

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

CONSUMER CREDIT (ADMINISTRATION) BILL 1996

EXPLANATORY MEMORANDUM

**Circulated by authority of
Gary Humphries MLA
Attorney-General**

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Consumer Credit (Administration) Bill 1996

GENERAL OUTLINE

Background

The Uniform Credit Laws Agreement (the Agreement) signed by all jurisdictions in July 1993, will see the implementation and commencement of nationally uniform credit legislation in the form of the Code ("the Code") on 1 November 1996. As part of its obligations under the Agreement, the ACT has already passed the *Consumer Credit Act 1995* which applies the Code in this jurisdiction. To facilitate the Code's operation in the ACT, an administrative structure must be created.

Objectives of the Bill

The Consumer Credit (Administration) Bill 1996 ("the Bill") will establish an administrative framework for the *Consumer Credit Act 1995* and the Code by carrying forward into the new scheme, key administrative functions established by the *Credit Act 1985* ("the Credit Act").

Key administrative functions and bodies being carried forward from the old scheme under the *Credit Act*, are:

- the Credit Tribunal;
- the Inquiries power of the Minister;
- unjust conduct provisions, provisions which will establish procedures for the discipline of credit providers and finance brokers who have engaged in unjust conduct;
- the functions and powers of the Director of Consumer Affairs; and
- the Financial Counselling Trust Fund, a fund into which monies from consumer credit proceedings are paid into and applied for a range of consumer credit related purposes.

In addition, the Bill will also provide for new administrative procedures, such as:

- the payment of negotiated settlements between the Director and credit providers or finance brokers into the Trust Fund;
- the appropriation of moneys by an Act of the Legislative Assembly into the Trust Fund; and
- in place of positive licensing, a new scheme of negative licensing with registration of credit providers and finance brokers based on Victorian consumer credit legislation.

Further, the Bill will also incorporate recent standards in penalties and other legislative developments. In particular, certain provisions of the *Inquiries*

Act 1991 will now operate in place of old Inquiry provisions established by the *Credit Act*. Also certain administrative appeal procedures will be streamlined. Combined with the rewriting of the Bill in a plain English style, the Bill will be a more modern and useable piece of legislation than the previous *Credit Act*.

DETAIL OF PROVISIONS

PART I - PRELIMINARY

Short Title and Commencement

Clauses 1 and 2 are formal requirements and they refer to the short title of the Bill and its commencement. While it is normal drafting practice to include a clause automatically commencing a Bill at the end of a 12 month period, (a Macklin clause) such a clause has not been included here as it would be inappropriate for a Bill which will provide for the administration of a nationally uniform legislative exercise, such as the Code. It is anticipated that the Code will commence on 1 November 1996. Therefore, **subclause 2(2)** only provides for the commencement of the Bill on a day fixed by the Minister by notice in the Gazette.

Interpretation

Clause 3 defines certain terms used in the Bill. In particular, important definitions used in this Bill are defined. These important definitions elaborate on concepts fundamental to the operation of the Bill and the Code. Key definitions and elaborated concepts are:

- “consumer credit”

⇒ The definition stating that “consumer credit” means credit to which the consumer credit legislation applies, ensures that credit, whether it is regulated under the *Credit Act 1985* (the old scheme) or the Code (the new scheme) will come under the operation of this Bill;

- “consumer credit legislation”

⇒ The definition “consumer credit legislation” covers all legislation that is relevant to the new scheme established under the Code and includes:

- * this Bill and the regulations made under it;
- * the *Consumer Credit Act 1995* and the regulations made under it;
- * the *Consumer Credit (ACT) Code* (section 4 of the *Consumer Credit Act 1995* applies the Consumer Credit Code in the ACT and states that it may be referred to as the *Consumer*

Credit (ACT) Code);

- * the *Consumer Credit (ACT) Regulations*; and
- * the *Credit Act 1985* and the regulations under it;

- **“Credit Code”**

⇒ This definition states that “Credit Code” means the *Consumer Credit (ACT) Code* and allows for the use of the shorter term throughout the Bill;

- **“credit provider”**

⇒ This definition ensures that credit providers, as defined under the *Consumer Credit Code* and the *Credit Act 1985*, are brought within the operation of this Bill. This definition also includes a prospective credit provider;

- **“debtor”**

⇒ This wide definition will include not only debtors under the consumer credit legislation but prospective debtors as well;

- **“finance broker” and “finance broking”**

⇒ This definition by its reference to “consumer credit” ensures that finance brokers who provide credit, either under the old scheme under the *Credit Act 1985* or, the new scheme under the *Consumer Credit Code*, will be subject to the operation of this Bill;

- **“defined influential person”**

⇒ This is a central concept to Parts II and III which deal with the registration of credit providers and finance brokers. Its meaning is designed to carry forward in modern form certain concepts used in the *Credit Act*. Concepts such as “[a] person concerned in the direction, management or conduct of the business of the licensee..”, “A person... concerned in the direction, management or conduct of a business of providing credit or a business of finance broking..” and “any person other than an officer of the body corporate who, in the opinion of the Tribunal, has control, or substantial control, of the body corporate”.

- **“unjust conduct”**

⇒ Unjust conduct covers conduct that is dishonest or unfair or breaches a contract or contravenes the consumer credit legislation and therefore deserving of a remedy.

PART II - CREDIT PROVIDERS & PART III - FINANCE BROKING

General Outline

A negative licensing regime for the registration for credit providers and finance brokers is created under Part II and Part III. The scheme, being a negative licensing system, sets minimal barriers to entry. If the applicant meets the criteria outlined in the application process the Director of Consumer Affairs (the Director) is obliged to register the applicant. Once registered the credit provider or finance broker need only submit an annual fee and statement to maintain his, her or its registration. There is, however, a host of disciplinary powers available to the Director, ranging from investigative powers and undertakings to suspension or cancellation of registration.

To explain the scheme in a logical manner, processes and divisions common to both credit providers and finance brokers are dealt with together, with parts peculiar to credit providers or finance brokers treated separately.

Exemptions

Under the scheme implemented, bodies outlined in **Division 1** of both **Parts II and III** are exempt from registration as credit providers or finance brokers

Part II—Credit Providers, Division 1—Exemptions

Exemption—collection of debts due to former credit providers

An exemption is given by **clause 4** in respect of collection of moneys by former registered credit providers, former holders of a credit provider license under the *Credit Act* and suspended registered credit providers. Under **clause 4** these persons will still be able to receive moneys from debtors under a consumer credit contract without need to apply for registration. This clause makes it clear that cancellation or suspension of registration or licence does not discharge a debtor's liability.

Exemption—Ministerial determination

Clause 5 grants the Minister a general power to exempt by determination a credit provider from the operation of Part II. However, **subclause (3)** by providing that the determination is a disallowable instrument for the purposes of section 10 of the *Subordinate Laws Act 1989* ensures that the ministerial determination is transparent and reviewable by the ACT Legislative Assembly.

Part III—Finance Broking, Division 1—Exemptions

Exemption—specified persons and bodies and exemption—finance broking in the course of another business

Clauses 28 and 29 outline bodies and persons exempt from registration as a finance broker. They are:

- Banks;
- Financial institutions;
- Legal practitioners acting in the course of their profession;
- Insurance and Life Insurance companies;
- Securities brokers and dealers;
- Curator of estates;
- Public Trustees;
- Trustee Companies; and
- Businesses which sell land or supply goods and services where they act as a finance broker for their clients in the ordinary course of business. To enjoy this exemption, the business must have written authority from the client. A good example of a person falling into this category of exemption would be real estate agents and motor vehicle dealers, but only if they genuinely act as finance brokers for clients coming to them in the ordinary course of business.

This ensures that these bodies and persons who may at first glance seem to be finance brokers, are exempt.

Exemption—Ministerial determination

Clause 30 grants the Minister power to exempt by determination, a finance broker from the operation of Part III. Subclause 30(3) ensures that the ministerial determination is transparent and reviewable by the ACT Legislative Assembly by stating that the determination is a disallowable instrument for the purposes of section 10 of the *Subordinate Laws Act 1989*.

Clauses 6-27 (credit providers) and 31-48 (finance brokers) are dealt with together as they cover essentially the same matters.

Registration

Under both Parts II and III the requirement to be registered extends to all persons who intend to provide consumer credit or act as finance brokers, unless they are exempt.

Part II—Credit Providers, Division 2—Provision of consumer credit and

Part III—Finance Broking, Division 2—Finance broking

Registration as a consumer credit provider or finance broker, clauses 6 (credit providers) and 31 (finance brokers)

Under clauses 6 and 31, persons not exempt, who intend to provide consumer credit or act as finance brokers will have to be registered (for exempt persons, see clauses 4-5, 28-30). Providing consumer credit or acting as a finance broker without registration attracts a substantial penalty, see subclauses 6(1)(a), (b) and 31(1)(a), (b). Under the clause penalties are expressed in penalty units, one penalty unit being equivalent to \$100.

Further, subclauses 6(2) and 31(2) prevents natural persons from holding themselves out as credit providers or finance brokers without being registered. Similarly, under subclauses 6(3) and 31(3), a body corporate cannot hold itself out as being a credit provider or a finance broker without first being registered. Contravention of these subclauses also attracts a substantial penalty.

Authorised names, clauses 7 and 37

Clause 7 only allows a credit provider to provide consumer credit under an authorised name (see clause 9). Likewise, under clause 37, a finance broker cannot act as a finance broker, in a name other than the name he, she or it is authorised to so do under clause 40. Breach of these clauses attracts a substantial penalty. The clauses also prohibit a credit provider or finance broker from holding out in a name other than the name they are authorised to operate under, see subclauses 7(3) and 37(3).

Partnerships, clauses 8 and 38

Clause 8 prohibits registered credit providers from providing consumer credit in partnership with a person who is not registered as a credit provider. Breach of the clause attracts a substantial penalty. Similarly, under clause 38 a registered finance broker is prohibited from finance broking in partnership with a person who is not a registered finance broker. A finance broker breaching this clause is liable to pay a penalty. This clause, therefore, requires each partner in a partnership to be registered if their business involves the provision of consumer credit or finance broking.

Part II—Credit Providers, Division 3—Registration of consumer credit providers and Part III—Finance Broking, Division 3—Registration of finance brokers

Authority conferred by registration, clauses 9 and 40

Under clauses 9 and 40 registration authorises a person or body corporate to provide consumer credit or act as a finance broker under the person's name or any other names endorsed on their registration certificate. If they operate in any other names, they will commit an offence under clauses 7 or 37.

Application for registration, clauses 10 and 41

These clauses allow a natural person over the age of 18 years or a body corporate to apply to be registered as a credit provider or finance broker. Subclauses (2) and (3) require that the application shall be in writing, in a form approved by the Minister, and accompanied by a set fee. Under clause 139, the Minister has the power to set fees payable for the purposes of the Administration Bill. Under subclause (4) the application is required to state:

- the applicant's name and address;
- if the applicant is a company, then the name and address of each director of the company.;
- the name or names under which the applicant intends to operate in the ACT;
- the principal address and any other addresses that the applicant intends to operate at;
- whether the applicant's business will be in partnership with any other person; and
- any other matter prescribed by regulations, clause 140 allows the Executive to make regulations for the purposes of this Bill.

Registration, clauses 11 and 42

Clauses 11 and 42 provide that unless the applicant is disqualified under Parts II and Part III of the Bill, the Director must register the applicant.

If disciplinary action is taken under clauses 23 or 54, an applicant can be disqualified. Failure to pay the annual fee or provide annual statements under clauses 16 and 47, and bankruptcy, fraud, dishonesty or mental incapacity under clauses 19 and 50, are also grounds for disqualification.

On registration the Director must provide the newly registered credit provider or finance broker with a certificate of registration and that certificate must be in a form approved by the Minister, see subclauses (2) and (3).

If a certificate of registration is lost or destroyed the Director can issue a duplicate if he or she is satisfied that it is genuinely lost or destroyed, see **subclause (4)**.

Endorsement of Names, clause 12 and 43

These clauses provide that the Director shall endorse the new name on a certificate of registration if a registered credit provider or finance broker applies in writing to operate under a new name.

Changed particulars, clause 13 and 44

Under these clauses an obligation arises where there are any changes to particulars notified in an application. The obligation requires the applicant or registered credit provider to inform the Director in writing of the matters changed within 14 days or be subject to a penalty. This requirement also extends to matters subsequently notified under this clause

Term of registration, clause 14 and 45

These clauses provide that a registration continues in force until it is cancelled, suspended or surrendered

Annual fees and statements, clause 15 and 46

These clauses provide that a registered credit provider or finance broker is required to pay a annual fee and lodge an annual statement on or before 27 March each year. This date and the 28 February date have been carried forward from the *Credit Act*.

The statement shall be in a form approved by the Minister, see **subclause (3)**. **Subclause (4)** allows the Director to give extensions of time to credit providers or finance brokers in which to pay their fee or lodge their statement.

Subclause (5) provides for a penalty for credit providers or finance brokers who fail to lodge their annual statements.

Subclause (6) provides that the initial fee payable by a newly registered credit provider or finance broker shall be calculated in accordance with **subclause (7)** or as otherwise provided by regulations.

Subclause (7) provides the formula for determining the initial fee payable by newly registered credit providers or finance brokers. In the interests of equity, the fee payable will be proportional to the period in which the new credit provider or finance broker has been registered. **Subclauses (8) and (9)** relate to the operation of **subclause (7)**.

Cancellation of registration for failure to pay fee or provide statement, clauses 16 and 47

These clauses provide for the cancellation and disqualification of a credit provider's or finance broker's registration for failing to pay the annual fee or provide an annual statement.

Surrender of registration, clauses 17 and 48

Under clauses 17 and 48 a credit provider or finance broker may surrender their registration.

Disciplinary procedures

Credit providers and finance brokers are subject to the same disciplinary regime of Division 4 under Parts II and III.

Parts II and Parts III, Divisions 4—Disciplinary procedures

Powers of Inquiry, clauses 18 and 49

These clauses give the Director power to make such inquiries that he or she thinks fit about a registered credit provider or finance broker.

Under subclause (2), the Director may request the Commissioner of Police to make any reasonable inquiries about a credit provider or finance broker. Under subclause (3), the Commissioner of Police is required to report the result of his or her inquiries to the Director. Subclause (4) allows inquiries to be made in respect of defined influential persons under the Bill and employees of registered credit providers or finance brokers. The term defined influential person includes directors and secretaries of credit providers or finance broking organisations and persons involved in the management of such bodies.

Cancellation or suspension for bankruptcy, fraud, dishonesty or incapacity, clauses 19 and 50

These clauses give the Director power to cancel or suspend the registration of a credit provider or finance broker who is a natural person, if he or she:

- becomes bankrupt; or
- is convicted of an offence involving fraud or dishonesty, punishable on conviction, by imprisonment for 3 months or more; or
- becomes incapable through mental infirmity of managing his or her affairs.

Similarly, subclause (2) gives the Director the power to cancel or suspend the registration of a credit provider or finance broker which is a body corporate,

if it:

- is dissolved; or
- is under administration, or
- is being wound up; or
- has ceased to do business; or
- is in receivership; or
- has entered into a compromise or scheme of arrangement with its creditors.

Subclause (3) provides that where the Director has cancelled the registration of a credit provider or finance broker, the Director shall also disqualify the credit provider or finance broker from being registered as a credit provider or finance broker during the period stated in the notice of cancellation

When read with clauses 11 and 42, this clause ensures that the Director does not register:

- recently cancelled credit providers as credit providers or finance brokers, or
- recently cancelled finance brokers as finance brokers or credit providers for the period of time stated in the notice of cancellation. It will prevent such persons from re-entering the market merely by making a new application for registration.

Subclause (4) provides an avenue of review for the credit provider or finance broker who has had their registration cancelled or suspended. Under the subclause, the Director has the power to remove a suspension or revoke a disqualification before it has run its course when an application has been made in writing by the credit provider or finance broker who has had their registration cancelled or suspended.

Grounds for other disciplinary action, clauses 20 and 51

These clauses provide that the following conduct are grounds for disciplinary action under clause 23. They are:

- where a credit provider has provided consumer credit inefficiently, dishonestly or unfairly;
- where a finance broker has acted as a finance broker inefficiently, dishonestly or unfairly;
- where a credit provider or finance broker has provided false or misleading information in relation to an application for registration;
- where a credit provider or finance broker has contravened—
 - the consumer credit legislation;
 - a direction of the Director under clause 23; or
 - an undertaking under the Bill or the *Credit Act*,
- where a credit provider has provided consumer credit while under suspension or while disqualified;

- where a finance broker has acted as a finance broker while under suspension or disqualified;
- where a credit provider or finance broker licensed under the *Credit Act* had:
 - provided false or misleading information in respect of his, her or its licence application;
 - breached a condition of licence;
 - failed to do a specified thing required by the Tribunal under the disciplinary provisions of the *Credit Act*;
 - provided consumer credit or acted as a finance broker while their licence was suspended, cancelled or disqualified under the *Credit Act*.

Complaints against credit providers, clauses 21 and 52

These clauses give a person a general right to make a complaint about the conduct of a registered credit provider or finance broker to the Director. A complaint under **clauses 21 or 52** is one of the mechanisms by which the investigative powers of the Director under Part VII and his or her disciplinary powers under **clause 23** will come into operation. Under Part VII, the Director under **clause 108(a)** has the general power to investigate complaints relating to consumer credit legislation received from credit providers, debtors, finance brokers and any other person.

Notice to show cause, clauses 22 and 53

Under **clauses 22 and 53** the Director, before taking any disciplinary action under **clause 23**, must issue the credit provider or finance broker concerned with a written notice inviting the person to show cause within 28 days of the notice as to why disciplinary action should not be undertaken. This ensures that the credit provider or finance broker has an opportunity to state their case before disciplinary action is taken.

Subclause (2) provides that the notice must specify the grounds in **clause 20** on which the Director proposes to take action, and include details of any complaint received by the Director.

Subclause (3) obliges the Director to take into consideration any complaint and any reasons that the credit provider or finance broker gives in relation to a notice under this clause before taking disciplinary action under **clause 23**.

Disciplinary action, clauses 23 and 54

These clauses provide that where the Director is reasonably satisfied that any of the grounds in **clause 20** are established in relation to the conduct of a credit provider or finance broker, he or she can take one or more of the following actions:

- reprimand a credit provider or finance broker;
- direct the credit provider or finance broker to pay a fine;
- direct the credit provider or finance broker to comply with a requirement within a set time;
- suspend the registration of a credit provider or finance broker for no more than 12 months;
- cancel the registration of credit providers or finance brokers and disqualify them from obtaining registration as a credit provider or finance broker for the period of time prescribed in the notice of cancellation;
- disqualify a specified defined influential person within the credit provider's or finance broker's organisation from obtaining registration. This person is usually a secretary or director of a credit provider or finance broking organisation, or a person who has substantial control over its activities and affairs or substantial concern in its management, see **clause 3**

Subclause (2) provides a substantial penalty for failing to comply with a direction by the Director to pay a fine or comply with a requirement under **subclauses 1(b) or (c)**.

Subclause (3) relieves a credit provider or finance broker from liability under this clause where he or she has already been convicted of an offence which forms wholly or in part a ground for disciplinary action under **clause 20**.

Subclause (4) provides a penalty for not returning a certificate to the Director within 14 days for endorsement, where the Director has required the credit provider or finance broker to comply with a direction under **subclause (1)(c)**.

Subclause (5) provides a penalty for failure to return the certificate of registration within 14 days, after the Director has suspended or cancelled the credit provider's or finance broker's registration.

Subclause (6) prohibits a disqualified person and a disqualified defined influential person (under **subclauses (1)(e) or (f)**) from being concerned in the direction, management or control of a credit providing or finance broking business for the period of the disqualification. Substantial penalties have been provided for breaching this clause.

Common General Procedures

Division 5—General

Death of a registered credit provider, clauses 24 and 55

These clauses allow the legal personal representative (eg., executor of an estate) of a deceased credit provider or finance broker to take over his or her

registration for a period of six months. Under this clause, the legal personal representative must apply within 28 days and accompany the application with the deceased's certificate of registration. Registration will be granted unless the applicant is disqualified under Parts II or III or the applicant ceases or is not the deceased's credit provider's or finance broker's legal personal representative.

Register of Credit Providers, clauses 25 and 56 and Access to Register, clauses 26 and 57

Under clauses 25 and 56 the Director must keep a register of credit providers and finance brokers which will contain particulars of a credit provider or finance broker. These registers will be accessible to any person upon written application to the Director, and payment of a fee, allowing them to inspect, make copies or take extracts, see clauses 26 and 57.

False or misleading statements, clauses 27 and 58

These clauses establish a general prohibition against giving false or misleading statements in relation to Parts II and III. It also imposes a substantial penalty. Under these clauses, the concept of false or misleading has been widened to include statements knowingly made by a person who had no reasonable grounds to believe that their statement was true or accurate or where a person omitted from a statement material matters, except where the person reasonably believed that the omission would not make the statement false or misleading.

Clauses particular to Finance Brokers

General Outline

These clauses are specific to finance brokers and are clauses that have been carried forward from the *Credit Act*.

Advertising

Clause 32 places certain requirements on advertising done by a finance broker. Under the clause, the finance broker must advertise in a name and address that the finance broker is authorised to operate under, see clause 40. There is a civil penalty for failing to comply with this clause.

Records

Clause 33 requires a finance broker to make a full record of a finance broking transaction and keep it for 3 years. Failure to do so attracts a civil penalty.

Commissions

Clause 34 deals with the commission a finance broker may receive from a finance broking transaction. Under the clause, a finance broker cannot demand, receive or accept any commission from a finance broking transaction unless the transaction is made according to a written agreement which is signed by the client and contains the particulars of the amount of credit to be provided, its terms, the maximum amount of interest and other charges to be paid in respect of the credit. Where the finance broker fails to comply with this requirement, the clause provides substantial penalties.

Subclauses (2), (3) and (4) provide for penalties where:

- a finance broker demands, receives or accepts a commission in excess of the maximum prescribed by regulations;
- a finance broker demands, receives or accepts any commission before actually securing credit for the client;
- a finance broker demands, receives or accepts a commission where the credit secured does not meet the particulars and terms of the written agreement signed by the client.

Subclause (5) gives power to the Court to order the finance broker to refund to the client any commission received in breach of this clause.

Valuation fees

Under **clause 35**, a finance broker can still receive a commission for valuing security offered by a client in respect of proposed credit as long as the valuation does not exceed the maximum prescribed in regulations and is held in trust by the finance broker.

False statements about credit provision

Clause 36 prohibits a finance broker from knowingly making a false or misleading statement to induce or attempt to induce a person to enter into a credit contract. In this clause, the concept of a false and misleading statement has been widened to include statements knowingly made by a finance broker who had no reasonable grounds to believe that their statement was true or accurate, or where the finance broker omitted from a statement material matters, except where the finance broker reasonably believed that the omission would not make the statement false or misleading

Proof of finance broking offences

Under this clause, a finance broker cannot be convicted of an offence under Division 2 of Part III unless it is proved that:

- the finance broker knew or had reasonable cause to suspect that the

- transaction was to involve consumer credit in whole or in part; or
- if the finance broker had made reasonable inquiries, the finance broker would have known or had reasonable cause to suspect that the transaction was to involve consumer credit in whole or in part;

PART IV - CREDIT TRIBUNAL

Division 1 - Establishment, functions and powers

Continuation of Tribunal

Clause 59 provides for the continuation of the ACT Credit Tribunal (“the Tribunal”) currently existing under the *Credit Act*.

Functions and powers

Clause 60 states that the Tribunal has the functions and powers that are conferred upon it by the consumer credit legislation. This clause ensures that the Tribunal can exercise all the powers conferred upon it by the consumer credit legislation. Consumer credit legislation, as explained above, is a defined term which constitutes all legislation relevant to the new scheme established under the Code.

Current functions and powers include re-opening credit contracts, conducting inquiries into important credit issues on behalf of the Minister and hearing disputed accounts between debtors and credit providers.

Division 2 - Tribunal membership

Membership

Clause 61 states that the Tribunal shall consist of a Chairperson, a person who represents the interests of credit providers and finance brokers, and a person who represents the interests of people who obtain consumer credit from credit providers and finance brokers. However, **clause 70** provides that all of the members of the Tribunal need not necessarily sit at a proceeding.

Terms of appointment, Remuneration and allowances, Leave of absence and Resignation

Clauses 62, 63, 64 and 65 are standard clauses for Tribunals in ACT legislation and they deal respectively with:

- a Tribunal member’s terms of appointment;
- remuneration and allowances for members of the Tribunal;
- grant of leave to a member or an acting member of the Tribunal; and

- resignation of members

Together with **clause 66** and the *Statutory Appointments Act 1994*, these clauses ensure the independence of the Tribunal by such mechanisms as appointment for a fixed period, see: **subclause 62(1)(c)**; eligibility for re-appointment and independent determination of a member's remuneration and allowances by the Remuneration Tribunal, see: **clause 63**

Termination of appointment

Under **clause 66**, the Minister may terminate the appointment of a member for misbehaviour, physical or mental incapacity, see **subclause 66(1)**. However, under **subclause 66(2)** the Minister must terminate the appointment of a member if:

- the member becomes bankrupt or takes the benefit of any law for the relief of bankrupt or insolvent debtors;
- compounds with creditors or makes an assignment of his or her remuneration for the benefit of creditors;
- is convicted of an offence punishable by imprisonment for one year or longer;
- is unreasonably absent from proceedings of the Tribunal; or
- ceases to have the qualifications described in **clause 61**.

This clause ensures that a Tribunal member cannot be arbitrarily removed from office, once appointed. A member can only be removed for certain specified reasons. This strengthens the independence of the Tribunal.

Acting appointments

This clause allows the Minister to appoint acting members to fill vacancies in the Tribunal. However, **subclauses (2) and (3)** impose two conditions upon an acting appointment which include that:

- an acting member can not act continuously, in place of a member of the Tribunal for more than 12 months; and
- a person can not be appointed an acting member unless he or she is eligible to be appointed as a member under **clause 61**.

Subclause (4) is a saving provision that validates anything done by or in relation to an acting member notwithstanding the fact that the appointment was ineffective or had ceased to have effect or the occasion to act had not arisen or had ceased.

Division 3—Registrar and Deputy Registrar

Registrar and Deputy Registrar

Clauses 68 and 69 provide for the Office of Registrar and Deputy Registrar and confer upon the office respective powers. Under the clauses, both offices are staffed by public servants who perform registry functions for the Tribunal.

Division 4—Proceedings

Constitution of Tribunal

Clause 70 deals with the constitution of the Tribunal in proceedings. Under subclause 70(1), the Tribunal would normally be constituted by the Chairperson and two other members for a proceeding. However, subclause 70(3) lists a number of exceptions to this general rule and allows the Chairperson to sit alone where:

- there is only one party to the proceeding and the Chairperson considers it unlikely that the proceeding will involve any other parties;
- where all parties to a proceeding agree to the Tribunal being constituted by the Chairperson alone; or
- where the proceeding is in a prescribed class of proceedings.

There is currently no class of prescribed proceedings under the *Credit Act* or the Code, however, power is vested in the Executive under clause 140 to prescribe such a class of proceedings. Conceivably, certain types of proceedings can appropriately be heard in this manner with benefits in expedition, costs and efficiency.

Arrangement of business

Subject to clause 70, under clause 71 the Chairperson may arrange the business of the Tribunal and decide which members shall constitute the Tribunal for the purposes of a particular proceeding.

Presiding member

Clause 72 states that a Chairperson shall preside at a proceeding.

Procedure

Clause 73 enables the Tribunal to determine the procedure to be followed in a proceeding. The Tribunal is not bound by the rules of evidence unlike a Court. This allows the Tribunal to operate in a less formal and technical manner which is a requirement of this clause. However, although not bound by the rules of evidence, the Tribunal must follow the

rules of natural justice. Natural justice requires that the parties be given a chance to be heard and that the Tribunal exercises its powers without bias.

Directions by Chairperson

Clause 74 enables the Chairperson to give directions as to procedure to reduce the cost of parties to the proceeding and to achieve a prompt hearing of matters in issue between the parties.

Assistance from Director

Clause 75 allows the Chairperson to request a report or assistance from the Director in relation to a proceeding before the Tribunal.

Determination of questions

Clause 76 enables the Chairperson to determine questions of law and states that where members are divided on a question, the question will be determined according to the opinion of the majority.

Reference of questions of law to Supreme Court

Clause 77 enables the Chairperson, on request by a party to a proceeding, to refer a question of law to the Supreme Court. The clause also prevents the Tribunal from making a decision to which the question is relevant while the Supreme Court is making its decision. It also prevents the Tribunal from making a decision that is inconsistent with the Supreme Court's decision once it has been made.

Joint liability

Clause 78 deals with the joint liability of parties. Joint liability and several liability are technical legal concepts. Where parties are jointly liable the common law requires that all the joint parties be joined to the proceeding and that if judgment is given against one party then no further action can be taken against the other joint party or parties.

So that proceedings can be conducted informally and with as little technicality as possible, this clause provides that where parties are jointly liable not all parties have to be joined to the proceeding. Also, the liability of the party who is not joined is not discharged. To ensure that there is fairness between the joint parties, a party who is joined to the proceeding may recover a contribution from a party who is not joined.

Legal personal representatives

Clause 79 enables a legal personal representative to bring or defend a proceeding in the Tribunal as if he or she was the person being represented.

Adding parties

Clause 80 enables the Chairperson to join a person to the proceeding if the Chairperson is of the opinion that the person ought to be a party to the proceeding. The clause also enables the Tribunal, on application by a person whose interest may be affected by a proceeding, to join that person to the proceeding.

Notice of proceeding

Clause 81 requires the Chairperson to fix a time and place for a proceeding and give notice of it.

Appearance and representation

Clause 82 allows a party to represent himself or herself. Alternatively, a party may be represented by a legal practitioner except where the regulations prescribe that the party may only be represented by a legal practitioner with the permission of the Tribunal. If the Tribunal agrees, a person may be represented by a person who is not a legal practitioner but that person may not charge any fee for representing the party.

Failure to appear

Clause 83 enables the Tribunal to conduct proceedings in a party's absence if the party who failed to appear was served with a notice of proceedings pursuant to **clause 81**.

Hearings

Under **clause 84** proceedings are generally in public. However, where because of the confidential nature of the subject matter or evidence or for any other reason the Tribunal believes it is desirable to hear the matter in private or prohibit or restrict disclosure of evidence, the Tribunal may order that the proceeding be in private or that particular evidence or a submission should not be publicly disclosed. Failure to comply with the direction is an offence.

Summoning witnesses

Clause 85 deals with the summoning of witnesses. Under the clause the Registrar is empowered to summon witnesses where directed or requested to do so by either the Chairperson or a party to the proceeding. Further, the clause requires a person who is summoned to produce a record, to produce that record in the English language and in a form decipherable on sight, if the record is not in writing or is not in the English language or is not decipherable on sight. Also, the clause deals with the penalty for failing to comply with a summons and the fees and allowances payable to

a witness and the payment of a witness's reasonable costs and expenses of attendance.

This clause is slightly different to the previous law. Previously, a summons did not have effect unless it was accompanied by attendance money. Earlier this year, the *Magistrates Court Act 1931* was amended to simply require that witnesses be given a form on which to claim their expenses and the failure to provide such a form did not entitle the person to refuse to comply with a summons. This clause implements the new standard procedure.

Taking of evidence

Clause 86 enables the Tribunal to take evidence on oath or affirmation and empowers the Chairperson to require a witness at a hearing to take an oath or an affirmation and administer an oath or affirmation. The clause empowers the Chairperson to require a witness to answer a question put to him or her or to produce a document or any other thing relevant to the hearing. The clause also deals with the penalty for failing or refusing to take an oath or make an affirmation or give evidence.

Inspection and retention of documents and things

Clause 87 empowers the Tribunal or a member of the Tribunal to inspect and retain documents and things. Where the Tribunal or a member retains a document, the clause entitles the person who is otherwise entitled to possess that document, to be supplied with a copy certified by a member of the Tribunal to be a true copy and until a certified copy is supplied the person is permitted to inspect, make copies of and take extracts from the document. The clause also empowers the Registrar to return retained documents and things.

Adjournments and stays

Clause 88 empowers the Tribunal to adjourn or stay a proceeding.

Dismissal of proceedings

Clause 89 empowers the Tribunal to dismiss a proceeding.

Costs

Clause 90 empowers the Tribunal to award costs.

Orders for payment of money

Under **clause 91** an order of the Tribunal can be filed in a court and then it is deemed to be a judgement of the court. This allows an order of the

Tribunal to be enforced as if it were a judgement of the court, eg., property seized and sold to recover the amount of the order.

Reasons for decisions of the Tribunal

Under clause 92 the Tribunal is required to serve a copy of its decision on each party. If reasons are not given with the decision a party has 28 days to apply for a statement of reasons. A statement of reasons is required to set out the material questions of fact referring to the evidence or other material that is the basis for those findings.

Division 5—Appeals to Supreme Court

Decisions of the Tribunal

Clause 93 provides for appeal to the Supreme Court from a decision of the Tribunal by providing that appeal procedures currently in Part XIXA of the *Magistrates Court (Civil Jurisdiction) Act 1982* apply to a decision of the Tribunal. This clause means that the same procedures for appealing from a Magistrates Court's decision apply to an appeal from the Tribunal, including seeking leave to appeal, filing notices and the powers of Supreme Court on appeal.

Decisions of the Magistrates Court

Clause 94 provides for appeal to the Supreme Court from a decision of the Magistrates Court made under the consumer credit legislation. Although the Tribunal has general jurisdiction under consumer credit legislation there are circumstances where the Magistrates Court can hear a matter under that legislation. In those circumstances appeal can be made from the Magistrates Court to the Supreme Court.

Jurisdiction of Supreme Court

Clause 95 empowers the Supreme Court to hear and determine an appeal under the Division.

Division 6—General

Contempt

Clause 96 sets out the penalty for obstructing or hindering the Tribunal or a member of the Tribunal in the performance of his or her functions or for disrupting a proceeding. This clause will also cover actions that would constitute contempt under the *Credit Act*.

Protection of members etc

Clause 97 provides for the protection and immunity of members in performing their functions, for the protection and immunity of legal practitioners appearing before the Tribunal, and for the protection and liabilities of witnesses appearing before the Tribunal.

Fees payable to Registrar

Clause 98 provides that a fee determined by the Minister under clause 139 is payable to the Registrar in respect of a proceeding

PART V—INQUIRIES

General Outline and Background

In addition to the general function of hearing disputes, the Tribunal or others may be appointed to inquire into a credit issue. It is expected that this Part would be used when there is a matter of public importance or concern facing the credit industry. This Part generally provides that the procedure in the *Inquiries Act 1991* will be followed.

Minister may order inquiry

Clause 99 provides that the Minister may appoint the Tribunal or any person to inquire into matters relating to the provision of credit or the consequences of the provision of credit.

Notice of inquiry

Clause 100 requires the Tribunal or the person appointed to conduct an Inquiry to give public notice of the Inquiry before commencing the Inquiry.

Application of *Inquiries Act 1991*

Clause 101 provides that Inquiries under this Part follow the same general procedure and attract the same protection as an Inquiry under the *Inquiries Act 1991*. Parts III and IV of the *Inquiries Act 1991* (with the exception of sections 14 and 14A) and sections 38 and 39 will apply to Inquiries under this Bill. Those Parts and sections provide for procedures and protections such as:

- the Tribunal (or other person) determines the procedure of the Inquiry;
- legal counsel may be appointed to assist the Inquiry;
- the Tribunal or other person has the same protections and immunities as a Judge when conducting the Inquiry;

- the Inquirer is not bound by the rules of evidence;
- provision for search warrants;
- conduct of hearings and powers to summons witnesses;
- offences, such as giving false evidence and failing to attend as a witness;
- qualified privilege for the publication of a fair and accurate report of the Inquiry; and
- reimbursement of expenses of witnesses.

Summons—indecipherable records

Clause 102 requires that a person who is summoned in the course of an Inquiry to produce a record, must produce that record in the English language in a form decipherable on sight, if the record is not in writing or is not in the English language or is not decipherable on sight.

Findings and recommendations

Clause 103 requires the Tribunal or the person conducting the Inquiry to make a written report to the Minister, with such recommendations as the Tribunal or the person thinks fit, as soon as practicable.

PART VI—UNJUST CONDUCT

General Outline

Part VI provides a central mechanism by which the Director can control the behaviour of credit and finance brokers in the consumer credit market. In addition to penalties as listed throughout the Bill, under this Part, unjust conduct can be made the subject of an undertaking or an order of the Tribunal.

Undertakings

Under clause 104 the Director with the consent of the Minister is able to:

- request a credit provider or finance broker to give certain undertakings about its conduct; or
- apply to the Tribunal under clause 106.

The undertaking could be to change conduct or to refrain from doing something that is leading to injustices or to rectify some problem. Where an undertaking is breached there are penalties but the Director is prevented from taking disciplinary action under clauses 23 and 54 and taking out an order under clause 106 in respect of conduct which accords with an undertaking.

Registration of undertakings

Under **clause 105** the Director must keep a register of undertakings and give a copy of an undertaking to the credit provider or finance broker giving the undertaking **and** the Registrar of the Credit Tribunal

Orders by the Tribunal

Under **clause 106** the Tribunal can order a person to refrain from certain conduct or to comply with an undertaking, where it is satisfied that:

- the person has engaged in unjust conduct as a credit provider or finance broker;
- the person has contravened an undertaking under **clause 105**;
- the person, who is an influential person in a body corporate, has consented to or conspired to commit unjust conduct.

Under the clause the Tribunal cannot make an order unless the order is applied for by the Director.

Contravention of orders

Clause 107 sets out penalties for contravening an order made by the Tribunal under **clause 106**.

PART VII - ROLE OF DIRECTOR OF CONSUMER AFFAIRS

Division 1 - Functions and powers

Functions

Clause 108 confers additional functions on the Director other than those already conferred under the consumer credit legislation. These additional functions include the investigation of consumer credit complaints by credit providers, debtors and others who have an apparent interest in the complaint; the initiation of own motion investigations and research; consultation with equivalent State & Territory Directors; the initiation of proceedings for consumer credit offences; and, general administrative assistance to the Chairperson or the Registrar.

Powers

Clause 109 confers on the Director powers to do all things necessary to fulfil his or her functions under the consumer credit legislation.

Division 2 - Functions of Director in relation to proceedings

Representing other persons before Tribunal

Clause 110 provides that the Director can be represented by a legal practitioner or another person in a proceeding before the Tribunal.

Taking or defending proceedings for other persons

Clause 111 provides that the Director can take or defend proceedings on behalf of a person or a strata corporation under the Code with the written consent of the complainant and the Minister. The Director must be satisfied that the complainant has a right to take such action and it is in the public interest to do so.

Conduct of proceedings so taken or defended

Clause 112 provides that where the Director has initiated proceedings under **clause 111** the Director shall take over the conduct of the proceedings on behalf of the complainant and may give effect to an order or decision of the Court or Tribunal.

The complaint is not liable to pay legal costs but is liable to pay any other any other amount ordered by the Court or Tribunal.

Intervention by Minister or Director

Clause 113 empowers the Minister or the Director to intervene in any proceedings arising under the consumer credit legislation before a Court or the Tribunal where the Minister or Director thinks it is in the public interest to do so. The Director, however, may only intervene with the Minister's consent.

Presumption that Minister has consented

Clause 114 establishes a presumption that the Minister has given consent for the Director to take or defend proceedings on behalf of a complainant or intervene in proceedings, unless the contrary is proved.

Investigation of certain applications to Tribunal

Clause 115 refers to applications under section 86 of the *Credit Act* and section 101 of the Code. These sections deal with the imposition or variation of penalties. Before these types of applications are heard the Chairperson of the Tribunal can request the Director to investigate the application and the Director must report on the findings.

Division 3 - Powers in relation to investigations

Investigating officers

Clause 116 sets out formal requirements that the Director must comply with if authorising Bureau officers to conduct investigations.

Powers of entry and inspection

Clause 117 confers on investigating officers certain powers of entry onto non-residential premises and powers relating to the production of records and provision of information for the purpose of ensuring compliance with the consumer credit legislation. The clause prohibits an investigating officer from remaining on the premises if the investigating officer does not produce sufficient identification.

Consent to entry

Clause 118 places certain obligations on an investigating officer to comply with prior to entering premises. For example, the investigating officer must produce relevant identification in accordance with **subclause (3)** and advise the person of their right to refuse entry. **Subclauses (2) and (3)** operate to ensure that a person giving consent to enter premises is fully aware of their rights to refuse entry. If these statutory obligations are not met, the Court will assume that consent was not voluntary, unless the contrary is proved.

Search Warrants

Clause 119 deals with the procedure for obtaining a search warrant from a Magistrate and sets out certain criteria which must be satisfied prior to the issuing of a warrant and specifies the particulars to be stated in a warrant.

Power to obtain information or documents

Clause 120 confers powers on an investigating officer to obtain information or documents by written notice and sets out certain rights and obligations of the person required to provide the information or documents.

Retaining and copying documents produced

Clause 121 authorises an investigating officer to take possession of, retain and copy documents

Obstructing etc. investigating officers

Clause 122 operates to ensure that investigating officers are not prevented from exercising their powers and makes it an offence for a person, without reasonable excuse, to obstruct or hinder an investigating officer in the exercise of his or her powers, or to fail to comply with a requirement.

PART VIII—FINANCIAL COUNSELLING TRUST FUND

Continuation of Fund

Clause 123 carries forward the Credit Tribunal presently existing under the *Credit Act* and continues its existence under this Act.

Payments to Fund

Under **clause 124** the following moneys must be paid into the Financial Counselling Trust Fund:

- public money appropriated by an Act of the Assembly for the purposes of the Fund;
- penalties paid under section 106 of the Code;
- amounts that a credit provider or finance broker has agreed or undertaken to pay to the Fund;
- amounts paid to the Territory in respect of continuing or recently finished proceedings under section 85AA of the *Credit Act*;
- interest received on the investment of moneys of the Fund.

Payments from Fund

Under **clause 125** moneys in the Financial Counselling Trust Fund can be used for the following purposes:

- consumer credit counselling;
- credit and debt management education;
- consumer credit research;
- consumer credit litigation; and
- any other credit related activity determined by the Minister.

Bank account

Clause 126 is an administrative clause which requires all moneys received by the Financial Counselling Trust Fund to be paid into a bank account maintained under section 51 of the *Financial Management Act 1996*.

PART IX—MISCELLANEOUS

Division I—Review by Credit Tribunal

Review of decisions—credit providers

Clause 127 provides a mechanism to review decisions of the Director concerning credit providers. Decisions of the Director are subject to a final review by an independent arbiter - the Tribunal. Decisions that can be reviewed are decisions to:

- cancel the registration of a credit provider; [paragraphs (a) and (c)]
- suspend the registration of a credit provider; [paragraphs (b) and (d)]
- disqualify a credit provider from obtaining registration as a credit provider or finance broker for a specified period; [paragraph (e)]
- remove the suspension of a credit provider; [paragraph (f)]
- revoke the disqualification of a credit provider; [paragraph (g)]
- take disciplinary action against a credit provider; [paragraph (h)]
- disqualify a defined influential person from obtaining registration as a credit provider or finance broker for a specified period; [paragraph (j)] ,
or
- not take disciplinary action against a credit provider after inviting the credit provider to show cause why such action should not be taken.
[paragraph (k)]

Review of decisions—finance brokers

Clause 128, like **clause 127**, provides a mechanism for people to have decisions of the Director reviewed by the Tribunal. This clause deals with decisions concerning finance brokers. Decisions that can be reviewed are decisions to:

- cancel the registration of a finance broker; [paragraphs (a) and (c)]
- suspend the registration of a finance broker; [paragraphs (b) and (d)]
- disqualify a finance broker from obtaining registration as a credit provider or finance broker for a specified period; [paragraph (e)]
- remove the suspension of a finance broker; [paragraph (f)]
- revoke the disqualification of a finance broker; [paragraph (g)]
- take disciplinary action against a finance broker; [paragraph (h)]
- disqualify a defined influential person from obtaining registration as a credit provider or finance broker for a specified period; [paragraph (j)]; or

- not take disciplinary action against a finance broker after inviting the credit provider to show cause why such action should not be taken.
[paragraph (k)]

Notification of decisions

To ensure that the Tribunal has the necessary information to review decisions of the Director, the Director is required to give reasons for making a decision that can be reviewed. Under clause 129, the Director must provide a notice setting out reasons for the decision within 28 days of making the decision. The reasons must set out the Director's findings on material questions of fact and refer to evidence or material on which those findings were based. In addition, the notice must include a statement to the effect that an application can be made to the Tribunal within 28 days after the date of the notice for a review of the decision. This ensures that those affected by the decision are made aware of their rights.

Application for review

Clause 130 sets out the time limits for applying to the Tribunal for a review of a decision. Generally, a person wanting to have a decision reviewed must apply to the Tribunal within 28 days of receiving the notice.

The Tribunal does, however, have power to extend the time for making an application. It is anticipated that the power to extend would be used to ensure that the interests of justice are served.

Review by Tribunal

Clause 131 vests power to review decisions in the Tribunal. When reviewing a decision, the Tribunal is not limited to traditional legal grounds of administrative review. The Tribunal has all the powers the Director has in relation to the making of the decision and may either, affirm the decision, vary it or set it aside. If the decision is set aside, the Tribunal may substitute its own decision or refer the matter back to the Director for reconsideration in accordance with the Tribunal's directions.

Operation and implementation of decision to be reviewed

Clause 132 provides that a decision of the Director continues to have effect, even though an application for review may be made. There is no automatic stay of a decision just because an application for review is made. However, on written application, the Tribunal has power to stay or otherwise affect the decision. The Tribunal must believe that such action is desirable taking into account the interests of any person affected by the review, or that it is appropriate to secure the effectiveness of the hearing and determination of the review.

Where an order to stay, or to otherwise affect the decision of the Director is made by the Tribunal, that order is subject to the conditions specified in the order and may be varied or revoked at a later time by the Tribunal. The order has effect until any period specified in the order is revoked or the review of the Tribunal becomes operative, whichever occurs first

Before making an order under this clause, the Tribunal must give reasonable opportunity to each party to the proceeding to make submissions.

Division 2—General

Secrecy

The main aim of **clause 133** is to prohibit persons who receive information or documents about other persons during the course of administering consumer credit legislation or from the Director, from:

- making a record of such information;
- directly or indirectly divulging such information; or
- giving such documents to another person,

unless he or she has the consent of the person or is divulging such information to a court for the purposes of a civil or criminal proceeding.

Limitation on prosecution

Under **clause 134** proceedings in respect of an offence under this Act or the *Credit Act* must be initiated within three years of its commission. Proceedings, however, outside this period can be initiated with the consent of the Minister.

Conduct of agents

Under **clause 135** conduct of agents, officers and employees acting within their actual or apparent authority will be taken to be the conduct of the credit provider or finance broker for whom the agent, officer or employee is working.

Extensions of time

Under **clause 136** the Tribunal, Director or Registrar will be able to extend a period in this Act or the *Credit Act*, despite the period having lapsed.

For example: under **clause 130** a person who is aggrieved by a Director's decision to cancel his or her registration as a credit provider can apply within 28 days to the Credit Tribunal to have the Director's decision reviewed

In this example, if the person is outside the 28 day period, the Tribunal will have the power under this clause to extend that 28 day period to allow the person aggrieved to make his or her application.

Registration—evidence

Clause 137 provides for a certificate of registration purporting to be signed by the Director to be evidence of the registration of the credit provider or finance broker referred to in the certificate.

Compliance with approved forms

Clause 138 provides that substantial compliance with approved forms or such compliance as circumstances allow is sufficient, and that strict compliance with these forms is not necessary.

Power of Minister to determine fees and Regulations

Clauses 139 and clause 140 are general administrative clauses giving the Minister the power to set fees for various administrative procedures under this Act and allowing the Executive to make regulations.