

Comments on National Consumer Credit Protection Bill 2009 (the “Bill”)

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My comments relate to section 162 of the Consumer Credit Code (Legibility and Language), which mirrors the corresponding provision in the existing Uniform Consumer Credit Code.

1. I support the requirement in section 162(1) and (1A) for a credit contract, mortgage, guarantee or notice to be ‘clearly expressed’.
2. Such an approach is in line with Section 715A of the Corporations Act, which concerns the presentation of disclosure documents in respect of debentures and provides that ‘[t]he information in a disclosure document must be worded and presented in a clear, concise and effective manner’.
3. The approach is preferable to a requirement that the document ‘be expressed in plain language’, as it focuses on the result rather than on the process.
4. I assume that the intention is not to require that the legal effect or meaning of the document (or the relevant provision) be clear to the counterparty, since this would be a difficult requirement to satisfy in view of the technical nature of certain provisions and the difficulties that lay persons experience in understanding such provisions. Instead, the intention is that the legal effect or meaning be ‘clearly expressed’. In other words, the focus is on clear expression rather than on clear meaning.
5. I have concerns about section 162(2) of the Consumer Credit Code - specifically, the power granted to the court to ‘prohibit the credit provider from using a provision in the same or similar terms in future credit contracts, mortgages or guarantees or notices’ - for the following reasons:
 - First, the phrase ‘the same or similar terms’ is potentially unclear. I assume that it is a compound phrase (i.e. it does not give the court discretion to decide whether the prohibition should apply just in respect of a provision ‘in the same terms’ or whether it should apply in respect of a provision ‘in the same or similar’ terms). In other words, if the court made an order pursuant to section 162(2), the terms of the order would be to prohibit the credit provider from using a provision ‘in the same or similar terms’.
 - Secondly, in its current form, the order that the court can make is expressed as a prohibition, the effect of which is that the credit provider would not be able to use ‘a provision in the same or similar terms’ in future documents. This approach is problematic for the reasons set out below:
 - It may be difficult for a credit provider to determine the extent of the prohibition, particularly as it relates to a provision ‘in similar terms’.

To begin with, the concept is ambiguous, since it could be interpreted as dealing with meaning and not just with expression (see my comments in paragraph 4 above). In addition, there is an element of subjectivity in determining whether a provision is ‘in similar terms’ and credit providers may have concerns about whether they have fully complied with the prohibition.

- It involves what is arguably an intrusive, ‘big brother’ power on the part of the courts, particularly in relation to the way in which provisions are expressed in future contracts and documents, and appears to run counter to the principle of ‘freedom of contract’. It also goes further than the power to interpret and modify the terms of an existing contract and appears to ignore existing principles of contractual interpretation, such as the *contra preferentem* rule. It adopts a solution that is more appropriate to dealing with unfair terms than dealing with provisions that are not clearly expressed.
- It is unhelpful insofar as it does not help credit providers to determine how compliance with the statutory requirements might be achieved.

6. I would suggest that section 162(2) be amended to read as follows:

If the court is satisfied, on application by ASIC, that a provision of a credit contract, mortgage or guarantee or a notice given by a credit provider under this Code does not comply with the requirements of this section, it may make an order requiring the credit provider to comply with the requirements in future credit contracts, mortgages or guarantees or notices.

7. Such an amendment would focus on achieving compliance with the statutory requirements rather than on prohibiting the language of future contractual provisions. It would also give credit providers greater flexibility in terms of determining how they might comply with the requirements. Granted, it would not guarantee compliance. However, I would argue that prohibiting provisions ‘on the same or similar’ terms would not guarantee compliance either.

Biographical details

Andrew Godwin is the Associate Director (Asian Commercial Law) of the Asian Law Centre, The University of Melbourne. He is also a Senior Lecturer and Director of the Graduate Program in Banking and Finance Law at the Melbourne Law School. His research interests include Chinese law, property law, financial and insolvency law and professional training. Prior to joining the Law School in 2006, Andrew was in private practice for 15 years, 10 of which were spent in Shanghai where he was a partner of a major international law firm. During his time in practice, Andrew acted for commercial and investment banks in a wide range of finance transactions, including secured lending, structured finance, derivatives and debt restructuring. He was also actively involved with financial institutions and multinational companies in their cross-border merger and acquisition projects. Andrew consults in the area of contract drafting and the use of plain language techniques.