

CREDIT (RURAL CONTRACTS) ACT 1987 No. 205

NEW SOUTH WALES



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CREDIT (RURAL CONTRACTS) ACT 1987 No. 205

NEW SOUTH WALES



Act No. 205, 1987

An Act to provide for the relief, in relation to credit contracts, of persons engaged in farming undertakings. [Assented to 8 December 1987]

Credit (Rural Contracts) 1987

The Legislature of New South Wales enacts:

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the Credit (Rural Contracts) Act 1987.

Commencement

2. This Act shall commence on a day to be appointed by proclamation.

Definitions

3. In this Act—

“commercial vehicle” means—

- (a) a motor vehicle within the meaning of the Motor Traffic Act 1909 constructed or adapted principally for the carriage of goods, but does not include a motor vehicle of the kind known as a utility, a station wagon or a panel van; or
- (b) a vehicle without motive power of its own and constructed or adapted principally for the carriage of goods and for being drawn by a motor vehicle within the meaning of that Act;

“Commissioner” means the Commissioner for Consumer Affairs holding office under section 6 of the Fair Trading Act 1987;

“credit contract” means a contract under or on the security of which any form of financial accommodation is provided and includes any arrangement under which goods are or may be used at or during any time or times by any person other than the owner of the goods where—

- (a) the arrangement is entered into in New South Wales;
- (b) the goods are supplied or delivered or agreed to be supplied or delivered in New South Wales; or
- (c) the goods may be used in New South Wales;

“credit provider”, in relation to a credit contract, means—

- (a) the person providing financial accommodation under the contract in the course of a business carried on by the person; and
- (b) any person to whom the rights under the contract of the person referred to in paragraph (a) pass, whether by operation of law or otherwise;

“debtor”, in relation to a credit contract, means the person to whom financial accommodation is provided under the contract;

“exempt proprietary company” has the same meaning as in the Companies (New South Wales) Code;

“farm machinery” means—

- (a) a harvester, binder, tractor, plough or other agricultural implement; or

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- (b) any other goods of a class commonly used for the purposes of a farming undertaking that are prescribed as being farm machinery for the purposes of this Act,

where the goods are acquired for the purposes of a farming undertaking;

“farming undertaking” includes—

- (a) any agricultural, apicultural, dairy farming, horticultural, orcharding, pastoral, poultry keeping, viticultural or other business involving the cultivation of the soil, the gathering of crops or the rearing of livestock;
- (b) the business of taking fish, crustacea, oysters or any other marine, estuarine or fresh-water animal life;
- (c) the cutting of timber for sale; and
- (d) any class of business prescribed as a farming undertaking;

“Tribunal” means the Commercial Tribunal of New South Wales constituted under the Commercial Tribunal Act 1984.

General application of Act

4. (1) This Act applies to a credit contract entered into by an individual, a partnership or an exempt proprietary company whose sole or principal business is a farming undertaking.

(2) This Act applies to a credit contract entered into before or after the commencement of this Act, but nothing in this Act affects any proceedings commenced before the Tribunal or a court before the commencement of this Act in relation to a credit contract.

(3) This Act does not apply to a credit contract enabling the purchase of land.

Application of Act to guarantors

5. This Act applies to a guarantor of the performance of a credit contract or a person liable under an indemnity given in respect of a credit contract in the same way as it applies to a debtor under a credit contract.

Relationship with other Acts

6. Where proceedings to determine any matter could be brought under the Contracts Review Act 1980, the Credit Act 1984 or this Act, the proceedings may be instituted under—

- (a) the Contracts Review Act 1980 or this Act, but not under both; or
- (b) the Credit Act 1984 or this Act, but not under both.

Act binds Crown

7. This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits the Crown in all its other capacities.

PART 2—UNJUST CONTRACTS**Interpretation**

8. For the purposes of this Part, a credit contract is unjust if—

- (a) it is unconscionable, harsh or oppressive; or
- (b) the interest rate is excessive, having regard to the risk, the value of any security, the amount of the consideration, the time for repayment, the amount financed and any other relevant circumstances.

Tribunal may re-open certain transactions

9. (1) Subject to section 12, the Tribunal may, at any time, on the application of the debtor under a credit contract, re-open the transaction that gave rise to the contract if it appears to the Tribunal that, in the circumstances relating to the contract at the time it was entered into, it was unjust.

(2) If the Tribunal re-opens a transaction under this section, the Tribunal may, notwithstanding any settlement of accounts or any agreement purporting to close previous dealings and create a new obligation, do any one or more of the following:

- (a) re-open an account already taken between the parties;
- (b) relieve the debtor from payment of any amount in excess of such amount as the Tribunal, having regard to the risk involved and all other circumstances, considers to be reasonably payable by the debtor to the credit provider under the contract;
- (c) set aside either wholly or in part or revise or alter an agreement made in connection with the transaction;
- (d) 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 Tribunal thinks fit to grant, is justly due to that party under the contract;
- (e) give judgment or make an order against a person for delivery of goods to which the contract relates and which are in the possession of that person.

Matters to be considered by Tribunal

10. (1) In determining whether a credit contract is unjust in the circumstances relating to the contract at the time it was entered into, the Tribunal shall have regard to the public interest and to all the circumstances of the case, including such consequences as those arising in the event of—

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- (a) compliance with all or any of the provisions of the contract; or
- (b) non-compliance with, or contravention of, all or any of the provisions of the contract.

(2) Without affecting the generality of subsection (1), the matters to which the Tribunal shall have regard include, to the extent that they are relevant in the circumstances—

- (a) whether or not there was any material inequality in the bargaining powers of the parties to the contract;
- (b) whether or not, at the time the contract was entered into, its provisions were the subject of negotiation;
- (c) whether or not it was reasonably practicable for the debtor to negotiate for the alteration of, or to reject, any of the provisions of the contract;
- (d) whether or not any of the provisions of the contract 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;
- (e) whether or not—
 - (i) the debtor (not being an exempt proprietary company) was reasonably able to protect his or her interests; or
 - (ii) a person who represented the debtor was reasonably able to protect the interests of the debtor, because of the debtor's or person's age or the state of the debtor's or person's physical or mental capacity;
- (f) the relative economic circumstances, educational background and literacy of—
 - (i) the parties to the contract; and
 - (ii) any person who represented any of the parties to the contract;
- (g) the form of the contract and the intelligibility of the language in which it is expressed;
- (h) whether or not, and when, independent legal or other expert advice was obtained by the debtor;
- (i) the extent to which the provisions of the contract and their legal and practical effects were accurately explained to the debtor or a person who represented the debtor and whether or not the debtor or person understood those provisions and their effects;
- (j) whether undue influence, unfair pressure or unfair tactics were exerted on or used against the debtor or a person who represented the debtor—
 - (i) by any other party to the contract;
 - (ii) by any person acting, or appearing or purporting to act, for any other party to the contract; or

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(iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract, or of any person acting, or appearing or purporting to act, for any other party to the contract;

(k) the conduct of the parties to the proceedings in relation to similar contracts, or courses of dealing, to which any of them has been a party; and

(l) the commercial or other setting, purpose and effect of the contract.

(3) For the purposes of subsection (2), a person shall be deemed to have represented a debtor if the person represented the debtor, or assisted the debtor to a significant degree, in negotiations prior to, or at, the time the contract was entered into.

(4) In determining whether a contract is unjust, the Tribunal shall not have regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was entered into.

(5) In determining whether to grant relief in respect of a contract that it finds to be unjust, the Tribunal may have regard to the conduct of the parties to the proceedings in relation to the contract since it was entered into.

Joinder of parties

11. If it appears to the Tribunal that a person other than a credit provider has shared in the profits of, or has a beneficial interest prospectively or otherwise in, a credit contract that the Tribunal holds to be unjust, the Tribunal may join that person as a party to the proceedings and may make such order in respect of that person as it thinks fit.

Limitation on re-opening of transactions

12. (1) Except as provided by subsection (2), a debtor may not make an application under section 9 in respect of a credit contract—

(a) in the case of a credit contract under which the credit provider has exercised a right to take possession of the property to which the contract relates—after the expiration of the period of 2 years after the time when the credit provider took possession of the property; or

(b) in any other case—after the expiration of the period of 2 years after the time when the contract is terminated.

(2) A debtor may make an application under section 9 in respect of a credit contract during the period of pendency of maintainable proceedings arising out of or in relation to the contract, being proceedings (including cross-claims) that are pending against the debtor.

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Orders of the Supreme Court

13. If the Supreme Court is satisfied, on the application of the Minister or the Attorney General, or both, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust credit contracts, it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into credit contracts of a specified class.

PART 3—HARDSHIP**Variation of commitments on account of hardship**

14. (1) If a debtor by reason of illness, unemployment, increase in interest rates, reduction in commodity prices, a delay in payment of money to the debtor, natural disaster or other reasonable cause is unable reasonably to discharge the debtor's obligations under a credit contract, the debtor may, where the debtor reasonably expects that the debtor would be able to discharge the debtor's obligations—

- (a) if the period of the contract were extended and the amount of each payment due under the contract accordingly reduced;
- (b) if the dates on which payments due under the contract during a specified period were postponed; or
- (c) if the period of the contract were extended and the dates on which payments due under the contract during a specified period were postponed,

apply to the credit provider for a variation of the contract.

(2) If a credit provider to whom application is made by a debtor under subsection (1) refuses to vary a contract in accordance with the application, the debtor may apply to the Tribunal or a Local Court for a variation of the contract.

(3) The Tribunal or a Local Court may, where it receives an application under subsection (2) and has given the debtor and the credit provider an opportunity to be heard, order, or refuse to order, a variation of the contract to which the application relates and, if it orders such a variation, may make such other orders as it thinks fit.

(4) If an application for variation of a contract is made to the Tribunal or a Local Court under subsection (2), the credit provider shall not institute proceedings, and shall not (except with the leave of the Tribunal or Local Court) exercise a right, under the contract or any collateral instrument before the Tribunal or Local Court has made or refused an order under subsection (3).

Penalty: 20 penalty units.

Duration of orders under s. 14

15. Unless an order under section 14 of the Tribunal or a Local Court is extended in accordance with section 20, the order ceases to have effect on the expiration of 12 months after the making of the order or such shorter period, if any, as may be specified by the Tribunal or Local Court in respect of the order.

Moratorium

16. (1) A debtor may apply to the Tribunal or a Local Court for an order under subsection (3) in respect of goods comprising farm machinery used in connection with the debtor's farming undertaking or a commercial vehicle so used and to which a credit contract entered into by the debtor with a credit provider relates.

(2) Service on a credit provider of notice of an application under subsection (1) operates—

- (a) if the credit provider has not taken possession of the goods to which the application relates—to suspend the power of the credit provider to take possession of the goods; or
- (b) if the credit provider has taken possession of the goods to which the application relates but has not sold the goods or otherwise parted with possession of the goods—to suspend the power of the credit provider to sell or otherwise part with possession of the goods.

until an order is made pursuant to the application or, as the case may be, the application is dismissed.

(3) If application is made for an order under this subsection and the Tribunal or a Local Court is satisfied that the debtor will have a reasonable prospect of being able to remedy, within 12 months after the service of notice of the application on the credit provider, any default of the debtor that would, but for this section, enable the credit provider to take or part with possession of the goods to which the application relates, the Tribunal or Local Court may—

- (a) if, at the time the credit provider was served with notice of the application, the credit provider had not taken possession of the goods—make an order suspending the power of the credit provider to take possession of the goods for such period, expiring not later than 12 months after service on the credit provider of notice of the application, as is specified in the order; or
- (b) if, at the time the credit provider was served with notice of the application the credit provider had taken possession of the goods but had not sold the goods or otherwise parted with possession of the goods—make an order that the credit provider restore the goods to the debtor and also make an order referred to in paragraph (a).

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(4) An order under subsection (3) may be made on such terms and conditions as the Tribunal or Local Court thinks fit including a condition that the debtor pay to the credit provider any enforcement expenses.

(5) If an order is made under subsection (3) and the debtor complies with any terms and conditions of the order that are applicable to the debtor, the credit provider shall not—

- (a) if the order is made under subsection (3) (a)—exercise the power to which the order relates during any period for which the power is suspended by the order; or
- (b) if the order is made under subsection (3) (b)—fail to comply with the order or the terms and conditions of the order that are applicable to the credit provider.

Penalty: 20 penalty units.

(6) If a credit provider contravenes subsection (5), the Tribunal or a Local Court may, on the application of the debtor, make an order requiring the credit provider to compensate the debtor for any damage suffered by the debtor as a consequence of the contravention, whether or not the credit provider has been prosecuted for the contravention and without prejudice to the credit provider's liability to be so prosecuted.

Application of Act to certain Supreme Court or District Court proceedings

17. (1) If a credit provider brings proceedings in the Supreme Court or District Court against a debtor in respect of a credit contract, the debtor may apply to the Court for an order of the kind that could be made by the Tribunal or a Local Court under section 14 or 16.

(2) The Supreme Court or District Court has jurisdiction to deal with an application under this section and in exercising its jurisdiction may do anything that the Tribunal or a Local Court could do in respect of an application under section 14, 15, 16 or 20.

(3) Sections 14, 15, 16 and 20 apply to and in respect of an application or order under this section in the same way as they apply to and in respect of an application or order under those sections.

(4) If the debtor makes an application under this section, the debtor may not make an application under section 14 or 16.

PART 4—MISCELLANEOUS

Intervention by Minister or Commissioner

18. (1) The Minister or the Commissioner with the consent of the Minister, if the Minister or the Commissioner, as the case may be, thinks that it would be in the public interest to do so, may intervene, and has a right to be heard personally or by counsel, solicitor or agent, in any proceedings (other than proceedings for an offence) arising under this Act before the Tribunal or a court.

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(2) If the Commissioner intervenes in any proceedings under subsection (1), it shall be presumed, unless the contrary is proved, that the Minister has consented to the intervention.

(3) The Minister or the Commissioner, on intervening under subsection (1) in any proceedings, becomes a party to the proceedings and has all the rights, including rights of appeal, of such a party.

Jurisdiction of the Tribunal and Local Courts

19. (1) Proceedings to determine any matter under Part 1 or 3 may be instituted before the Tribunal or a Local Court, but not before both.

(2) Nothing in the Local Courts (Civil Claims) Act 1970 limits or prevents the exercise of jurisdiction by a Local Court under this Act.

(3) In exercising its jurisdiction under this Act, a Local Court has the powers, authorities, duties, functions and immunities of the Tribunal.

(4) If proceedings are instituted in, or are before, the Tribunal in a matter for the determination of which the Tribunal and a Local Court each have jurisdiction, the proceedings shall—

- (a) if all the parties to the proceedings so agree; or
- (b) if the Tribunal of its own motion or on the application of a party so directs,

be transferred to a Local Court in accordance with the rules made under the Local Courts (Civil Claims) Act 1970 and shall continue before the Local Court as if they had been instituted there.

(5) If proceedings are instituted in, or are before, a Local Court in a matter for the determination of which the Tribunal and a Local Court each have jurisdiction, the proceedings shall—

- (a) if all the parties to the proceedings so agree; or
- (b) if the Local Court of its own motion or on the application of a party so directs,

be transferred to the Tribunal in accordance with the rules of the Tribunal and shall continue before the Tribunal as if they had been instituted there.

Variation and effect of orders

20. (1) If an order under Part 3 of the Tribunal or a Local Court is in force, the credit provider or the debtor under the credit contract to which the order relates may apply to the Tribunal or Local Court for a variation of the order, including a variation as to the duration of the order, or for the cancellation of the order.

(2) The Tribunal or a Local Court may, where it receives an application under subsection (1), vary or cancel the order to which the application relates as it thinks fit or refuse to vary or cancel the order.

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(3) An order in force under this Act, and such an order as varied from time to time, has effect according to its tenor.

Orders as to costs

21. (1) The Tribunal or a Local Court may make an order for costs in respect of any proceedings before it under this Act and may determine the amount of the costs.

(2) The Tribunal or a Local Court shall not make an order for costs against a debtor if compliance with the order would cause the debtor significant hardship.

Variation of application of Act

22. (1) The Governor may, by order published in the Gazette, declare that the provisions of this Act, or such of those provisions as are specified in the order—

- (a) do not have effect in relation to a specified person or to a specified class of persons;
- (b) have effect in relation to a specified person or to a specified class of persons to such extent as is specified;
- (c) do not have effect in relation to a specified transaction or matter or class of transactions or matters;
- (d) have effect in relation to a specified transaction or matter or class of transactions or matters to such extent as is specified;
- (e) do not have effect in relation to a specified transaction or class of transactions entered into by a specified person or specified class of persons or in relation to specified associated matters; or
- (f) have effect in relation to a specified transaction or class of transactions entered into by a specified person or specified class of persons, or in relation to specified associated matters, to such extent as is specified.

(2) An order made under subsection (1)—

- (a) may specify the period during which the order shall remain in force; or
- (b) may provide that its operation is subject to such terms and conditions as are specified in the order.

(3) The Governor may, by order published in the Gazette, revoke or vary an order made under this section.

(4) An order in force under this section, including an order that is varied under this section, has effect according to its tenor.

(5) A person to whom an order under this section applies, including an order that is varied under this section, shall comply with the terms and conditions (if any) to which the operation of the order is subject.

Penalty: 50 penalty units.

Contracting out of Act prohibited

23. (1) A provision in any agreement (whether in writing or not and whether entered into before or after the commencement of this Act) under which the operation of a provision of this Act is excluded, modified or restricted of which has the effect of excluding, modifying or restricting a provision of this Act is void.

(2) A credit provider shall not enter into an agreement that includes a provision that, by reason of subsection (1), is void.

Penalty: 50 penalty units.

Offence by body corporate

24. If an offence against this Act or the regulations committed by a body corporate is proved to have been committed with the consent or connivance of any person, being a director, manager, security or other officer of the body corporate, the person, as well as the body corporate, shall be deemed to have committed that offence and is liable to be proceeded against and punished accordingly.

Proceedings for offences

25. Proceedings for an offence against this Act or the regulations shall be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

Limitation

26. Notwithstanding anything in any Act, proceedings for an offence against this Act 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.

Disposal of proceedings for offences

27. (1) Proceedings for an offence against this Act or the regulations may be taken and prosecuted only by the Commissioner or, in the name of the Commissioner, by a person acting with the authority of the Commissioner.

(2) In proceedings for an offence against this Act or the regulations, an authority to prosecute purporting to have been signed by the Commissioner is evidence of that authority without proof of the signature of the Commissioner.

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Regulations

28. (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) A regulation may create an offence punishable by a penalty not exceeding 5 penalty units.