

## THE CREDIT ACT

AJ MYERS

Barrister, Victoria

I have been asked to speak about the Credit Act 1984. The Credit Act 1984 came into operation on 28 February 1985. Similar, but by no means identical legislation came into operation in New South Wales and the Australian Capital Territory at about the same time and will come into operation in Western Australia on 31 March 1985. There is in force in South Australia similar legislation.

The Credit Act 1984 is based upon the report of a Committee of the Law Council of Australia made in January 1972 and commonly known as the Molomby Committee Report. As you may imagine the Act now in operation, although based upon the Report of the Molomby Committee, shows the effects (should I say, benefits) of other various influences.

The Credit Act 1984 must be considered in conjunction with the Chattel Securities Act. Simon Begg and I will speak about the Credit Act. Tony Duggan and Dick Viney, about the Chattel Securities Act.

A lot could be said about the Credit Act, not all complimentary. It is a complex enactment, and very long - 174 sections, and many schedules.

One of the main recommendations of the Molomby Committee was that the various transactions by which the acquisition of goods were financed should be governed by the same rules. Thus there should be no difference in legal consequences whether the transaction effected was a conditional sale, a hire-purchase agreement, a long-term lease or a loan secured by a mortgage of the goods purchased with the loan moneys. If there is to be discerned any unifying principle underlying the Credit Act it is that these various transactions having or serving the same economic purpose should be treated, in law, in the same way.

Under the Credit Act certain "credit sale contracts", "loan contracts", "continuing credit contracts" and "mortgages" within the meaning of the Act are affected by the terms of the Act. The principle provisions of the Act regulating each such contract are to be found in Part III of the Act. Contracts to which Part III of the Act applies are, in the terminology of the Act, "regulated" contracts. Regulated mortgages, which Simon Begg will hereafter discuss, are dealt with in Part IV of the Act.

"Credit sale contract" is defined to mean:

"Subject to sections 13 and 14, a contract of sale of goods or services where in respect of the payment for the goods or services credit is, or is to be, provided to a debtor, being a buyer but not being a body corporate, by a supplier in the course of a business carried on by the supplier and under the contract -

- (a) a charge is made for the provision of credit;
- (b) the amount payable by the debtor is not required to be paid within the period of four months after credit is provided under the contract; or
- (c) the amount payable by the debtor may be paid by five or more instalments or by a deposit and four or more instalments -

but does not include any contract of a class or description of contracts prescribed as being credit sale contracts that are not credit sale contracts within the meaning of this Act."

The provisions of sections 13 and 14 are central to the Act. Broadly, section 13 provides that a hire-purchase or long-term lease of goods is deemed to be a credit sale contract whereunder property in the subject goods passes to the hirer and the owner is deemed to be a debtor for the moneys payable thereunder secured by a mortgage of the goods. Section 13 applies where the cash price of the goods at the time of the contract is not more than \$20,000 or the goods are or include a commercial vehicle or farm machinery in relation to which the cash price is more than \$20,000. Section 13 does not apply to a contract for the hiring of goods to a body corporate. Nor does it apply to a contract for the hiring of goods that are or might reasonably be expected to be used by the hirer wholly or mainly in a business and the whole or the greater part of the amount payable under the contract is or might reasonably be expected to be a loss or outgoing necessarily incurred in carrying on that business. Section 14 excludes from the definition of credit sale contract a lay-by sale and a contract of sale of goods or services in respect of which is provided under a continuing credit contract.

It will be seen therefore, that section 13 has a very profound effect. Although in legal form a transaction may be hire-purchase agreement or a long-term lease it will be treated otherwise under the provisions of the Credit Act. The effects of section 13 will be felt outside the field of regulation of credit sale contracts. Plainly the income tax treatment of a long-term lease which is a credit sale contract within the meaning of the Credit Act will be affected because of the deemed passing of property to the lessee.

I have mentioned that the New South Wales and Victorian Acts are similar but not identical. One respect in which the Victorian and New South Wales Acts diverge is in relation to the scope of section 13. The New South Wales Act (like the Victorian Act)

provides that section 13 does not apply to a long-term lease where the goods are or might reasonably be expected to be used by a person for the purpose of a business carried on by him and where the whole or greater part of the amount of the contract is or might reasonably be expected to be, a loss or outgoing necessarily incurred in carrying on a business. However, unlike the Victorian Act this exclusion does not extend to hire-purchase agreements.

Under Part III of the Credit Act credit sale contracts relating to goods or services where the cash price is not more than \$20,000 or where the contract relates to a commercial vehicle or farm machinery are regulated. Section 16 of the Act provides that Part III does not apply to the provision of credit by a bank or a pastoral finance company where the credit is provided by way of overdraft or otherwise than by credit sale contract, continuing credit contract or loan contract within the meaning of the Act. There is also an exemption for co-operative credit societies and provision to prescribe other exemptions.

The manner in which credit sale contracts are regulated by Part III of the Act is complex and I cannot even venture upon the subject in this short address.

"Loan contract" is defined as follows:

"Subject to section 15, means a contract under which a person in the course of a business carried on by him provides or agrees to provide, whether on one or more occasions, credit to another person, not being a body corporate, in one or more of the following ways:

- (a) By paying an amount to or in accordance with the instructions to that other person;
- (b) By applying an amount in satisfaction or reduction of an amount owed to him by that other person;
- (c) By varying the terms of a contract under which moneys owed to him by that other person are payable;
- (d) By deferring an obligation of that other person to pay an amount to him;
- (e) By taking from that other person a bill of exchange or other negotiable instrument on which that other person (whether alone or with another person or other persons) is liable as drawer, acceptor or endorser -

but does not include any contract of a class or description of contracts prescribed as being loan contracts that are not loan contracts within the meaning of this Act."

Section 30 provides that Part III does not apply to a loan contract if the amount of the loan is more than \$20,000 or if the rate of interest does not exceed 14 per cent per annum unless when the loan contract was made security was taken over farm machinery or a commercial vehicle.

Continuing credit contract is defined in section 48 of the Act. The definition is complex. But in essence an agreement is for purposes of the Act a continuing credit where:

- (a) A person (the creditor) in the course of a business carried on by him, agrees with another person (not being a body corporate) to provide credit to that other person in respect of -
  - (i) payment of goods or services or cash supplied by the creditor to the other person from time to time; or
  - (ii) payment by the creditor to a third person in respect of goods or services or cash supplied by that third person to that other person from time to time; and
- (b) The amounts owing to the creditor from time to time under the agreement are or are to be calculated on the basis that all amounts owing, and all payments made, by that other person under or in respect of the agreement are entered in one or more accounts kept for the purpose of the agreement.

The regulatory provisions of Part III of the Act apply to a continuing credit contract where the continuing credit contract is for the supply of cash, and a charge is made at an annual percentage rate exceeding 14 per cent or where the continuing credit contract is for payment for goods or services and a charge is made for the provision of credit or credit is extended for a period of not less than four months or the amount of the credit is repayable by five or more instalments. The provisions of Part III do not regulate a continuing credit contract where the maximum amount of credit under the contract exceeds \$20,000 or the credit is provided for a bank or pastoral finance company by overdraft on current account.

Part IV of the Act deals with regulated mortgages. Part V deals with the termination and enforcement of regulated contracts and regulated mortgages. Part VI contains further provisions dealing with regulated contracts and regulated mortgages. Part VII deals with contracts of insurance and Part VIII with guarantees in relation to regulated contracts and regulated mortgages. Part IX extends the old equitable rules dealing with the enforcement of harsh and unconscionable transactions. The provisions of Parts IV, V, VI, VII and VIII do not apply to the provision of credit by a bank or pastoral finance company where the credit is provided by way of overdraft otherwise than by way of credit sale contract, continuing credit contract or term loan.