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**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL  
TERRITORY**

**CREDIT (AMENDMENT) BILL 1994**

**EXPLANATORY MEMORANDUM**

**Circulated by authority of  
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## CREDIT (AMENDMENT) BILL 1994

### Outline

This Bill amends the *Credit Act 1985* which regulates the provision of consumer credit in the ACT as part of a substantially uniform scheme which operates in most States. The *Credit Act 1985* provides for the protection of consumers by requiring credit providers to disclose all the basic information that borrowers should know about their contracts. It also protects consumers against various unfair lending practices and, through the ACT Credit Tribunal, provides borrowers with a forum for settling disputes arising under regulated credit contracts.

This Bill amends the *Credit Act 1985* to:

- (a) enable the Minister to make regulations prescribing the upper financial limit applicable to regulated credit sale and loan contracts and the minimum annual percentage rate applicable to regulated loan contracts;
- (b) establish a Financial Counselling Trust Fund with moneys in the Fund to be administered by the Minister and to be used to assist consumer credit counselling, credit and debt management education, consumer credit research, consumer credit litigation and such other credit-related activities as the Minister determines appropriate;
- (c) enable the Credit Tribunal to order credit providers who incur a civil penalty to contribute to a Financial Counselling Trust Fund;
- (d) address a defect in the legislation raised by the Scrutiny of Bills Committee, ie limiting exceptions from the civil penalty regime to contracts made after 28 February 1985, the date of commencement of the *Credit Act 1985*.
- (e) to allow credit providers to be reimbursed in relation to financial institutions duty; and
- (f) correct a technical error in the definition of "financial institution" located in section 5 of the Act which resulted from the amendment of that definition by the *Financial Institutions (Consequential Amendments) Act 1992*.

### Financial Considerations

Implementation of the Bill will not involve additional resources. Income for the Trust Fund is dependent upon the Credit Tribunal identifying suitable applications to exercise its discretion.

## NOTES ON CLAUSES

### Formal Clauses

Clause 1 is a formal requirement. It refers to the short title of the Bill.

### Commencement

Various Clauses of the Bill have different dates upon which they commence operation. Clause 2 sets out what those different dates are. Clauses 1, 2 and 3 of the Bill commence on the day on which the Act is notified in the ACT Government Gazette. Paragraph 4(a) and Clause 12 of the Bill shall be taken to have commenced from a date earlier than the date the Act is notified in the Gazette after passage through the Assembly. In the case of paragraph 4(a) that date is 1 July 1992 and in the case of Clause 12 the date is 28 February 1985. The reasons for those commencement dates are evident from the explanations of those provisions found in the discussion of those Clauses. The other provisions of the Bill shall commence on a day fixed by the Minister by notice in the Gazette, and where this has not occurred within six months of the Bill itself being notified in the Gazette after passage by the Assembly, those provisions will be taken to have commenced on the first day after the end of that period.

### Principal Act

Clause 3 provides that the Principal Act is the *Credit Act 1985*.

### Interpretation

Clause 4 amends the existing definition provisions in section 5 of the *Credit Act 1985* as well as inserting a new definition.

Clause 4(a)(a) amends the definition of "financial institution" in section 5 of the *Credit Act 1985*. A credit provider who falls within the definition of "financial institution" will under section 18, be exempt from certain contractual requirements as well as exempt from the licensing requirements of the *Credit Act 1985* (although there is still a requirement to be registered as a credit provider under the Act). Doubt has been expressed as to whether the present definition of "financial institution", which was previously amended by the *Financial Institutions (Consequential Amendments) Act 1992* (part of a package of uniform legislation which introduces uniform regulation of credit unions and other societies around Australia), includes credit unions and other societies which were originally registered outside the ACT. The amendment removes the uncertainty by adding the words "a foreign society, or a continuing foreign society" after the words "or a credit union".

This amendment is made retrospective to 1 July 1992 the date of the commencement of the *Financial Institutions (Consequential Amendments)*

**Act 1992.** Such a provision, is required as foreign credit unions and building societies may not have complied with the licensing and contractual requirements of the *Credit Act 1985*. As a result they may attract a civil penalty under section 157 of the *Credit Act 1985* and in turn borrowers may not be liable to repay the amount financed or the credit charges levied. Affected credit unions and building societies could make an application to the ACT Credit Tribunal for relevant orders under section 85 to reduce their loss. While this is possible credit unions and building societies should not bear a loss which would have occurred through no fault of their own; nor should borrowers receive a fortuitous windfall through a technical defect in legislation.

Clause 4 amends the definition of "financial institution" further to comply with the definition in the *Financial Institutions (Consequential Amendments) Act 1992*.

Clause 4(b) inserts into section 5 of the *Credit Act 1985* a new definition of "Financial Counselling Trust Fund" which is defined to mean the fund established by subsection 241AA(1) of the Act.

#### **Application of the *Credit Act 1985***

Section 30 specifies the types of credit sale contracts and loan contracts which are regulated by the *Credit Act 1985*. Credit sale contracts and loan contracts are defined in section 5(1) of the *Credit Act 1985*. In relation to credit sale contracts, the gist of these provisions is that these contracts will not be regulated under the Act if the cash price is \$20000 or more or the contract relates wholly or partly to a commercial vehicle or farm machinery. A loan contract will not be regulated under the Act if the amount financed by the contract exceeds \$20000, or there is a credit charge which is less than 14% per annum or there is an acceptable rate of interest which is less than 14% per annum, unless the loan is secured by a mortgage over a commercial vehicle or farm machinery.

Due to a substantial drop in interest rates and the effects of inflation over time (the \$20000 monetary limit was set in 1984), many consumers are now entering into credit contracts which are not covered by the *Credit Act 1985* and are accordingly being denied its protection. A more flexible mechanism is required for the setting and alteration of the interest rate and monetary parameters which accommodates changes in interest rates and takes account of the effects of inflation.

Clause 7 amends section 30 of the *Credit Act 1985* to remove the references to \$20,000 and 14% and substitutes the more flexible mechanism of prescribing, as appropriate, the percentage rate and monetary amounts by regulation.

**Clauses 5, 6 and 13** similarly remove the references to 14% and \$20,000 in sections 13, 20 and 243 of the *Credit Act 1985* which flow from section 30 and substitutes references, as appropriate, to the amount or the percentage rate prescribed by regulation.

#### **Recoupment of financial institutions duty**

Under section 75 of the *Credit Act 1985*, a credit provider may only impose those costs, fees or charges in relation to the provision of credit and related matters that are permitted under the Act to be included, in the case of a regulated credit sale or regulated loan contract, as part of the amount financed, or, in the case of a continuing credit contract, as part of the amount owing under that contract. As a result, a credit provider, who attempts to include an amount in a contract which is not authorised by the Act, will not be able to enforce that contract against the consumer, ie, the contract will be void.

**Clauses 8 and 9** amend the *Credit Act 1985* to allow credit providers to obtain reimbursement of financial institutions duty from consumers in relation to any financial institutions liability they may incur on the basis that it is consistent with the other types of charges which credit providers are permitted to recoup from consumers under the *Credit Act 1985*. Similar provisions already exist in the Victorian and New South Wales credit legislation.

#### **Financial Counselling Trust Fund**

The *Credit Act 1985* currently provide for the automatic imposition of a civil penalty on a credit provider for certain contraventions of the Act which prevents a credit provider from recovering credit charges payable in the future under the contract and makes the credit provider liable to repay those credit charges already recovered. Under section 85(1) of the *Credit Act 1985*, a credit provider can apply to the ACT Credit Tribunal for an order reinstating the credit provider's right to recover credit charges due under a contract. Section 86 of the *Credit Act 1985* enables the Tribunal, on the application of a credit provider, to make a general order under section 85 in relation to one or more specified contracts. Section 85(2) of the *Credit Act 1985* sets out the options available to the Tribunal in determining an application under section 85(1). Additional criminal penalties may also be imposed by a Court for those breaches.

**Clause 10** of the Bill amends the *Credit Act 1985* to give the ACT Credit Tribunal the discretion, where a credit provider has applied for an order under section 85 in respect of a number of contracts in accordance with the procedure set out in section 86, to order under section 85AA(1) that a credit provider pay a specified amount into a Financial Counselling Trust Fund. As a consequence of making that order it follows that the Tribunal must

also determine that the debtors are liable to pay the credit charges under the contract.

Section 85AA(2) of the *Credit Act 1985* provides that the Tribunal should not make an order that a credit provider pay an amount into the Trust Fund unless the Tribunal is satisfied that, having regard to all the relevant circumstances it must consider under section 85(2)(c), the contravention or failure giving rise to the application should not be excused and thus warrants the imposition of a civil penalty. The Tribunal must be satisfied that the credit provider would incur costs in:

- identifying the contracts (s.85AA(2)(b)(i));
- altering its records...(s.85AA(2)(b)(ii));
- locating the debtor...(s.85AA(2)(b)(iii));
- refunding to a debtor...(s.85AA(2)(b)(iv)); or
- or otherwise giving effect to any decrease in liability of the debtor (s.85AA(2)(b)(v)).

which, individually or in total are likely to be excessive having regard to the amount of the reduction in liability of the relevant debtor.

Section 85AA(3) *Credit Act 1985* provides that the Tribunal, in determining the amount to be paid into the Trust Fund, shall have regard to the number of contracts to which the determination relates, those matters set out in section 85AA(2)(b) as well as to such other matters as the Tribunal considers relevant. Where the credit provider has not identified all affected contracts, the Tribunal may base its calculation of the amount to be paid into the Trust Fund on an estimate of the number of contracts.

The Tribunal should be able to direct payment into the Trust Fund in respect of all contracts or only some contracts. Section 85AA does not remove borrowers' rights to be heard by the Tribunal if they consider that they have suffered loss or damage as a result of the contravention by the credit provider. The Tribunal will retain its discretion to make a determination in accordance with section 85(2)(c) in relation to an individual contract where a borrower comes forward and establishes particular loss or damage, or direct payment to the Trust Fund. Section 85AA(4) provides that subsections 85(4), (4A), (4B) and 5 apply to an order under section 85AA as if the order were a determination under section 85.

Clause 11 inserts a new Part XVAA into the *Credit Act 1985* relating to the establishment and administration of the Financial Counselling Trust Fund. Section 241AA(1) establishes the Trust Fund and section 241AA(2) provides that the Fund is a trust account for the purposes of section 85 of the *Audit Act 1989*.

Section 241AB provides that the following amounts shall be paid into the Financial Counselling Trust Fund:

- amounts which the ACT Credit Tribunal orders to be paid into the Trust Fund;
- amounts, and interest on those amounts, recovered as a result of enforcing a judgement under section 206 relating to such a determination; and
- interest earned from the investment of money held in that Trust Fund.

Section 241AC of the *Credit Act 1985* provides that moneys standing to the credit of the Financial Counselling Trust Fund may be expended to provide funds for:

- consumer credit counselling;
- credit and debt management education;
- consumer credit research;
- consumer credit litigation; or
- such other credit related activities as are determined by the Minister.

### **Exemptions from civil penalty**

Section 241A of the *Credit Act 1985*, which deals with exemptions from the civil penalty regime, was intended to apply to contracts made after 28 February 1985, the date of commencement of the *Credit Act 1985*. However section 241A(1) provides that the section applies to credit sale contracts and loan contracts entered into before the commencement of section 8 of the *Credit (Amendment) Act 1991*. Section 8 of the *Credit (Amendment) Act 1991* was deemed to have commenced on the date the *Credit Act 1985* commenced, ie, 28 February 1985, and, as a result, section 241A of the Act applies to contracts made before the date of commencement of the Act. This drafting error drew the attention of the Scrutiny of Bills Committee. Clause 12 amends section 241A so that it has the effect intended.

### **Amendments to bring Credit Act 1985 in accord with the Corporations Law**

Paragraph 156(3)(c) and sub-paragraph 163(1)(b)(ii)(b) omit the term *Companies Act 1981* of the Commonwealth for the term Corporations Law.