

CREDIT CONTRACTS AND CONSUMER FINANCE ACT 2003

Introduction

The Credit Contracts and Consumer Finance Act 2003 (“the Act”) replaces the Credit Contracts Act 1981. The principal objective of the Act is to protect the interests of consumers under credit contracts.

Other objectives of the Act include to:

- provide for the disclosure of adequate information to consumers under credit contracts;
- enable consumers to distinguish between competing credit or lease arrangements;
- enable consumers to seek reasonable changes to consumer credit contracts where the consumer suffers unforeseen hardship; and
- prevent oppressive credit contracts and oppressive conduct by creditors.

What does the Act apply to?

The majority of the Act is directed toward the regulation of “consumer credit contracts”.

A “credit contract” is defined under the Act as a contract under which credit is or may be advanced. “Credit” is to defer payment of a debt or defer payment of the purchase of property or services.

A “consumer” credit contract exists where:

- the debtor is a natural person (not a company, partnership or family trust);
- the debtor enters into the contract primarily for personal domestic or household purposes (which excludes investment); and
- any of the following applies:
 - interest is payable;
 - credit fees are payable; or
 - a security interest is taken by the creditor; and
- the creditor is in the business of providing credit, or makes a practice of doing so in the course of another business or provides credit as a trustee or nominee for another person.

Some parts of the Act also apply to consumer leases of goods and non-consumer credit contracts.

Key requirements of the Act

The Act sets out certain requirements for consumer credit contracts including:

- the contract must specify the annual interest rate;
- the maximum interest that can be charged must be limited to applying the daily interest rate to the unpaid daily balances;
- interest must be charged in arrears;
- default interest may only be charged when the debtor defaults in payment or when the debtor exceeds the credit limit under the contract;
- payments made by a debtor must be credited to the debtor’s account as soon as practicable after the payment has been made;
- a debtor may make a full repayment of their loan at any time.

Disclosure

The Act requires that key information about a consumer credit contract is disclosed to the debtor

How disclosure is made

Disclosure of a credit contract must be made in writing in a disclosure statement. A disclosure statement may be in a separate document or incorporated into the credit contract itself.

Disclosure can be made in 3 different ways:

- giving the disclosure statement to the person to whom disclosure is to be made;
- sending the disclosure statement by post to that person's last known address; or
- sending the disclosure statement to the email address specified by the person (provided that the debtor first consents to this method of disclosure).

Initial disclosure

Initial disclosure must be made before a consumer enters into a credit contract or within 5 working days of signing the credit contract.

The Act specifies certain information which must be disclosed to a debtor. This information includes:

- full name and address of the creditor;
- initial unpaid balance and its component parts;
- details of any subsequent advances;
- total advances to be made;
- credit limit;
- annual interest rate;
- fixed period of interest (if any);
- method of calculating interest;
- credit fees and charges;
- payments required;
- how any amount payable on full prepayment is to be calculated;
- details of any security interest;
- default interest charges; and
- statement of rights.

Continuing disclosure

The Act imposes an obligation on creditors to continually disclose information about credit contracts, such as the opening and closing unpaid balances, the date and amount of each interest charge and the date and amount of each fee charged.

Continuing disclosure must be made at least every 45 working days for a revolving credit contract and at least 6 monthly for every other type of credit contract.

Fixed amount loans and fixed payment credit contracts, interest free loans and credit contracts where consumers can access information about the contract on-line are excluded from the continuing disclosure obligations under the Act.

Guarantor disclosure

Where a credit contract is guaranteed, the credit contract together with all of the terms of the guarantee must be disclosed to the guarantor either before the guarantee is given or within 15 working days after it is given.

Request disclosure

Under the Act a guarantor and debtor have the right to request disclosure of certain matters in respect of consumer credit contracts. These matters include:

- the effect of any part prepayment on the debtor's obligations;
- full particulars of any changes made to the consumer credit contract;
- the amount of any fee or charge payable on any part prepayment;
- the amount required for any full prepayment; and
- the unpaid balance and payments required.

Cancellation rights

Debtors have the right to cancel a consumer credit contract at any time prior to initial disclosure being made and within 3 working days after initial disclosure has been made.

Immediately following cancellation of the consumer credit contract the debtor must refund the advance (if any) to the creditor, pay interest for the time the advance was made and reimburse the creditor for any reasonable expenses the creditor has incurred.

Unreasonable credit or default fees

The Act stipulates that a consumer credit contract must not provide for a credit fee or a default fee that is unreasonable. Credit fees do not include interest charges.

A debtor, guarantor or the Commerce Commission can apply to Court for an order that a credit fee or a default fee is unreasonable.

There are a number of tests that the Court can apply to determine whether a credit fee or a default fee is unreasonable depending on the type of fee that is claimed to be unreasonable.

Consumer leases

A lease is defined in the Act as "a contract for the hire of goods". A lease is a "consumer lease" if:

- the lessee is a natural person; and
- the lessee enters into the lease primarily for personal, domestic or household purposes; and
- the lessor carries on the business of leasing goods or makes a practice of leasing goods in the course of a business carried on by the lessor; and
- if:
 - the term of the lease is for 1 year or more; or
 - the lessee has an option to purchase the goods.

The initial disclosure, variation disclosure and request disclosure obligations under the Act which apply to consumer credit contracts also apply to consumer leases. The information that must be disclosed for consumer credit contracts must also be disclosed for consumer leases.

In addition, a consumer lease will be deemed to be a “consumer credit contract” where either one of the following applies:

- the cash price of the goods under the consumer lease is equivalent to or exceeds the amount payable under the lease; or
- the lessee has an option to purchase the goods for no additional amount, for a nominal amount or for an amount substantially below the fair market value of the goods at the end of the term of the lease.

If a consumer lease is deemed to be a consumer credit contract, all of the provisions under the Act which apply to consumer credit contracts will also apply to the consumer lease.

Buy back transactions of land

In addition to consumer credit contracts and consumer leases, the Act regulates buy-back schemes for land. These schemes usually involve homeowners selling their property to a financier as a means of raising money with the right to re-purchase their home at a later date and the right to live in their home in the meantime (usually paying rent).

Financiers of buy-back transaction are required under the Act to ensure that:

- as much of the information as possible relating to consumer credit contracts is disclosed to the customer in respect of the buy back transaction;
- a copy of the terms of the buy-back transaction is supplied to the customer;
- the customer receives independent legal advice; and
- they do not charge unreasonable fees.

If the buy-back transaction also falls within the definition of a “consumer credit contract” then the provisions of the Act applying to consumer credit contracts will also apply to the buy-back transaction.

Oppression

A Court may re-open a credit contract, consumer lease or buy-back transaction if it considers that:

- the contract is oppressive;
- a right or power conferred by the contract has been exercised or is intended to be exercised in an oppressive manner; or
- a party to the contract was induced by another party to the contract to enter into it by oppressive means.

“Oppressive” is defined in the Act as “oppressive, harsh, unjustly burdensome, unconscionable or in breach of reasonable standards of commercial practice”.

For credit contracts and consumer leases there is a limitation period of 1 year from the end of the contract or the date of performance of the last obligation for bringing proceedings for re-opening the contract or lease.

For buy-back transactions, there is a limitation period of 3 years after the due date for the performance of the last obligation under the transaction for bringing proceedings for re-opening the transaction.

Unforeseen hardship

The Act provides that a debtor under a consumer credit contract may apply to the creditor to change the contract where the debtor has suffered unforeseen hardship. If the creditor refuses to make changes to the contract the debtor can then apply to Court.

Unforeseen hardship is defined in the Act as the situation where the debtor is unable reasonably, because of illness, injury, loss of employment or the end of a relationship to meet the debtor's obligations under a consumer credit contract.

The changes which a debtor can seek to be made to a consumer credit contract are limited to:

- extending the term of the contract and reducing the amount of each payment due;
- postponing the dates on which payments are due under the contract (without a change to the interest rate);
- extending the term of the contract and postponing the dates on which payments are due under the contract (without a change to the interest rate).

A debtor cannot seek to write off any part of the unpaid balance under the credit contract or reduce the annual interest rate.

Conclusion

The Act creates a regime with the purpose of protecting consumers under credit contracts, leases and buy-back transactions.

Should you suspect that your creditor has not complied with the Act or you find yourself suffering unforeseen hardship, please do not hesitate to contact us to discuss any possible options which may be open to you under the Act.