

## New Credit Laws Expected By June 1992

**New laws regulating credit arrangements are in draft form. The Credit Bill 1991 is intended when enacted to replace individual State and Territory credit legislation. This article examines the scope of the new laws, the exclusions, disclosures and other important features.**

The Standing Committee of Consumer Affairs Ministers of all States, Territories and the Commonwealth of Australia (SCOCAM) has resolved to replace existing state and territory legislation regulating the provision of credit. The Credit Bill is intended principally to replace the current uniform Credit Acts of New South Wales, Victoria, Western Australia, Queensland and the Australian Capital Territory (collectively the Credit Act) as well as the Consumer Credit Act (1972) and the Consumer Transactions Act (1972) of South Australia.

The Bill represents a significant departure from the current Credit Act in terms of simpler drafting and extended application. The extent of its application will ultimately depend upon the regulations accompanying the Bill. It appears that the regulations will contain much of the detail required for the Bill's successful operation. Draft regulations should be available by late January 1992.

Submissions from interested parties suggesting amendments to the Bill may be made to SCOCAM until 29 November 1991. Ministers intend to introduce the Bill into each state and territory legislature in the autumn session of 1992 with a view to enactment by 30 June 1992.

### What is a credit contract?

A credit contract is defined in the Bill as one under which credit is provided.

Credit is defined broadly in the context of the provision of a benefit. Where a benefit of a commercial value is provided on terms where a debtor is required to pay for or repay the benefit later or where the debtor provides a negotiable instrument providing for payment at a later date in consideration of the benefit, there is the provision of credit. Credit is also to include a benefit consisting of a right to use goods. Postponement of the time for payment of a debt by a debtor will constitute a benefit.

The following are illustrations of credit contracts:

- overdrafts;
- loans of money;
- goods leases;
- housing loans;
- credit card contracts;
- multiple advance contracts;
- hire purchase contracts;
- sale of land or goods by instalment.

### Types of credit contract to which the Bill applies

A credit contract will be regulated by the Bill where a creditor, in the course of or incidentally to its business, provides credit to a natural person or a strata corporation, wholly or predominantly for private purposes and the

creditor imposes a charge for providing that credit.

A credit contract will be deemed by the Bill to be wholly or predominantly for private purposes unless either it is clear from the terms of the credit contract that this is not the case or the debtor provides the creditor with a declaration stating that this is not the case. If the creditor knows or ought to know that the declaration is false, the declaration is of no effect.

The Bill also applies to "securities" (mortgages or guarantees) which guarantee or secure obligations under a credit contract to which the Bill applies and where the guarantor or mortgagor is a natural person or a strata corporation.

Unlike the Credit Act, the Bill offers no special status to transactions involving agricultural machinery and commercial vehicles.

### Limited exclusions to the new legislation

Unless further exemptions are provided by the regulations, the only exclusions to the application of the Bill are where:

- the credit is provided without prior arrangement;
- the credit is provided for a period of less than 30 days;
- the credit is a goods lease either for a fixed period of four months or less, or for an indeterminate period not contemplated to be greater than four months;
- the credit is provided by a pawnbroker in the ordinary course of the pawnbroker's business;
- the credit is provided by the trustee of a deceased estate to a beneficiary or prospective beneficiary of that estate.

Unlike the Credit Act, there are no exclusions provided for housing loans, overdrafts, loans to employees, term loans by banks and credit transactions entered into by co-operative societies, permanent building societies or credit unions. Also, a credit contract to which the Bill applies will not be excluded from its application merely because the amount of credit to be provided exceeds a ceiling limit (such as the present limit of \$20,000 applying in NSW), unless the regulations provide a limit. Similarly, unless the regulations otherwise provide, credit contracts to which the Bill applies will not be excluded because the interest rate charged on the credit provided is below a certain threshold rate (such as the present limit of 14% in NSW).

### Substantial disclosures required

The disclosures to be made in credit contracts are substantial. A credit contract must include the following information:

- the creditor's name and place of business;
- if ascertainable, the amount of credit to be provided;
- the limit on the amount of credit to be provided (if any);
- the cash price and a description of the goods to be provided under a sale of goods by instalment and goods lease credit contract;
- the comparison rate;
- a method of calculating interest charges payable under the credit contract;
- if ascertainable, the total interest charge payable by a debtor;
- if the interest rate payable under a credit contract is liable to be varied, the basis on which the variation will be made;
- where repayments are to be made by instalments the basis for their calculation, when and where they are to be paid and if ascertainable, the number of instalments;
- a statement of establishment charges (or method of calculation);
- a statement of permissible incidental charges (or method of calculation);
- when and for what periods statements of account will be provided;
- an outline of enforcement expenses;
- if an early termination fee is payable under a housing loan contract, the amount of the fee;
- details of security to be taken by a creditor;
- if a commission is to be paid by or to a creditor in connection with a credit contract, who are the payer and the payee, and what will be the amount of the commission;
- if there is to be a related insurance contract, the name of the insurer, the amount of the premium, the risks covered by the insurance, the nature of the creditor's interest in the insurance (if any) and the amount of any commission to be paid by the insurer;
- any information required by the regulations.

### Other notable features in the Bill

Many aspects of the new legislation require consideration:

- Licensing of creditors will not be required. It is not clear what is to be done to exclude persons refused a licence or whose licence has been withdrawn under the Credit Act as the Bill contains no transitional provisions. The Bill as presently drafted provides no method by which a person or entity can be precluded from providing credit to individuals or strata corporations for private purposes.
- The Crown will be bound.
- Pre-contractual conduct is tightened up particularly in respect of advertising and unfair conduct. Although the provisions of the Bill focus upon credit contracts the provisions regulating advertising and unfair conduct refer to credit and are not limited to credit contracts. There is a possibility therefore that these provisions will apply to all creditors.
- Unlike the Credit Act, advertisements containing a reference to the cost of credit must contain examples of hypothetical credit transactions and the comparison rate (see below). Again, probably through a drafting error, the provisions apply to advertisements for credit, not just credit to be provided under regulated credit contracts.
- It is no longer necessary to charge interest at a fixed rate. Interest may be calculated in any way by a creditor but the amount actually charged must not exceed that amount calculated in accordance with the method provided in the Bill.
- A "comparison rate" must be included in all credit contracts. The comparison rate will serve the same function as the annual percentage rate under the Credit Act, namely, to provide a comparative indicator of the cost of credit between a range of credit products. However, unlike the Credit Act, the Bill provides a standard formula for its calculation. The formula is of a compounding character and takes into account the time cost of money. The comparison rate calculated pursuant to the formula is therefore closer to the "effective" rate of interest to be charged under a credit contract than is the annual percentage rate under the Credit Act.
- Certain fees are prohibited such as pre-contractual charges other than an "establishment charge" which is defined to include charges for assessing creditworthiness and preparing contracts. Certain other charges will be regulated. Again, surely unintentionally, these provisions regulate all applications for credit, not just credit to be provided under credit contracts.
- Credit contracts are required to be easily legible, have print of a certain size and to be expressed in plain English. Ambiguities in credit contracts will be resolved against the creditor. Provision is made for the Commissioner of Consumer Affairs to publish suggested models on which credit contracts, securities and other documents to which the Bill relates, may be based. To the extent these documents conform with the suggested models they cannot be called into question on the grounds of form, legibility or comprehensibility.

- Although the Bill applies to housing loan contracts certain concessions are made in respect of them, namely, a default rate of interest may be charged on an amount in default, prepayment fees may be charged and there is some protection afforded against forfeiture of interest charges.
- A creditor failing to comply with certain pre-contractual disclosure requirements and the requirements as to formation of credit contracts is liable to have the right to any interest charge under a credit contract forfeited automatically. The Bill also provides scope for the remission of any interest charge to be ordered by the Commercial Tribunal where certain other pre-contractual disclosure requirements and requirements as to statements of account are not complied with by a creditor.
- The mechanism for applying for reinstatement of forfeited interest charges is slightly easier than at present.
- The defences against liability of credit providers in "linked" transactions will not be as easy to establish as at present.
- Creditors will now be able to assign their rights under a credit contract or related security (for example, on the sale of a business) to non-licensed credit providers and without the consent of any regulatory body.
- The Bill limits the commission which a creditor or linked supplier or both may charge for arranging insurance on behalf of a debtor or guarantor to 20% of the initial premium.
- The Bill contains extensive provisions relating to the manner in which credit contracts may be varied. Unilateral variations by creditors, variations of interest charges and variations requested by debtors and guarantors on the grounds of hardship or injustice are specifically dealt with.

### Conclusion

The relative simplicity and brevity of the Bill is to be welcomed. In some cases, however, certainty has been sacrificed for plain English and the Bill has been given a much wider operation than necessary.

There are also some provisions which are unduly onerous on providers of credit. Businesses providing credit will be rewarded by paying close attention to the Bill.

- **Reprinted with permission from Commercial Headlines, a news sheet from The Australian Legal Group.**