administrative character; or
- (c) to do another thing;

then—

- (d) the power may be exercised; and
- (e) anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment, instrument or other thing into effect;

before the empowering provision commences.

(2) If a provision of a Queensland Act (the “**empowering provision**”) that does not commence on its enactment would, had it commenced, amend a provision of this Code so that it would confer a power—

- (a) to make an appointment; or
- (b) to make a statutory instrument of a legislative or administrative character; or
- (c) to do another thing;

then—

- (d) the power may be exercised; and
- (e) anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment, instrument or other thing into effect;

before the empowering provision commences.

(3) If—

- (a) this Code has commenced and confers a power to make a statutory instrument (the “**basic instrument-making power**”); and
- (b) a provision of a Queensland Act that does not commence on its enactment would, had it commenced, amend this Code so as to confer additional power to make a statutory instrument (the “**additional instrument-making power**”);

then—

- (c) the basic instrument-making power and the additional instrument-making power may be exercised by making a single instrument; and
 - (d) any provision of the instrument that required an exercise of the additional instrument-making power is to be treated as made under subclause (2).
- (4) If an instrument, or a provision of an instrument, is made under subclause (1) or (2) that is necessary for the purpose of—
- (a) enabling the exercise of a power mentioned in the subclause; or
 - (b) bringing an appointment, instrument or other thing made or done under such a power into effect;

the instrument or provision takes effect—

- (c) on the making of the instrument; or
- (d) on such later day (if any) on which, or at such later time (if any) at which, the instrument or provision is expressed to take effect.

(5) If—

- (a) an appointment is made under subclause (1) or (2); or
- (b) an instrument, or a provision of an instrument, made under subclause (1) or (2) is not necessary for a purpose mentioned in subclause (4);

the appointment, instrument or provision takes effect—

- (c) on the commencement of the relevant empowering provision; or
- (d) on such later day (if any) on which, or at such later time (if any) at which, the appointment, instrument or provision is expressed to take effect.

(6) Anything done under subclause (1) or (2) does not confer a right, or impose a liability, on a person before the relevant empowering provision commences.

(7) After the enactment of a provision mentioned in subclause (2) but before the provision's commencement, this clause applies as if the references in subclauses (2) and (5) to the commencement of the empowering provision were references to the commencement of the provision mentioned in subclause (2) as amended by the empowering provision.

(8) In the application of this clause to a statutory instrument, a reference to the enactment of the instrument is a reference to the making of the instrument.

PART 5—DISTANCE, TIME AND AGE

Matters relating to distance, time and age

30. (1) In the measurement of distance for the purposes of this Code, the distance is to be measured along the shortest road ordinarily used for travelling.

(2) If a period beginning on a given day, act or event is provided or allowed for a purpose by this Code, the period is to be calculated by excluding the day, or the day of the act or event, and—

- (a) if the period is expressed to be a specified number of clear days or at least a specified number of days—by excluding the day on which the purpose is to be fulfilled; and
- (b) in any other case—by including the day on which the purpose is to be fulfilled.

(3) If the last day of a period provided or allowed by this Code for doing anything is not a business day in the place in which the thing is to be or may be done, the thing may be done on the next business day in the place.

(4) If the last day of a period provided or allowed by this Code for the filing or registration of a document is a day on which the office is closed where the filing or registration is to be or may be done, the document may be filed or registered at the office on the next day that the office is open.

(5) If no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the prescribed occasion happens.

(6) If, in this Code, there is a reference to time, the reference is, in relation to the doing of anything in a jurisdiction, a reference to the legal time in the jurisdiction.

(7) For the purposes of this Code, a person attains an age in years at the beginning of the person's birthday for the age.

PART 6—EFFECT OF REPEAL, AMENDMENT OR EXPIRATION

Time of Code ceasing to have effect

31. If a provision of this Code is expressed—

- (a) to expire on a specified day; or
- (b) to remain or continue in force, or otherwise have effect, until a specified day;

this provision has effect until the last moment of the specified day.

Repealed Code provisions not revived

32. If a provision of this Code is repealed or amended by a Queensland Act, or a provision of a Queensland Act, the provision is not revived merely because the Queensland Act or the provision of the Queensland Act—

- (a) is later repealed or amended; or
- (b) later expires.

Saving of operation of repealed Code provisions

33. (1) The repeal, amendment or expiry of a provision of this Code does not—

- (a) revive anything not in force or existing at the time the repeal, amendment or expiry takes effect; or
- (b) affect the previous operation of the provision or anything suffered, done or begun under the provision; or
- (c) affect a right, privilege or liability acquired, accrued or incurred under the provision; or
- (d) affect a penalty incurred in relation to an offence arising under the provision; or
- (e) affect an investigation, proceeding or remedy in relation to such a right, privilege, liability or penalty.

(2) Any such penalty may be imposed and enforced, and any such investigation, proceeding or remedy may be begun, continued or enforced, as if the provision had not been repealed or amended or had not expired.

Continuance of repealed provisions

34. If a Queensland Act repeals some provisions of this Code and enacts new provisions in substitution for the repealed provisions, the repealed provisions continue in force until the new provisions commence.

Code and amending Acts to be read as one

35. This Code and all Queensland Acts amending this Code are to be read as one.

PART 7—INSTRUMENTS UNDER CODE

Schedule applies to statutory instruments

36. (1) This Schedule applies to a statutory instrument, and to things that may be done or are required to be done under a statutory instrument, in the same way as it applies to this Code, and things that may be done or are required to be done under this Code, except so far as the context or subject matter otherwise indicates or requires.

(2) The fact that a provision of this Schedule refers to this Code and not also to a statutory instrument does not, by itself, indicate that the provision is intended to apply only to this Code.

PART 8—APPLICATION TO COASTAL SEA

Application

37. This Code has effect in and relation to the coastal sea of this jurisdiction as if that coastal sea were part of this jurisdiction.

[Minister's second reading speech made in—
Legislative Assembly on 23 May 1995
Legislative Council on 30 May 1995]

BY AUTHORITY