

CONSUMER CREDIT (QUEENSLAND) AMENDMENT BILL 1998

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The objectives of this Bill are to amend the *Consumer Credit (Queensland) Act 1994* in order to make changes to the Consumer Credit Code (the Code). The amendments are intended to improve the operation of the Code.

The Code was enacted as an Appendix to the *Consumer Credit (Queensland) Act 1994*. The principal objective of the Code is to ensure that borrowers and guarantors are provided with adequate information at all stages of consumer credit transactions to enable them to make informed choices and decisions.

The Code also provides significant redress mechanisms for borrowers and guarantors in the event that credit providers fail to comply with the requirements of the Code.

Reasons for the objectives and how they will be achieved

The Code became effective nationally on 1 November 1996. Before the legislation could be proclaimed, a number of special transitional regulations had to be made to overcome serious practical problems which had not been detected in the consultation processes prior to the passage of the legislation.

These regulations were made under section 11 of the *Consumer Credit (Queensland) Act 1994*. That section enables the making of regulations of a savings or transitional nature that can override the Code itself. However because of limits to the special regulation making power, the regulations had to be given a limited operational life. They are currently due to expire on 1 November 1998.

One of the principal purposes of the Bill is to insert into the Code

provisions to replace the special transitional regulations. On each occasion that this occurs throughout the Bill, this memorandum will identify the regulation concerned. In some cases the wording of the new provision in the Bill differs from that of the regulation which it replaces. In the majority of instances this is attributable either to the provision now being contained in a Bill rather than in the *Consumer Credit Regulation 1995* (the Regulation) or to a change in drafting style, and no change in meaning is intended. In the few cases where the provision is not intended to replicate the effect of the regulation, this Memorandum explains what is intended.

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 will be applied as the law of Queensland by the Bill. 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 is required to any changes to the Code by the Queensland Parliament and the Council has formally approved of the changes to be made by the Bill.

Administrative cost to Government of implementation

The administrative costs of implementation of the amendments contained in the *Consumer Credit (Queensland) Amendment Bill 1998* will be negligible.

Fundamental legislative principles

The Bill contains no infringements of fundamental legislative principles.

Consultation

Draft Bills were widely circulated in 1997 and 1998 and significant

changes were made to the Bill after consideration of responses. The following organisations were consulted:

Queensland Law Society Inc and other State legal organisations

Litigation Reform Commission

Financial Counselling Services (Qld) Inc

Financial Counsellors Assoc. Qld

Other State Consumer Organisations

Australian Bankers Association

Australian Association of Permanent Building Societies

Australian Finance Conference

Credit Union Services Corporation Ltd

Mortgage Industry Association of Australia

Law Council of Australia

Australian Consumers' Association

Trustee Corporations Association of Australia

NOTES ON PROVISIONS

Short Title

Consumer Credit (Queensland) Amendment Act 1998

Clauses 1 to 3 are purely formal. Clause 1 sets out the short title, clause 2 deals with commencement of the provisions of the Act, and clause 3 states that the Act amends the Consumer Credit Code.

Clause 4 incorporates into Code section 4 the equivalents of Regulation sections 59 (1) and (3) and 70 (3). Those provisions modified the meaning of the term “amount of credit” for the purposes of the Code so that it does not include any interest charge or any fee or charge—

- that is to be or may be debited after credit is first provided under the contract; and
- that is not payable in connection with the making of the contract or the making of a mortgage or guarantee related to the contract.

Clause 5 amends Code section 7 (9) which provides that credit provided by an employer (or related corporation of the employer) to existing and former employees is exempt from some provisions of the Code. However section 7 (9) imposes a condition that where the credit provider carries on a business of providing credit, the exemption will only apply to credit provided to existing and former employees on more favourable terms than those on which credit is provided to other persons.

The condition works satisfactorily only where the business of providing credit to persons who are not existing or former employees is a business of providing credit to which the Code applies. Where the business consists of commercial credit or some other form of credit which the Code does not regulate, there may be no satisfactory basis of comparison. *Clause 5* amends section 7 (9) accordingly.

Clause 6 amends Code section 11 (3). Code section 11 (2) provides that credit will be presumed not to be provided for personal, domestic or household purposes if the debtor declares, before entering into the contract, that the credit is to be applied wholly or predominantly for business or investment purposes. In such a case the Code will not apply to the contract. However Code section 11 (3) renders such a declaration ineffective if the credit provider or any other person who obtained the declaration knows or had reason to believe that the credit was in fact intended to be applied wholly or predominantly for private, domestic or household purposes. It is now appreciated that section 11 (3) can operate unfairly where a false declaration is obtained but from a person who is not a finance broker and is entirely unconnected with the credit provider. *Clause 6* removes this anomaly.

Clause 7 amends Code section 12. Code section 12 (b) permits a contract to be in the form of a written offer by the credit provider that may be accepted by the debtor or an authorised person accessing or drawing down credit or by some other act of the debtor (but not an authorised person) that satisfies the conditions of the offer. There are some circumstances where it would be acceptable for the contract to be formed

where the “other act” is performed by the authorised person, especially as the authorised person is frequently a secondary cardholder. New section 12 (1) (b) and (2) remove that limitation.

However, at the same time, it includes new subsection (3) which ensures that the credit provider or any associate cannot ordinarily be authorised by a debtor for the purposes of section 12 (1) (b) procedures. Note however that section 12 (3) also expressly permits a debtor to authorise the credit provider to debit the debtor's account. This is a common practice where the debtor is entering into a new continuing credit contract and wishes the outstanding balance under the existing contract to be paid out and debited to the debtor's account under the new contract.

Proposed section 12 (4) is designed to confirm that where a contract consists of more than one document it is sufficient for only one to be duly signed if the other documents are referred to in the signed document.

Clause 8 amends Code section 15 which is a key provision setting out the matters which must be contained in a contract document.

Clause 8 (1) re-enacts section 15 (B) (a) in order to eliminate an ambiguity. There has been considerable debate as to whether the expression “to the extent that they are ascertainable” appearing at the end of section 15 (B) (a) applies to both the amounts and the persons referred to in (a). New 15 (B) (a) clarifies that disclosure of amounts and persons is only required where both are ascertainable.

Clause 8 (2) makes a minor drafting correction to Code section 15 (E).

Clause 8 (3) incorporates into Code section 15 (F) (a) the equivalent of Regulation sections 59 (2) and (3). Those provisions limited the requirement to disclose the total amount of repayments to a contract which, on the standard assumptions, would be paid out within seven years.

Clause 8 (3) further amends Code section 15 (F) (a) so as to remove the requirement to disclose the period over which the repayments are to be made. There have been some difficulties in determining what the expression “the period over which they are to be paid” means in cases where no repayments are required for a particular period at the commencement of the loan. It is however proposed to amend Regulation section 13 (3) so that credit providers may, if they so wish, continue to disclose the period over which the repayments are to be made.

Clause 8 (4) further amends Code section 15 (F) to ensure that the

disclosure obligations under section 15 (F) (a) do not apply to the disclosure of minimum payments under a continuing credit contract. Such minimum repayments are already required to be disclosed under clause 15 (F) (b).

Clause 8 (5) amends Code section 15 (N) which specifies what must be disclosed in the contract if the debtor is to enter into a credit-related insurance contract and the insurance is to be financed. The name of the insurer, the amount payable to the insurer and particulars of commission to be paid by the insurer are among the matters required to be disclosed. In the case of consumer credit insurance, it is common for there to be two insurers (one a life insurer and the other a general insurer), two separate premiums and possibly two separate amounts of commission. It is considered that adequate disclosure is given if the name of the general insurer and the aggregate amounts of premium and of commission, respectively, are disclosed and the amendments made by clause 8 (5) will authorise (but not require) this simpler form of disclosure.

Clause 9 incorporates into Code section 18 (3) the equivalent of Regulation section 60 (1) which relieves a credit provider from having to provide the debtor with a copy of the credit contract in the form in which it was made if the debtor has already been given such a copy. However the Regulation section 60 (1) requirement that the copy be signed by the credit provider has been deleted.

Clause 10 amends Code section 19 (1) under which a debtor may terminate a credit contract after the contract has been made unless any credit has been obtained or attempted to be obtained.

Some concern has arisen that the expression “attempted to be obtained” is imprecise thus creating uncertainty as to the extent of debtors' rights under the subsection.

Clause 10 amends the subsection so as to remove any reference to credit being “attempted to be obtained” and in lieu providing that the debtor cannot terminate the contract if a card or other means of obtaining credit provided to the debtor by the credit provider has been used to acquire goods or services for which credit is to be advanced under the contract.

Clause 11 amends Code section 21 (1) (a) . The term “fee or charge” in section 21 (1) (a) can only refer to a 'credit' fee or charge since it is only a credit fee or charge which can be prohibited under section 29 of the Code.

Clause 12 amends Code section 24. Section 24 (2) requires a credit

provider to credit each payment made as soon as practicable after receipt of the payment. However, section 24 (3) creates an exception where a payment is made under a contract before it has become payable if -

- the contract prohibits the early payment; and
- the credit provider informs the debtor before accepting the payment that the payment will not be credited until the due date.

In practice 24 (3) has proved inadequate principally because it does not contemplate payments being made electronically. Where this happens the credit provider does not know of the payment until after it has been made and thus has no opportunity to inform the debtor as required prior to accepting the payment. Clause 12 substitutes a new section 24 (3) to overcome that problem. In particular new section 24 (3) (a) contemplates the credit provider reversing the credited payment while section 24 (3) (c) contemplates the credit provider refunding the payment.

Clause 13 incorporates into Code section 25 (2) the equivalent of Regulation section 61 (1). That provision gave credit providers more flexibility in fixing when a day ends for various purposes under the contract.

Clause 14 incorporates into Code section 27 the equivalent of Regulation section 62 (1). Code section 27 is aimed generally at preventing interest being debited in advance. Regulation section 62(1) was aimed at ensuring that interest could be debited on the last day of the period to which the interest charge applies and the new section 27 (4) also reflects this purpose, provided the safeguards set out in new section 27 (4) (b) are applied.

Clause 15 amends Code section 30 (1) and (4). Some doubt has been expressed that the expression “A fee or charge payable by a debtor in respect of an amount payable by the credit provider to another person” may not be broad enough to encompass a fee or charge payable by a debtor in respect of an amount that has already been paid by the credit provider to another person.

Clause 15 (1) and (2) amend Code section 30 (1) to ensure that the subsection extends to amounts actually paid as well as those which are payable.

Clause 15 (3) simply deletes Code section 30 (4) which is considered unnecessary because the express provisions of Code section 135 make it clear that the commission described in that section may be accepted by the

parties mentioned. As the subsection is unnecessary, it has created confusion and uncertainty and accordingly it is proposed to delete it.

Clause 16 amends Code section 31 which, in general terms, provides that credit providers must issue periodic statements of account.

Section 31 (3) (b) provides that a statement of an account need not be given if no amount has been debited or credited to the account during the statement period and the outstanding balance is zero or below a prescribed level. It is now considered appropriate to extend the exception to cases where the only debits or credits in the relevant period have been government charges or duties on receipts or withdrawals (ie FID or BAD). *Clause 16* (1) so provides.

Clause 16 (2) adds a new section 31 (3) (f) so as to provide an additional exception from the obligation to issue periodic statements of account. The exception applies where the debtor has died or is insolvent and the debtor's personal representative or trustee has not requested a statement of account.

Clause 16 (3) adds to section 31 a new subsection (4) the equivalent of Regulation section 64 (1). That provision was intended to ensure that where more than one facility is provided under a credit contract, the credit provider has some flexibility in the method of issuing statements of account.

Clause 17 amends Code section 32 (I) which specifies what must be set out in a statement of account if a payment to an insurer has been made during the statement period under a credit-related insurance contract. The name of the insurer, the amount paid to the insurer and the amount of any commission must be disclosed. In the case of consumer credit insurance, it is common for there to be two insurers (one a life insurer and the other a general insurer), two separate premiums and possibly two separate amounts of commission. It is considered that adequate disclosure is given if the name of the general insurer and the aggregated amounts of premium and of commission respectively, are disclosed. The amendments made by *clause 17* will permit (but not require) this simpler disclosure.

Clauses 18 (1) and (2) incorporate into Code section 34 the equivalent of Regulation section 65(1). That provision modified the operation of Code section 34 by limiting the amount of information a credit provider must give in response to request made by the debtor under that section, to information about amounts currently overdue and payable.

Clause 18 (3) adds a new Code section 34 (3A) which provides that where a statement is requested under the section by a joint debtor or

guarantor, it is only necessary despite section 171 to give the statement to the particular debtor or guarantor who requested it.

Clause 19 amends Code section 36 which deals with disputed accounts. The general rule is that, except in the case of a continuing credit contract, the debtor must give written notice of the dispute within 30 days of receiving the statement of account in which the disputed item is first shown. That rule overlooked the fact that for some contracts (i.e. contracts for a fixed term at a fixed rate) no statements of account are required.

Clause 19 (1) amends section 36 (4) so that it will apply only to contracts for which a statement or statements are given.

Clause 19 (2) adds a new section 36 (4A) so as to provide that for a contract for which a statement of account need not be and is not given for the relevant period, the notice of dispute must be given not later than three months after the end of the contract.

Clause 20 of the Bill adds a new Code section 36A to the Code. The new section effectively incorporates the provisions of Regulation section 63. The principal purpose of that provision of the Regulation was to ensure that the Code does not prohibit the practice of “effective dating” of entries in debtors' accounts. However there is no equivalent to Regulation section 63 (4) which required details of any adjustments to be included in a statement of account.

Clause 21 amends Code section 37. The objective of that section is to provide that the provision of credit as a result of, inter alia, a deferral or waiver of an amount under an existing credit contract is not to be treated as creating a whole new contract for the purposes of the Code. There is some concern that the term “deferral or waiver” does not necessarily extend to a postponement, particularly as the term “postponement” is used extensively in Division 3 of Part 5 of the Code, *Clause 21* (1) and (2) make the appropriate amendments.

Clause 21 (3) and (4) provide that the provisions of section 37 extend to leases.

Clause 22 of the Bill incorporates into Code section 39 the equivalent of Regulation section 60 (2) which relieves a credit provider from having to give a further copy of a mortgage to the mortgagor after the mortgage has been made where a copy has previously been provided to the mortgagor.

Clause 23 amends Code section 44 which prohibits third party

mortgages being taken to secure obligations under credit contracts or guarantees. The clause adds a new section 44 (5) to ensure that for the purposes of that section a reference to a credit contract or a guarantee includes a reference to a proposed credit contract or a proposed guarantee.

Clause 24 amends Code section 51 (1) which currently requires the prospective guarantor be given a copy of the relevant contract document and the prescribed information statement before the obligations under the credit contract are secured by guarantee. As presently drafted it is arguable that the requirements of section 51 may be met where the guarantor signs the guarantee before being provided with the contract to which the guarantee relates and that where that happens the only consequence is that the guarantor's liability is postponed until the contract document and information statement are provided.

This was never the intention and the amendments to section 51 (1) ensure that the documents must be given prior to the guarantee being signed.

Clause 25 re-enacts Code section 52 so as to clarify that it is not necessary for the credit provider to:

- provide a further copy of the guarantee document if the credit provider has previously given one to the guarantor; or
- provide a further copy of the credit contract or proposed credit contract if the credit provider has previously given one to the guarantor.

Clause 26 amends Code section 53 (1) (b) by deleting the words “or pre-contractual statement”. The words are superfluous as there is no obligation under the Code for guarantors to be provided with pre-contractual statements for contracts proposed to be guaranteed.

Clause 27 amends Code section 54 (3) so as to ensure that the disclosure requirements of section 51 (as well as section 50) do not apply to an extension of a guarantee under section 54.

Clause 28 amends Code section 55. The primary rule under the section is in section 55 (1) which provides that “a guarantee is void to the extent that it secures an amount ... that exceeds the sum of the amount of the liabilities of the debtor and the reasonable expenses of enforcing the guarantee.....”.

Section 55 (2) provides that nothing in 55 (1) “prevents a credit provider

from enforcing a guarantee ... that is unenforceable solely because of the debtor's death, insolvency or incapacity or any other act or omission by, or circumstances affecting, the debtor". There is considerable debate about the meaning of the passage emphasised above. One view is that the passage has an extremely limited meaning because of the operation of the rule which, means that the other act, omission or circumstance must be similar in nature to death, insolvency or incapacity. The other view is that the passage is not so limited and that any act or omission by, or other circumstance affecting, the debtor will suffice to set aside the general limitation of liability in 55 (1) if the contract of guarantee so provides.

The latter was not the original intention. The predecessor of Code section 55 is Credit Act 1984 section 137 which limits a guarantor's liability to that of the debtor plus enforcement expenses. There was no provision granting any relief from the strict limitation on the guarantor's liability.

The intention was to provide in Code section 55 (2) for a degree of relief from the strict rule embodied in section 55 (1). In view of the confusion that now exists and in view of the fact that, assuming the rule that general matters are limited to things of the like kind to the specific matters applies, the phrase "or any other act or omission by, or circumstance affecting, the debtor" appears to have an extremely limited effect, the Bill proposes to make the position certain simply by deleting the words.

It is also proposed to make a special regulation under section 11 of the Consumer Credit (Queensland) Act 1994 to expressly save any guarantee entered into prior to the commencement of clause 28 of the Bill if the guarantee complied with section 55 (2) at the time it was entered into.

Clause 29 re-enacts Code section 56 (2).

Code section 56 (1) provides that where the terms of a credit contract are changed to increase or allow for an increase in liabilities, the liabilities of a guarantor of that contract are not increased unless—

- the credit provider gives the guarantor certain written particulars of the change in the contract; and
- the credit provider subsequently obtains from the guarantor a written acceptance of the extension of the guarantee to those increased liabilities.

Code section 56 (2) provides for a number of exceptions to the operation of 56 (1). Proposed new section 56 (2) maintains the existing exceptions

and adds several more which are set out in paragraphs (c) and (d) of the new subsection.

Clause 30 amends Code section 59 (4) so as to reduce from 30 to 20 the number of days notice required to be given of changes concerning the manner of calculating or applying interest under a credit contract. It is expected that this amendment (and the similar amendments made by clauses 31 (1), 32 and 33 (1) will facilitate the notification of changes as appropriate messages on statements of account rather than in entirely separate notices.

Clause 31 (1) amends Code section 60 (1) so as to reduce from 30 to 20 the number of days notice required to be given of certain changes affecting repayments under a contract.

Clause 31 (2) adds a new section 60 (2A) which provides that in certain circumstances a credit provider may be required only to give particulars of a change in the method of calculation of the amount, frequency or time for payment of instalments or minimum repayments.

Clause 31 (2) also adds a new section 60 (2B) which provides that section 60 will no longer apply to changes which occur while no repayments are required to be made of credit provided under the contract. The principal practical effect will be that no advance notice will have to be given of changes in payments required to be made during any period where interest only payments are required.

Clause 32 amends Code section 61 (1) so as to reduce from 30 to 20 the number of days notice required to be given of certain changes concerning credit fees and changes.

Clause 33 (1) amends Code section 63 (1) so as to reduce from 30 to 20 the number of days notice required to be given of certain unilateral changes by the credit provider.

Clause 33 (2) corrects a technical drafting problem in Code section 63 (3).

Clause 34 adds a new Code section 63 A. The new section effectively incorporates the following sections of the Regulation:

66 (1) and (2)

67 (1) and (2)

68 (1) and (2)

69 (1) and (2)

Each of those provisions modifies the amount of information a credit provider is obliged to give when notifying a change of a particular kind under a contract.

Clause 35 amends Code section 65.

Clause 35 (1) amends section 65 (1) so as to require written confirmation of certain changes made by agreement to a contract, mortgage or guarantee to be given to the other party not later than 30 days after the date of the agreement rather than within 30 days after that date.

Clause 35 (2) clarifies that section 65 (3) does not apply to an increase in the amount of credit under a continuing credit contract. This was the original intention but there has been some concern that the matter was unclear.

Clause 35 (3) adds a new subsection (5) to section 65. The new subsection is the equivalent of sub-sections (1) and (2) of Regulation section 70. Those provisions modify the amount of information a credit provider is obliged to give after the parties to a credit contract, mortgage or guarantee agree to a change.

Clause 36 (1) amends Code section 67 so as to require written confirmation of certain changes made in response to an application under section 66 to be given to the debtor and any guarantor not later than 30 days after the date of the agreement rather than within 30 days after that date.

Clause 36 (2) adds a new subsection (2) to section 67. The new subsection is the equivalent of Regulation section 71 which modifies the amount of information a credit provider is obliged to give after a change is made to a contract consequent upon an application made under Code section 66.

Clause 37 amends Code section 73 (1) and (2), each of which provides for a time limit within which applications may be brought under Division 3 of Part 4 of the Code. It provides that the relevant application may not be brought more than two years after a specified event “or the credit provider writes off the relevant debt.....” Considerable concern has been expressed about the imprecision of the term “writes off” particularly as in practice, a debt which has been written off may be brought back on to the books if the debtor's circumstances change. There is also the possibility that the debt may be regarded as written off for certain purposes only. *Clause 37* amends section 73 (1) and (2) by referring to the contract otherwise coming

to an end rather than to the writing off the debt.

Clause 38 adds new Code section 76 (4) which provides that where a request for a statement of a pay out figure is made by one of a number of joint debtors or guarantors, the statement need only be given to the particular debtor or guarantor who requested it and this particular rule will apply notwithstanding the general provision to the contrary in section 171.

Clause 39 amends Code section 78.

Clause 39 (1) amends section 78 (7) by deleting the expression “total amount payable under the contract” and substituting “amount required to pay out the contract”. The expression deleted is considered to be ambiguous as, literally, it can mean either the total amount payable under the contract disregarding any payments made or, alternatively, the total amount remaining payable at the relevant time. The amendment rectifies this ambiguity.

Clause 39 (2) amends section 78 (8) (a) to overcome a drafting problem. The provision currently fails to recognise that a mortgage might have been given by a guarantor as distinct from the debtor.

Clause 39 (3) adds a new paragraph (e) to section 78 (8) to ensure that a credit provider who has sold mortgaged goods surrendered in accordance with the section is entitled to deduct from the proceeds of sale expenses reasonably incurred in connection with the possession and sale of the mortgaged goods. The amendment recognises that such expenses may not necessarily be recoverable under paragraph (d) of section 78 (8) where the goods have been voluntarily delivered up to the credit provider at a time when the debtor was not in default under the contract.

Clause 39 (4) amends section 78 (9) to ensure that the provision will operate satisfactorily where the goods were mortgaged by a guarantor.

Clause 40 amends Code section 80.

Clause 40 (1) corrects a practical problem which arises under section 80 (3). This subsection is currently drafted in terms which assume that a default notice under either section 80 (1) or (2) will allow the debtor or mortgagor a period of exactly 30 days from the date of the notice to remedy the default. However, both section 80 (1) and (2) provide that the default notice must allow a period of at least 30 days from the date of the notice. Credit providers frequently ensure they are in compliance with those subsections by allowing more than the bare 30 days. The amendment to

section 80 (3) is intended to remedy that problem.

Clause 40 (2) adds new section 80 (3A) to clarify that default notices under 80 (1) and (2) may be combined when given to a person who is both a debtor and a mortgagor.

Clause 40 (3) makes a minor drafting clarification to section 80 (4) (c).

Clause 40 (4) amends section 80 (6) to ensure that the section is construed as being in addition to any other provision of any other law relating to the enforcement of mortgages over any kind of property rather than merely over real property. The amendment is to ensure that the Code provisions harmonise with particular property law rules of individual jurisdictions.

Clause 40 (5) further amends section 80 (6) to clarify that the section does not prevent the contemporaneous issue of a notice under another law with the issue of a Code default notice, nor the combination of such notices in the same document.

Clause 41 makes a minor drafting change to Code 86 (2).

Clause 42 amends Code section 87. Code section 86 provides that a debtor, mortgagor or guarantor who has been given a default notice or a demand for payment may apply to the credit provider for postponement of the enforcement proceedings or any action taken under such proceedings or of the operation of an acceleration clause.

Section 87 (1) then proceeds to provide that the default notice or demand for payment is to be taken not to have been given or made if -

- a postponement is negotiated with the credit provider;
- written notice of the conditions of the postponement is given to the debtor, mortgagor or guarantor; and
- the debtor, mortgagor or guarantor complies with the conditions of the postponement

It has been pointed out that where the credit provider fails to give the debtor, mortgagor or guarantor written notice of the conditions, the result may be that section 87 (1) will not operate to the intended benefit or the debtor, mortgagor or guarantor. This drafting problem is remedied by clause 42 (1) and by clause 42 (2) in so far as it adds new section 87 (3) to provide a positive requirement to give written notice of the conditions of the

postponement.

Clause 42 (2) also adds -

- a new section 87 (4) to ensure that credit providers do not have dual obligations under sections 65 and 87 in relation to a particular postponement; and
- a new section 87 (5) to clarify that where any conditions of a postponement are not complied with, the credit provider is not required to give a further default notice before proceeding with enforcement proceedings.

Clause 43 makes two minor amendments in Code section 96.

Clause 43 (1) amends section 96 (2) by deleting the expression “total amount payable under the contract” and substituting “amount required to pay out the contract”. The expression deleted is considered to be ambiguous as, literally, it can mean either the total amount payable under the contract disregarding any payments made or, alternatively, the total amount remaining payable at the relevant time. The amendment rectifies this ambiguity and now uses the same terminology as section 75.

Clause 43 (2) amends section 96 (3) to overcome a drafting problem in that the provision appears to fail to recognise that a mortgage might have been given by a guarantor as distinct from a debtor.

Clause 44 amends Code section 98 (1).

Section 96 (1) provides that where repossessed goods are being sold, the sale should take place as soon as reasonably practicable after the expiration of the section 94 notice or at such time as the credit provider and mortgagor agree.

However, section 98 (1) is in terms which assume that the obligation is solely to sell as soon as practicable and thus disregards the possibility that the credit provider and mortgagor may agree on a different time of sale. Clause 47 corrects that anomaly in section 98 (1).

Clause 45 amends Code section 99.

There is considerable doubt as to whether section 99 (1) entitles a credit provider to recover as enforcement expenses, expenses incurred internally by the use of staff and facilities of the credit provider as distinct from using out sourced agencies. It is unsatisfactory for there to be serious uncertainty

in such an important provision of the Code. It has been accepted that if the provision currently permits the recovery only of externally incurred expenses, the result is more likely than not disadvantageous to the debtor or guarantor as it is generally believed that the expenses incurred will be higher if external agencies are engaged. Accordingly, clause 45 (1) specifically provides that internally incurred expenses are recoverable.

Clause 45 (2) adds new section 99 (3) so as to confer on appropriate courts and tribunals specific jurisdiction to determine any dispute between the parties concerning the amount of enforcement expenses.

Clause 46 amends Code section 100. That section specifies which provisions of the Code are “key requirements”, breaches of which attract the civil penalty. Code section 100 (1) (e) and 100 (2) (d) provide that the requirement in Code sections 15 (G) (a) and (b) to disclose in a contract certain information about any credit fees and charges payable under the contract is a key requirement.

The ambit of Code section 100 (1) (e) and 100 (2) (d) was modified by Regulation section 72 (2) which provided, in effect, that for civil penalty purposes there is no key requirement to disclose information about government fees and charges. The principal reason for the modification was that there are serious difficulties in ascertaining the exact amount of some government fees and charges, particularly when the debtor/mortgagor may be eligible for a concession or rebate. It was felt inappropriate to impose the severe sanction of a civil penalty in those circumstances.

Clause 46 makes more extensive modifications. It provides that for civil penalty purposes there is no key requirement to disclose information about any fees and charges which are not “retained” fees and charges. Retained credit fees and charges are all fees and charges payable under the contract other than those paid by the credit provider to an unrelated third party such as valuation fees, survey fees, municipal fees and charges and, of course, government fees and charges.

Clause 46 expands upon the modification made by Regulation section 72(2). Credit providers experience similar difficulties in ascertaining in advance the exact amount of certain other third party fees and charges (particularly certain municipal fees and charges) as they do with government fees and charges.

Clause 47 amends Code section 117 (3) so as to clarify that the term

“tied loan contract” does not include a continuing credit contract.

Clause 48 amends Code section 119 (1) to clarify that in the passage “the debtor suffers loss or damage as a result of misrepresentation, breach of contract, or failure of consideration in relation to the contract”, the reference to the contract is construed as a reference to the sale contract.

Clause 49 adds new Code section 124 (4).

Section 124 provides that if -

- a purchaser of goods or services makes it known to a supplier that credit is required to pay for the goods or services; and
- the purchaser after making reasonable endeavours fails to obtain credit on reasonable terms,

the purchaser is entitled to terminate the sale contract.

Because the term “services” is defined as including rights in relation to, and interests in, real property, the provision is capable of entitling a purchaser to terminate a contract for the sale of land even where the purchaser has not included a specific “subject to finance” condition in the contract. It was not intended that the section should have such an effect and new section 124 (4) limits the right to terminate the contract under the section to a case where the vendor is aware that the purchaser intended to obtain credit from the vendor or from a linked credit provider of the vendor.

Clause 50 of the Bill adds a new subsection (8) to Code section 125.

Code section 125 gives certain rights to a debtor where -

- a sale contract is rescinded or discharged;
- there is a loan contract or a continuing credit contract under which the sale contract is financed; and
- the credit provider is linked with the supplier under the sale contract as defined by Code section 117 (1).

In these circumstances the debtor is entitled -

- in the case of a loan contract, to terminate the loan contract; or
- in the case of a continuing credit contract, to be credited with the relevant amount of credit and any interest charged.

It is now recognised that Code section 125 may have a wider application than originally intended. In particular it may permit a debtor to terminate a

loan contract where the debtor has rescinded a sale contract that is only incidental to the main transaction being financed. Take for example a contract for the purchase of a house to be financed under a housing loan. If the debtor arranges a home buildings insurance contract and the first year's premium is financed under the housing loan contract, the debtor may be able to terminate the whole housing loan contract if the insurance contract is rescinded and, as is common, there is an established pattern of referrals by the financier to the insurer. This was never the intention. Rather the intention was that the debtor could terminate the loan contract only if the principal sale contract (in this case the home purchase contract) has been rescinded. Proposed Code section 125 (8) will so limit the right to terminate the loan contract.

Clause 51 amends Code section 132 by adding new subsections (2) and (3).

New section 132 (2) excludes from the operation of the Code insurance over mortgaged property that is -

- insurance in the nature of an extended warranty period for goods; or
- is insurance over property that is not mortgaged under the credit contract.

As to paragraph (b), the provision incorporates the effect of Regulation section 74 (1).

New section 132 (3) provides that the Code does not apply to a contract for consumer credit insurance in connection with a credit contract unless the contract for consumer credit insures obligations of the debtor under the same credit contract. This subsection incorporates the provisions of Regulation 74 (2).

Clause 52 deletes the second sentence in Code section 134 (1). That sentence is rendered superfluous by the proposed new section 132 (2) (a) to be included in the Code pursuant to clause 51.

Clause 53 amends Code section 138.

Section 138 (1) provides that on termination of the credit contract any relevant credit-related consumer credit insurance contract financed under the credit contract is terminated. Section 138 (2) requires the credit provider to pay or credit the debtor with a proportion or rebate of premium paid under such a consumer credit insurance contract in force immediately before the

credit contract is terminated.

Section 138 (4) provides that the regulations may describe the manner of calculating the proportionate rebate of premium.

None of these provisions appears to recognise the possibility that in some circumstances it is not appropriate to rebate the whole of the premium paid. For example, if a contract of consumer credit insurance provides for a death benefit, a disability benefit and unemployment benefit, for death, disability or involuntary unemployment occurring during the term of the relevant credit contract, it is necessary to deal appropriately with the case where the debtor dies before the end of the term of the contract.

In such a case the death benefit under the contract will become payable and although the contract has been terminated by the death of the debtor, it is obviously inappropriate that any part of the premium paid for death benefit should be refunded. However, it is appropriate for there to be separate proportionate rebates of the premiums paid for disability or unemployment.

The amendments to section 138 (4) and new section 138 (6) are intended to deal with these problems.

Clause 54 re-enacts Code section 140 (3) and (4).

The original section 140 (3) and (4) created serious practical difficulties.

The critical expression “any reference to the cost of any credit” in 140 (3) was found to be too imprecise to create any degree of certainty as to the circumstances, in which 140 (3) did and did not apply. Accordingly the subsection has been redrafted in terms which avoid that expression. The question whether the subsection applies is now answered by applying the simple test—does the advertisement state the amount of any repayment?

New subsection 140 (3) also states in more precise terms how a credit provider may comply with the obligation to state that fees and charges are payable where that is required. It gives the credit provider three alternatives each of which is set out in the subsection.

The original subsection 140 (4) has also been discarded because it created serious practical difficulties. In its terms it apparently prevented the inclusion of any additional material beyond the compulsory disclosed material being included in an advertisement. To the extent that the provision prevented credit providers from disclosing particulars of fees and charges payable (as distinct from merely stating that unspecified fees and charges

are payable) the provision appeared to be at odds with the broad objectives of the Code. New subsection (4) now contains provisions concerning voluntary disclosure of the comparison rate, which were formerly located in the original 140 (3).

Clause 55 amends Code section 143. That section currently requires any interest rate disclosed in an advertisement or to a prospective debtor to be “the annual percentage rate or rates”. This expression has caused some difficulty especially in the context of an advertisement because the “annual percentage rate” is only defined in section 25 in the context of the annual percentage rate under a credit contract. In the context of an advertisement there is of course no particular credit contract in mind. Accordingly clause 55 substitutes the expression “expressed as a nominal percentage rate per annum”.

Clause 56 amends Code section 146 (1). That provision currently prohibits a credit provider from visiting a place of residence for the purpose of inducing a person who resides there to apply for or obtain credit except by prior arrangement with that particular person. It is now considered that this is unduly restrictive and that the main policy objective of the provision, namely restricting door to door canvassing for credit, will be met so long as the person with whom the arrangement to visit is made is a person who normally resides at the premises but not necessarily the person whom the credit provider wishes to solicit.

Clause 57 amends Code section 152 (1) (c) so that the obligation to disclose in a consumer lease the amount of any stamp duty or other government charge does not extend to FID and BAD.

Clause 58 adds new subsections (2) and (3) to Code section 153.

New section 153 (2) relieves a lessor from having to provide the lessee with a further copy of the consumer lease.

New section 153 (3) provides that section 171 in its application to section 153, applies as if references in section 171 to the credit provider were references to the lessor or a lease broker and references to the debtor were references to the lessee.

Clause 59 amends Code section 166 (3) so as to clarify that section 166 (1) does not apply while the credit provider, though having assigned its rights under a credit contract, continues to be entitled to receive payments from the debtor, irrespective of whether the debtor is actually making the

payments required under the contract.

Clause 60 adds new Code section 169A.

After the Code was enacted in 1994, Regulation sections 75, 76 and 77 were promulgated to deal with some particular difficulties said to arise from the application of the Code to certain types of mortgage securitisation programs. The difficulties were seen to arise from the possible application of a rule of law which, on the grounds of public policy, rendered void any attempt by a person to obtain or enforce an indemnity given by another person in respect of liability for an act or omission by the first person which constitutes an offence at law.

While the simplest solution to this problem was statutorily to set the common law rule aside, it was considered that the regulation making power contained in the relevant sections of the Consumer Credit (Queensland) Act 1994 could not validly make such provision. In lieu Regulation sections 75, 76 and 77 were made to deal with the basic problem by adopting a narrower approach.

Under the Bill the opportunity is presented to adopt the broader approach of setting aside the common law rule and new section 169A so provides.

Clause 61 re-enacts Code section 171.

New section 171 (1) specifies how the remainder of the section is to apply.

New section 171 (2) replaces former 171 (1) so that a credit provider or other person is relieved from the obligation to give a notice or other document to a person if -

- the credit provider has previously unsuccessfully tried to give a notice in accordance with the Code by leaving it at or sending it to the address currently nominated by the person to the credit provider or in the absence of such nomination the address of the place of residence or business last known to the person giving the notice; and
- the credit provider has reasonable grounds for believing the person cannot be contacted at that address.

Under the previous provision in 171 (1) the credit provider was required to obtain an order of the court in order to be relieved of the obligation to

give notices and other documents. This has proved to be commercially and practically unrealistic.

New section 171 (3) maintains the essence of the former rule in 171 (2) that where there are joint debtors, mortgagors or guarantors a notice or document must be given to each of them but subject to the exceptions provided by new section 171 (4) and (5).

New section 171 (4) provides that where there are two or more joint debtors, mortgagors or guarantors, one of them may be nominated by all or any number of the others to receive the notice or other document on the nominating person (s) behalf and the notice need not be addressed to all of them. The provision is intended to operate in the following way.

Assume there are four joint debtors and three of them all nominate the same fourth person to receive notices on their behalf. In such a case all four are effectively served by giving the notice on the nominated person. It is not intended that the person nominated should be required to sign the nomination form.

Assume on the other hand that only two of the four persons nominate the same person to receive notices on their behalf and the remaining person makes no nomination. In this instance the two nominating persons and the nominated person are all effectively served by giving the notice to the nominated person. However, in this case, the fourth person (who has not participated in this process as a nominating or nominated person) must be served separately.

New section 171 (4) is aims to ensure that joint borrowers and guarantors have reasonable flexibility in choosing how many identical copies of notices and statements of account they require. It is arguable that under the terms of the previous Code section 171 (3) a nomination had to encompass all joint debtors, mortgagors or guarantors and even then was effective only if all of them resided at the same address.

New section 171 (5) provides a further option in addition to the procedures available under section 171 (4). Representations have been made that where two or more joint debtors, mortgagors or guarantors reside at the same address, it should not be necessary for one or more of them to have to nominate another to receive notices. In these circumstances they should be able to jointly consent to receiving a single copy at that address which is to be addressed jointly to them. However, as the final sentence in new section 171 (5) indicates, this is an alternative to the section 171 (4)

procedures and accordingly where the joint debtors, mortgagors or guarantors reside at the same address, it is for them to choose which of the procedures provided under subsections (4) and (5) they prefer.

New section 171 (6) provides for further options. A person may nominate any other person to receive a notice or other document on the nominating person's behalf except in the circumstances excluded by paragraphs (a), (b) and (c).

New section 171 (7) provides that a notice or other document may be given to a person by giving it to a legal practitioner acting for that person in the relevant matter.

New section 171 (8) provides for the withdrawal of nominations or consents under section 171.

New section 171 (9) provides that a nomination or consent or the withdrawal of either must be in the form required by the regulations.

Clause 62 amends Code section 172 which specifies the manner in which notices or other documents are to be served.

Clause 62 (1) amends section 172 (1) (a) (ii) so that the sub paragraph refers to “an appropriate address” of the person rather than the various choices of address currently specified.

Clauses 62 (2) to (4) are formal renumbering provisions.

Clause 62 (5) adds new subsections (2) and (3) to section 172 to define what is meant by the appropriate address of a debtor or other persons for the purposes of section 172 (1).

Clause 63 amends Code section 176.

Clause 63 (1) amends section 176 (2), which generally prohibits a person from authorising a credit provider (or an associate of a credit provider) from entering into a credit contract, mortgage or guarantee on that person's behalf. The objective of the provision is to prevent prospective debtors, mortgagors and guarantors from authorising a credit provider to act for them.

However, it is common commercial practice for persons with whom credit providers have agencies and like arrangements to be authorised by a credit provider to enter into contracts with the debtor on the credit provider's behalf. For example, a senior officer of a retail motor sales business might be authorised by a financier to whom clients of motor business are routinely

referred to enter into contracts with customers on the financier's behalf. Clause 63 (1) amends section 176 (2) accordingly.

Clause 63 (2) deletes section 176 (4) which becomes superfluous as a result of the new provisions dealing with persons associated with the credit provider which have been included in Schedule 1 of the Code by clause 65 (7) of the Bill.

Clause 64 adds a new Code section 182A. New section 182A clarifies that proceedings may be taken against an officer, agent, or employee of a credit provider or other person irrespective of whether proceedings have been taken against the credit provider or other person.

Clause 65 makes a number of amendments to the definitions in Schedule 1 of the Code.

Clause 65 (4), (5) and (6) of the Bill amend the definition of “credit fees and charges”. The amendments are intended to incorporate into the Code the equivalent of Regulation section 58.

Clause 65 (2) deletes the definition of the term “ordinarily resident”. By virtue of Code section 6 (1) (a), the Code does not apply to a credit contract unless, at the time the contract is entered into, the debtor is ordinarily resident in the relevant jurisdiction. The original definition gives the term an extended or artificial meaning if at the relevant time the debtor is not ordinarily resident anywhere in Australia; in such a case the debtor is effectively deemed to be ordinarily resident in the State or Territory where he or she is currently resident for the time being. It is now considered unnecessary to extend the application of the Code to people ordinarily resident outside Australia and accordingly the definition is to be deleted.

Clause 65 (2) deletes the existing definition of the term “predominant” in the context of the purpose for which credit is provided or goods are hired. The definition in Schedule 1 is superfluous as the term is adequately defined in that context by Code sections 6 (5) and 148 (5).

Clause 65 (3) defines the term “retained credit fees and charges”. As explained in the clause notes to clause 49, the primary meaning of the term is credit fees and charges which are retained by the credit provider as distinct from those that are passed on (or are retained in reimbursement of an amount paid) to a third party which is not a related body corporate, for Corporations Law purposes, of the credit provider. Clause 65 (3) (b) is

intended to ensure that where a credit provider pays a fee or charge to a related corporation which is a financial institution providing banking type services, the fee will not be considered a retained credit fee or charge if the financial institution provides its services to the credit provider on the same terms as those services are provided to customers who are unrelated to the institution.

Clause 65 (7) defines what is intended wherever in the Code reference is made to a person who is “associated” with a credit provider. These references occur in Code sections 11 (3), 12 (3), 171 (6) and in section 176 (2) of the Code as proposed to be amended by the Bill.