



Western Australia

Consumer Credit (Western Australia) Code

Compare between:

[27 Jun 2006, 00-b0-04] and [29 Sep 2006, 00-c0-04]

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Part 1 — Preliminary

1. Short title

This Code may be cited as the *Consumer Credit Code*^{1,2}.

2. Commencement

This Code commences as provided under section 2 of the *Consumer Credit (Queensland) Act 1994* of Queensland².

3. Interpretation generally

- (1) Schedule 1 contains the principal definitions of words and expressions used in this Code.
- (2) Schedule 2 contains other miscellaneous provisions relating to the interpretation of this Code.

4. Meaning of “credit” and “amount of credit”

- (1) For the purposes of this Code, “**credit**” is provided if under a contract —
 - (a) payment of a debt owed by one person (the debtor) to another (the credit provider) is deferred; or
 - (b) one person (the debtor) incurs a deferred debt to another (the credit provider).
- (2) For the purposes of this Code, the “**amount of credit**” is the amount of the debt actually deferred.

The “**amount of credit**” does not include —

- (a) any interest charge under the contract; or
- (b) any fee or charge —
 - (i) that is to be or may be debited after credit is first provided under the contract; and

- (ii) that is not payable in connection with the making of the contract or the making of a mortgage or guarantee related to the contract.

5. Meaning of “credit contract”

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

6. Provision of credit to which this Code applies

- (1) This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered into or (in the case of pre-contractual obligations) is proposed to be entered into —
 - (a) the debtor is a natural person ordinarily resident in this jurisdiction or a strata corporation formed in this jurisdiction; and
 - (b) the credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes; and
 - (c) a charge is or may be made for providing the credit; and
 - (d) the credit provider provides the credit in the course of a business of providing credit or as part of or incidentally to any other business of the credit provider.
- (2) If not all the debtors under a credit contract ordinarily reside, or are strata corporations formed, in this jurisdiction, this Code applies only if credit is first provided under the contract in this jurisdiction.
- (3) If this Code applies to the provision of credit (and to the credit contract and related matters) —
 - (a) this Code applies in relation to all transactions or acts under the contract whether or not they take place in this jurisdiction; and

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- (b) this Code continues to apply even though the debtor ceases to be ordinarily resident in this jurisdiction.
- (4) For the purposes of this section, investment by the debtor is not a personal, domestic or household purpose.
- (5) For the purposes of this section, the predominant purpose for which credit is provided is —
 - (a) the purpose for which more than half of the credit is intended to be used; or
 - (b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

7. Provision of credit to which this Code does not apply

- (1) **Short term credit.** This Code does not apply to the provision of credit if, under the contract —
 - (a) the provision of credit is limited to a total period that does not exceed 62 days; and
 - (b) the maximum amount of credit fees and charges that may be imposed or provided for does not exceed 5% of the amount of credit; and
 - (c) the maximum amount of interest charges that may be imposed or provided for does not exceed an amount (calculated as if the Code applied to the contract) equal to the amount payable if the annual percentage rate were 24% per annum.
- (2) **Credit without express prior agreement.** This Code does not apply to the provision of credit if, before the credit was provided, there was no express agreement between the credit provider and the debtor for the provision of credit. For example, when a cheque account becomes overdrawn but there is no expressly agreed overdraft facility or when a savings account falls into debit.

- (3) **Credit for which only account charge payable.** This Code does not apply to the provision of credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided. However, this Code applies if the charge is of a nature prescribed by the regulations for the purposes of this subsection or if the charge exceeds the maximum charge (if any) so prescribed.
- (4) **Joint credit and debit facilities.** This Code does not apply to any part of a credit contract under which both credit and debit facilities are available to the extent that the contract or any amount payable or other matter arising out of it relates only to the debit facility.
- (5) **Bill facilities.** This Code does not apply to the provision of credit arising out of a bill facility, that is, a facility under which the credit provider provides credit by accepting, drawing, discounting or endorsing a bill of exchange or promissory note. However, the regulations may provide for the application of the Code to the provision of all or any credit arising out of such a facility.
- (6) **Insurance premiums by instalments.** This Code does not apply to the provision of credit by an insurer for the purpose of the payment to the insurer of an insurance premium by instalments, even though the instalments exceed the total of the premium that would be payable if the premium were paid in a lump sum, if on cancellation the insured would have no liability to make further payments under the contract.
- (7) **Pawnbrokers.** This Code does not apply to the provision of credit by a pawnbroker in the ordinary course of a pawnbroker's business (being a business which is being lawfully conducted by the pawnbroker). However, sections 70 to 72 (Court may reopen unjust transactions) apply to any such provision of credit.
- (8) **Trustees of estates.** This Code does not apply to the provision of credit by the trustee of the estate of a deceased person by way

of an advance to a beneficiary or prospective beneficiary of the estate. However, sections 70 to 72 (Court may reopen unjust transactions) apply to any such provision of credit.

- (9) **Employee loans.** This Code (other than this Part, Part 4, Division 3, Part 5, Divisions 4 and 5, Part 7, Part 11 and Schedules 1 and 2) does not apply to the provision of credit by an employer, or a related body corporate within the meaning of the Corporations Law of an employer, to an employee or former employee (whether or not it is provided to the employee or former employee with another person). However, for a credit provider that provides credit to which this Code applies in the course of a business of providing credit to which this Code applies to employees or former employees and to others, this subsection applies only to the provision of credit on terms that are more favourable to the debtor than the terms on which the credit provider provides credit to persons who are not employees or former employees of the credit provider or a related body corporate.
- (10) **Regulations may exclude credit.** The regulations may exclude, from the application of all or any provisions of this Code, the provision of credit of a class specified in the regulations. In particular (but without limiting the generality of the foregoing), the regulations may so exclude the provision of credit if the amount of the credit exceeds or may exceed a specified amount or if the credit is provided by a credit provider of a specified class.

8. Mortgages to which this Code applies

- (1) This Code applies to a mortgage if —
- (a) it secures obligations under a credit contract or a related guarantee; and
 - (b) the mortgagor is a natural person or a strata corporation.

- (2) If any such mortgage also secures other obligations, this Code applies to the mortgage to the extent only that it secures obligations under the credit contract or related guarantee.
- (3) The regulations may exclude, from the application of all or any provisions of this Code, a mortgage of a class specified in the regulations.

9. Guarantees to which this Code applies

- (1) This Code applies to a guarantee if —
 - (a) it guarantees obligations under a credit contract; and
 - (b) the guarantor is a natural person or a strata corporation.
- (2) If any such guarantee also guarantees other obligations, this Code applies to the guarantee to the extent only that it guarantees obligations under the credit contract.
- (3) The regulations may exclude, from the application of all or any provisions of this Code, a guarantee of a class specified in the regulations.

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

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

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

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

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- (3) Accordingly, if because of section 6(1) the contract is a credit contract, this Code (including Part 6) applies as if the contract had always been a sale of goods by instalments, and for that purpose —
- (a) the amounts payable under the contract are the instalments; and
 - (b) the credit provider is the person who is to receive those payments; and
 - (c) the debtor is the person who is to make those payments; and
 - (d) the property of the supplier in the goods passes under the contract to the person to whom the goods are hired on delivery of the goods or the making of the contract, whichever occurs last; and
 - (e) the charge for providing the credit is the amount by which the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so), exceeds the cash price of the goods; and
 - (f) a mortgage containing the terms and conditions set out in the regulations is taken to have been entered into in writing between the person to whom the goods are hired under the contract and the supplier as security for payment to the supplier of the amount payable to the supplier by the person to whom the goods are hired under the contract; and
 - (g) any provision in the contract for hiring by virtue of which the supplier is empowered to take possession, or dispose of, the goods to which the contract relates is void.
- (4) For the purposes of this section, the amount payable under the contract includes any agreed or residual value of the goods at

the end of the hire period or on termination of the contract, but does not include the following amounts —

- (a) any amount payable in respect of services that are incidental to the hire of goods under the contract;
- (b) any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the hirer at the earliest opportunity.

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

11. Presumptions relating to application of Code

- (1) In any proceedings (whether brought under this Code or not) in which a party claims that a credit contract, mortgage or guarantee is one to which this Code applies, it is presumed to be such unless the contrary is established.
- (2) Credit is presumed conclusively for the purposes of this Code not to be provided wholly or predominantly for personal, domestic or household purposes if the debtor declares, before entering into the credit contract, that the credit is to be applied wholly or predominantly for business or investment purposes (or for both purposes).
- (3) However, such a declaration is ineffective for the purposes of this section if the credit provider (or any other relevant person who obtained the declaration from the debtor) knew, or had reason to believe, at the time the declaration was made that the credit was in fact to be applied wholly or predominantly for personal, domestic or household purposes. For the purposes of this subsection, a relevant person is a person associated with the credit provider or a finance broker (or a person acting for a finance broker) through whom the credit was obtained.
- (4) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.

Part 2 — Credit contracts

Division 1 — Negotiating and making credit contracts

12. Credit contract to be in form of written contract document

- (1) A credit contract must be in the form of —
 - (a) a written contract document signed by the debtor and the credit provider; or
 - (b) a written contract document signed by the credit provider and constituting an offer to the debtor that is accepted by the debtor in accordance with the terms of the offer.
- (2) An offer may be accepted by the debtor for the purposes of subsection (1)(b) —
 - (a) by the debtor or a person authorised by the debtor accessing or drawing down credit to incur a liability; or
 - (b) by any other act of the debtor or of any such authorised person that satisfies the conditions of the offer and constitutes an acceptance of the offer at law.
- (3) The credit provider, or a person associated with the credit provider, may not be authorised by the debtor for the purposes of subsection (2). However, this subsection does not prevent the debtor authorising the credit provider to debit the debtor's account.
- (4) In the case of a contract document consisting of more than one document, it is sufficient compliance with this section if one of the documents is duly signed and the other documents are referred to in the signed document.

13. Other forms of contract

- (1) The regulations may authorise other ways of making a credit contract that do not involve a written document.

- (2) In that case, the provisions of this Division apply with such modifications as are prescribed by the regulations.

14. Precontractual disclosure

- (1) A credit provider must not enter into a credit contract unless the credit provider has given the debtor —
- (a) a precontractual statement setting out the matters required by section 15 to be included in the contract document; and
 - (b) an information statement in the form required by the regulations of the debtor's statutory rights and statutory obligations.
- (2) Those statements must be given —
- (a) before the contract is entered into; or
 - (b) before the debtor makes an offer to enter into the contract;
- whichever first occurs.
- (3) Before entering into a credit contract, the credit provider may inform the debtor of the comparison rate. If the credit provider does so, the comparison rate must be calculated as prescribed by the regulations and be accompanied by the warnings set out in the regulations.
- (4) The precontractual statement must contain the financial information specified by the regulations in the form prescribed by the regulations.
- (5) The precontractual statement may be the proposed contract document or be a separate document or documents.
- (6) A document forming part of a precontractual statement consisting of more than one document when the pre-contractual statement is first given must indicate that it does not contain all of the required precontractual information.

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

15. Matters that must be in contract document

The contract document must contain the following matters —

(A) Credit provider's name.

The credit provider's name.

(B) Amount of credit.

- (a) If the amount of credit to be provided is ascertainable —

- (i) that amount; and
- (ii) the persons, bodies or agents (including the credit provider) to whom it is to be paid and the amounts payable to each of them, but only if both the person, body or agent and the amount are ascertainable.

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

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

(C) Annual percentage rate or rates.

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

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

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

- (i) the name of the rate or a description of it; and
- (ii) the margin or margins (if any) above or below the reference rate to be applied to determine the annual percentage rate or rates; and

- (iii) where and when the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and
- (iv) the current annual percentage rate or rates.

(D) Calculation of interest charges.

The method of calculation of the interest charges payable under the contract and the frequency with which interest charges are to be debited under the contract.

(E) Total amount of interest charges payable.

The total amount of interest charges payable under the contract, if ascertainable (but only if the contract would, on the assumptions under sections 158 and 160, be paid out within 7 years of the date on which credit is first provided under the contract).

(F) Repayments.

- (a) If more than one repayment is to be made —
 - (i) the amount of the repayments or the method of calculating the amount; and
 - (ii) if ascertainable, the number of the repayments; and
 - (iia) if ascertainable, the total amount of the repayments, but only if the contract would, on the assumptions under sections 158 and 160, be paid out within 7 years of the date on which credit is first provided under the contract; and
 - (iii) when the first repayment is to be paid, if ascertainable, and the frequency of payment of repayments.
- (b) If the contract provides for a minimum repayment, the amount of that repayment, if ascertainable, but, if not, the method of calculation of the minimum repayment.

Paragraph (a) does not apply to minimum repayments under a continuing credit contract.

(G) Credit fees and charges.

- (a) A statement of the credit fees and charges that are, or may become, payable under the contract, and when each such fee or charge is payable, if ascertainable.
- (b) The amount of any such fee or charge if ascertainable, but, if not, the method of calculation of the fee or charge, if ascertainable.
- (c) The total amount of credit fees and charges payable under the contract to the extent that it is ascertainable.

(H) Changes affecting interest and credit fees and charges.

If the annual percentage rate or rates or the amount or frequency of payment of a credit fee or charge or instalment payable under the contract may be changed, or a new credit fee or charge may be imposed, a statement or statements to that effect and of the means by which the debtor will be informed of the change or the new fee or charge.

(I) Statements of account.

The frequency with which statements of account are to be provided to the debtor (except in the case of a credit contract for which the annual percentage rate is fixed for the whole term of the contract and under which there is no provision for varying the rate).

(J) Default rate.

- (a) If the contract is a contract under which a default rate of interest may be charged when payments are in default— a statement to that effect and the default rate and how it is to be applied.
- (b) If the default rate under the contract is determined by referring to a reference rate —
 - (i) the name of the rate or a description of it; and

- (ii) the margin or margins (if any) above or below the reference rate to be applied to determine the default rate; and
- (iii) when and where the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and
- (iv) the current default rate.

(K) Enforcement expenses.

A statement that enforcement expenses may become payable under the credit contract or mortgage (if any) in the event of a breach.

(L) Mortgage or guarantee.

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

(M) Commission.

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

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

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

(N) Insurance financed by contract.

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

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

In the case of consumer credit insurance that includes a contract of general insurance within the meaning of the *Insurance Contracts Act 1984* (Cwlth)—

- (i) it is sufficient compliance with paragraphs (a) and (b) if the contract document contains the name of the general insurer and the total amount payable to the insurers (or, if it is not ascertainable, how it is calculated); and
- (ii) it is sufficient compliance with paragraph (d) relating to the amount of commission if the contract document contains the total amount of commission (expressed as a monetary amount or as a proportion of the premium) to be paid by the insurers.

(O) Other information.

Any information or warning required by the regulations.

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

16. Form and expression of contract document

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

17. Alteration of contract document

- (1) An alteration of (including an addition to) a contract document by the credit provider after it is signed by the debtor is presumed to be ineffective unless, after the alteration is made, the debtor signs or initials in the margin opposite the alteration.
- (2) This section does not apply to an alteration having the effect of reducing the debtor's liabilities under the credit contract.

18. Copy of contract for debtor

- (1) If a contract document is to be signed by the debtor and returned to the credit provider, the credit provider must give the debtor a copy to keep.
- (2) A credit provider must, not later than 14 days after a credit contract is made, give a copy of the contract in the form in which it was made to the debtor.
- (3) Subsection (2) does not apply if the credit provider has previously given the debtor a copy of the contract document to keep.

19. When debtor may terminate contract

- (1) Although a credit contract has been made, the debtor may nevertheless, by written notice to the credit provider, terminate the contract unless —
 - (a) any credit has been obtained under the contract; or
 - (b) 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.

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

20. Offence for noncompliance

A credit provider must not —

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

Maximum penalty — 100 penalty units.

Division 2 — Debtor's monetary obligations

21. Prohibited monetary obligations

- (1) A credit contract must not impose a monetary liability on the debtor —
- (a) in respect of a credit fee or charge prohibited by this Code; or
 - (b) in respect of an amount of a fee or charge exceeding the amount that may be charged consistently with this Code; or
 - (c) in respect of an interest charge under the contract exceeding the amount that may be charged consistently with this Code.
- (2) **Civil effect.** Any provision of a credit contract that imposes a monetary liability prohibited by subsection (1) is void to the extent that it does so. If an amount that is prohibited by subsection (1) is paid, it may be recovered.
- (3) A credit fee or charge cannot be charged in respect of a credit contract unless the contract authorises it to be charged.

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

22. Offences related to prohibited monetary obligations

A credit provider must not —

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

Maximum penalty — 100 penalty units.

23. Loan to be in money or equivalent

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

Maximum penalty — 100 penalty units.

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

24. Early payments and crediting of payments

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

Maximum penalty — 100 penalty units.

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

Maximum penalty — 100 penalty units.

- (3) Despite subsection (2), a credit provider is not required to credit a payment under a credit contract before it is payable under the contract if the contract prohibits its early payment and —
- (a) the credit provider informs the debtor, as soon as practicable after the credit provider becomes aware of the payment, that it will not be credited to the debtor (or that any credit will be reversed) until it becomes payable under the contract, and the debtor elects to leave the payment with the credit provider; or
 - (b) the credit provider informs the debtor, before accepting the payment, that it will not be credited to the debtor until it becomes payable under the contract; or
 - (c) the credit provider refunds the payment to the debtor.
- (4) A credit contract may not, under this section, prohibit the paying out of the contract at any time under section 75.

Division 3 — Interest charges

25. Definitions relating to interest

- (1) In this Code—
- “annual percentage rate”** under a credit contract means a rate specified in the contract as an annual percentage rate;
 - “daily percentage rate”** means the rate determined by dividing the annual percentage rate by 365;
 - “default rate”** means a higher annual percentage rate permitted by section 28;
 - “unpaid balance”** under a credit contract at any time means the difference between all amounts credited and all amounts debited to the debtor under the contract at that time;
 - “unpaid daily balance”** for a day under a credit contract means the unpaid balance under the contract at the end of that day.
- (2) A credit contract may specify, for the purposes of payments or any other purposes under the contract, when a day ends.

Different times of the day may be specified for different purposes.

26. Limit on interest charges

- (1) The maximum amount of an interest charge that may be imposed or provided for under a credit contract is—
 - (a) where only one annual percentage rate applies to the unpaid balances under the contract—the amount determined by applying the daily percentage rate to the unpaid daily balances; or
 - (b) in any other case—the sum of each of the amounts determined by applying each daily percentage rate to that part of the unpaid daily balances to which it applies under the contract.
- (2) However, an interest charge under a credit contract for a month, a quarter or half a year may be determined by applying the annual percentage rate or rates, divided by 12 (for a month), by 4 (for a quarter) or by 2 (for half a year), to the whole or that part of the average unpaid daily balances to which it applies. The regulations may provide for the calculation of unpaid daily balances in these circumstances.
- (3) This section does not prevent the imposition of a default rate of interest permitted by section 28.

27. Early debit or payment of interest charges prohibited

- (1) A credit provider must not, at any time before the end of a day to which an interest charge applies, require payment of or debit the interest charge.
- (2) A credit contract may provide for an interest charge to become payable or be debited at any time after the day to which it applies.
- (3) The regulations may provide that subsection (1) does not apply to the first payment of interest charges under a credit contract.

- (4) This section does not apply to the debit of an interest charge under a credit contract before the end of the period to which the charge applies if —
- (a) the charge is debited on the last day of the period; and
 - (b) the amount debited is not treated by the credit provider as part of the unpaid daily balance for that day for the purpose of calculating interest charges under the contract.

28. Default interest

- (1) A credit contract may not provide that an annual percentage rate applicable under a credit contract to any part of the unpaid balance will differ according to whether the debtor is in default under the contract.
- (2) However, a credit contract may provide for such a differential rate if the higher rate is imposed only in the event of default in payment, in respect of the amount in default and while the default continues.

Division 4 — Fees and charges

29. Prohibited credit fees or charges

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

30. Fees or charges passed on to other parties

- (1) A fee or charge payable by a debtor for an amount payable or to reimburse an amount paid by the credit provider to another person, body or agency is not to exceed the actual amount payable or paid by the credit provider if that amount is ascertainable when the fee or charge is paid by the debtor. The actual amount payable is to be determined after taking into account any discount or other rebate or other applicable

allowance received or receivable by the credit provider or a related body corporate within the meaning of the Corporations Law.

- (2) If the actual amount paid by the credit provider to another person was not ascertainable when the debtor paid an amount to the credit provider for the fee or charge and is less than the amount paid by the debtor, the credit provider must refund or credit the difference to the debtor.
- (3) Nothing in this section requires a rebate on tax payable by the credit provider or a related body corporate to be taken into account in determining the actual amount payable or paid by a credit provider.

Division 5 — Credit provider's obligation to account

31. Statements of account

- (1) A credit provider that provides credit must give to the debtor, or arrange for the debtor to be given, periodic statements of account in accordance with this Division.
Maximum penalty — 100 penalty units.
- (2) The maximum period for a statement of account is —
 - (a) in the case of a continuing credit contract under which credit is ordinarily obtained only by the use of a card— 40 days; or
 - (b) in the case of any other continuing credit contract— 40 days or such longer period, not exceeding 3 months, as is agreed by the credit provider and the debtor; or
 - (c) in any other case—6 months.
- (3) A statement of account need not be given if —
 - (a) the credit is provided under a credit contract for which the annual percentage rate is fixed for the whole term of the contract and under which there is no provision for varying the rate; or

- (b) no amount has been debited or credited to the account during the statement period (other than debits for government charges, or duties, on receipts or withdrawals) and the amount outstanding is zero or below a level fixed by the regulations; or
 - (c) the credit provider wrote off the debt of the debtor under the credit contract during the statement period and no further amount has been debited or credited to the account during the statement period; or
 - (d) the debtor was in default under the credit contract (not being a continuing credit contract) during the statement period and the credit provider has commenced enforcement proceedings; or
 - (e) the debtor was in default under a continuing credit contract during the preceding 120 days, or during the statement period and the 2 immediately preceding statement periods, whichever is the shorter time, and the credit provider has, before the commencement of the statement period, exercised a right not to provide further credit under the contract and has not provided further credit during the period; or
 - (f) the debtor has died or is insolvent and the debtor's personal representative or trustee in bankruptcy has not requested a statement of account.
- (4) A separate statement of account may, but need not, be given in respect of each or any number of the credit facilities provided under a credit contract.

32. Information to be contained in statements of account

A statement of account must contain the following matters—

(A) **Statement period.**

The dates on which the statement period begins and ends.

(B) **Balances.**

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

(C) **Credit provided.**

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

(D) **Identity of supplier.**

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

(E) **Interest charges.**

- (a) The amount of the interest charge debited to the debtor's account during the statement period and when the interest was debited.
- (b) The annual percentage rate or rates and, if required by Part 4, details of any change since the last statement period.

(F) **Fees and charges.**

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

(G) **Payments to or from account.**

- (a) Particulars of each amount paid by the debtor to the credit provider, or credited to the debtor, during the statement period.
- (b) Particulars of any amount transferred to or from the account to which the statement relates or to or from any other account maintained under or for the purposes of the credit contract.

(H) **Amounts payable by debtor.**

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

(I) Insurance payments.

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

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

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

In the case of consumer credit insurance that includes a contract of general insurance within the meaning of the *Insurance Contracts Act 1984* (Cwlth) —

- (i) it is sufficient compliance with paragraph (a) if the statement of account contains the name of the general insurer, the total amount payable to the insurers and the kind of insurance; and
- (ii) it is sufficient compliance with paragraph (b) if the statement of account contains the total amount of commission (expressed as a monetary amount or as a proportion of the premium) to be paid by the insurers.

(J) Alterations.

Any correction of information in a previous statement of account.

(K) Other.

Any other information required by the regulations.

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

33. Opening balance must not exceed closing balance of previous statement

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

34. Statement of amount owing and other matters

- (1) A credit provider must, at the request of a debtor or guarantor and within the time specified by this section, provide a statement of all or any of the following —
 - (a) the current balance of the debtor's account;
 - (b) any amounts credited or debited during a period specified in the request;
 - (c) any amounts currently overdue and when each such amount became due;
 - (d) any amount currently payable and the date it became due.

Maximum penalty — 100 penalty units.

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

- (3) A statement under this section may be given orally but if the request for the statement is made in writing the statement must be given in writing.
- (3A) In the case of joint debtors or guarantors, the statement under this section need only be given to a debtor or guarantor who requests the statement and not, despite section 171, to each joint debtor or guarantor.
- (4) A credit provider is not required to provide a further written statement under this section if it has, within the 3 months before the request is given, given such a statement to the person requesting it.
- (5) Except where otherwise ordered by the Court on the application of the debtor or guarantor, a credit provider is not required to provide information in a statement under this section about amounts credited or debited, or which were overdue or payable, more than 7 years before the request is given unless those amounts are currently overdue and payable.

35. Court may order statement to be provided

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

36. Disputed accounts

- (1) If a debtor, by written notice to a credit provider, disputes a particular liability entered against the debtor under a credit contract, the credit provider must give the debtor a written notice explaining in reasonable detail how the liability arises.
- (2) A written notice need not be given if the credit provider agrees with the debtor as to the disputed amount and gives the debtor a written notice advising of the agreed liability.

- (3) If in the case of a continuing credit contract the disputed entry appears in a statement of account in which a date for payment of the amount of the account, or part of that amount, is shown, the notice of dispute must be given to the credit provider on or before that date.
- (4) In the case of any other credit contract for which a statement of account is given, the notice of dispute must be given to the credit provider within 30 days of receiving the statement of account in which the amount, or part of that amount, was first shown.
- (4A) In the case of a credit contract in respect of which a statement of account need not be and is not given for the period to which the disputed liability relates, the notice of dispute must be given to the credit provider not later than 3 months after the end of the contract.
- (5) The credit provider must not begin enforcement proceedings on the basis of a default arising from the disputed liability until at least 30 days have elapsed from the time the written explanation or advice as to agreement was given.
- (6) A debtor or credit provider may apply to the Court to have the Court determine a disputed liability and, if satisfied that a liability is genuinely disputed, the Court may determine the matters in dispute and make such consequential orders as it thinks just.
- (7) If an application is made to the Court under this section within 30 days after the explanation is given, the credit provider must not, without leave of the Court, begin enforcement proceedings on the basis of a default arising from the disputed liability.
Maximum penalty — 50 penalty units.
- (8) This section does not affect a dispute not dealt with, or not arising, under this section.

37. Dating and adjustment of debits and credits in accounts

- (1) For the purposes of this Code and the credit contract, a debit or a credit made by a credit provider to a debtor's account is taken to have been made, and has effect, on the date assigned to the debit or credit, not on the date on which it is processed.
- (2) A credit provider may subsequently adjust debits or credits to a debtor's account, and the account balances, so as to accurately reflect the legal obligations of the debtor and the credit provider.
- (3) However, subsections (1) and (2) do not permit a debit or a credit to be assigned a date other than the date on which it is processed, or the subsequent adjustment of a debit or a credit or account balance, if —
 - (a) the assignment or adjustment is not consistent with the credit contract; or
 - (b) the adjustment results in an interest charge that is more than the maximum amount permitted by the Code, as calculated on the basis of debits or credits to a debtor's account consistent with the credit contract; or
 - (c) the assignment or adjustment results in a contravention of section 24; or
 - (d) the assignment of the date on which an interest charge is taken to be debited results in a debit being taken to be done before a time permitted under this Code.
- (4) An adjustment by a credit provider under subsection (2) does not affect any liability of a credit provider under Part 6.

Division 6 — Certain transactions not to be treated as contracts

37. Deferrals, waivers and changes under contracts

- (1) The provision of credit as a result of a change to an existing credit contract, or a deferral or waiver of an amount under an existing credit contract or a postponement relating to an existing credit contract, is not to be treated as creating a new credit

contract for the purposes of this Code, if the change, deferral, waiver or postponement is made in accordance with this Code or the existing credit contract.

- (2) In this section —
“existing credit contract” includes existing consumer lease.

Part 3 — Related mortgages and guarantees

Division 1 — Mortgages

Note: This Division applies to a mortgage (under which the mortgagor is a natural person or a strata corporation) which secures obligations under a credit contract or related guarantee, whether or not it also secures other obligations (see section 8).

38. Form of mortgage

- (1) A mortgage must be in the form of a written mortgage document that is signed by the mortgagor.
- (2) It is sufficient compliance with subsection (1) if —
 - (a) the mortgage is contained in a credit contract signed by the mortgagor; or
 - (b) one of the documents comprising the mortgage document is signed by the mortgagor (and the other documents are referred to in the signed document).
- (3) However, a goods mortgage need not be in the form of a written mortgage document if the credit provider lawfully had possession of the goods that are subject to the mortgage before the mortgage was entered into, otherwise than because the credit provider supplied the goods (for example, the goods were held by way of security).
- (4) A mortgage is not enforceable unless it complies with this section.

39. Copy of mortgage for mortgagor

- (1) If a mortgage is in the form of a written mortgage document and is not part of a credit contract, the credit provider must give the mortgagor a copy to keep, in the form in which it was made, within 14 days after it is made.
- (2) This section does not apply if the credit provider has previously given the mortgagor a copy of the mortgage document to keep.

40. Mortgages over all property void

- (1) A mortgage that does not describe or identify the property which is subject to the mortgage is void.
- (2) Without limiting subsection (1), a provision in a mortgage that charges all the property of the mortgagor is void.

41. Restriction on mortgage of future property

- (1) A provision in a mortgage to the effect that the mortgagor creates or agrees to create a mortgage over or in respect of property or a class of property that is to be, or may be, acquired by the mortgagor after the mortgage is entered into is void.
- (2) However, this section does not apply —
 - (a) to a provision in a mortgage of property that is to be acquired wholly or partly with the credit provided under the credit contract secured by the mortgage; or
 - (b) to a provision in a mortgage relating to property or a class of property (whether or not ascertained) described or identified in the mortgage; or
 - (c) to a provision in a mortgage relating to goods acquired in replacement for, or as additions or accessories to, other goods subject to the mortgage; or
 - (d) to any other provision specified by the regulations.

42. Mortgages and continuing credit contracts

- (1) A provision in a mortgage to the effect that goods supplied from time to time under a continuing credit contract are subject to the mortgage is void.
- (2) However, this section does not apply to a provision in a mortgage relating to specified goods securing payment of a debt under a continuing credit contract.

43. All accounts mortgages

- (1) In addition to securing credit provided by the credit contract or proposed credit contract, or securing obligations under a related guarantee or proposed related guarantee, to which a mortgage initially applies, the mortgage may contain a provision that secures credit provided under another future credit contract or future related guarantee.
- (2) Any such mortgage is unenforceable in relation to such a future credit contract or future related guarantee unless the credit provider has —
 - (a) given the mortgagor a copy of the contract document of the credit contract or proposed credit contract or a copy of the guarantee or proposed guarantee to which the mortgage is to relate; and
 - (b) subsequently obtained from the mortgagor a written acceptance of the extension of the mortgage or obtained acceptance in some other form provided for by the regulations.
- (3) Section 38 (Form of mortgage) does not apply to an extension of a mortgage under this section.

44. Third party mortgages prohibited

- (1) A credit provider must not enter into a mortgage to secure obligations under a credit contract unless each mortgagor is a debtor under the contract or a guarantor under a related guarantee.
- (2) A credit provider must not enter into a mortgage to secure obligations under a guarantee unless each mortgagor is a guarantor under the guarantee or a debtor under the related credit contract.
- (3) A mortgage which does not comply with this section is unenforceable.

- (4) The Court may, on the application of a party to a mortgage that is unenforceable because of this section, order that the credit provider takes such steps as are necessary to discharge the mortgage.
- (5) In this section, a reference to a credit contract or guarantee includes a reference to a proposed credit contract or proposed guarantee.

45. Maximum amount which may be secured

- (1) A mortgage is void to the extent that it secures an amount, in relation to any credit contract which it secures, that exceeds the sum of the amount of the liabilities of the debtor under the credit contract and the reasonable enforcement expenses of enforcing the mortgage.
- (2) A mortgage is void to the extent that it secures an amount, in relation to any guarantee which it secures, that exceeds the limit of the guarantor's liability under the guarantee and the reasonable enforcement expenses of enforcing the mortgage.
- (3) This section does not affect a provision of a mortgage permitted by section 43.

46. Prohibited securities

- (1) A mortgage cannot be created over employees' remuneration or employment benefits or benefits under a superannuation scheme unless the regulations permit it to do so.
- (2) An obligation under a credit contract cannot be secured by a cheque, or bill of exchange or promissory note, endorsed or issued by the debtor or guarantor.
- (3) A mortgage or security is void to the extent that it contravenes this section.

47. Assignment or disposal of mortgaged property by mortgagor

- (1) A mortgagor must not assign or dispose of property that is subject to a mortgage without the credit provider's consent or the authority of the Court under subsection (3).
Maximum penalty — 50 penalty units.
- (2) The credit provider must not unreasonably withhold consent or attach unreasonable conditions to the consent (but a condition requiring security over property of an equivalent kind and value is not to be regarded as unreasonable).
- (3) The Court may, on application by a mortgagor, authorise the mortgagor to dispose of mortgaged property on conditions determined by the Court if —
 - (a) the credit provider fails within a reasonable time to reply to a request for consent to do so by the mortgagor; or
 - (b) consent is unreasonably withheld, or unreasonable conditions are attached to the consent.

48. Conditions on consent to assignment or disposal of property subject to mortgage

- (1) As a condition of granting consent to an assignment or disposal of property subject to a mortgage, the credit provider may make any or all of the requirements set out in this section. This section does not limit any other requirements that may be made by the credit provider.
- (2) The credit provider may require any breaches of the credit contract to which the mortgage relates and of the mortgage to be remedied.
- (3) The credit provider may require the mortgagor and the assignee or person to whom the property is disposed to execute and deliver to the credit provider an agreement relating to the assignment or disposal in a form approved by the credit provider under which, without prejudicing or affecting the liability of the

mortgagor, the assignee or person to whom the property is disposed agrees with the credit provider —

- (a) to be personally liable to pay the amounts due or that become due under the mortgage; and
 - (b) to perform and observe all other requirements and conditions of the mortgage.
- (4) The credit provider may require the mortgagor and the assignee or person to whom the property is disposed to pay the reasonable costs (if any) incurred by the credit provider for —
- (a) stamp duty in respect of the assignment or disposal agreement, or any other document the credit provider reasonably requires to be executed in connection with the assignment or disposal; and
 - (b) fees payable to a duly qualified legal practitioner.

49. Offence for noncompliance

- (1) A credit provider must not —
- (a) enter into a mortgage that contravenes a requirement of this Division; or
 - (b) otherwise contravene a requirement of this Division.
- (2) A credit provider must not enter into a mortgage that is void or unenforceable, or that includes a provision that is void or unenforceable, because of this Division.

Maximum penalty — 50 penalty units.

Division 2 — Guarantees

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

50. Form of guarantee

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

- (2) It is sufficient compliance with subsection (1) if the guarantee is contained in a mortgage signed by the guarantor.
- (3) The regulations may make provision for or with respect to the content of guarantees and the way they are expressed.
- (4) A guarantee is not enforceable unless it complies with this section and regulations made under this section.

51. Disclosure

- (1) Before a guarantee is signed by the guarantor, the credit provider must give to the prospective guarantor —
 - (a) a copy of the contract document of the credit contract or proposed credit contract; and
 - (b) a document in the form prescribed by the regulations explaining the rights and obligations of a guarantor.
- (2) A guarantee is not enforceable unless subsection (1)(a) is complied with.

52. Copies of documents for guarantor

- (1) A credit provider must, not later than 14 days after a guarantee is signed and given to the credit provider, give the guarantor —
 - (a) a copy of the guarantee signed by the guarantor; and
 - (b) a copy of the credit contract or proposed credit contract.
- (2) Subsection (1)(a) does not apply if the credit provider has previously given the guarantor a copy of the guarantee document to keep and subsection (1)(b) does not apply if the credit provider has previously given the guarantor a copy of the credit contract or proposed credit contract to keep.

53. Guarantor may withdraw before credit is provided

- (1) Although a guarantee has been made, the guarantor may nevertheless, by written notice to the credit provider —
 - (a) withdraw from the guarantee unless the debtor has —

- (i) ceased to be entitled to terminate the credit contract under section 19; or
 - (ii) entered into another contract or reliance on the availability of credit under the credit contract;
 - or
 - (b) withdraw from the guarantee after credit is first provided under the contract if the credit contract made differs in some material respect from the proposed credit contract given to the guarantor before the guarantee is signed.
- (2) The guarantor may withdraw from a guarantee under this section to the extent only that it guarantees obligations under the credit contract.
- (3) This section is subject to section 56.

[Section 53 amended by the Consumer Credit (Western Australia) Act 1996 s. 13.]

54. Extension of guarantee

- (1) In addition to guaranteeing obligations under a credit contract or proposed credit contract to which a guarantee initially applies, a guarantee may contain a provision that makes credit provided under another future credit contract subject to the guarantee.
- (2) Any such guarantee is unenforceable in relation to such a future credit contract unless the credit provider has —
 - (a) given the guarantor a copy of the contract document of that future credit contract; and
 - (b) subsequently obtained from the guarantor a written acceptance of the extension of the guarantee or obtained acceptance in some other form provided for by the regulations.
- (3) Section 50 (Form of guarantee) and section 51 (Disclosure) do not apply to an extension of a guarantee under this section.

55. Limitation of guarantor's liability

- (1) **Total amount for which guarantor can be liable.** A guarantee is void to the extent that it secures an amount, in relation to a credit contract to which this Code applies, that exceeds the sum of the amount of the liabilities of the debtor under the credit contract and the reasonable expenses of enforcing the guarantee, or any lesser amount agreed between the credit provider and the guarantor.
- (2) **Unenforceable contracts.** Nothing in subsection (1) prevents a credit provider from enforcing a guarantee relating to liabilities under a credit contract that is unenforceable solely because of the debtor's death, insolvency or incapacity.
- (3) **Debtors under 18 years of age.** A guarantee which guarantees the liability of a debtor who was under 18 years of age when the liability was incurred cannot be enforced against the guarantor unless it contains a prominent statement to the effect that the guarantor may not be entitled to an indemnity against the debtor.
- (4) **Guarantor may limit liabilities under continuing credit contract.** In the case of a continuing credit contract, a guarantor may, by notice to the credit provider, limit the guarantee so that it applies only to liabilities related to credit previously provided to the debtor under the credit contract (including any liabilities not yet debited to the debtor's account) and such further amount (if any) as the guarantor agrees to guarantee.
- (5) **Guarantee must not limit indemnity.** A guarantee is void to the extent that it limits the guarantor's right to indemnity from the person whose liability the guarantor has guaranteed or it postpones or otherwise purports to limit the guarantor's right to enforce the indemnity against the person.
- (6) **Effect of section.** This section does not affect a provision of a guarantee permitted by section 54.

56. Increase in guarantor's liabilities

- (1) If the terms of a credit contract are changed to increase or allow for an increase in liabilities, the liabilities of a guarantor under a guarantee that secures those liabilities are not increased unless —
- (a) the credit provider gives to the guarantor a written notice setting out particulars of the change in the terms of the credit contract; and
 - (b) the credit provider has subsequently obtained from the guarantor a written acceptance of the extension of the guarantee to those increased liabilities or obtained acceptance in some other form provided for by the regulations.
- (2) This section does not apply to an increase in liabilities resulting from —
- (a) a change of a kind referred to in section 58(2)(a) or (b); or
 - (b) a change of which notice is required to be given under Division 1 of Part 4 (not being a change referred to in section 62(3) or 63); or
 - (c) a change under section 68(2) or a postponement under section 88(2); or
 - (d) a deferral or waiver of a debtor's obligations for a period not exceeding 90 days.

57. Offence for noncompliance

- (1) A credit provider must not —
- (a) enter into a guarantee that contravenes a requirement of this Division; or
 - (b) otherwise contravene a requirement of this Division.

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

Maximum penalty — 50 penalty units.

Part 4 — Changes to obligations under credit contracts, mortgages and guarantees

Division 1 — Unilateral changes by credit provider

58. Application of Division

- (1) This Division applies only to changes made unilaterally by a credit provider under a credit contract, mortgage or guarantee.
- (2) This Division does not apply to the following changes under a credit contract —
 - (a) a change to a new annual percentage rate payable under the contract (not being a rate determined by referring to a reference rate), if both the new rate and when it takes effect are ascertainable from the contract;
 - (b) an increase in the amount of repayments, if the increase occurs automatically, as specified by the contract, and both the amount of the increase and when it takes effect are ascertainable from the contract;
 - (c) an increase in the term of a credit contract, if the increase occurs only because of an increase in the annual percentage rate or rates payable under the contract;
 - (d) a change made under Division 3.
- (3) Nothing in this Division confers on a credit provider or a debtor any power or right to change the credit contract or its terms in addition to those conferred by the contract.

59. Interest rate changes

- (1) **Notification of interest rate changes.** A credit provider must, not later than the day on which a change in the annual percentage rate or rates payable under a credit contract takes effect, give to the debtor written notice setting out —
 - (a) the new rate or rates or, if a rate is determined by referring to a reference rate, the new reference rate; and

(b) any information required by the regulations.

Maximum penalty — 100 penalty units.

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

Maximum penalty — 100 penalty units.

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

- (4) **Notification of other interest changes.** A credit provider must, not later than 20 days before a change in the manner in which interest is calculated or applied under a credit contract (including a change in or abolition of any interest free period under the contract) takes effect, give to the debtor written notice setting out —

(a) particulars of the change; and

(b) any information required by the regulations.

Maximum penalty — 100 penalty units.

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

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

60. Repayment changes

- (1) **Notification of repayment changes.** A credit provider must, not later than 20 days before a change in the amount or

frequency or time for payment of, or a change in the method of calculation of, instalments or minimum repayments, under a credit contract takes effect, give to the debtor written notice setting out —

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

Maximum penalty — 100 penalty units.

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

Maximum penalty — 100 penalty units.

- (2A) If the amount or frequency or time for payment of instalments or minimum repayments is not specified in the credit contract but is determined by a method of calculation so specified, this section requires the credit provider to give particulars only of any change in that method of calculation.
- (2B) This section does not apply to a change that occurs while the credit contract does not require any repayment of the amount of credit provided.
- (3) **Application.** This section applies whether or not the change is a change to the terms of the contract.

61. Credit fees and charges changes

- (1) **Notification of credit fees and charges changes.** A credit provider must, not later than 20 days before a change in the amount of a credit fee or charge (including a new credit fee or charge), or a change in the frequency or time for payment of a credit fee or charge, under a credit contract takes effect, give to the debtor written notice setting out —
- (a) particulars of the change; and

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(b) any information required by the regulations.

Maximum penalty — 100 penalty units.

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

Maximum penalty — 100 penalty units.

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

Maximum penalty — 100 penalty units.

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

62. Changes to credit limits etc. in continuing credit contracts

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

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

Maximum penalty — 100 penalty units.

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

63. Other unilateral changes by credit provider

- (1) A credit provider must not exercise a power under a credit contract, mortgage or guarantee to unilaterally change its terms without giving to the other party, not less than 20 days before the change takes effect, written notice setting out —
- (a) particulars of the change in the terms of the credit contract, mortgage or guarantee; and
 - (b) any information required by the regulations.

Maximum penalty — 100 penalty units.

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

Maximum penalty — 100 penalty units.

- (3) This section does not apply to a change of which notice is required to be given under section 59, 60, 61 or 62 (or which would be required to be so given but for an exception provided in any such section) or which is referred to in section 62(3).

64. Particulars of matters as changed only required to be given under this Division in certain cases

The credit provider may, under section 59, 60, 61 or 63, give a person particulars only of a matter as changed instead of particulars of the change, but only if the credit provider —

- (a) makes it clear to the person that the matter has changed;
- or

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Division 2 Changes by agreement of parties

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- (b) issues to the person a new set of terms and conditions relating to the credit contract, mortgage or guarantee.

65. Prohibited increases in liabilities

- (1) If the annual percentage rate under a credit contract is currently fixed for a specified term (including the whole term) of the contract, the contract cannot be changed unilaterally by a credit provider so as to increase, or change the method of calculation of a fee or charge so as to increase, a fee or charge —
 - (a) payable by the debtor on early termination of the credit contract; or
 - (b) payable on prepayment of an amount under the credit contract.
- (2) The regulations may prescribe circumstances in which such a change is permitted.

Division 2 — Changes by agreement of parties

65. Changes by agreement

- (1) If the parties under a credit contract, mortgage or guarantee agree to change its terms, the credit provider must, not later than 30 days after the date of the agreement, give to the other party under the agreement a written notice setting out —
 - (a) particulars of the change in the terms of the credit contract, mortgage or guarantee; and
 - (b) any information required by the regulations.Maximum penalty — 100 penalty units.
- (2) Subsection (1) does not apply to a change which defers or otherwise reduces the obligations of the debtor for a period not exceeding 90 days or to an agreement to increase the amount of credit under a credit contract.
- (3) If the parties under a credit contract (other than a continuing credit contract) propose to increase the amount of credit under

the contract by agreement, the credit provider must also, before the agreement is made, give to the debtor a written notice containing the information required by the regulations.

Maximum penalty — 100 penalty units.

- (4) This section does not apply to a change made under Division 3.
- (5) The credit provider may, under subsection (1), give a person particulars only of a matter as changed instead of particulars of the change, but only if the credit provider —
- (a) makes it clear to the person that the matter has changed; or
 - (b) issues to the person a new set of terms and conditions relating to the credit contract, mortgage or guarantee.

Division 3 — Changes on grounds of hardship and unjust transactions

66. Changes on grounds of hardship

- (1) **General principle.** A debtor who is unable reasonably, because of illness, unemployment or other reasonable cause, to meet the debtor's obligations under a credit contract and who reasonably expects to be able to discharge the debtor's obligations if the terms of the contract were changed in a manner set out in subsection (2) may apply to the credit provider for such a change.
- (1a) The Government Consumer Agency may, if requested in writing by a debtor, assist a debtor in applying for a change in the terms of a credit contract under subsection (1) and in any negotiations with the credit provider relating to the change.
- (2) **Changes.** An application by a debtor must seek to change the terms of the contract in one of the following ways —
- (a) extending the period of the contract and reducing the amount of each payment due under the contract

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accordingly (without a change being made to the annual percentage rate or rates);

- (b) postponing during a specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates);
 - (c) extending the period of the contract and postponing during a specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates).
- (3) **Application.** This section and sections 67 to 69 do not apply to a credit contract under which the maximum amount of credit that is or may be provided is more than \$125 000 (or such other amount as may be prescribed by the regulations).

[Section 66 amended by Consumer Credit (Western Australia) Act 1996 s. 13.]

67. Notice of change

- (1) A credit provider that enters into an agreement with the debtor on any such application must, not later than 30 days after the date of the agreement, give to the debtor, and any guarantor under a guarantee related to the contract, a written notice setting out —
- (a) particulars of the change in the terms of the credit contract; and
 - (b) any information required by the regulations.
- Maximum penalty — 50 penalty units.
- (2) The credit provider may, under subsection (1), give a person particulars only of a matter as changed instead of particulars of the change, but only if the credit provider —
- (a) makes it clear to the person that the matter has changed; or
 - (b) issues to the person a new set of terms and conditions relating to the credit contract.

68. Changes by Court

- (1) If the credit provider does not change the credit contract in accordance with the application, the debtor may apply to the Court to change the terms of the credit contract.
- (2) The Court may, after allowing the applicant, the credit provider and any guarantor a reasonable opportunity to be heard, by order change the credit contract in a manner set out in section 66, and make such other orders as it thinks fit, or refuse to change the credit contract.
- (3) The Court may, if it thinks it appropriate in the circumstances, stay any enforcement proceedings under the credit contract, and make such other orders as it thinks fit, until the application has been determined.

69. Credit provider may apply for variation of change

- (1) A credit provider under a credit contract that has been changed by an order under section 68(2) may apply to the Court for an order varying or revoking the order.
- (2) A credit provider subject to a stay of enforcement proceedings or other order under section 68(3) may apply to the Court for an order varying or revoking the stay or order.
- (3) On an application under this section, the Court may vary or revoke the order or stay to which the application relates as it thinks fit, or may refuse the application.

70. Court may reopen unjust transactions

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

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- (2) **Matters to be considered by Court.** In determining whether a term of a particular credit contract, mortgage or guarantee is unjust in the circumstances relating to it at the time it was entered into or changed, the Court is to have regard to the public interest and to all the circumstances of the case and may have regard to the following —
- (a) the consequences of compliance, or noncompliance, with all or any of the provisions of the contract, mortgage or guarantee;
 - (b) the relative bargaining power of the parties;
 - (c) whether or not, at the time the contract, mortgage or guarantee was entered into or changed, its provisions were the subject of negotiation;
 - (d) whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the contract, mortgage or guarantee or the change;
 - (e) whether or not any of the provisions of the contract, mortgage or guarantee impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the contract, mortgage or guarantee;
 - (f) whether or not the debtor, mortgagor or guarantor, or a person who represented the debtor, mortgagor or guarantor, was reasonably able to protect the interests of the debtor, mortgagor or guarantor because of his or her age or physical or mental condition;
 - (g) the form of the contract, mortgage or guarantee and the intelligibility of the language in which it is expressed;
 - (h) whether or not, and if so when, independent legal or other expert advice was obtained by the debtor, mortgagor or guarantor;
 - (i) the extent to which the provisions of the contract, mortgage or guarantee or change and their legal and

practical effect were accurately explained to the debtor, mortgagor or guarantor and whether or not the debtor, mortgagor or guarantor understood those provisions and their effect;

- (j) whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor, mortgagor or guarantor and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics;
 - (k) whether the credit provider took measures to ensure that the debtor, mortgagor or guarantor understood the nature and implications of the transaction and, if so, the adequacy of those measures;
 - (l) whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship;
 - (m) whether the terms of the transaction or the conduct of the credit provider is justified in the light of the risks undertaken by the credit provider;
 - (n) the terms of other comparable transactions involving other credit providers and, if the injustice is alleged to result from excessive interest charges, the annual percentage rate or rates payable in comparable cases;
 - (o) any other relevant factor.
- (3) **Representing debtor, mortgagor or guarantor.** For the purposes of subsection (2)(f), a person is taken to have represented a debtor, mortgagor or guarantor if the person represented the debtor, mortgagor or guarantor, or assisted the debtor, mortgagor or guarantor to a significant degree, in the negotiations process prior to, or at, the time the credit contract, mortgage or guarantee was entered into or changed.

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- (4) **Unforeseen circumstances.** In determining whether a credit contract, mortgage or guarantee is unjust, the Court is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract, mortgage or guarantee was entered into or changed.
- (5) **Conduct.** In determining whether to grant relief in respect of a credit contract, mortgage or guarantee that it finds to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the contract, mortgage or guarantee since it was entered into or changed.
- (6) **Application.** This section does not apply to a change in the annual percentage rate or rates payable under a contract, or to an establishment fee or charge or other fee or charge, in respect of which an application may be made under section 72 (Court may review unconscionable interest and other charges). This section does not apply to a change to a contract under this Division.
- (7) **Meaning of unjust.** In this section, “**unjust**” includes unconscionable, harsh or oppressive.

71. Orders on reopening of transactions

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

- (a) reopen an account already taken between the parties;
- (b) relieve the debtor and any guarantor from payment of any amount in excess of such amount as the Court, having regard to the risk involved and all other circumstances, considers to be reasonably payable;
- (c) set aside either wholly or in part or revise or alter an agreement made or mortgage given in connection with the transaction;

- (d) order that the mortgagee takes such steps as are necessary to discharge the mortgage;
- (e) give judgment for or make an order in favour of a party of such amount as, having regard to the relief (if any) which the Court thinks fit to grant, is justly due to that party under the contract, mortgage or guarantee;
- (f) give judgment or make an order against a person for delivery of goods to which the contract, mortgage or guarantee relates and which are in the possession of that person;
- (g) make ancillary or consequential orders.

72. Court may review unconscionable interest and other charges

- (1) The Court may, if satisfied on the application of a debtor or guarantor that —
 - (a) a change in the annual percentage rate or rates under a credit contract to which section 59(1) or (4) applies; or
 - (b) an establishment fee or charge; or
 - (c) a fee or charge payable on early termination of a credit contract; or
 - (d) a fee or charge for a prepayment of an amount under a credit contract;

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

- (2) For the purposes of this section, a change to the annual percentage rate or rates is unconscionable if and only if it appears to the Court that —
 - (a) it changes the annual percentage rate or rates in a manner that is unreasonable, having regard to any advertised rate or other representations made by the credit provider before or at the time the contract was entered into, the period of time since the contract was

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entered into and any other consideration the Court thinks relevant; or

- (b) the change is a measure that discriminates unjustifiably against the debtor when the debtor is compared to other debtors of the credit provider under similar contracts.
- (3) In determining whether an establishment fee or charge is unconscionable, the Court is to have regard to whether the amount of the fee or charge is equal to the credit provider's reasonable costs of determining an application for credit and the initial administrative costs of providing the credit or is equal to the credit provider's average reasonable costs of those things in respect of that class of contract.
- (4) For the purposes of this section, a fee or charge payable on early termination of the contract or a prepayment of an amount under the credit contract is unconscionable if and only if it appears to the Court that it exceeds a reasonable estimate of the credit provider's loss arising from the early termination or prepayment, including the credit provider's average reasonable administrative costs in respect of such a termination or prepayment.

73. Time limit

- (1) An application (other than an application under section 72) may not be brought under this Division more than 2 years after the relevant credit contract is rescinded or discharged or otherwise comes to an end.
- (2) An application under section 72 may not be brought more than 2 years after the relevant change takes effect or fee or charge is charged under the credit contract or the credit contract is rescinded or discharged or otherwise comes to an end.

74. Joinder of parties

- (1) If it appears to the Court that a person other than a credit provider or a mortgagee (a **“third party”**) has shared in the

profits of, or has a beneficial interest prospectively or otherwise in, a credit contract or mortgage that the Court holds to be unjust, the Court may make an order about the third party that the Court considers appropriate.

- (2) However, before making an order about the third party, the Court must —
- (a) join the third party as a party to the proceedings; and
 - (b) give the third party an opportunity to appear and be heard in the proceedings.

Part 5 — Ending and enforcing credit contracts, mortgages and guarantees

Division 1 — Ending of credit contract by debtor

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

- (1) A debtor or guarantor is entitled to pay out the credit contract at any time.
- (2) The amount required to pay out a credit contract (other than a continuing credit contract) is the total of the following amounts —
 - (a) the amount of credit;
 - (b) the interest charges and all other fees and charges payable by the debtor to the credit provider up to the date of termination;
 - (c) reasonable enforcement expenses;
 - (d) early termination charges, if provided for in the contract;

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

76. Statement of pay out figure

- (1) A credit provider must, at the written request of a debtor or guarantor, provide a written statement of the amount required to pay out a credit contract (other than a continuing credit contract) as at such date as the debtor or guarantor specifies. If so requested, the credit provider must also provide details of the items which make up that amount.
- (2) The statement must also contain a statement to the effect that the amount required to pay out the credit contract may change according to the date on which it is paid.

- (3) A credit provider must give a statement, complying with this section, within 7 days after the request is given to the credit provider.
- (4) In the case of joint debtors or guarantors, the statement under this section need only be given to a debtor or guarantor who requests the statement and not, despite section 171, to each joint debtor or guarantor.

Maximum penalty — 50 penalty units.

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

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

78. Surrender of mortgaged goods and goods subject to sale by instalments

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

the debtor or mortgagor may give written notice of an intention to return the goods to the credit provider or, if the goods are in

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the credit provider's possession, require the credit provider in writing to sell the goods.

- (2) **Delivery of goods.** A debtor or mortgagor may return the goods to the credit provider at the credit provider's place of business during ordinary business hours within 7 days of the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider.
- (3) **Notice of value.** The credit provider must, within 14 days after a debtor or mortgagor returns the goods or requires the credit provider to sell the goods, give the debtor or mortgagor a written notice containing the estimated value of the goods and any other information required by the regulations.
- (4) **Return or sale of goods.** If the debtor or mortgagor, within 21 days after the notice under subsection (3) is given, requests by written notice return of the goods to the debtor or mortgagor or withdraws the requirement to sell the goods (and the debtor is not in default under the terms of the credit contract), the credit provider must return to the debtor or mortgagor any goods returned by the debtor or mortgagor and must not comply with the requirement.
- (5) **Nominated purchaser.** The debtor or mortgagor may, within 21 days after the notice under subsection (3) is given, nominate in writing a person who is prepared to purchase the goods from the credit provider at the estimated value or at any greater amount for which the credit provider has obtained a written offer to buy the goods. The credit provider must offer to sell the goods to that person for the estimated value or, if there is a written offer to buy the goods for a greater amount, that amount.
- (6) **Sale of goods by credit provider.** The credit provider must, if the goods are not required to be returned under subsection (4), as soon as reasonably practicable (or at such other time as the credit provider and the debtor or mortgagor agree) sell the goods in accordance with subsection (5) or, if no buyer is nominated or

the nominated buyer under that subsection does not buy the goods, for the best price reasonably obtainable.

- (7) **Amount to be credited to debtor or mortgagor.** The credit provider must credit the debtor or mortgagor with a payment equivalent to the proceeds of the sale less any amounts which the credit provider is entitled to deduct from those proceeds. On the sale of the goods, the amount required to pay out the contract becomes due.
- (8) **Deductions from proceeds.** A credit provider that sells mortgaged goods under this section is entitled to deduct from the proceeds of that sale only the following amounts —
- (a) the amount currently secured by the mortgage in relation to the credit contract or guarantee, not being more than the amount required to discharge the contract or guarantee;
 - (b) the amount payable to discharge any prior mortgage to which the goods were subject;
 - (c) the amounts payable in successive discharge of any subsequent mortgages to which the goods were subject and of which the credit provider had notice;
 - (d) the credit provider's reasonable enforcement expenses;
 - (e) the expenses reasonably incurred by the credit provider in connection with the possession and sale of the mortgaged goods.
- (9) **Notice of amount credited and other matters.** The credit provider must give the debtor or mortgagor a written notice stating the gross amount realised on the sale, the net proceeds of the sale, the amount credited to the debtor or mortgagor and the amount required to pay out the credit contract or the amount due under the guarantee.
- (10) **Offence—credit provider.** A credit provider that contravenes a requirement of this section is guilty of an offence.
Maximum penalty (subsection (10)) — 50 penalty units.

79. Compensation to debtor or mortgagor

- (1) The Court, on application by the debtor or mortgagor, may order a credit provider to credit the debtor or mortgagor with a payment, fixed by the Court, exceeding the net proceeds of sale if it is not satisfied that the credit provider sold the goods as soon as reasonably practicable (or at such other time as the credit provider and debtor or mortgagor agreed) for the best price reasonably obtainable.
- (2) On application by the debtor or mortgagor, the mortgagee under any prior mortgage to which the goods are subject or the mortgagee under any subsequent mortgage of which the credit provider has notice, the Court, if not satisfied that the credit provider complied with section 78, may make an order requiring the credit provider to compensate the debtor or mortgagor or the relevant mortgagee for any loss suffered as a result.
- (3) The onus of proving that section 78 was complied with is on the credit provider.

Division 2 — Enforcement of credit contracts, mortgages and guarantees

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

- (1) **Enforcement of credit contract.** A credit provider must not begin enforcement proceedings against a debtor in relation to a credit contract unless the debtor is in default under the credit contract and —
 - (a) the credit provider has given the debtor, and any guarantor, a default notice, complying with this section, allowing the debtor a period of at least 30 days from the date of the notice to remedy the default; and
 - (b) the default has not been remedied within that period.

Maximum penalty — 50 penalty units.

- (2) **Enforcement of mortgage.** A credit provider must not begin enforcement proceedings against a mortgagor to recover payment of money due or take possession of, sell, appoint a receiver for or foreclose in relation to property subject to a mortgage, unless the mortgagor is in default under the mortgage and —
- (a) the credit provider has given the mortgagor a default notice, complying with this section, allowing the mortgagor a period of at least 30 days from the date of the notice to remedy the default; and
 - (b) the default has not been remedied within that period.
- Maximum penalty — 50 penalty units.
- (3) **Default notice requirements.** A default notice must specify the default and the action necessary to remedy it and that a subsequent default of the same kind that occurs during the period specified in the default notice for remedying the original default may be the subject of enforcement proceedings without further notice if it is not remedied within the period.
- (3A) **Combined notices.** Default notices that may be given under subsections (1) and (2) may be combined in one document if given to a person who is both a debtor and a mortgagor.
- (4) **When default notice not required.** A credit provider is not required to give a default notice or to wait until the period specified in the default notice has elapsed, before beginning enforcement proceedings, if —
- (a) the credit provider believes on reasonable grounds that it was induced by fraud on the part of the debtor or mortgagor to enter into the credit contract or mortgage; or
 - (b) the credit provider has made reasonable attempts to locate the debtor or mortgagor but without success; or
 - (c) the Court authorises the credit provider to begin the enforcement proceedings; or

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- (d) the credit provider believes on reasonable grounds that the debtor or mortgagor has removed or disposed of mortgaged goods under a mortgage related to the credit contract or under the mortgage concerned, or intends to remove or dispose of mortgaged goods, without the credit provider's permission or that urgent action is necessary to protect the mortgaged property.
- (5) **Non-remedial default.** If the credit provider believes on reasonable grounds that a default is not capable of being remedied —
 - (a) the default notice need only specify the default; and
 - (b) the credit provider may begin the enforcement proceedings after the period of 30 days from the date of the notice.
- (6) **Other law about mortgages not affected.** This section is in addition to any provision of any other law relating to the enforcement of real property or other mortgages and does not prevent the issue of notices to defaulting mortgagors under other legislation. Nothing in this section prevents a notice to a defaulting mortgagor under other legislation being issued at the same time, or in the same document, as the default notice under this section.

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

81. Defaults may be remedied

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

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

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

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

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

Maximum penalty — 50 penalty units.

83. Requirements to be met before credit provider can repossess mortgaged goods

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

Maximum penalty — 100 penalty units.

- (2) However, the restriction does not apply —
- (a) to a continuing credit contract; or

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- (b) if the credit provider believes on reasonable grounds that the debtor has removed or disposed of the mortgaged goods, or intends to remove or dispose of them, without the credit provider's permission or that urgent action is necessary to protect the goods.
- (3) In any proceedings in which it is established that a credit provider has taken possession of mortgaged goods contrary to subsection (1), the burden of establishing that the possession of the goods was lawfully taken by virtue of subsection (2) lies on the credit provider.
- (4) Nothing in this section prevents a credit provider from accepting the return of goods under section 78.

84. Acceleration clauses

- (1) For the purposes of this Part, an “**acceleration clause**” is a term of a credit contract or mortgage providing that —
 - (a) on the occurrence or non-occurrence of a particular event, the credit provider becomes entitled to immediate payment of all, or a part, of an amount under the contract that would not otherwise have been immediately payable; or
 - (b) whether or not on the occurrence or non-occurrence of a particular event, the credit provider has a discretion to require repayment of the amount of credit otherwise than by repayments fixed, or determined on a basis stated, in the contract;

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

- (2) An “**on demand facility**” is a credit contract or mortgage under which —
 - (a) the total amount outstanding under the contract or mortgage is repayable at any time on demand by the credit provider; and

- (b) there is no agreement, arrangement or understanding between the credit provider and the debtor or mortgagor that repayment will only be demanded on the occurrence or non-occurrence of a particular event.

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

- (1) An acceleration clause is to operate only if the debtor or mortgagor is in default under the credit contract or mortgage and —
 - (a) the credit provider has given to the debtor and any guarantor, or to the mortgagor, a default notice under section 80; and
 - (b) the default notice contains an additional statement of the manner in which the liabilities of the debtor or mortgagor under the contract or mortgage would be affected by the operation of the acceleration clause and also of the amount required to pay out the contract (as accelerated); and
 - (c) the default has not been remedied within the period specified in the default notice (unless the credit provider believes on reasonable grounds that the default is not capable of being remedied).
- (2) However, a credit provider is not required to give a default notice under section 80 or to wait until the period specified in the default notice has elapsed before bringing an acceleration clause into operation, if —
 - (a) the credit provider believes on reasonable grounds that it was induced by fraud on the part of the debtor or mortgagor to enter into the contract or mortgage; or
 - (b) the credit provider has made reasonable attempts to locate the debtor or mortgagor but without success; or
 - (c) the Court authorises the credit provider not to do so; or

- (d) the credit provider believes on reasonable grounds that the debtor or mortgagor has removed or disposed of mortgaged goods under a mortgage related to the credit contract or the mortgage concerned, or intends to remove or dispose of mortgaged goods, without the credit provider's permission or that urgent action is necessary to protect the goods.
- (3) This section is in addition to any provision of any other law relating to the enforcement of real property mortgages and does not prevent the issue of notices to defaulting mortgagors under other legislation.

Division 3 — Postponement of enforcement proceedings

86. Postponement of exercise of rights

- (1) A debtor, mortgagor or guarantor who has been given a default notice under Division 2 or a demand for payment under section 82 may, at any time before the end of the period specified in the notice or demand, negotiate with the credit provider a postponement of the enforcement proceedings or any action taken under such proceedings or of the operation of any applicable acceleration clause.
- (2) This Division does not apply to a credit contract in respect of which the maximum amount of credit that is or may be provided is more than \$125 000 (or such other amount as may be prescribed by the regulations).

87. Effect of negotiated postponement

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

- (2) It is a condition of any postponement negotiated with a credit provider after the credit provider has taken possession of property subject to a mortgage that the mortgagor pay the reasonable costs of the credit provider in taking possession of the property.
- (3) A credit provider must give written notice of the conditions of a postponement referred to in subsection (1) not later than 30 days after agreement is reached on the postponement. The notice must set out the consequences under subsection (5) if the conditions of the postponement are not complied with.
Maximum penalty — 100 penalty units.
- (4) A credit provider that is required to give notice under section 65 in relation to a postponement is not required to comply with subsection (3).
- (5) If any of the conditions of a postponement are not complied with, a credit provider is not required to give a further default notice under this Code to the debtor, mortgagor or guarantor with whom the postponement was negotiated before proceeding with enforcement proceedings.

88. Postponement by Court

- (1) If the debtor, mortgagor or guarantor is unable to negotiate a postponement, the debtor, mortgagor or guarantor may apply to the Court for a postponement.
- (2) The Court may, after allowing the applicant, the credit provider and any debtor, mortgagor or guarantor concerned a reasonable opportunity to be heard, order or refuse to order the postponement to which the application relates and may make such other orders as it thinks fit.
- (3) The Court may, if it thinks it appropriate in the circumstances, stay any enforcement proceedings under the credit contract or mortgage until the application has been determined.

89. Credit provider may apply for variation of postponement order

- (1) A credit provider that is subject to an order under this Division may apply to the Court for variation of the order.
- (2) On such an application, the Court may vary the order to which the application relates as it thinks fit or may refuse to vary the order or may revoke the order.

Division 4 — Enforcement procedures for goods mortgaged

90. Information as to location of mortgaged goods

- (1) A credit provider may, by written notice to a mortgagor under a goods mortgage, require the mortgagor to inform the credit provider within 7 days where the mortgaged goods are and, if the mortgaged goods are not in the mortgagor's possession, to give the credit provider all information in the mortgagor's possession that might assist the credit provider to trace the goods.
- (2) A mortgagor who contravenes a notice under this section is guilty of an offence.
Maximum penalty — 50 penalty units.

91. Entry to residential property to take possession of goods

- (1) A credit provider, or an agent of a credit provider, must not enter any part of premises used for residential purposes for the purpose of taking possession of mortgaged goods under a goods mortgage unless —
 - (a) the Court has authorised the entry; or
 - (b) the occupier of the premises has, after being informed in writing of the provisions of this section, consented in writing to the entry.
- (2) The regulations may provide for procedures for the obtaining and giving of consent for the purposes of this section and may

set out the circumstances in which consent is or is not taken to have been given.

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

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

92. Court may order entry

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

93. Order for possession

- (1) The Court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, order a person who has possession of the goods to deliver them to the credit provider at a specified time or place or within a specified period.
- (2) The Court may, on the application of a credit provider or other person required to deliver goods to a credit provider, by order vary the place at which or time or period within which goods must be delivered to the credit provider.
- (3) A person who contravenes an order under this section is guilty of an offence.

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

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

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

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- (b) the enforcement expenses incurred up to the date on which the goods were taken into the credit provider's possession and, if enforcement expenses are accruing while the goods remain in the credit provider's possession, the rate of accrual;
 - (c) a statement of the mortgagor's rights and obligations in the form set out in the regulations.
- (2) **Goods not to be sold immediately.** A credit provider must not dispose of goods taken under the mortgage within 21 days after the date of the notice, unless the Court authorises the credit provider to do so.
- (3) **Effect of proceedings.** If at the end of that 21-day period a stay of enforcement proceedings is in force under this Code or an application under section 70 has not been determined, the credit provider must not dispose of the goods until those proceedings have been determined and any period allowed for appeal has elapsed.
- (4) **Payment during notice period.** The credit provider must return the goods if —
 - (a) the amount in arrears (less any accelerated amount) and the credit provider's reasonable enforcement expenses are paid within that 21-day period and the debtor has not committed a further default of the same kind under the credit contract; or
 - (b) the credit contract is paid out.
- (5) **Offence.** A credit provider that contravenes this section is guilty of an offence.

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

95. Mortgagor may nominate purchaser of goods taken by credit provider

- (1) The mortgagor may, within 21 days after the date of the notice given under section 94, nominate in writing a person who is

prepared to purchase the goods from the credit provider at the estimated value or at any greater amount for which the credit provider has obtained a written offer to buy the goods.

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

Maximum penalty — 50 penalty units.

96. Sale of goods by credit provider

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

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

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

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

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

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

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

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

98. Compensation to mortgagor

- (1) The Court, on application by a mortgagor, may order a credit provider to credit the mortgagor with a payment, fixed by the Court, exceeding the net proceeds of sale if it is not satisfied that the credit provider sold the goods as soon as reasonably practicable, or at a time agreed between the credit provider and the mortgagor, for the best price reasonably obtainable.
- (2) On application by a mortgagor, the mortgagee under any prior mortgage to which the goods are subject or the mortgagee under any subsequent mortgage of which the credit provider has notice, the Court, if not satisfied that the credit provider exercised its power of sale in accordance with this Division, may make an order requiring the credit provider to compensate the mortgagor or the relevant mortgagee for any loss suffered as a result.
- (3) The onus of proving that a power of sale was exercised in accordance with this Division is on the credit provider that exercised it.

Division 5 — Enforcement expenses

99. Recovery of enforcement expenses

- (1) A credit provider must not recover or seek to recover enforcement expenses from a debtor, mortgagor or guarantor in excess of those reasonably incurred by the credit provider. Enforcement expenses of a credit provider extend to those reasonably incurred by the use of the staff and facilities of the credit provider.
- (2) **Civil effect.** Any provision of the credit contract, mortgage or guarantee that appears to confer a greater right is void. If enforcement expenses are in fact recovered in excess of this limitation, they may be recovered back.
- (3) If there is a dispute between the credit provider and the debtor, mortgagor or guarantor about the amount of enforcement expenses that may be recovered by the credit provider, the Court may, on application by any of the parties to the dispute, determine the amount of that liability.

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

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Part 6 — Civil penalties for defaults of credit providers

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

100. Key requirements

- (1) For the purposes of this Division, a “key requirement” in connection with a credit contract (other than a continuing credit contract) is any one of the requirements of this Code contained in the following provisions —
 - (a) section 15(B);
 - (b) section 15(C);
 - (c) section 15(D);
 - (d) section 15(E);
 - (e) section 15(G)(a) and (b)—but only in respect of retained credit fees and charges;
 - (f) section 15(H);
 - (g) section 15(J);
 - (h) section 15(N)(a) and (b);
 - (i) section 21(1)—but only at the time the credit contract is entered into.

- (2) For the purposes of this Division, a “key requirement” in connection with a continuing credit contract is any one of the requirements of this Code contained in the following provisions —
 - (a) section 15(B)(b);
 - (b) section 15(C);
 - (c) section 15(D);
 - (d) section 15(G)(a) and (b)—but only in respect of retained credit fees and charges;
 - (e) section 15(H);

- (f) section 21(1);
 - (g) section 32(E);
 - (h) section 33.
- (3) A key requirement relating to a disclosure or a statement of account extends to the requirements set out in Part 2 as to the manner in which the disclosure or statement is to be made, but does not extend to any requirements set out in the regulations.

101. Application for order relating to key requirements

- (1) A party to a credit contract or a guarantor or the Government Consumer Agency may apply to the Court for an order under this Division.
- (2) A debtor or guarantor may not make an application for an order under this Division in respect of a contravention under a contract if the contravention under that contract is or has been subject to an application for an order made by the credit provider or a Government Consumer Agency under this Code.
- (3) Subsection (2) does not prevent an application from being made for an order for the payment of compensation under section 107.

[Section 101 amended by Consumer Credit (Western Australia) Act 1996 s. 13.]

102. Civil penalty may be imposed for contravention of key requirement

- (1) **Declaration as to key requirement.** The Court must, on an application being made, by order declare whether or not the credit provider has contravened a key requirement in connection with the credit contract or contracts concerned.
- (2) **Penalty orders.** The Court may make an order, in accordance with this Division, requiring the credit provider to pay an amount as a civil penalty, if it is of the opinion that the credit provider has contravened a key requirement.

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- (3) **Prudential standing.** The Court, in considering the imposition of a civil penalty, must have regard primarily to the prudential standing of any credit provider concerned, or of any subsidiary of the credit provider (within the meaning of the Corporations Law), if the credit provider or subsidiary takes deposits or is a borrowing corporation (within the meaning of that Law). However, the Court is to have regard to that prudential standing only if the credit provider requests the Court to do so.
- (4) **Other matters to be considered.** The Court, in considering the imposition of a civil penalty, must have regard to the following —
- (a) the conduct of the credit provider and debtor before and after the credit contract was entered into;
 - (b) whether the contravention was deliberate or otherwise;
 - (c) the loss or other detriment (if any) suffered by the debtor as a result of the contravention;
 - (d) when the credit provider first became aware, or ought reasonably to have become aware, of the contravention;
 - (e) any systems or procedures of the credit provider to prevent or identify contraventions;
 - (f) whether the contravention could have been prevented by the credit provider;
 - (g) any action taken by the credit provider to remedy the contravention or compensate the debtor or to prevent further contraventions;
 - (h) the time taken to make the application and the nature of the application;
 - (i) any other matter the Court considers relevant.
- (5) **Related contraventions.** The Court must, for the purposes of determining an application for an order under this Division or the amount of a civil penalty, treat a contravention of a key requirement that occurs merely because of another contravention of a key requirement as being a contravention of

the same kind. If a provision referred to in section 100 contains several requirements, the Court must treat contraventions of more than one of those requirements as a single contravention of the one key requirement for the purposes of determining the amount of a civil penalty.

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

103. Penalty if application made by debtor or guarantor

- (1) On application being made by a debtor or a guarantor for an order, the maximum civil penalty that may be imposed by the Court for a contravention of a key requirement is an amount not exceeding the amount of —
- (a) except as provided by paragraphs (b) and (c)—all interest charges payable under the contract from the date it was made; or
 - (b) in the case of a contravention of a key requirement relating to a statement of account of a continuing credit contract—all interest charges payable under the contract for the period to which the statement of account relates; or
 - (c) in the case of a contravention of a key requirement relating to prohibited monetary obligations—all interest charges accruing under the contract from the date the contravention occurred.
- (2) The Court may, however, impose a greater civil penalty if the debtor or guarantor satisfies the Court that the debtor has suffered a loss. The amount of the civil penalty is to be not less than the amount of the loss.
- (3) For the purposes of subsection (1)(a), the amount of future interest charges payable under a credit contract is to be calculated on the assumptions in sections 158 and 160.

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104. Payment of penalty to debtor or guarantor

- (1) An amount of civil penalty ordered by the Court to be paid on an application for an order made by a debtor or a guarantor may be set off by the debtor or guarantor against any amount that is due or becomes due to the credit provider under the credit contract. If there is no such amount, the amount of the civil penalty is a debt due by the credit provider to the debtor or guarantor.
- (2) An order made on application by a debtor or a guarantor may include such directions as the Court considers appropriate relating to the payment of the amount owed by the debtor or the credit provider as a result of the order.

105. Penalty if application made by a credit provider or Government Consumer Agency

- (1) On application being made by a credit provider or the Government Consumer Agency for an order, the maximum civil penalty that may be imposed by the Court for a contravention of a key requirement relating to a contract affected by the application is an amount calculated so that the total civil penalty for all contraventions of the requirement in Australia (as disclosed by the credit provider) does not exceed \$500 000.
- (2) For the purpose of determining the penalty, the Court is, in making an order, to determine the appropriate amount of penalty for disclosed contraventions of the key requirement in all jurisdictions and to determine the amount payable in each jurisdiction proportionately according to the number of contracts in that jurisdiction affected by the disclosed contraventions.
- (3) An order relating to the amount payable in another jurisdiction has no effect in this jurisdiction and has such effect in that other jurisdiction as the law of that other jurisdiction provides.

106. Payment of penalty to fund

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

107. Compensation for debtor or guarantor

- (1) The Court may, on application by a debtor or a guarantor, order that the credit provider pay to the debtor or guarantor an amount by way of compensation for loss arising from the contravention of a key requirement.
- (2) The Court may only order an amount to be paid by way of compensation if the debtor or guarantor satisfies the Court that the debtor or guarantor has suffered a loss arising from the contravention. The amount of compensation is not to exceed the amount of the loss.
- (3) The Court may not make an order under this section if the debtor or guarantor has previously obtained or been refused a civil penalty referred to in section 104 relating to the same contravention.
- (4) An amount payable under this section does not affect the amount of penalty for the purposes of section 105.

108. Recognition of civil penalty determined in other jurisdictions

- (1) A credit provider or the Government Consumer Agency may register with the Court of this jurisdiction an order made by a Court in another jurisdiction under a provision of a law of that other jurisdiction corresponding to sections 102 and 105.
- (2) On registration of the order, the order is taken to be an order under sections 102 and 105.

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[Section 108 amended by Consumer Credit (Western Australia) Act 1996 s. 13.]

109. Other jurisdiction more appropriate

- (1) The Court may, on the application of a credit provider or the Government Consumer Agency or a Government Consumer Agency of another jurisdiction, refuse to hear an application on the ground that it is more appropriate that the application be determined in another specified jurisdiction under the corresponding provisions of the corresponding laws of that jurisdiction.
- (2) Before determining whether to refuse to hear an application, the Court must consider —
 - (a) whether the number of affected credit contracts in the other jurisdiction exceeds the number in this jurisdiction; and
 - (b) any other matter the Court considers relevant.

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

- (1) An application for an order by a credit provider or the Government Consumer Agency —
 - (a) may apply to any one or more credit contracts; and
 - (b) may apply to all or any class of credit contracts entered into by the credit provider during a specified period (for example, all credit contracts entered into during a specified period which are affected by a specified contravention).
- (2) The Court may require notice of any such application to be published by notice, in a form approved by the Court, in a newspaper circulating throughout this jurisdiction or Australia, as the Court determines.

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

111. Government Consumer Agency may represent interests of debtors

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

112. Directions pending Court's decision

- (1) The Court may, before disposing of an application by a debtor or guarantor for an order under this Division, make such directions as it considers appropriate to protect the interests of the debtor or guarantor concerned.
- (2) Subject to any such directions of the Court, the application does not prevent —
- (a) any proceedings for the enforcement of the debtor's obligations (or the obligations of a guarantor) from being taken; or
 - (b) any rights over property the subject of a mortgage from being exercised.
- (3) For the purposes of this section, a reference to the disposal of an application includes a reference to its withdrawal by the applicant.
- (4) A credit provider affected by a direction of the Court may apply to the Court for variation of the direction. The Court may, on such an application being made, vary or revoke the direction or refuse to vary or revoke the direction.

113. Offences

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

113A. Time limit for application for orders under this Division

- (1) Proceedings under this Division for a declaration of contravention and the imposition of a civil penalty for a contravention may not be brought after 6 years from the day the contravention happened.
- (2) Subsection (1) applies despite any Act relating to the limitation of time for commencing actions.
- (3) In this section —
“contravention” means contravention of a key requirement.

Division 2 — Other civil penalties

114. Civil effect of other contraventions

- (1) If a credit provider contravenes a requirement of or made under this Code (other than one for which a civil effect is specifically provided by Division 1 or by any other provision of this Code), the Court may order the credit provider to make restitution or pay compensation to any person affected by the contravention and, in that event, may make any consequential order it considers appropriate in the circumstances.
- (2) An application for the exercise of the Court’s powers under this section may be made by the Government Consumer Agency or by any person affected by the contravention.

Part 7 — Related sale contracts

Division 1 — Interpretation and application

115. Meaning of sale contract

For the purposes of this Code, a “**sale contract**” is a contract for any one or more of the following —

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

116. Sale contracts to which this Part applies

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

117. Linked credit providers and tied credit contracts

- (1) For the purposes of this Code, a “**linked credit provider**” of a supplier means a credit provider —
 - (a) with whom the supplier has a contract, arrangement or understanding relating to the supply to the supplier of goods in which the supplier deals, relating to the business carried on by the supplier of supplying goods or services or relating to the provision to persons to whom goods or services are supplied by the supplier of credit in respect of payment for those goods or services; or
 - (b) to whom the supplier, by arrangement with the credit provider, regularly refers persons for the purpose of obtaining credit; or
 - (c) whose forms of contract or forms of application or offers for credit are, by arrangement with the credit provider, made available to persons by the supplier; or

- (d) with whom the supplier has a contract, arrangement or understanding under which contracts or applications or offers for credit from the credit provider may be signed by persons at the premises of the supplier.
- (2) For the purposes of this Code, a “tied continuing credit contract” is a continuing credit contract under which a credit provider provides credit in respect of the payment by a debtor for goods or services supplied by a supplier in relation to whom the credit provider is a linked credit provider.
- (3) For the purposes of this Code, a “tied loan contract” is a credit contract (other than a continuing credit contract) entered into between a credit provider and a debtor where —
 - (a) the credit provider knows or ought reasonably to know that the debtor enters into the credit contract wholly or partly for the purposes of payment for the goods or services supplied by a supplier; and
 - (b) at the time the credit contract is entered into the credit provider is a linked credit provider of the supplier.

Division 2 — Liability of credit providers for suppliers' misrepresentations

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

- (1) If there is a tied loan contract or a tied continuing credit contract in respect of a sale contract, any representation, warranty or statement made (whether orally or in writing) by the supplier, or any person acting on behalf of the supplier, to the debtor in relation to the tied loan contract or tied continuing credit contract gives the debtor the same rights against the credit provider as the debtor would have had if it had been made by the credit provider.
- (2) Without prejudice to any other rights or remedies to which a credit provider may be entitled, a credit provider is entitled to be

indemnified by the person who made the representation, warranty or statement, and any person on whose behalf it was made, against any damage suffered by the credit provider through the operation of this section.

Division 3 — Liability of credit providers in relation to goods

119. Right to damages under sale contract against both supplier and linked credit provider (cf. *Trade Practices Act 1974* (Cwlth) s 73)

- (1) General right to damages. If —
- (a) a supplier supplies goods, or causes goods to be supplied, to a linked credit provider of the supplier and a debtor enters into a contract with the linked credit provider for the provision of credit in respect of the supply by way of sale of the goods to the debtor; or
 - (b) a debtor enters into a contract with a linked credit provider of a supplier for the provision of credit in respect of the supply by the supplier of goods or services, or goods and services, to the debtor;

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

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

provider by the debtor that was not induced by the supplier; or

(b) if the proceedings relate to a contract of sale with respect to which a tied loan contract applies, that —

(i) after due inquiry before becoming a linked credit provider of the supplier, the credit provider was satisfied that the reputation of the supplier in respect of the supplier's financial standing and business conduct was good; and

(ii) after becoming a linked credit provider of the supplier, but before the tied loan contract was entered into, the linked credit provider had not had cause to suspect that the debtor might, if the contract was entered into, be entitled to recover an amount of loss or damage suffered as a result of misrepresentation, breach of contract or failure of consideration in relation to the contract as referred to in subsection (1); and

(iii) after becoming a linked credit provider of the supplier, but before the tied loan contract was entered into, the credit provider had not had cause to suspect that the supplier might be unable to meet the supplier's liabilities as and when they fell due; or

(c) if the proceedings relate to a contract of sale with respect to which a tied continuing credit contract entered into by the linked credit provider applies, that, having regard to —

(i) the nature and volume of business carried on by the linked credit provider; and

(ii) such other matters as appear to be relevant in the circumstances of the case;

the linked credit provider, before becoming aware of the contract of sale, or of proposals for the making of the

contract of sale (whichever the linked credit provider first became aware of), had not had cause to suspect that a person entering into such a contract with the supplier might be entitled to claim damages against, or recover a sum of money from, the supplier for misrepresentation, breach of contract or failure of consideration as referred to in subsection (1).

120. Limits on debtor's right of action against linked credit provider (cf. *Trade Practices Act 1974 (Cwlth)* s 73)

- (1) Debtor may raise credit provider's liability. Subject to subsection (2), in relation to a contract referred to in section 119(1)(a) or (b), in which a credit provider claims damages or an amount of money from a debtor, the debtor may set up the liability of the credit provider under section 119 in diminution or extinction of the debtor's liability.
- (2) Proceedings to be brought against both supplier and linked credit provider. Subject to subsection (3), a debtor may not, in respect of a liability for which, by reason of section 119, a supplier and a linked credit provider are jointly and severally liable —
 - (a) bring proceedings to recover an amount of loss or damage from the credit provider; or
 - (b) where proceedings are brought against the debtor by the linked credit provider, make a counterclaim or exercise the right conferred by subsection (1) against the credit provider;

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

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

- (a) the supplier is insolvent, cannot be located after reasonable inquiry, or has died or been dissolved; or
 - (b) in the opinion of the court in which the proceedings are taken, it is not reasonably likely that a judgment obtained against the supplier would be satisfied and the court has, on the application of the debtor, declared that subsections (2), (5)(a) and (6)(a) do not apply in relation to the proceedings.
- (4) Limit of credit provider's liability. The liability of a linked credit provider to a debtor for damages or a sum of money in respect of a contract referred to in section 119(1) is not to exceed the sum of —
 - (a) the amount of credit under the tied loan contract or tied continuing credit contract; and
 - (b) the amount of interest (if any) or damages in the nature of interest allowed or awarded against the linked credit provider by the court; and
 - (c) the amount of costs (if any) awarded by the court against the linked credit provider or supplier or both.
- (5) Enforcement of judgment against linked credit provider. Where in proceedings arising under section 119, judgment is given against a supplier and a linked credit provider, the judgment —
 - (a) must not be enforced against the linked credit provider unless a written demand made on the supplier for satisfaction of the judgment has remained unsatisfied for not less than 30 days; and
 - (b) may be enforced against the linked credit provider only to the extent of the amount calculated in accordance with this section, or so much of the judgment debt as has not been satisfied by the supplier, whichever is the lesser.
- (6) Enforcement of right against linked credit provider. Where in proceedings in respect of the liability arising under section 119,

a right conferred by subsection (1) is established against a linked credit provider, the debtor —

- (a) may not receive the benefit of the right unless judgment has been given against the supplier and linked credit provider, a written demand has been made on the supplier for satisfaction of the judgment and the demand has remained unsatisfied for not less than 30 days; and
- (b) may receive the benefit only to the extent of the amount calculated in accordance with this section or so much of the judgment debt as has not been satisfied by the supplier, whichever is the lesser.

121. Liability of supplier to linked credit provider (cf. *Trade Practices Act 1974* (Cwlth) s 73)

Unless the linked credit provider and supplier otherwise agree, the supplier is liable to the linked credit provider for the amount of a loss suffered by the linked credit provider, being an amount not exceeding the maximum amount of the linked credit provider's liability under section 120(4) and, unless the court otherwise determines, the amount of costs (if any) reasonably incurred by the linked credit provider in defending the proceedings by reason of which the liability was incurred.

122. Interest may be awarded (cf. *Trade Practices Act 1974* (Cwlth) s 73)

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

date on which the judgment is given, at a rate prescribed by the regulations.

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

123. Subrogation of credit provider (cf. *Trade Practices Act 1974* (Cwlth) s 73)

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

Division 4 — Termination of related transactions

124. Termination of sale contract which is conditional on obtaining credit

- (1) If a purchaser of goods or services makes it known to a supplier that credit is required in order to pay for the goods or services and the purchaser, after making reasonable endeavours to do so, fails to obtain credit on reasonable terms, the purchaser is entitled to terminate the sale contract.
- (2) A purchaser may terminate a sale contract under this section even though goods or services have already been supplied under the contract but, if practicable, goods supplied under the sale contract must be returned to the supplier.
- (3) If a sale contract is terminated under this section —
 - (a) the supplier is entitled to —

- (i) reasonable compensation for damage to, or deterioration of, goods supplied under the sale contract (other than fair wear and tear) up to the date of their return to the supplier or, if they are not returned, the cash price of the goods; and
 - (ii) the reasonable value of the services supplied under the sale contract up to the date of termination; and
 - (b) the purchaser is entitled (subject to the supplier's entitlement referred to above) to the return of money paid under the sale contract.
- (4) This section does not apply to a sale contract for the supply of rights in relation to, and interests in, real property unless the supplier was aware that the purchaser intended to obtain the credit from the supplier or from a linked credit provider of the supplier.

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

- (1) If a sale contract is rescinded or discharged (whether under this Code or any other law) and there is a tied loan contract or a tied continuing credit contract made with the purchaser by a linked credit provider of the supplier under the sale contract, the debtor is entitled —
- (a) in the case of a tied loan contract—to terminate the credit contract; or
 - (b) in the case of a tied continuing credit contract—to be credited with the amount of credit in relation to the sale contract and the interest charges attributable to that amount.
- (2) If a tied loan contract is terminated under this section, any related guarantee or mortgage is terminated to the extent to which it secures obligations under the contract or any related guarantee.

- (3) If a tied loan contract is terminated under this section, the credit provider is entitled to recover from the debtor any part of the amount of credit that has not been paid to the supplier and the debtor is entitled to recover from the credit provider any interest charges or other amounts paid by the debtor under the credit contract.
- (4) If a mortgage or guarantee is terminated under this section, the credit provider is entitled to recover from the mortgagor or guarantor any part of the amount of credit that has not been paid to the supplier and that is secured by the mortgage or guarantee, and the mortgagor or guarantor is entitled to recover from the credit provider any other amounts paid by the mortgagor or guarantor.
- (5) If a tied loan contract is terminated under this section, the credit provider is entitled to recover from the supplier (subject to any agreement between them) the amount of any loss suffered by the credit provider as a result of the operation of this section.
- (6) A supplier who knows that a sale contract referred to in subsection (1) has been rescinded or discharged must forthwith give the credit provider under any tied loan contract or tied continuing credit contract notice of the termination.
Maximum penalty — 50 penalty units.
- (7) This section does not apply if the credit is provided as a result of an approach by the debtor that was not induced by the supplier or credit provider.
- (8) This section applies —
 - (a) to the exercise by a purchaser of a right under this Code or any other law to rescind or discharge a sale contract; and
 - (b) to a tied loan contract or a tied continuing credit contract, but only if the sale contract was the principal purpose for which the credit was provided.

126. Termination of linked maintenance services contract if credit contract terminated

- (1) If —
- (a) there is a tied loan contract or a tied continuing credit contract made with the debtor by a linked credit provider of the supplier under a sale contract to supply maintenance services; and
 - (b) the tied loan contract or tied continuing credit contract is terminated (whether under this Code or any other law) before the end of the term of the sale contract;

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

- (2) In any such case, the credit provider must inform the debtor in accordance with the regulations of the debtor's rights under this section.
- Maximum penalty — 50 penalty units.
- (3) The regulations may prescribe the manner of calculating the proportionate rebate of consideration for the purposes of this section.
- (4) This section does not apply if the credit is provided as a result of an approach by the debtor that was not induced by the supplier or credit provider.

127. Termination of contract under this Part to be in writing

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

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

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

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

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

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

Division 5 — Other provisions

130. Requirement as to source of credit for goods or services

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

Maximum penalty — 100 penalty units.

131. Prohibition on payment for goods or services by postdated bills of exchange or notes which exceed cash price of goods or services

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

Maximum penalty — 100 penalty units.

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

Part 8 — Related insurance contracts

132. Interpretation and application

- (1) For the purposes of this Code, a “credit-related insurance contract” is a contract for insurance of any of the following kinds in connection with a credit contract —
 - (a) insurance over mortgaged property;
 - (b) consumer credit insurance;
 - (c) insurance of a nature prescribed for the purposes of this section by the regulations.
- (2) This Code does not apply to insurance over mortgaged property that —
 - (a) is insurance for an extended period of warranty for goods; or
 - (b) is insurance over property that is not mortgaged to secure obligations under the credit contract.
- (3) This Code does not apply to consumer credit insurance in connection with a credit contract unless the contract for consumer credit insurance insures the obligations of the debtor under the credit contract.

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

- (1) A credit provider or a supplier must not —
 - (a) require a debtor or guarantor to take out insurance or to pay the cost of insurance taken out or arranged by the credit provider or supplier; or
 - (b) represent to a debtor or guarantor that the debtor or guarantor is required to pay the cost of any such insurance;

unless the insurance is compulsory insurance, mortgage indemnity insurance, insurance over mortgaged property or

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insurance of a nature and extent approved for the purposes of this section by the regulations.

Maximum penalty — 100 penalty units.

- (2) A credit provider or a supplier must not, in connection with a credit contract or a sale contract in relation to which there is a tied loan contract or a tied continuing credit contract —
- (a) require a debtor or guarantor to take out insurance with a particular insurer (unless the insurer is the only insurer providing insurance of the relevant kind or the requirement is exempted from the operation of this section by the regulations); or
 - (b) make any unreasonable requirement as to the terms on which the debtor or guarantor is to take out insurance.

Maximum penalty — 100 penalty units.

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

134. Financing of insurance premiums over mortgaged property

- (1) A credit provider must not knowingly provide credit to the debtor to pay the premium or finance the premium on insurance taken out by the debtor over mortgaged property for a period of insurance exceeding 1 year, but may provide credit for or finance successive premiums for periods of 1 year or less.

Maximum penalty — 100 penalty units.

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

Maximum penalty — 100 penalty units.

- (3) **Civil effect.** If a credit provider contravenes subsection (1), the insured is entitled to recover the whole of the premium paid

under the contract from the credit provider. If a credit provider contravenes subsection (2), the insured is entitled to recover the amount of premium debited in contravention of the subsection.

135. Commission for consumer credit insurance

- (1) This section applies to commission paid by an insurer in connection with consumer credit insurance taken out by the debtor, or for which an amount is paid by the debtor.
- (2) The total of any such commission accepted by all or any of the following —
 - (a) the credit provider;
 - (b) the supplier under a sale contract in relation to which there is a tied loan contract or a tied continuing credit contract;
 - (c) the agent of the credit provider or supplier;

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

- (3) A credit provider or any such supplier or agent must not accept, and an insurer must not pay, a commission exceeding, in amount or value, the maximum allowed under this section.
Maximum penalty — 100 penalty units.
- (4) Civil effect. If a credit provider or supplier contravenes this section, the insured is entitled to recover the whole amount or value of the commission from the credit provider or the supplier, as the case requires.

136. Supply of copy of credit-related insurance contract by insurer

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

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- (2) In the case of any such contract of insurance entered into by the credit provider in which the debtor has a beneficial interest, the credit provider must ensure that a written notice containing particulars of the insurance prescribed by the regulations is given to the debtor within 14 days after the beneficial interest is acquired by the debtor.
- (3) This section does not apply to compulsory insurance.
Maximum penalty — 100 penalty units.

137. Rejection of debtor's proposal for insurance

- (1) If a credit provider proposes to finance the amount payable by the debtor under or in connection with a credit-related insurance contract and the proposal for insurance is rejected by an insurer, the insurer must inform the debtor and the credit provider of its rejection.
- (2) Unless the insurance is to be arranged with another insurer, the credit provider must ensure that any amount paid by the debtor is refunded or credited in full.
Maximum penalty — 100 penalty units.
- (3) The credit provider may, in turn, recover the amount paid to the debtor from the insurer, if an amount has been paid to the insurer by the debtor under or in connection with the proposed insurance contract.

138. Termination of consumer credit insurance contract if credit contract terminated

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

contract for consumer credit insurance in force immediately before the credit contract is terminated.

- (3) The credit provider may, in turn, recover the amount paid to the debtor from the insurer.
- (4) The regulations may prescribe the manner of calculating the proportionate rebate of premium for the purposes of this section, including the rebate payable where this section does not apply to the whole of a credit-related insurance contract.
- (5) This section has effect despite any provision of the credit-related insurance contract.
- (6) This section does not apply to a credit-related insurance contract, to the extent that it provides a benefit in the event of the death of the debtor, if a credit contract is terminated on the death of a debtor. However, it does apply to the credit-related insurance contract to the extent that it provides other benefits.

139. Termination of insurance contract over mortgaged property if credit contract terminated

- (1) If a credit contract is terminated before the end of the term of a credit-related insurance contract over mortgaged property financed under the credit contract or before any such insurance contract is otherwise terminated, the debtor is entitled to terminate the insurance contract and recover from the insurer a proportionate rebate of premium paid under the insurance contract.
- (2) On the termination of the credit contract, the credit provider must inform the debtor in accordance with the regulations of the debtor's rights under this section.
Maximum penalty — 50 penalty units.
- (3) The regulations may prescribe the manner of calculating the proportionate rebate of premium for the purposes of this section.

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- (4) An entitlement under this section to terminate an insurance contract may be exercised only by notice in writing to the insurer.
- (5) This section has effect despite any provision of the credit-related insurance contract.

Part 9 — Advertising and related conduct

140. Advertising

- (1) **General principle.** A person must not publish, or cause to be published, an advertisement that states or implies that credit is available unless the advertisement complies with this section and, until the expiry of Part 9A, with the provisions of Division 2 of that Part.
Maximum penalty — 100 penalty units.
- (2) **Regulations.** The advertisement must not contain a statement of a kind prohibited by the regulations. It must contain any statement required by the regulations.
- (3) **Annual percentage rate.** The advertisement need not contain an annual percentage rate, but must do so if the advertisement states the amount of any repayment. If the advertisement contains an annual percentage rate and credit fees and charges are payable, the advertisement must —
 - (a) state that fees and charges are payable; or
 - (b) specify the amount of the fees and charges payable; or
 - (c) specify the amount of some of the fees and charges payable and state that other fees and charges are payable.
- (4) **Comparison rate.** The advertisement may contain the comparison rate calculated as prescribed by the regulations and, if it does so, must be accompanied by the warnings set out in the regulations. This subsection does not apply while Part 9A has effect.
- (5) **Civil effect.** A person who suffers loss as a result of a contravention by another person of this section may recover the amount of the loss against that other person or any other person involved in the contravention.

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141. Persons liable for advertisements

- (1) A person is, in the absence of proof to the contrary, taken to have caused an advertisement to be published if —
 - (a) the person provides credit, owns or has an interest in any goods, or supplies or has an interest in the supply of any goods or services, which the advertisement promotes; and
 - (b) the advertisement specifies the name, business name, address, telephone number, facsimile number or post office box number of the person or the person's agent.
- (2) It is a defence to a charge under section 140 of causing an advertisement that does not comply with that section to be published if the person charged proves that he or she could not, by the exercise of reasonable care, have prevented the noncompliance to which the offence relates.

142. Defence

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

143. Interest rates which may be disclosed

A person must not disclose an interest rate —

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

unless the interest rate is expressed as a nominal percentage rate per annum or is the comparison rate calculated as prescribed by the regulations and accompanied by the warnings set out in the regulations.

Maximum penalty — 100 penalty units.

144. False or misleading representations

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

Maximum penalty — 50 penalty units.

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

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

145. Harassment

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

Maximum penalty — 100 penalty units.

146. Canvassing of credit at home

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

Maximum penalty — 100 penalty units.

- (2) A person who visits another's residence for the purpose of offering goods or services for sale and who offers to provide or arrange for the provision of credit to finance the sale will not be

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taken to have called for the purpose of inducing a person to apply for or obtain credit.

Part 9A — Comparison rates

Division 1 — Preliminary

146A. Object of Part

- (1) The object of this Part is to assist consumers to identify the true cost of credit offered by credit providers.
- (2) In order to achieve that object, this Part —
 - (a) makes it mandatory for credit providers to include the comparison rate in advertisements for consumer credit (other than under continuing credit contracts) if an interest rate is advertised; and
 - (b) requires credit providers, linked suppliers and finance brokers to supply consumers with schedules of comparison rates for any such consumer credit.

The comparison rate will reflect the total cost of credit arising from interest charges and other prescribed credit fees and charges.

146B. Part not to apply to continuing credit contracts

- (1) This Part does not apply to advertising or other matters about the provision of credit under continuing credit contracts.
- (2) Accordingly, a reference in this Part to the provision of credit (or to a credit contract or related matters) does not include a reference to the provision of credit under a continuing credit contract (or to a continuing credit contract or matters related to such a contract).

146C. Definitions

In this Part —

“**comparison rate schedule**” see section 146J.

“consumer credit product” means any form of facility for the provision of credit (other than under a continuing credit contract) provided to debtors by a credit provider.

“credit advertisement” means an advertisement in any form or medium that states or implies that credit is available, but (for the avoidance of doubt) does not include—

- (a) notices or other documents required or authorised to be given under this Code; or
- (b) a publication that only lists reference rates.

“finance broker” means a person who carries on the business of negotiating, or acting as intermediary to obtain, credit for persons other than the employer or principal of the person so negotiating or acting.

“name”, of a consumer credit product, means the usual name or description by which the credit provider describes or advertises the product.

146D. Expiry of Part

This Part expires on the fourth anniversary of its commencement, or on an earlier day fixed by a regulation.

Note — Section 14(3) provides that a credit provider may, before entering into a credit contract, inform the debtor of the comparison rate. Section 140(4) continues (after the expiry of this Part) the provision that an advertisement about the availability of consumer credit may contain the comparison rate.

[Section 146D amended in Gazette 27 Jun 2006 p. 2282.]

Division 2 — Comparison rate in credit advertising

146E. Comparison rate mandatory in advertisements containing annual percentage rate

- (1) A credit advertisement must contain the relevant comparison rate in accordance with this Part if it contains an annual percentage rate.

- (2) A credit advertisement may contain the relevant comparison rate in accordance with this Part even if it does not contain an annual percentage rate.

Note — Section 140(1) makes it an offence (maximum penalty—100 penalty units) if a person publishes a credit advertisement that does not comply with this Division.

146F. The relevant comparison rate

- (1) The relevant comparison rate for the purposes of section 146E is the comparison rate calculated for whichever of the designated amounts and terms most closely represents the typical amount of credit and term initially provided by the credit provider for the consumer credit product being advertised.
- (2) The designated amounts and terms are the amounts and terms prescribed by a regulation for the purposes of this section.
- (3) The credit advertisement may contain more than one relevant comparison rate.

146G. Information about comparison rate

- (1) The credit advertisement must clearly state the name of the consumer credit product, the amount of credit and the term to which each comparison rate applies.
- (2) If the comparison rate is calculated for an amount of credit prescribed by a regulation for the purposes of this subsection, the credit advertisement must clearly state —
- (a) that the comparison rate is for a secured loan if it has been calculated on the basis that a mortgage or guarantee is taken by the credit provider; or
 - (b) that the comparison rate is for an unsecured loan if it has not been so calculated.

The word “**secured**” or “**unsecured**” in connection with the amount of credit for which the comparison rate is calculated is a sufficient description for the purposes of this subsection.

- (3) The credit advertisement must clearly state that a comparison rate schedule will be available at the premises of the credit provider, finance broker or supplier to which the advertisement relates.

146H. Warning about comparison rate

- (1) A comparison rate in a credit advertisement must be accompanied by a warning about the accuracy of the comparison rate that is prescribed by a regulation.
- (2) If a comparison rate schedule comprises 2 or more documents, a separate warning must be given on each document.
- (3) The warning may be given in conjunction with the basis on which the comparison rate is calculated, that is, that the comparison rate is accurate only for the specified amount of credit and specified term.

146I. Other requirements for comparison rate

- (1) A comparison rate in any credit advertisement must be identified as a comparison rate.
- (2) A comparison rate in any credit advertisement must not be less prominent than —
 - (a) any annual percentage rate stated in the advertisement; and
 - (b) the amount of any repayment stated in the advertisement.
- (3) The following applies to credit advertisements on television, the Internet or other electronic display medium —
 - (a) if the annual percentage rate is in spoken form and not displayed on the screen in text, the comparison rate must also be in spoken form;

- (b) if the annual percentage rate is displayed on the screen in text, the comparison rate must also be displayed on the screen in text and may be in spoken form;
- (c) if the comparison rate is in spoken form, the warning and other information may be either in spoken form or displayed on the screen in text;
- (d) if the comparison rate is displayed on the screen in text, the warning and other information must also be displayed on the screen in text.

Division 3 — Comparison rate schedules

146J. The comparison rate schedule

The comparison rate schedule is a schedule that lists, in accordance with this Part, comparison rates for consumer credit products of a credit provider.

146K. When comparison rate schedule to be provided to consumers

- (1) **Premises of credit provider.** A credit provider is required to display and make available for collection by members of the public copies of the relevant comparison rate schedule at any premises of the credit provider —
 - (a) at which the credit provider displays or makes available for collection by members of the public copies of documents advertising the consumer credit products of the credit provider; or
 - (b) at which members of the public may lodge applications for credit in person.
- (2) **Premises of finance broker.** A finance broker is required to display and make available for collection by members of the public copies of the relevant comparison rate schedule or schedules at any premises of the finance broker —

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- (a) at which the finance broker displays or makes available for collection by members of the public copies of documents advertising the consumer credit products of credit providers; or
 - (b) at which members of the public may lodge applications for credit in person.
- (3) **Premises of linked suppliers.** A supplier is required to display and make available for collection by members of the public copies of the relevant comparison rate schedule or schedules at any premises of the supplier —
- (a) at which the supplier displays or makes available for collection by members of the public copies of documents advertising the consumer credit products of credit providers who are linked credit providers of the supplier; or
 - (b) at which members of the public may lodge applications for credit in person.

Note— Section 117 defines “linked credit provider” for the purposes of the Code.

- (4) **Internet sites etc.** A credit provider, finance broker or supplier who makes material advertising consumer credit products available on an Internet site, or on any other public electronic system, under the control of the credit provider, finance broker or supplier is to ensure that electronic access to the relevant comparison rate schedule is also available to members of the public who access that material.
- (5) **Provision of credit applications.** A credit provider, finance broker or supplier is to ensure that a copy of the relevant comparison rate schedule accompanies any application for credit that is sent or given by the credit provider, finance broker or supplier to any prospective debtor.

146L. Relevant comparison rate schedule

- (1) The relevant comparison rate schedule or schedules for the purposes of section 146K are as follows —
 - (a) in the case of the premises of a credit provider—a schedule or schedules for all of the consumer credit products of the credit provider;
 - (b) in the case of the premises of a finance broker—a schedule or schedules for the consumer credit products of each credit provider with which the broker deals (except as provided by subsection (2));
 - (c) in the case of the premises of a supplier—a schedule or schedules for the consumer credit products of each linked credit provider;
 - (d) in the case of an Internet site or any other public electronic system—a schedule or schedules for the consumer credit product or products of each credit provider concerned;
 - (e) in the case of an application for credit—a schedule or schedules for the consumer credit product or products to which the application relates.
- (2) If a finance broker deals with the consumer credit products of more than 6 credit providers, comparison rate schedules are only required to be displayed under section 146K(2) for at least 6 credit providers (one for each of the credit providers with whose products the broker mainly deals).

146M. Comparison rates to be listed in schedule

- (1) The comparison rates required to be listed in a relevant comparison rate schedule for the purposes of section 146K are the comparison rates calculated for each of the designated amounts of credit and terms for the consumer credit product or products concerned.

- (2) The designated amounts and terms are the amounts and terms prescribed by a regulation for the purposes of this section.
- (3) The comparison rate schedule for any consumer credit product need not list any of the above amounts that are not generally available in connection with that consumer credit product. If an amount is generally available, it is to be listed in the comparison rate schedule whether or not it is generally available for the term prescribed under subsection (2) for that amount.
- (4) In the case of a comparison rate that is calculated for an amount of credit prescribed by a regulation for the purposes of this subsection, the comparison rate schedule must clearly state —
 - (a) that the comparison rate is for a secured loan if it has been calculated on the basis that a mortgage or guarantee is taken by the credit provider; or
 - (b) that the comparison rate is for an unsecured loan if it has not been so calculated.

The word “secured” or “unsecured” in connection with the amount of credit for which the comparison rate is calculated is a sufficient description for the purposes of this subsection.

- (5) The comparison rate schedule must clearly state —
 - (a) the name of the consumer credit product, the amount of credit and the term applicable to each comparison rate listed in the schedule; and
 - (b) the annual percentage rate for each such amount of credit and term.

146N. Form of comparison rate schedule

- (1) A comparison rate schedule is to take the form of —
 - (a) a printed document (comprising one or more pages); or
 - (b) text displayed on a screen, where access to the schedule is to be made available on an Internet site, or on any other public electronic system.

- (2) Comparison rates for different consumer credit products of a credit provider may be shown on a single or several comparison rate schedules.

146O. Warning about comparison rates

- (1) The comparison rates in a comparison rate schedule must be accompanied by a warning about the accuracy of the comparison rate that is prescribed by a regulation.
- (2) If a comparison rate schedule comprises 2 or more documents, a separate warning must be given on each document.
- (3) If a comparison rate schedule is displayed in text on a screen, a regulation may require more than one warning to be given.

146P. Other requirements for comparison rate schedules

- (1) A comparison rate schedule must comply with the following requirements —
- (a) the schedule must have “comparison rate schedule” as its title;
 - (b) the schedule must clearly state the name of the credit provider providing the consumer credit product to which it relates (if the credit provider is ascertainable);
 - (c) the schedule must clearly state the date of its issue.
- (2) A comparison rate schedule may contain —
- (a) the name of the finance broker or supplier who displays the schedule or makes it available; and
 - (b) information for the purposes of contacting the credit provider, finance broker or supplier named in the schedule.
- (3) A comparison rate schedule is not to contain any information other than that required or permitted by or under this Code.

146Q. Offence for noncompliance with this Division

A credit provider, finance broker or supplier that contravenes a requirement of this Division is guilty of an offence.

Maximum penalty — 100 penalty units.

Division 4 — Miscellaneous

146R. Calculation of comparison rates

- (1) A regulation may make provision about the way in which comparison rates are to be calculated for the purposes of this Part.
- (2) For the purposes of calculating the relevant comparison rate, credit fees or charges are not ascertainable and need not be included in the calculation if their imposition or amount is dependent on events that may or may not happen (unless a regulation under this section otherwise provides).

146S. Compliance grace period following changes in interest or fees

A credit advertisement or comparison rate schedule does not cease to comply with this Part merely because of a change in the annual percentage rate or in any credit fees or charges during the period of 7 days after the change takes effect.

146T. Regulations—exemptions and other matters

A regulation may make provision about the following —

- (a) exempting any class of persons or matters from the operation of any provision of this Part;
- (b) requirements with which a credit advertisement containing a comparison rate, or a comparison rate schedule, must comply.

Part 10 — Consumer leases

Division 1 — Interpretation and application

147. Meaning of consumer lease

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

148. Consumer leases to which this Part applies

- (1) This Part applies to a consumer lease if, when the lease is entered into —
 - (a) the lessee is ordinarily resident in this jurisdiction or a strata corporation formed in this jurisdiction; and
 - (b) the goods are hired wholly or predominantly for personal, domestic or household purposes; and
 - (c) a charge is or may be made for hiring the goods and the charge together with any other amount payable under the consumer lease exceeds the cash price of the goods; and
 - (d) the lessor hires the goods in the course of a business of hiring goods or as part of or incidentally to any other business of the lessor.
- (2) If not all the lessees under a consumer lease ordinarily reside, or are strata corporations formed, in this jurisdiction, this Code applies only if goods are first hired under the lease in this jurisdiction.
- (3) If this Part applies to a consumer lease —
 - (a) this Part applies to all transactions or acts under the lease whether or not they take place in this jurisdiction; and
 - (b) this Part continues to apply even though the lessee ceases to be ordinarily resident in this jurisdiction.

- (4) For the purposes of this section, the amount payable under a consumer lease includes any agreed or residual value of the goods at the end of the lease or on termination of the lease by the lessor or lessee, but does not include —
- (a) any amount payable for services that are incidental to the hire of the goods under the lease; or
 - (b) any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the lessee at the earliest opportunity.
- (5) For the purposes of this section, the predominant purpose for which goods are hired is —
- (a) the purpose for which more than one half of the goods are intended to be used; or
 - (b) if the same goods are intended to be used for different purposes, the purpose for which the goods are intended to be most used.

149. Consumer leases to which this Part does not apply

- (1) **Short term or indefinite leases.** This Part does not apply to a consumer lease for a fixed period of 4 months or less or for an indefinite period.
- (2) **Employment-related leases.** This Part does not apply to a consumer lease under which goods are hired by an employee in connection with the employee's remuneration or other employment benefits.
- (3) **Regulations.** The regulations may exclude from the application of all or any provisions of this Part consumer leases of a class specified in the regulations.

150. Presumptions relating to application of this Part

- (1) In any proceedings (whether brought under this Code or not) in which a party claims that a lease is a consumer lease to which

this Part applies, it will be presumed to be such unless the contrary is established.

- (2) Goods hired under a lease are presumed conclusively for the purposes of this Part not to be hired wholly or predominantly for personal, domestic or household purposes if the lessee declares, before hiring the goods, that the goods are hired wholly or predominantly for business purposes.
- (3) However, such a declaration is ineffective for the purposes of this section if the lessor (or any other person who obtained the declaration from the lessee) knew, or had reason to believe, at the time the declaration was made that the goods were in fact hired wholly or predominantly for personal, domestic or household purposes.

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

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

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

151. Form of consumer lease

- (1) A consumer lease must be in the form of a written lease document signed by the lessee and containing the information required by this Division.
- (2) The regulations may make provision for or with respect to the form of consumer leases and the way they are expressed.
- (3) A lessor must not enter into a consumer lease that contravenes a requirement of this section or regulations made under this section.

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

152. Disclosures in consumer leases

- (1) A consumer lease must contain the following matters, if ascertainable —
 - (a) a description or identification of the goods hired under the lease;
 - (b) the amount or value of any consideration to be paid or provided by the lessee before the delivery of those goods;
 - (c) the amount of any stamp duty or other government charge (other than on receipts or withdrawals) payable by the lessee in respect of the lease;
 - (d) the amount of any other charges not included in the rental payable under the lease, and a description of those charges;
 - (e) the amount of each rental payment to be made by the lessee under the lease, the date on which the first rental payment is due and either the dates on which subsequent rental payments are due or the interval between rental payments;
 - (f) the number of rental payments to be made by the lessee, and the total amount of rental payable under the lease;
 - (g) a statement of the conditions on which the lessee may terminate the lease;
 - (h) a statement of the liabilities (if any) of the lessee on termination of the lease.
- (2) A consumer lease is taken to comply with this section despite any omission or other error if the Court is satisfied that the omission or error is not of such a nature as to mislead the lessee to his or her disadvantage.
- (3) A lessor must not enter into a consumer lease that contravenes a requirement of this section.

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

153. Copy of lease etc. for lessee

- (1) A lessor must, within 14 days after entering into a consumer lease, give to the lessee a copy of the consumer lease, together with a statement in the form prescribed by the regulations explaining the rights and obligations of a lessee.
Maximum penalty — 50 penalty units.
- (2) Subsection (1) does not apply if the lessor has previously given the lessee a copy of the consumer lease to keep.
- (3) Section 171 applies to this section as if references in that section to the credit provider were references to the lessor or a lease broker and as if references in that section to the debtor were references to the lessee.

154. Further goods and deferrals or waivers under consumer leases

The provision of further goods under a consumer lease or a change in a consumer lease as a result of a deferral or waiver of payment of an amount payable under a consumer lease is not to be treated as creating a new consumer lease for the purposes of this Part or as creating a credit contract, if the provision of the further goods or the deferral or waiver is permitted by this Code or the consumer lease.

Division 3 — Other provisions applicable to consumer leases

155. Application of certain Code provisions to consumer leases

- (1) The following provisions of this Code apply in relation to a consumer lease in the same way as they apply in relation to credit contracts —
 - (a) Division 3 of Part 4 (relating to changes to contracts on the grounds of hardship and unjust transactions), other than section 72;

- (b) sections 90 to 93 (relating to information as to mortgaged goods, entry to residential property to take possession of goods and orders by the Court for entry and possession);
 - (c) Part 11 (relating to miscellaneous matters).
- (2) For the purposes of the application of those provisions —
 - (a) references to a credit provider are to be read as references to a lessor; and
 - (b) references to a debtor are to be read as references to a lessee; and
 - (c) references to a credit contract or contract are to be read as references to a consumer lease; and
 - (d) references to mortgaged goods are to be read as references to goods hired under a consumer lease.
- (3) For the purposes of the application of Division 3 of Part 4, the words ‘(without a change being made to the annual percentage rate or rates)’ are taken to be omitted from section 66 wherever occurring.

156. Notice of repossession

- (1) A lessor must not exercise any right under a consumer lease to take possession of goods subject to the lease unless the lessor has given the lessee 30 days’ written notice of the lessor’s intention to do so.
- (2) However, the lessor is not required to give the notice in accordance with this section if —
 - (a) the right arises under a lease granted for a fixed term at the end of that term; or
 - (b) the lessor believes on reasonable grounds that the lessee has disposed of goods hired under the lease, or intends to dispose of such goods, contrary to the terms of the lease; or

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

Maximum penalty — 50 penalty units.

157. Termination of lease

- (1) A lessee may, at any time before the end of a consumer lease, end the lease by returning the goods hired under the lease to the lessor during ordinary business hours or at such other time as may be agreed with the lessor or fixed by the Court on the application of the lessee.
- (2) The amount payable by a lessee on the termination of a consumer lease under this section before the end of its fixed term is —
 - (a) the amount payable under the lease on such a termination; or
 - (b) the amount determined in accordance with the principles (if any) set out in the regulations for the purposes of this section;

whichever is the lesser.

Part 11 — Miscellaneous

Division 1 — Tolerances and assumptions

158. Tolerances and assumptions relating to information

- (1) Disclosures generally. Information disclosed in a pre-contractual statement, contract document, mortgage document or guarantee, statement, notice or consumer lease, or otherwise disclosed for the purposes of this Code, is taken to be correctly disclosed if —
 - (a) it is within tolerances allowed by the regulations; and
 - (b) the disclosure is made as at a date stated in it.
- (2) **Disclosure of interest charges.** Disclosures for the purposes of this Code relating to interest charges may be made on the following assumptions (and such other assumptions under this section as are applicable) —
 - (a) that, in the case of an annual percentage rate or default rate, there will be no variation in the rate as disclosed over the whole term of the contract or any shorter term for which it applies;
 - (b) if a change to a variable rate is provided for by the contract, that the variable rate applicable over the term for which it applies is the same as the equivalent variable rate as at the date disclosure is made;
 - (c) that the debtor will make the repayments required by the contract at the times required by the contract.
- (3) **Disclosure of repayments.** Disclosures for the purposes of this Code relating to repayments may be made on the assumption that the debtor will pay the repayments required by the contract at the times required by the contract and on such other assumptions under this section as are applicable.
- (4) **Disclosures of credit fees and charges.** Disclosures relating to credit fees and charges for the purposes of this Code may be

made on the following assumptions (and on such other assumptions under this section as are applicable) —

- (a) that there will be no change in the credit fees and charges as so disclosed and no new fees or charges imposed;
 - (b) that the debtor will pay the fees and charges required by the contract at the times required by the contract.
- (5) **Disclosures in consumer leases.** Disclosures for the purposes of this Code relating to consideration, charges and payments in a consumer lease may be made on the assumptions that there will be no change in the matters disclosed and no new charges imposed.
- (6) **When information is ascertainable.** Information required to be disclosed for the purposes of this Code, which is not otherwise ascertainable, is taken to be ascertainable if it is ascertainable, as at the date the disclosure is made, on the basis of assumptions set out in this section or in the regulations.
- (7) **Disclosure of names.** Information disclosed for the purposes of this Code as to a name is taken to be correctly disclosed if the information is sufficient to identify the person concerned.

159. Tolerances relating to contracts and other documents

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

160. Regulations

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

Division 2 — Documentary provisions

161. Form of notices

- (1) The regulations may prescribe the form of any notices required or authorised to be given under this Code and may require such notices to contain specified information.
- (2) A notice required to be given by a mortgagee under this Code may include information required to be given in the same situation under an Act, and the notice may be included in any notice given under that Act.
- (3) A notice required or authorised to be given under this Code is to be in writing unless this Code or the regulations otherwise provide.

162. Legibility and language

- (1) A credit contract, guarantee or a notice given by a credit provider under this Code —
 - (a) must be easily legible; and
 - (b) to the extent that it is printed or typed must conform with the provisions of the regulations as to print or type; and
 - (c) must be clearly expressed.
- (2) If the Court is satisfied, on application by the Government Consumer Agency, that a provision of a credit contract, a guarantee or a notice given by a credit provider under this Code does not comply with the requirements of this section, it may prohibit the credit provider from using a provision in the same or similar terms in future credit contracts, guarantees or notices.
- (3) A credit provider that contravenes a prohibition imposed under subsection (2) is guilty of an offence.

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

163. Copies of contracts and other documents

- (1) A credit provider must in accordance with this section, at the written request of a debtor, mortgagor or guarantor, provide to the debtor, mortgagor or guarantor a copy of —
 - (a) the credit contract, mortgage or guarantee; or
 - (b) any credit-related insurance contract in the credit provider's possession; or
 - (c) a notice previously given to the debtor, mortgagor or guarantor under this Code.
- (2) The copy must be provided —
 - (a) within 14 days, if the original came into existence 1 year or less before the request is given; or
 - (b) within 30 days, if the original came into existence more than 1 year before the request is given.

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

- (3) A copy under this section may instead be provided in the form of a computer generated facsimile containing the same information as was contained in the original document, or in any other manner prescribed by the regulations. Until the contrary is proved, any such facsimile or copy is taken to contain the same information as the original document.
- (4) A credit provider must provide a copy of a notice which requires a debtor, mortgagor or guarantor to take action if requested in accordance with subsection (1) even though the contract has been discharged or terminated but only if the request is made within 2 years of the discharge or termination.
Maximum penalty — 30 penalty units.

164. Signing of documents

- (1) It is sufficient compliance with a requirement under this Code that a document be signed by a person if the person's signature

is written on the document by another person by or under the authority of the person required to sign.

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

Division 3 — General provisions

165. Crown to be bound

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

166. Assignment by credit provider

- (1) If the rights of a credit provider under a credit contract, mortgage or guarantee are assigned or pass by law to another person, this Code from then on applies to that other person and does not impose any further obligation on the credit provider.
- (2) The debtor, mortgagor or guarantor has and may exercise the same rights in respect of the credit contract, mortgage or guarantee against the assignee as the debtor, mortgagor or guarantor has against the credit provider.
- (3) Subsection (1) does not apply while the credit provider continues to receive payments from the debtor, or would continue to do so if the debtor complied with the credit contract.

167. Assignment by debtor, mortgagor or guarantor

- (1) If the rights of a debtor, mortgagor or guarantor under a credit contract, mortgage or guarantee are assigned or pass by law to another person, this Code from then on applies to that other person and does not confer any further rights on the debtor, mortgagor or guarantor.
- (2) Subsection (1) does not apply if the rights are assigned or pass by law to a corporation which is neither a trustee for the debtor,

mortgagor or guarantor nor an executor of the debtor's, mortgagor's or guarantor's estate.

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

168. Appropriation of payments

- (1) A debtor who is liable to a credit provider under 2 or more credit contracts may require the credit provider by written notice to apply a payment to a particular one of those contracts or to divide the payment between them in a specified manner.
- (2) A credit provider that contravenes a requirement under this section is guilty of an offence.
Maximum penalty — 30 penalty units.
- (3) A debtor may not make a requirement under this section if the debtor and the credit provider have previously agreed as to the application of the payment concerned in relation to the credit contracts under which the debtor is liable to the credit provider.

169. Contracting out

- (1) A provision of a contract or other instrument by which a person seeks to avoid or modify the effect of this Code is void.
- (2) A provision of a contract or other instrument by which a person seeks to have the debtor or guarantor indemnify the credit provider for any loss or liability arising under this Code is void.
- (3) A credit provider that is a party to any such contract or other instrument is guilty of an offence.
Maximum penalty — 100 penalty units.
- (4) Subsection (2) does not affect the operation of section 55(2).

169A. Indemnities

- (1) An indemnity for any liability under this Code is not void, and cannot be declared void, on the grounds of public policy, despite any rule of law to the contrary.
- (2) The liabilities to which this section applies include the following —
 - (a) a liability for any criminal or civil penalty incurred by any person under this Code;
 - (b) a payment in settlement of a liability or alleged liability under this Code;
 - (c) a liability under another indemnity for any liability under this Code.
- (3) This section is subject to section 169(2).
- (4) This section does not derogate from any other rights and remedies that exist apart from this section.
- (5) This section extends to any indemnity obtained before the commencement of this section.

170. Effect of noncompliance

- (1) A credit contract, mortgage or guarantee or any other contract is not illegal, void or unenforceable because of a contravention of this Code unless this Code contains an express provision to that effect.
- (2) Except as provided by this section, this Code does not derogate from rights and remedies that exist apart from this Code.

171. Giving notice or other document

- (1) **Application.** This section applies as follows —
 - (a) This section applies (subject to this subsection) to notices or other documents that are required to be given for the purposes of this Code.

- (b) This subsection and subsections (3) and (7) apply, but the remainder of this section does not apply, to pre-contractual statements and notices given under section 14.
- (c) Subsections (4), (5) and (6) do not apply to default notices.
- (d) This section applies despite the provisions of any other section of this Code (except sections 34(3A) and 76(4)) to the contrary.

Note: Examples of notices or other documents to which this section applies are those required to be given under sections 18, 31, 34, 39, 51, 52 and 76.

- (2) **Unsuccessful attempts by credit provider.** A credit provider is relieved from the obligation to give a notice or other document to a person if —
 - (a) the credit provider has previously made a reasonable (but unsuccessful) attempt to give a notice or other document in accordance with this Code by leaving it at, or by sending it by post, telex, facsimile or similar facility to the appropriate address of the person under section 172; and
 - (b) the credit provider has reasonable grounds for believing that the person can no longer be contacted at that address.
- (3) **Joint debtors etc—general obligation.** In the case of joint debtors, mortgagors or guarantors, a notice or other document must be given to each debtor, mortgagor or guarantor, except as provided by this section.
- (4) **Joint debtors etc—nomination of one of them.** A notice or other document may be given to any 2 or more joint debtors, mortgagors or guarantors by being given to one of the joint debtors, mortgagors or guarantors nominated by them to receive the notice or other document on their behalf. The notice or other document need not be addressed to all of them.

- (5) **Joint debtors etc—same address.** A single copy of a notice or other document may be given to any 2 or more joint debtors, mortgagors or guarantors at the same address if each of them has consented to a single copy being given and the notice or other document is addressed jointly to them. The procedure prescribed by this subsection is an alternative to the procedure prescribed by subsection (4).
- (6) **Nominated persons generally.** A notice or other document may be given to a person by being given to any other person nominated by the person to receive the notice or other document on his or her behalf. However —
- (a) a debtor, mortgagor or guarantor cannot nominate the credit provider or a person associated with the credit provider; and
 - (b) a mortgagor cannot nominate the debtor if the mortgage is given by a guarantor; and
 - (c) a guarantor cannot nominate the debtor.
- (7) **Legal practitioners.** A notice or other document may be given to a person by being given to a legal practitioner acting for the person in the matter concerned.
- (8) **Withdrawal of nomination or consent.** A nomination or consent under this section ceases to have effect if it is withdrawn by the person who made or gave it.
- (9) **Form of nomination or consent.** A nomination or consent under this section (or the withdrawal of any such nomination or consent) must be in the form required by the regulations.

172. Manner of giving notice or other document

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

- (i) by delivering it to the person personally; or
 - (ii) by leaving it at, or by sending it by post, telex, facsimile or similar facility to, an appropriate address of the person; or
- (b) to a body corporate —
 - (i) by leaving it at the registered office of the body corporate with an officer of the body corporate; or
 - (ii) by sending it by post, telex, facsimile or similar electronic facility to its registered office.
- (2) The appropriate address of a debtor, mortgagor, guarantor or consumer lessee for the purposes of subsection (1) is —
 - (a) an address nominated in writing by that person to the person giving the notice or other document; or
 - (b) if there is no such nomination, the address of the place of residence of that person last known to the person giving the notice or other document.
- (3) An appropriate address of any other person for the purposes of subsection (1) is —
 - (a) an address nominated in writing by that person to the person giving the notice or other document; or
 - (b) the address of the place of residence or business of that person last known to the person giving the notice or other document.
- (4) Nothing in subsection (1) —
 - (a) affects the operation of another law that authorises the service of a notice or other document otherwise than as provided in subsection (1); or
 - (b) affects the power of a court or tribunal to authorise service of a notice or other document otherwise than as provided in subsection (1).

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

173. Date of notice or other document

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

174. Extensions of time

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

175. Orders of Court

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

176. Conduct of agents and related matters

- (1) The conduct of an officer, agent or employee of a credit provider acting within his or her actual or ostensible authority will be imputed to the credit provider and taken to be conduct of the credit provider.
- (2) A person cannot authorise a credit provider, or a person associated with a credit provider, to enter into a credit contract, mortgage or guarantee on the person's behalf. This subsection does not prevent a credit provider from authorising a person associated with the credit provider to enter into a credit contract on behalf of the credit provider.
- (3) A credit provider or person associated with a credit provider that purports to act as agent of a debtor, mortgagor or a guarantor in entering into a credit contract or a mortgage or guarantee is guilty of an offence.
Maximum penalty — 50 penalty units.
- (5) A credit provider is not, for the purposes of this Code taken to know or have reason to believe something because an officer, agent or employee of the credit provider does so, unless the knowledge or reason to believe that thing is acquired by the officer, agent or employee acting in that capacity and in connection with the transaction concerned.

177. Reciprocal conferral of powers and jurisdiction

- (1) The regulations may give effect to a cross-vesting scheme under which —
 - (a) administrative and judicial powers conferred by this Code may be exercised by administrative and judicial

- authorities of any jurisdiction in which a law adopting this Code is in force; and
- (b) administrative and judicial authorities of this jurisdiction may exercise administrative and judicial powers conferred by any such law of that jurisdiction.
- (2) Nothing in subsection (1) affects any other powers of any court.

Division 4 — Provisions relating to offences

178. Penalty at end of provision

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

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

- (2) If no offence is so mentioned, a contravention of the section, subsection or part constitutes an offence against the provision that is punishable on conviction by a penalty not more than the specified penalty.
- (3) This section applies to the regulations in the same way as it applies to this Code, subject to any necessary modification.

179. Penalty units

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

180. Summary offences

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

181. Double jeopardy

If an act or omission constitutes an offence —

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

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

182. Aiding and abetting, attempts

- (1) A person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly concerned in or a party to, the commission of an offence against this Code or the regulations is taken to have committed that offence and is liable to the penalty for the offence.
- (2) A person who attempts to commit an offence against this Code or the regulations commits an offence and is punishable as if the attempted offence had been committed.

182A. Offences by officers, agents or employees

An officer, agent or employee of a credit provider or other person may be prosecuted for an offence against this Code or the regulations (if liable for the offence) whether or not proceedings have been taken against the credit provider or other person.

183. Offences by corporations

- (1) If a corporation contravenes a provision of this Code or the regulations, each officer of the corporation is taken to have

contravened the provision if the officer knowingly authorised or permitted the contravention.

- (2) An officer of a corporation may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or convicted under the provision.
- (3) Nothing in this section affects the liability imposed on a corporation for an offence committed by the corporation against this Code or the regulations.
- (4) In this section —
“**officer**” means a director of the corporation or a person who is otherwise concerned in its management.

184. Limitations

Despite anything in any Act, proceedings for an offence against this Code or the regulations may be brought within the period of 3 years that next succeeds the commission of the offence or, with the consent of the Attorney-General, at any later time.

Part 12 — Transitional provisions

Division 1 — Transitional provision for *Consumer Credit (Queensland) Amendment Act 2001*

185. Provision for particular contracts ending after commencement of amendment

- (1) This Code does not apply to the provision of short term credit if —
- (a) the contract is entered into before the commencement day; and
 - (b) the term of the contract ends after the commencement day.
- (2) In this section —
- “**commencement day**” means the day the *Consumer Credit (Queensland) Amendment Act 2001*, section 4 commenced.
- “**short term credit**” means the provision of credit mentioned in section 7(1) as in force immediately before the commencement day.

Division 2 — Transitional provision for *Consumer Credit (Queensland) Amendment Act 2002*

186. Time limits under s 113A for certain civil penalty orders

- (1) Section 113A does not apply in relation to a contravention of a key requirement that happened more than 2 years before the commencement of the section.
- (2) Subject to subsection (1), section 113A* applies to a contravention of a key requirement that happened before the commencement of the section.

* Section 113A (Time limit for application for orders under this Division)

Schedule 1 — Principal definitions

section 3(1)

1. Definitions

(1) In this Code, unless the contrary intention appears —

“**acceleration clause**” see section 84.

“**amount of credit**” see section 4(2).

“**annual percentage rate**” see section 25.

“**cash price**” of goods or services to which a credit contract relates means the lowest price (unaffected by any discount between the credit provider and the supplier) that a cash purchaser might reasonably be expected to pay for them (either from the supplier or, if not available for cash from the supplier, from another supplier).

“**commission**” includes any form of monetary consideration or any form of non-monetary consideration to which a monetary value can be assigned.

“**compulsory insurance**” means —

- (a) compulsory third-party personal injury insurance; or
- (b) insurance of a nature declared by the regulations to be compulsory insurance for the purposes of this Code.

“**consumer credit insurance**” means insurance that insures the capacity of the debtor to make repayments under the credit contract, including insurance against sickness of, injury to, or disability or death of, the debtor or against unemployment of the debtor, and also including life insurance (including insurance under a group policy) to cover any outstanding amount on the debtor’s death.

“**consumer lease**” see section 147.

“**continuing credit contract**” means a credit contract under which —

- (a) multiple advances of credit are contemplated; and
- (b) the amount of available credit ordinarily increases as the amount of credit is reduced.

“contract” includes a series or combination of contracts, or contracts and arrangements.

“contract document” means the document or documents setting out the terms of a contract.

“Court”, in relation to a provision of this Code, means the court or tribunal which has by law jurisdiction under that provision.

“credit” see section 4(1).

“credit contract” see section 5.

“credit fees and charges” means fees and charges payable in connection with a credit contract or mortgage, but does not include —

- (a) interest charges (including default charges); or
- (b) any fees or charges that are payable to or by a credit provider in connection with a credit contract in connection with which both credit and debit facilities are available if the fees or charges would be payable even if credit facilities were not available (not being annual fees or charges in connection with continuing credit contracts under which credit is ordinarily obtained only by the use of a card); or
- (c) government charges, or duties, on receipts or withdrawals; or
- (d) enforcement expenses.

“credit provider” means a person that provides credit, and includes a prospective credit provider.

“credit-related insurance contract” see section 132.

“daily percentage rate” see section 25.

“date” of a notice see section 173.

“debtor” means a person (other than a guarantor) who is liable to pay for (or to repay) credit, and includes a prospective debtor.

“default notice” see Part 5.

“default rate” see section 25.

“dispose” of property includes —

- (a) sell the property; or

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- (b) part with possession of the property to the prejudice of the owner or a mortgagee of the property; or
- (c) destroy the property.

“enforcement expenses”, in relation to a mortgage, includes expenses incurred by the mortgagee in preserving or maintaining property subject to the mortgage (including insurance, rates and taxes payable for the property) but only if the expenses are incurred after a breach occurs and are authorised by the mortgage.

“enforcement proceedings”, in relation to a credit contract or a guarantee or mortgage, means —

- (a) proceedings in a court to recover a payment due under the contract or a guarantee; or
- (b) taking possession of property under a mortgage or taking any other action to enforce a mortgage.

“goods” includes —

- (a) ships, aircraft or other vehicles; or
- (b) animals, including fish; or
- (c) minerals, trees or crops, whether on, under or attached to land or not;

but does not include anything declared by the regulations not to be goods for the purposes of this Code.

“goods mortgage” means a mortgage over goods.

“Government Consumer Agency” means the person who, or body which, has by law the functions of the Government Consumer Agency under this Code.

“guarantee” includes an indemnity (other than one arising under a contract of insurance).

“guarantee document” means the document or documents setting out the terms of a guarantee.

“guarantor” includes a prospective guarantor.

“insolvent” means —

- (a) in the case of a natural person—a person who is an insolvent under administration within the meaning of the Corporations Law; or

- (b) in the case of a corporation—a corporation that is an externally-administered corporation within the meaning of the Corporations Law.

“jurisdiction” means a State or Territory.

“key requirement” see Part 6.

“land” includes any interest in land.

“linked credit provider” see section 117(1).

“merchant service agreement” means an agreement between a credit provider and a supplier of goods and services under which the credit provider agrees to pay to the supplier amounts for goods or services supplied by the supplier and paid by means of credit cards, whether or not the credit cards are issued by the credit provider.

“mortgage” includes —

- (a) any interest in, or power over, property securing obligations of a debtor or guarantor; or
- (b) a credit provider’s title to land or goods subject to a sale by instalments; or
- (c) a mortgage taken to have been entered into under section 10(3);

but does not include a consumer lease to which Part 10 applies.

“mortgage document” means the document or documents setting out the terms of a mortgage by reference to which the mortgage is created.

“mortgagor” includes a prospective mortgagor.

“penalty unit” see section 179.

“purchaser” means —

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

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

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

cl. 1

“retained credit fees and charges” means credit fees and charges retained by the credit provider, other than credit fees and charges passed on to (or retained in reimbursement of an amount paid to) —

- (a) a third party that is not a related body corporate (for the purposes of the Corporations Law) of the credit provider; or
- (b) a financial institution that is such a related body corporate in respect of the provision of banking services that are provided to the credit provider by the financial institution on the same terms as those services are ordinarily provided to customers who are not related to or associated with the financial institution.

“sale contract” see section 115.

“services” includes —

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

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

“strata corporation” means —

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

“supplier” means a supplier of goods or services.

“supply” includes agree to supply.

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

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

“tied loan contract” see section 117(3).

“unpaid balance” see section 25.

“unpaid daily balance” see section 25.

- (2) For the purposes of this Code, a person is “associated” with a credit provider if —
- (a) the person and the credit provider are related bodies corporate for the purposes of the Corporations Law; or
 - (b) the person is a supplier in respect of whom the credit provider is a linked credit provider; or
 - (c) the person is an officer, agent or employee of the credit provider, or of any such related body corporate or supplier, acting in that capacity.

Schedule 2 — Miscellaneous provisions relating to interpretation

section 3(2)

Part 1 — Preliminary

1. Displacement of Schedule by contrary intention

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

Part 2 — General

2. Code to be construed not to exceed legislative power of Legislature

- (1) This Code is to be construed as operating to the full extent of, but so as not to exceed, the legislative power of the Legislature of this jurisdiction.
- (2) If a provision of this Code, or the application of a provision of this Code to a person, subject matter or circumstance, would, but for this clause, be construed as being in excess of the legislative power of the Legislature of this jurisdiction —
 - (a) it is a valid provision to the extent to which it is not in excess of the power; and
 - (b) the remainder of this Code, and the application of the provision to other persons, subject matters or circumstances, is not affected.
- (3) This clause applies to this Code in addition to, and without limiting the effect of, any provision of this Code.

3. Every section to be a substantive enactment

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

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

- (1) The heading to a Part, Division or Subdivision into which this Code is divided is part of this Code.
- (2) A Schedule to this Code is part of this Code.
- (3) Punctuation in this Code is part of this Code.
- (4) A heading to a section or subsection of this Code does not form part of this Code.
- (5) Notes included in this Code (including footnotes and endnotes) do not form part of this Code.

5. References to particular Acts and to enactments

In this Code —

- (a) an Act of this jurisdiction may be cited —
 - (i) by its short title; or
 - (ii) by reference to the year in which it was passed and its number; and
- (b) a Commonwealth Act may be cited —
 - (i) by its short title; or
 - (ii) in another way sufficient in a Commonwealth Act for the citation of such an Act;together with a reference to the Commonwealth; and
- (c) an Act of another jurisdiction may be cited —
 - (i) by its short title; or
 - (ii) in another way sufficient in an Act of the jurisdiction for the citation of such an Act;together with a reference to the jurisdiction.

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

- (1) A reference in this Code to an Act includes a reference to —
 - (a) the Act as originally enacted, and as amended from time to time since its original enactment; and

- (b) if the Act has been repealed and re-enacted (with or without modification) since the enactment of the reference—the Act as re-enacted, and as amended from time to time since its re-enactment.
- (2) A reference in this Code to a provision of this Code or of an Act includes a reference to —
 - (a) the provision as originally enacted, and as amended from time to time since its original enactment; and
 - (b) if the provision has been omitted and re-enacted (with or without modification) since the enactment of the reference—the provision as re-enacted, and as amended from time to time since its re-enactment.
- (3) Subclauses (1) and (2) apply to a reference in this Code to a law of the Commonwealth or another jurisdiction as they apply to a reference in this Code to an Act and to a provision of an Act.

7. Interpretation best achieving Code's purpose

- (1) In the interpretation of a provision of this Code, the interpretation that will best achieve the purpose or object of this Code is to be preferred to any other interpretation.
- (2) Subclause (1) applies whether or not the purpose is expressly stated in this Code.

8. Use of extrinsic material in interpretation

- (1) In this clause —
“**extrinsic material**” means relevant material not forming part of this Code, including, for example —
 - (a) material that is set out in the document containing the text of this Code as printed by the Government Printer of Queensland; and
 - (b) a relevant report of a Royal Commission, Law Reform Commission, commission or committee of inquiry, or a similar body, that was laid before the Legislative Assembly of Queensland before the provision concerned was enacted; and

- (c) a relevant report of a committee of the Legislative Assembly of Queensland that was made to the Legislative Assembly of Queensland before the provision was enacted; and
- (d) a treaty or other international agreement that is mentioned in this Code; and
- (e) an explanatory note or memorandum relating to the Bill that contained the provision, or any relevant document, that was laid before, or given to the members of, the Legislative Assembly of Queensland by the member bringing in the Bill before the provision was enacted; and
- (f) the speech made to the Legislative Assembly of Queensland by the member in moving a motion that the Bill be read a second time; and
- (g) material in the Votes and Proceedings of the Legislative Assembly of Queensland or in any official record of debates in the Legislative Assembly of Queensland; and
- (h) a document that is declared by this Code to be a relevant document for the purposes of this clause.

“ordinary meaning” means the ordinary meaning conveyed by a provision having regard to its context in this Code and to the purpose of this Code.

- (2) Subject to subclause (3), in the interpretation of a provision of this Code, consideration may be given to extrinsic material capable of assisting in the interpretation —
 - (a) if the provision is ambiguous or obscure—to provide an interpretation of it; or
 - (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable—to provide an interpretation that avoids such a result; or
 - (c) in any other case—to confirm the interpretation conveyed by the ordinary meaning of the provision.
- (3) In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be had to —

- (a) the desirability of a provision being interpreted as having its ordinary meaning; and
- (b) the undesirability of prolonging proceedings without compensating advantage; and
- (c) other relevant matters.

9. Effect of change of drafting practice and use of examples

If —

- (a) a provision of this Code expresses an idea in particular words; and
- (b) a provision enacted later appears to express the same idea in different words for the purpose of implementing a different legislative drafting practice, including, for example —
 - (i) the use of a clearer or simpler style; or
 - (ii) the use of gender-neutral language;the ideas must not be taken to be different merely because different words are used.

10. Use of examples

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

- (a) the example is not exhaustive; and
- (b) the example does not limit, but may extend, the meaning of the provision; and
- (c) the example and the provision are to be read in the context of each other and the other provisions of this Code, but, if the example and the provision so read are inconsistent, the provision prevails.

11. Compliance with forms

- (1) If a form is prescribed or approved by or for the purpose of this Code, strict compliance with the form is not necessary and substantial compliance is sufficient.
- (2) If a form prescribed or approved by or for the purpose of this Code requires —

- (a) the form to be completed in a specified way; or
- (b) specified information or documents to be included in, attached to or given with the form; or
- (c) the form, or information or documents included in, attached to or given with the form, to be verified in a specified way;

the form is not properly completed unless the requirement is complied with.

Part 3 — Terms and references

12. Definitions

(1) In this Code —

“**Act**” means an Act of the Legislature of this jurisdiction.

“**adult**” means an individual who is 18 or more.

“**affidavit**”, in relation to a person allowed by law to affirm, declare or promise, includes affirmation, declaration and promise.

“**amend**” includes —

- (a) omit or omit and substitute; or
- (b) alter or vary; or
- (c) amend by implication.

“**appoint**” includes re-appoint.

“**Australia**” means the Commonwealth of Australia but, when used in a geographical sense, does not include an external Territory.

“**business day**” means a day that is not —

- (a) a Saturday or Sunday; or
- (b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done.

“**calendar month**” means a period starting at the beginning of any day of 1 of the 12 named months and ending —

- (a) immediately before the beginning of the corresponding day of the next named month; or
- (b) if there is no such corresponding day—at the end of the next named month.

“calendar year” means a period of 12 months beginning on 1 January.

“commencement”, in relation to this Code or an Act or a provision of this Code or an Act, means the time at which this Code, the Act or provision comes into operation.

“Commonwealth” means the Commonwealth of Australia but, when used in a geographical sense, does not include an external Territory.

“confer”, in relation to a function, includes impose.

“contravene” includes fail to comply with.

“country” includes —

- (a) a federation; or
- (b) a state, province or other part of a federation.

“date of assent”, in relation to an Act, means the day on which the Act receives the Royal Assent.

“definition” means a provision of this Code (however expressed) that —

- (a) gives a meaning to a word or expression; or
- (b) limits or extends the meaning of a word or expression.

“document” includes —

- (a) any paper or other material on which there is writing; or
- (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; or
- (c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being reproduced (with or without the aid of another article or device).

“estate” includes easement, charge, right, title, claim, demand, lien or encumbrance, whether at law or in equity.

“expire” includes lapse or otherwise cease to have effect.

“external Territory” means a Territory, other than an internal Territory, for the government of which as a Territory provision is made by a Commonwealth Act.

“**fail**” includes refuse.

“**financial year**” means a period of 12 months beginning on 1 July.

“**foreign country**” means a country (whether or not an independent sovereign State) outside Australia and the external Territories.

“**function**” includes duty.

“**Gazette**” means the Government Gazette of this jurisdiction.

“**Gazette notice**” means notice published in the Gazette.

“**gazetted**” means published in the Gazette.

“**Government Printer**” means the Government Printer of this jurisdiction, and includes any other person authorised by the Government of this jurisdiction to print an Act or instrument.

“**individual**” means a natural person.

“**insert**”, in relation to a provision of this Code, includes substitute.

“**instrument**” includes a statutory instrument.

“**interest**”, in relation to land or other property, means —

- (a) a legal or equitable estate in the land or other property; or
- (b) a right, power or privilege over, or in relation to, the land or other property.

“**internal Territory**” means the Australian Capital Territory, the Jervis Bay Territory or the Northern Territory.

“**Jervis Bay Territory**” means the Territory mentioned in the *Jervis Bay Territory Acceptance Act 1915* (Cwlth).

“**make**” includes issue or grant.

“**minor**” means an individual who is under 18.

“**modification**” includes addition, omission or substitution.

“**month**” means a calendar month.

“**named month**” means 1 of the 12 months of the year.

“**Northern Territory**” means the Northern Territory of Australia.

“**number**” means —

- (a) a number expressed in figures or words; or
- (b) a letter; or
- (c) a combination of a number so expressed and a letter.

“oath”, in relation to a person allowed by law to affirm, declare or promise, includes affirmation, declaration or promise.

“office” includes position.

“omit”, in relation to a provision of this Code or an Act, includes repeal.

“party” includes an individual or a body politic or corporate.

“penalty” includes forfeiture or punishment.

“person” includes an individual or a body politic or corporate.

“power” includes authority.

“prescribed” means prescribed by, or by regulations made or in force for the purposes of or under, this Code.

“printed” includes typewritten, lithographed or reproduced by any mechanical means.

“proceeding” means a legal or other action or proceeding.

“property” means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action.

“provision”, in relation to this Code or an Act, means words or other matter that form or forms part of this Code or the Act, and includes —

- (a) a Chapter, Part, Division, Subdivision, section, subsection, paragraph, subparagraph, sub-subparagraph or Schedule of or to this Code or the Act; or
- (b) a section, clause, subclause, item, column, table or form of or in a Schedule to this Code or the Act; or
- (c) the long title and any preamble to the Act.

“record” includes information stored or recorded by means of a computer.

“repeal” includes —

- (a) revoke or rescind; or
- (b) repeal by implication; or
- (c) abrogate or limit the effect of this Code or instrument concerned; or

- (d) exclude from, or include in, the application of this Code or instrument concerned any person, subject matter or circumstance.

“**sign**” includes the affixing of a seal or the making of a mark.

“**statutory declaration**” means a declaration made under an Act, or under a Commonwealth Act or an Act of another jurisdiction, that authorises a declaration to be made otherwise than in the course of a judicial proceeding.

“**statutory instrument**” means an instrument (including a regulation) made or in force under or for the purposes of this Code, and includes an instrument made or in force under any such instrument.

“**swear**”, in relation to a person allowed by law to affirm, declare or promise, includes affirm, declare or promise.

“**word**” includes any symbol, figure or drawing.

“**writing**” includes any mode of representing or reproducing words in a visible form.

- (2) In a statutory instrument —
“**the Code**” means this Code.

13. Provisions relating to defined terms and gender and number

- (1) If this Code defines a word or expression, other parts of speech and grammatical forms of the word or expression have corresponding meanings.
- (2) Definitions in or applicable to this Code apply except so far as the context or subject matter otherwise indicates or requires.
- (3) In this Code, words indicating a gender include each other gender.
- (4) In this Code —
- (a) words in the singular include the plural; and
 - (b) words in the plural include the singular.

14. Meaning of may and must etc.

- (1) In this Code, the word “**may**”, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion.
- (2) In this Code, the word “**must**”, or a similar word or expression, used in relation to a power indicates that the power is required to be exercised.
- (3) This clause has effect despite any rule of construction to the contrary.

15. Words and expressions used in statutory instruments

- (1) Words and expressions used in a statutory instrument have the same meanings as they have, from time to time, in this Code, or relevant provisions of this Code, under or for the purposes of which the instrument is made or in force.
- (2) This clause has effect in relation to an instrument except so far as the contrary intention appears in the instrument.

16. Effect of express references to bodies corporate and individuals

In this Code, a reference to a person generally (whether the expression “person”, “party”, “someone”, “anyone”, “no-one”, “one”, “another” or “whoever” or another expression is used) —

- (a) does not exclude a reference to a body corporate or an individual merely because elsewhere in this Code there is particular reference to a body corporate (however expressed); and
- (b) does not exclude a reference to an individual or a body corporate merely because elsewhere in this Code there is particular reference to an individual (however expressed).

17. Production of records kept in computers etc.

If a person who keeps a record of information by means of a mechanical, electronic or other device is required by or under this Code —

- (a) to produce the information or a document containing the information to a court, tribunal or person; or

- (b) to make a document containing the information available for inspection by a court, tribunal or person;

then, unless the court, tribunal or person otherwise directs —

- (c) the requirement obliges the person to produce or make available for inspection, as the case may be, a document that reproduces the information in a form capable of being understood by the court, tribunal or person; and
- (d) the production to the court, tribunal or person of the document in that form complies with the requirement.

18. References to this jurisdiction to be implied

In this Code —

- (a) a reference to an officer, office or statutory body is a reference to such an officer, office or statutory body in and for this jurisdiction; and
- (b) a reference to a locality or other matter or thing is a reference to such a locality or other matter or thing in and of this jurisdiction.

19. References to officers and holders of offices

In this Code, a reference to a particular officer, or to the holder of a particular office, includes a reference to the person for the time being occupying or acting in the office concerned.

20. Reference to certain provisions of Code

If a provision of this Code refers —

- (a) to a Part, section or Schedule by a number and without reference to this Code—the reference is a reference to the Part, section or Schedule, designated by the number, of or to this Code; or
- (b) to a Schedule without reference to it by a number and without reference to this Code—the reference, if there is only 1 Schedule to this Code, is a reference to the Schedule; or
- (c) to a Division, Subdivision, subsection, paragraph, subparagraph, sub-subparagraph, clause, subclause, item,

column, table or form by a number and without reference to this Code—the reference is a reference to —

- (i) the Division, designated by the number, of the Part in which the reference occurs; and
- (ii) the Subdivision, designated by the number, of the Division in which the reference occurs; and
- (iii) the subsection, designated by the number, of the section in which the reference occurs; and
- (iv) the paragraph, designated by the number, of the section, subsection, Schedule or other provision in which the reference occurs; and
- (v) the paragraph, designated by the number, of the clause, subclause, item, column, table or form of or in the Schedule in which the reference occurs; and
- (vi) the subparagraph, designated by the number, of the paragraph in which the reference occurs; and
- (vii) the sub-subparagraph, designated by the number, of the subparagraph in which the reference occurs; and
- (viii) the section, clause, subclause, item, column, table or form, designated by the number, of or in the Schedule in which the reference occurs;

as the case requires.

21. Reference to provisions of this Code or an Act is inclusive

In this Code, a reference to a portion of this Code or an Act includes —

- (a) a reference to the Chapter, Part, Division, Subdivision, section, subsection or other provision of this Code or the Act referred to that forms the beginning of the portion; and
- (b) a reference to the Chapter, Part, Division, Subdivision, section, subsection or other provision of this Code or the Act referred to that forms the end of the portion.

Example — A reference to ‘sections 5 to 9’ includes both section 5 and section 9. It is not necessary to refer to ‘sections 5 to 9 (both inclusive)’ to ensure that the reference is given an inclusive interpretation.

Part 4 — Functions and powers

22. Performance of statutory functions

- (1) If this Code confers a function or power on a person or body, the function may be performed, or the power may be exercised, from time to time as occasion requires.
- (2) If this Code confers a function or power on a particular officer or the holder of a particular office, the function may be performed, or the power may be exercised, by the person for the time being occupying or acting in the office concerned.
- (3) If this Code confers a function or power on a body (whether or not incorporated), the performance of the function, or the exercise of the power, is not affected merely because of vacancies in the membership of the body.

23. Power to make instrument or decision includes power to amend or repeal

If this Code authorises or requires the making of an instrument or decision —

- (a) the power includes power to amend or repeal the instrument or decision; and
- (b) the power to amend or repeal the instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision.

24. Matters for which statutory instruments may make provision

- (1) If this Code authorises or requires the making of a statutory instrument in relation to a matter, a statutory instrument made under this Code may make provision for the matter by applying, adopting or incorporating (with or without modification) the provisions of —
 - (a) an Act or statutory instrument; or
 - (b) another document (whether of the same or a different kind);as in force at a particular time or as in force from time to time.
- (2) If a statutory instrument applies, adopts or incorporates the provisions of a document, the statutory instrument applies, adopts or incorporates

the provisions as in force from time to time, unless the statutory instrument otherwise expressly provides.

- (3) A statutory instrument may —
 - (a) apply generally throughout this jurisdiction or be limited in its application to a particular part of this jurisdiction; or
 - (b) apply generally to all persons, matters or things or be limited in its application to —
 - (i) particular persons, matters or things; or
 - (ii) particular classes of persons, matters or things; or
 - (c) otherwise apply generally or be limited in its application by reference to specified exceptions or factors.
- (4) A statutory instrument may —
 - (a) apply differently according to different specified factors; or
 - (b) otherwise make different provision in relation to —
 - (i) different persons, matters or things; or
 - (ii) different classes of persons, matters or things.
- (5) A statutory instrument may authorise a matter or thing to be from time to time determined, applied or regulated by a specified person or body.
- (6) If this Code authorises or requires a matter to be regulated by statutory instrument, the power may be exercised by prohibiting by statutory instrument the matter or any aspect of the matter.
- (7) If this Code authorises or requires provision to be made with respect to a matter by statutory instrument, a statutory instrument made under this Code may make provision with respect to a particular aspect of the matter despite the fact that provision is made by this Code in relation to another aspect of the matter or in relation to another matter.
- (8) A statutory instrument may provide for the review of, or a right of appeal against, a decision made under the statutory instrument, or this Code, and may, for that purpose, confer jurisdiction on any court, tribunal, person or body.
- (9) A statutory instrument may require a form prescribed by or under the statutory instrument, or information or documents included in,

attached to or given with the form, to be verified by statutory declaration.

25. Presumption of validity and power to make

- (1) All conditions and preliminary steps required for the making of a statutory instrument are presumed to have been satisfied and performed in the absence of evidence to the contrary.
- (2) A statutory instrument is taken to be made under all powers under which it may be made, even though it purports to be made under this Code or a particular provision of this Code.

26. Appointments may be made by name or office

- (1) If this Code authorises or requires a person or body —
 - (a) to appoint a person to an office; or
 - (b) to appoint a person or body to exercise a power; or
 - (c) to appoint a person or body to do another thing;the person or body may make the appointment by —
 - (d) appointing a person or body by name; or
 - (e) appointing a particular officer, or the holder of a particular office, by reference to the title of the office concerned.
- (2) An appointment of a particular officer, or the holder of a particular office, is taken to be the appointment of the person for the time being occupying or acting in the office concerned.

27. Acting appointments

- (1) If this Code authorises a person or body to appoint a person to act in an office, the person or body may, in accordance with this Code, appoint —
 - (a) a person by name; or
 - (b) a particular officer, or the holder of a particular office, by reference to the title of the office concerned;to act in the office.

- (2) The appointment may be expressed to have effect only in the circumstances specified in the instrument of appointment.
- (3) The appointer may —
 - (a) determine the terms and conditions of the appointment, including remuneration and allowances; and
 - (b) terminate the appointment at any time.
- (4) The appointment, or the termination of the appointment, must be in, or evidenced by, writing signed by the appointer.
- (5) The appointee must not act for more than 1 year during a vacancy in the office.
- (6) If the appointee is acting in the office otherwise than because of a vacancy in the office and the office becomes vacant, then, subject to subclause (2), the appointee may continue to act until —
 - (a) the appointer otherwise directs; or
 - (b) the vacancy is filled; or
 - (c) the end of a year from the day of the vacancy;whichever happens first.
- (7) The appointment ceases to have effect if the appointee resigns by writing signed and delivered to the appointer.
- (8) While the appointee is acting in the office —
 - (a) the appointee has all the powers and functions of the holder of the office; and
 - (b) this Code and other laws apply to the appointee as if the appointee were the holder of the office.
- (9) Anything done by or in relation to a person purporting to act in the office is not invalid merely because —
 - (a) the occasion for the appointment had not arisen; or
 - (b) the appointment had ceased to have effect; or
 - (c) the occasion for the person to act had not arisen or had ceased.

- (10) If this Code authorises the appointer to appoint a person to act during a vacancy in the office, an appointment to act in the office may be made by the appointer whether or not an appointment has previously been made to the office.

28. Powers of appointment imply certain incidental powers

- (1) If this Code authorises or requires a person or body to appoint a person to an office —
- (a) the power may be exercised from time to time as occasion requires; and
 - (b) the power includes —
 - (i) power to remove or suspend, at any time, a person appointed to the office; and
 - (ii) power to appoint another person to act in the office if a person appointed to the office is removed or suspended; and
 - (iii) power to reinstate or reappoint a person removed or suspended; and
 - (iv) power to appoint a person to act in the office if it is vacant (whether or not the office has ever been filled); and
 - (v) power to appoint a person to act in the office if the person appointed to the office is absent or is unable to discharge the functions of the office (whether because of illness or otherwise).
- (2) The power to remove or suspend a person under subclause (1)(b) may be exercised even if this Code provides that the holder of the office to which the person was appointed is to hold office for a specified period.
- (3) The power to make an appointment under subclause (1)(b) may be exercised from time to time as occasion requires.
- (4) An appointment under subclause (1)(b) may be expressed to have effect only in the circumstances specified in the instrument of appointment.

29. Exercise of powers between enactment and commencement

(1) If a provision of this Code (the “**empowering provision**”) that does not commence on its enactment would, had it commenced, confer a power —

- (a) to make an appointment; or
- (b) to make a statutory instrument of a legislative or administrative character; or
- (c) to do another thing;

then —

- (d) the power may be exercised; and
- (e) anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment, instrument or other thing into effect;

before the empowering provision commences.

(2) If a provision of a Queensland Act (the “**empowering provision**”) that does not commence on its enactment would, had it commenced, amend a provision of this Code so that it would confer a power —

- (a) to make an appointment; or
- (b) to make a statutory instrument of a legislative or administrative character; or
- (c) to do another thing;

then —

- (d) the power may be exercised; and
- (e) anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment, instrument or other thing into effect;

before the empowering provision commences.

(3) If —

- (a) this Code has commenced and confers a power to make a statutory instrument (the “**basic instrument-making power**”); and

- (b) a provision of a Queensland Act that does not commence on its enactment would, had it commenced, amend this Code so as to confer additional power to make a statutory instrument (the “**additional instrument-making power**”);

then —

- (c) the basic instrument-making power and the additional instrument-making power may be exercised by making a single instrument; and
 - (d) any provision of the instrument that required an exercise of the additional instrument-making power is to be treated as made under subclause (2).
- (4) If an instrument, or a provision of an instrument, is made under subclause (1) or (2) that is necessary for the purpose of —
- (a) enabling the exercise of a power mentioned in the subclause; or
 - (b) bringing an appointment, instrument or other thing made or done under such a power into effect;

the instrument or provision takes effect —

- (c) on the making of the instrument; or
 - (d) on such later day (if any) on which, or at such later time (if any) at which, the instrument or provision is expressed to take effect.
- (5) If —
- (a) an appointment is made under subclause (1) or (2); or
 - (b) an instrument, or a provision of an instrument, made under subclause (1) or (2) is not necessary for a purpose mentioned in subclause (4);

the appointment, instrument or provision takes effect —

- (c) on the commencement of the relevant empowering provision; or
- (d) on such later day (if any) on which, or at such later time (if any) at which, the appointment, instrument or provision is expressed to take effect.

- (6) Anything done under subclause (1) or (2) does not confer a right, or impose a liability, on a person before the relevant empowering provision commences.
- (7) After the enactment of a provision mentioned in subclause (2) but before the provision's commencement, this clause applies as if the references in subclauses (2) and (5) to the commencement of the empowering provision were references to the commencement of the provision mentioned in subclause (2) as amended by the empowering provision.
- (8) In the application of this clause to a statutory instrument, a reference to the enactment of the instrument is a reference to the making of the instrument.

Part 5 — Distance, time and age

30. Matters relating to distance, time and age

- (1) In the measurement of distance for the purposes of this Code, the distance is to be measured along the shortest road ordinarily used for travelling.
- (2) If a period beginning on a given day, act or event is provided or allowed for a purpose by this Code, the period is to be calculated by excluding the day, or the day of the act or event, and —
 - (a) if the period is expressed to be a specified number of clear days or at least a specified number of days—by excluding the day on which the purpose is to be fulfilled; and
 - (b) in any other case—by including the day on which the purpose is to be fulfilled.
- (3) If the last day of a period provided or allowed by this Code for doing anything is not a business day in the place in which the thing is to be or may be done, the thing may be done on the next business day in the place.
- (4) If the last day of a period provided or allowed by this Code for the filing or registration of a document is a day on which the office is closed where the filing or registration is to be or may be done, the document may be filed or registered at the office on the next day that the office is open.

- (c) affect a right, privilege or liability acquired, accrued or incurred under the provision; or
 - (d) affect a penalty incurred in relation to an offence arising under the provision; or
 - (e) affect an investigation, proceeding or remedy in relation to such a right, privilege, liability or penalty.
- (2) Any such penalty may be imposed and enforced, and any such investigation, proceeding or remedy may be begun, continued or enforced, as if the provision had not been repealed or amended or had not expired.

34. Continuance of repealed provisions

If a Queensland Act repeals some provisions of this Code and enacts new provisions in substitution for the repealed provisions, the repealed provisions continue in force until the new provisions commence.

35. Code and amending Acts to be read as one

This Code and all Queensland Acts amending this Code are to be read as one.

Part 7 — Instruments under Code

36. Schedule applies to statutory instruments

- (1) This Schedule applies to a statutory instrument, and to things that may be done or are required to be done under a statutory instrument, in the same way as it applies to this Code, and things that may be done or are required to be done under this Code, except so far as the context or subject matter otherwise indicates or requires.
- (2) The fact that a provision of this Schedule refers to this Code and not also to a statutory instrument does not, by itself, indicate that the provision is intended to apply only to this Code.

Part 8 — Application to coastal sea

37. Application

This Code has effect in and relation to the coastal sea of this jurisdiction as if that coastal sea were part of this jurisdiction.

Notes

¹ This is a compilation of the *Consumer Credit (Western Australia) Code*². ~~The and includes the amendments made by the other written laws referred to in the following table~~ ~~contains information about that Code~~^{1a}.

Compilation table

Short title	Number and Year	Assent	Commencement
<i>Consumer Credit (Western Australia) Code</i>			9 Jul 2003 (see s. 2 of the <i>Consumer Credit (Western Australia) Amendment Act 2003</i> and <i>Gazette</i> 9 Jul 2003 p. 2735)
<i>Consumer Credit (Western Australia) Code Amendment Order 2006</i> ³ published in <i>Gazette</i> 27 Jun 2006 p. 2282-3			27 Jun 2006

^{1a} On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.

Provisions that have not come into operation

<u>Citation</u>	<u>Gazettal</u>	<u>Commencement</u>
<u><i>Consumer Credit (Western Australia) Code Amendment Order (No. 2) 2006</i> s. 4-12⁴</u>	<u>29 Sep 2006</u> <u>p. 4243-9</u>	<u>Operative on commencement of the Queensland <i>Consumer Credit and Trade Measurement Amendment Act 2006</i> s. 4 (see s. 2)</u>

² The *Consumer Credit (Western Australia) Code* was originally set out in the Appendix to the *Consumer Credit (Western Australia) Act 1996*. It came into operation on 1 November 1996. On 9 July 2003 the Appendix was repealed by the *Consumer Credit (Western Australia) Amendment Act 2003* s. 14.

Section 5(1) of the *Consumer Credit (Western Australia) Act 1996* applies the Consumer Credit Code set out in the Appendix to the *Consumer Credit (Queensland) Act 1994* (as in force on 9 July 2003) as a law of Western Australia.

It applies, as amended by Part 5 of the WA Act. The Code, as applied and amended, may be cited as the *Consumer Credit (Western Australia) Code*.

If the Consumer Credit Code of Queensland is amended, the Governor may, by order under section 5(2) of the WA Act, amend the *Consumer Credit (Western Australia) Code*.

³ Note: A draft Order (the *Consumer Credit (Western Australia) Code Amendment Order 2006*) containing this provision was approved by the Legislative Assembly on 18 May 2006 (see Hansard p. 2865-6) and by the Legislative Council on 1 June 2006 (see Hansard p. 3398-9).

⁴ On the date as at which this compilation was prepared, the *Consumer Credit (Western Australia) Code Amendment Order (No. 2) 2006* s. 4-12 had not come into operation. They read as follows:

“
—

4. Section 17 amended

Section 17(1) is repealed and the following subsection is inserted instead —

“
—

(1) An alteration of (including an addition to) a contract document by the credit provider after it is signed by the debtor is ineffective unless the debtor has agreed in writing to the alteration.

”
—

5. Section 162 amended

(1) Section 162(1) is amended as follows:

(a) by inserting after “contract,” —

“ mortgage or ”;

(b) by inserting after “Code” —

“
—

, other than a document transmitted by electronic communication

”
—

(2) After section 162(1) the following subsection is inserted —

“
—

(1A) A credit contract, mortgage or guarantee or a notice given by a credit provider under this Code, if transmitted by electronic communication —

(a) must be easily legible; and

(b) must conform with the provisions of the regulations, if any, as to content, legibility and accompanying information; and

(c) must be clearly expressed.

”
—

(3) Section 162(2) is amended as follows:

(a) by deleting “a guarantee” and inserting instead —
“ mortgage or guarantee ”;

(b) by inserting after “credit contracts,” —
“ mortgages or ”.

6. Section 163 amended

Section 163(3) is repealed.

7. Section 164A inserted

After section 164 the following section is inserted in Division 2 —

“
—

164A. Electronic transactions and documents

(1) Without limiting the provisions of this Code, it is declared that any contract, mortgage or guarantee referred to in this Code may be made in accordance with the laws of this jurisdiction in relation to electronic transactions.

(2) Without limiting the provisions of this Code, it is declared that any requirement or permission by or under this Code, however expressed —

(a) to give information in writing; or

(b) to provide a signature; or

(c) to produce a document; or

(d) to record information in writing; or

(e) to retain a document;

may be met in accordance with the laws of this jurisdiction in relation to electronic transactions.

Example: Giving information would include the requirement under section 34(1) to provide a statement of amount owing.

Note: The laws of this jurisdiction relating to electronic transactions include a definition relating to the giving of information. That definition provides generally, that giving information includes, but is not limited to —

(a) making an application;

(b) making or lodging a claim;

(c) giving, sending or serving a notification;

(d) lodging a return;

(e) making a request;

(f) making a declaration;

(g) lodging or issuing a certificate;

(h) making, varying or cancelling an election;

(i) lodging an objection;

(j) giving a statement of reasons.

(3) The regulations may provide that —

- (a) a specified transaction, or a specified class of transactions; or
 - (b) a specified document, or a specified class of documents; or
 - (c) specified information, or a specified class of information;
- referred to by or under this Code must not be made, given or provided by electronic communication.

”.

Note: The following note will be inserted at the end of section 172(2) —

“ Note: A nominated address may be an electronic address. ”

Note: The following note will be inserted at the end of section 172(3) —

“ Note: A nominated address may be an electronic address. ”

Note: The following note will be inserted immediately after each of the definitions of “document”, “sign” and “writing” in Schedule 2, clause 12(1) —

“ Note: See section 164A. ”

8. Section 171 amended

Section 171(2)(a) is amended by deleting “similar facility” and inserting instead —

“ electronic communication ”.

9. Section 172 amended

(1) Section 172(1) is amended as follows:

(a) in paragraph (a)(ii) by deleting “post, telex, facsimile or similar facility” and inserting instead —

“

—

post, telex or facsimile or, with the written consent of the person in accordance with subsection (1A), by electronic communication

”.

(b) in paragraph (b)(ii) by deleting “post, telex, facsimile or similar electronic facility” and inserting instead —

“

—

post, telex or facsimile or, with the written consent of the body corporate in accordance with subsection (1A), by electronic communication

”.

(2) After section 172(1) the following subsection is inserted —

- “
-
- (1A) A debtor, mortgagor or guarantor may consent to the giving of documents by electronic communication by, and only by, a specific positive election in writing, after being informed that if consent is given —
- (a) paper documents may no longer be given; and
- (b) electronic communications should be regularly checked for notices; and
- (c) consent to the giving of documents by electronic communication may be withdrawn at any time.
- ”
- (3) Section 172(2) is amended by deleting “mortgagor, guarantor or consumer lessee” and inserting instead —
- “ mortgagor or guarantor ”.
- (4) After section 172(3) the following subsections are inserted —
- “
-
- (3A) If a person nominates an address under subsection (2)(a) or (3)(a), the person may, by notice in writing to the person giving the notice or other document referred to in subsection (1), change the nominated address or cancel the nomination.
- (3B) If this Code requires or permits a notice or other document to be given to a debtor, mortgagor or guarantor by a credit provider (whether the expression “deliver”, “serve”, “notify”, “send” or “give” or another expression is used), the notice or other document may, with the written consent in accordance with subsection (3C) of the debtor, mortgagor or guarantor, as the case may be, to service of documents by this process, be given by —
- (a) making it available for a reasonable period of time on the credit provider’s information system for retrieval by electronic communication by the debtor, mortgagor or guarantor; and
- (b) promptly notifying the debtor, mortgagor or guarantor by electronic communication that the information is available for retrieval on that information system and the nature of the information; and
- (c) providing the debtor, mortgagor or guarantor with the ability to readily retrieve the information by electronic communication.

- (3C) A person may consent to the giving of documents by the process in subsection (3B) by, and only by, a specific positive election in writing, after being informed that if consent is given —
- (a) there is no longer a requirement that paper documents be given; and
 - (b) electronic communications should be regularly checked for notices; and
 - (c) consent to the giving of documents by that process may be withdrawn at any time.
- (3D) In addition to the requirements of the laws of this jurisdiction in relation to electronic transactions, if a notice or other document is given by sending it to a nominated electronic address or by the process in subsection (3B) —
- (a) the notice or other document must be in a format that enables the notice or other documents to be printed and saved to an electronic file; and
 - (b) at the time the notice or other document was sent or was made available on the credit provider's information system, it was reasonable to expect that the intended recipient would be readily able to print the notice or other document and to save it to an electronic file.
- (3E) A nomination or consent under this section ceases to have effect if it is cancelled or withdrawn by the person who made or gave it.
- (3F) The regulations made provide for or with respect to —
- (a) the electronic retention of documents under this Code that have been given by electronic communication or by the process in subsection (3B); and
 - (b) electronic access to those documents by the relevant debtor, mortgagor or guarantor.

”

10. Section 173 amended

- (1) Section 173(1) is amended by deleting paragraph (c) and inserting instead —

“

- (c) in the case of a notice or other document sent by facsimile transmission — on the date it bears or the date on which the machine from which the transmission was sent produces a report indicating that the notice or other document was sent to the facsimile or other number of the addressee, whichever is the later; or

- (d) in the case of a notice or other document given in accordance with section 172(3B) — at the time when the electronic communication referred to in section 172(3B)(b) enters the information system of the addressee; or
- (e) in the case of a notice or other document given by electronic communication — at the time when the electronic communication enters the information system of the addressee.

”

(2) After section 173(2) the following subsection is inserted —

“

(3) This section has effect despite anything to the contrary in the laws of this jurisdiction in relation to electronic transactions.

”

11. Section 173A inserted

After section 173 the following section is inserted —

“

173A. Attribution of electronic communications

(1) For the purposes of this Code, the purported originator of an electronic communication is bound by that communication only if —

- (a) the purported originator and the addressee of an electronic communication have agreed that the Electronic Funds Transfer Code of Conduct as published from time to time on the Internet site of the Australian Securities and Investments Commission applies to the electronic communication and under that Code of Conduct the purported originator is bound by the communication; or
- (b) in any other case, the communication was sent by the purported originator or with the authority of the purported originator.

(2) Subsection (1) does not affect the operation of section 176.

(3) This section has effect despite anything to the contrary in the laws of this jurisdiction in relation to electronic transactions.

”

12. Schedule 2 amended

Clause 12(1) is amended by inserting in the appropriate alphabetical position —

“

— **“electronic communication”** means —

(a) a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both; or

(b) a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system.

“information system” means a system for generating, sending, receiving, storing or otherwise processing electronic communications.

”

Note: A draft Order (the Consumer Credit (Western Australia) Code Amendment Order 2006) containing these provisions was approved by the Legislative Assembly on 18 May 2006 (see Hansard p. 2865-6) and by the Legislative Council on 1 June 2006 (see Hansard p. 3398-9).

”