

CREDIT (RURAL FINANCE) BILL 1996

EXPLANATORY NOTES

Policy Objective

The primary objective of the legislation is to give farmers the right to apply to a court for a moratorium of up to twelve months against the repossession and/or sale of their farming equipment by mortgagees.

Reasons for the Policy Objective

In September, 1994, the *Consumer Credit (Queensland) Act 1994* was passed. The *Consumer Credit (Queensland) Code* (“the Code”) forms the Appendix to that Act. The Code was enacted pursuant to the provisions of an agreement entered into between the States and Territories known as the Uniform Consumer Credit Laws Agreement 1993 (“the uniform agreement”) by which all States and Territories agreed to enact uniform consumer credit laws (“the Code”). The scheme set out under the uniform agreement was that the Code would be initially passed by the Queensland Parliament and then each other State or Territory would be obliged to pass application of laws legislation applying the Code as passed by Queensland as the law of that jurisdiction, or alternatively to pass legislation consistent with the Code.

By a proclamation dated 27 June 1996, the Deputy Governor fixed 1 November 1996 as the commencement date for the *Consumer Credit (Queensland) Act 1994*.

The Code replaces the existing credit legislation in Queensland (the *Credit Act 1987*), although the *Credit Act 1987* will not be repealed and will have continuing effect in relation to matters arising under credit contracts to which it applies.

The Code, however, only applies to credit provided, wholly or predominantly, for a personal, domestic or household purpose and therefore will not cover loans to rural producers for the purchase of farming equipment, whereas the *Credit Act* applies to loans to farmers for the purchase of farming equipment and commercial vehicles.

Section 116 of the *Credit Act 1987* has proved particularly useful to some farmers threatened with repossession of their machinery or vehicles. Section 116, in effect, allows a court to order a moratorium of up to twelve months before farm machinery can be repossessed by a mortgagee. The provision has helped a number of farmers who need the equipment to harvest crops and therefore trade themselves out of difficulty.

As the rural community had expressed concern at the loss of section 116 in relation to mortgages over farm equipment to which the *Credit Act 1987* would no longer apply, and as the uniform agreement did not prevent the States and Territories from enacting whatever separate legislation they saw fit to protect farmers, Queensland determined to enact this legislation, to be proclaimed at the same time as the Consumer Credit Code, in order to maintain the status quo by continuing, as far as possible, the protection given to farmers by section 116 of the *Credit Act 1987*.

Method by which Policy Objective will be Achieved

Under the Bill, if a mortgagee has a right under a mortgage over farm equipment to take possession of, or sell, the equipment, then the mortgagee must not exercise that right unless the mortgagor has defaulted, the mortgagee has given a default notice to the mortgagor and the mortgagor has not remedied the default by the due day stated in the notice. Once the mortgagor receives that notice, and up until the mortgagee parts with possession, or sells, the equipment, the mortgagor has the option of applying to a court for a relieving order. The Bill also allows the mortgagor to apply for a relieving order in certain other circumstances. A relieving order prevents the mortgagee from taking possession of, or selling, the farm equipment for a period of up to 12 months. If the mortgagee already has the equipment, the court can order that it be returned to the mortgagor.

It is reasonable and appropriate to give farmers the right to apply to a court for a moratorium against the repossession and/or sale of their equipment, since a relatively short delay in such action by a mortgagee may result in a farmer trading out of his or her financial difficulty. The court cannot make a relieving order arbitrarily, but is bound to consider a number of factors, including whether the mortgagor has a reasonable prospect of remedying the default within 1 year, and how necessary the equipment is to the mortgagor in carrying on the farming business.

Estimated Cost of Government Implementation

The Bill will not result in any significant costs to Government. The only costs will be those consequent on information to, and education of, farmers and mortgagees on their rights and obligations. The costs of complying with the Bill will fall on mortgagees who wish to enforce their mortgages by repossessing and/or selling farm equipment and on any mortgagors who wish to make applications to the court for a relieving order.

Consistency with Fundamental Legislative Principles

The Bill is consistent with fundamental legislative principles.

Consultation

During the development of the Bill, consultation occurred with the Office of Rural Communities, the Legal Aid Office Queensland, the Department of Primary Industries and various organisations which assist farmers and debtors, namely, Lifeline, the Queensland Graingrowers Association and Financial Counselling Services (Qld.) Inc. All these bodies are strongly in favour of the legislation.

Consultation also occurred with the Australian Finance Conference, which represents a number of key credit providers. The Conference was not opposed to the retention of the protections now given to farmers by section 116 of the *Credit Act 1987*.

NOTES ON CLAUSES**PART 1—PRELIMINARY**

Clause 1 provides for the title of the Act to be the *Credit (Rural Finance) Act 1996*.

Clause 2 sets out the commencement provision and provides that the Act comes into operation on a day to be fixed by proclamation. It is expected that this will coincide with the commencement of the *Consumer Credit (Queensland) Act 1994*.

Clause 3 allows for key words in the Act to be defined in a dictionary contained in the schedule.

Clause 4 clarifies the purpose of the Act.

Clause 5 provides for the Act to apply to the State and, so far as possible, the Commonwealth and the other States. The clause also states that the Act only applies to a mortgage if the mortgagor is an individual. So as to remove any possibility of overlap between this Act and section 116 of the *Credit Act 1987*, the clause further provides that the Act does not apply in relation to a mortgage to which the *Credit Act 1987* applies. Further, to remove any duplication in relation to default notices, the clause states that Part 2 does not apply in relation to a mortgage to which the *Consumer Credit (Queensland) Code* applies.

Clause 6 states that the court with jurisdiction exercisable under the Act is either, if proceedings in relation to a mortgage have been instituted in, or are before, a court, that court or otherwise the court the monetary jurisdiction of which is not exceeded by the amount payable under the mortgage when the proceedings concerned are begun. The intention is that a mortgagor will not be forced to commence more expensive proceedings under the Act in, say, the Supreme Court if there is very little owing under the mortgage at the time the mortgagor wishes to apply for a relieving order.

PART 2—DEFAULT NOTICE

Clause 7 requires a mortgagee who has a right under a mortgage over farm equipment to take possession of, or sell the equipment, not to exercise, or purport to exercise the right unless the mortgagor has defaulted and the mortgagee has given the mortgagor a default notice and the default has not been remedied by the due date stated in the notice.

Clause 8 states the requirements for the default notice. The notice must state that the mortgagee intends to take possession of, or sell, the equipment on or after a stated day (the "due day") which must be at least thirty days after the notice is given to the mortgagor.

Clause 9 makes it clear that the mortgagee does not have to give a further default notice to a mortgagor before exercising a right under the mortgage for the further default if the mortgagee has already given the mortgagor a default notice and the mortgagor makes a further default of the same kind as specified in the default notice before the due day stated in that notice and the further default is not remedied by the due day stated in the default notice for the first default.

Clause 10 provides that a mortgagee does not have to give a mortgagor a default notice before taking possession of farm equipment if the mortgagee reasonably believes the mortgagor has removed or disposed of the equipment, or intends to do same, or it is necessary to take possession urgently to protect the equipment.

Clause 11 states that the mortgagee does not have to give a default notice in exercising, or purporting to exercise, a right under a mortgage, if the mortgagee reasonably believes it was induced by fraud by the mortgagor to enter into the mortgage or the mortgagee has unsuccessfully made all reasonable attempts to find the mortgagor or the court orders that the mortgagee may take possession of, or sell, the equipment without first giving a default notice.

Clause 12 provides that the mortgagee bears the onus of proof should the mortgagee allege that because of clauses 10 and 11 there is no need to give the mortgagor a default notice.

PART 3—RELIEVING ORDER

Clause 13 sets out the preconditions which must apply before a mortgagor can make an application for a relieving order.

Clause 14 requires any mortgagor who applies for a relieving order to give a copy of the application to the mortgagee unless the court orders that this is not necessary because the court is satisfied that the mortgagor has unsuccessfully made all reasonable attempts to find the mortgagee.

Clause 15 spells out the consequences for a mortgagee once the mortgagor has been given a notice of application.

Clause 16 states that, once the mortgagor applies for a relieving order the court must decide the application by either dismissing it or by making a relieving order. It sets out the matters that the court must consider before making the order. Under the clause, the court is empowered to make the relieving order on terms it considers appropriate, including requiring the mortgagor to pay the mortgagee's enforcement expenses.

Clause 17 requires a mortgagee to comply with a relieving order.

PART 4—MISCELLANEOUS

Clause 18 states that, should a mortgagee contravene clauses 7, 15 or 17 then the court may, on the application of the mortgagor, order the mortgagee to compensate the mortgagor for any loss suffered because of the contravention.

Clause 19 provides that the Act is in addition to any other law about the enforcement of a mortgage and does not prevent the issue of a notice to a mortgagor under other legislation (subject to the provisions of clause 5(3)).

Clause 20 prohibits a mortgage or other instrument from containing any provision which would avoid or modify the effect of the Act or by which the mortgagor indemnifies the mortgagee for any loss or liability arising under the Act. Further, a mortgagee must not be a party to a mortgage or other instrument containing a provision of this nature.

Clause 21 provides that should there be more than one mortgagee, mortgagor or guarantor, then any notice must be given to each such mortgagee, mortgagor or guarantor.

Clause 22 allows the chief executive to approve forms for use under the Act.

Clause 23 provides that the Governor in Council may make regulations under the Act.

The *Schedule* to the Act contains a dictionary of terms used in the Act.